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European Scrutiny Committee

Sixty-fourth Report of Session 2017–19

Documents considered by the Committee on 1 May 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.

Summary

EU Strategy on China

The Committee has considered the European Commission's new economic and political strategy for engagement with China, which covers many points of importance to the UK including industrial subsidies, infrastructure security and reciprocal market access for exporters. It has drawn the document to the attention of various Select Committees to highlight the diplomatic challenges the UK will face when it has to seal with China purely bilaterally after Brexit, and because it demonstrates the types of engagement it can expect from the EU when the UK is a "third country" outside of the Single Market.

Cleared from scrutiny; drawn to the attention of the Business, Energy & Industrial Strategy Committee and the Foreign Affairs Committee

European System of Financial Supervision

Based on the latest information provided by the Treasury, the European Scrutiny Committee has published its final report on the reforms to the EU's system of financial supervision, and in particular the powers of its independent Supervisory Authorities for the banking, insurance and capital markets.

While significantly watered down compared to the European Commission's original 2017 proposals, the new rules will expand the powers of the Supervisory Authorities at the expense of national regulators like the Financial Conduct Authority. Because of Brexit, the extent to which the legislation will apply in the UK remains a matter of some uncertainty and will depend on whether Parliament ratifies the Withdrawal Agreement (at which point a transitional period would take effect, during which EU law would continue to apply). Separately, the Treasury is seeking powers to implement the reforms even in a "no deal" Brexit scenario, to facilitate cooperation with the EU on matters of market access for financial services under a new UK-EU trading arrangement.

Cleared from scrutiny; drawn to the attention of the Treasury Committee

Connecting the European Travel Information and Authorisation System (ETIAS) with other EU security and migration information systems

The European Commission has proposed technical changes to various EU security and migration information systems so that they can be cross-checked against the new European Travel Information and Authorisation System ("ETIAS"). This system, expected to be operational after 2021, will require all visa-free third country nationals (including UK nationals post-exit) wishing to visit the Schengen area for a short stay of less than three months to make an online application for travel authorisation ahead of their journey. The UK is only entitled to participate in one of the proposals amending two EU information systems in which the UK currently participates—the law enforcement part of the Schengen Information System (SIS II) and a criminal records information database (ECRIS-TCN). Previously, the Government told the European Scrutiny Committee that there would be "no obvious operational benefits" for the UK if it were to participate. Nor did the Government foresee any risk of the UK being ejected from SIS II and ECRIS-TCN during any post-exit transition/implementation period or anticipate that the UK's non-participation would be prejudicial to negotiations on a future EU/UK security agreement. The Committee inferred that the Government was therefore unlikely to participate. Contrary to expectations, the Immigration Minister (Rt Hon. Caroline Nokes MP) writes to confirm the Government's decision to participate, citing concerns that if it did not, the UK might not be able to continue to take part in SIS II and ECRIS-TCN. The European Scrutiny Committee notes the apparent volte-face, requests further explanation of the change in the Government's position and seeks an update on the prospects for reaching a political agreement within the Council as well as on the position of the European Parliament.

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

Upgrading the EU Visa Information System

The proposed Regulation would make the EU's Visa Information System (VIS) interoperable with other EU migration and security information systems so that more thorough background checks can be carried out on visa applicants. The changes would also help to close information gaps and support law enforcement in tackling terrorism and other serious crime. As VIS builds on parts of the Schengen rule book in which the UK does not participate, and the changes envisaged will not apply to the UK, the Government indicated that the proposal would have no direct legal, policy or financial implications for the UK. The European Scrutiny Committee questioned this assessment, noting that the biometric information (facial images and fingerprints) of UK nationals could be collected and stored in VIS if the EU were to introduce visa requirements post-exit/transition. It also sought further information on the wider Brexit implications of the proposal, including how the proposed Regulation would affect UK law enforcement access to data held in VIS. In her latest update, the Immigration Minister (Rt Hon. Caroline Nokes MP) confirms that the Government will not introduce visa requirements for EU citizens and that the EU has reciprocated by legislating for UK nationals to have visa-free access to the EU once free movement rights cease to apply. She describes the means available to the UK to maintain data flows for law enforcement purposes once the UK leaves the EU and becomes a third country but does not address the Committee's concern that VIS and

other EU migration and security information systems do not contemplate (or, in some cases, preclude) third country access. The Minister is asked to update the Committee on the progress of negotiations and on any eventual compromise reached by the Council and the European Parliament on third country access to personal data held in VIS.

Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee and the Joint Committee on Human Rights

Workers' rights: work-life balance, and transparent and predicable working conditions

The two files under scrutiny were last considered by the Committee in March 2019 and scrutiny waivers granted to allow the Government to support adoption at Council. The first (on the proposed Work-Life Balance Directive), would provide for: 10 working days of paternity leave; a payment or allowance for a minimum of 2 months parental leave per parent, per child; and a minimum of 5 days carers' leave. The second (on the proposed Working Conditions Directive), would: set a flexible definition of 'worker' in Member States; provide an 'enhanced' written statement of employment terms for workers; limit probationary periods to 6 months; protect a worker's right to undertake parallel employment; provide a minimum level of work predictability; ensure that mandatory training is provided free of charge; and extend the right to request a contract variation to all workers falling under the purview of the Directive.

The Minister with charge over both proposals (Kelly Tolhurst MP), wrote to the Committee on 21 April 2019. The Minister explains that neither the Work-Life Balance Directive nor the Transparent and Predicable Working Conditions Directive were put for adoption at the March EPSCO Council. This is said to be because the requisite legal checks were not completed in time. The Minister believes it likely that both proposals will now be put for adoption in either May or June. On the content of the proposals, the Minister states that both draft Directives have not been amended and, therefore, as per her previous correspondence, the Government's position remains unchanged: that it wishes to support adoption (as such, she requests scrutiny waivers for both files). The Committee grants the requested waivers, however, limits these to the end of May owing to the domestic legal and political context against which the proposals are set to be adopted, in particular, their potential interaction with the forthcoming 'Withdrawal Agreement Bill'.

In response to a previous request for further information, the Minister explains how the Government's so-called 'consultation commitment' on future EU workers' rights legislation will operate. The Minister explains that under the Government's proposed legislation on future changes to EU law on workers' rights, a system of reporting periods will be established. The first reporting period will take place 6 months from the end of the transition/implementation period (currently the end of December 2020). This system will operate on a six-monthly cycle where new legislation is adopted at EU-level, however, where none is adopted, a report will be made after 12 months. It appears from the Minister's statements that legislation that is adopted before or during the transitionary period—but that will take effect in Member States after the transitionary period ends—will be included in the first round of reports (six months after the end of the transitionary period). As such, and in the absence of any Government commitment to the contrary, it is unlikely that either the proposed Work Life Balance Directive or the Transparent and Predictable Working Conditions Directive will be given effect to in UK law until

2022 at the earliest (taking into account the current end of the transitionary period, the Government's proposed reporting cycle under its workers' rights commitment and the subsequent consultation it will run with employers' associations and trade unions).

Not cleared from scrutiny; further information requested; but scrutiny waiver granted for adoption; drawn to the attention of the Business, Energy and Industrial Strategy Committee, the Women and Equalities Committee, and the Work and Pensions Committee

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: The EU's strategy towards China [Joint Communication (C)]; Workers' rights: work-life balance, and transparent and predictable working conditions [Proposed Directives (NC)]

Defence Committee: Operation SOPHIA: EU anti-trafficking mission in the Mediterranean [Council Decision (C)]

Foreign Affairs Committee: The EU's strategy towards China [Joint Communication (C)]; Operation SOPHIA: EU anti-trafficking mission in the Mediterranean [Council Decision (C)]

Home Affairs Committee: Connecting the European Travel Information and Authorisation System (ETIAS) with other EU security and migration information systems [Proposed Regulations (NC)]; Upgrading the EU Visa Information System [Proposed Regulation (NC)]

International Development Committee: Operation SOPHIA: EU anti-trafficking mission in the Mediterranean [Council Decision (C)]

International Trade Committee: The EU's strategy towards China [Joint Communication (C)]

Joint Committee on Human Rights: Upgrading the EU Visa Information System [Proposed Regulation (NC)]

Treasury Committee: European System of Financial Supervision: powers of the EU's supervisory authorities [Proposed (a) Regulation; (b) Directive; (c) Amended Regulation (C)]

Women and Equalities Committee: Workers' rights: work-life balance, and transparent and predictable working conditions [Proposed Directives (NC)]

Work and Pensions Committee: Workers' rights: work-life balance, and transparent and predictable working conditions [Proposed Directives (NC)]

1 Workers' rights: work-life balance, and transparent and predictable working conditions

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; scrutiny waiver granted ahead of adoption; drawn to the attention of the Business, Energy and Industrial Strategy Committee, the Women and Equalities Committee, and the Work and Pensions Committee
Document details	(a) Proposal for a Directive on work-life balance for parents and carers and repealing Council Directive 2010/18/EU; (b) Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions
Legal base	(a) Article 153(1)(i) and 153(2)(b) TFEU, ordinary legislative procedure, QMV; (b) Article 153(1)(b) and 153(2) TFEU, ordinary legislative procedure, QMV
Department	Business, Energy and Industrial Strategy
Document Numbers	(a) (38689), 8633/17 + ADDs 1–3, COM(17) 253; (b) (39396), 16018/17 + ADDs 1–2, COM(17) 797

Summary and Committee's conclusions

1.1 The two proposals under scrutiny form part of the Commission's most recent efforts to modernise EU employment law. Alongside the proposal for establishing a European Labour Authority (which is currently held under scrutiny by the Committee), they represent the first serious concerted effort by Member States to tackle—by way of binding European legislation—the challenges to family-and professional-life wrought by the rise of atypical forms of employment.

1.2 Documents (a) and (b) were considered in March 2019 by the Committee and scrutiny waivers granted in order for the Government to support adoption at Council.[1] Waivers were granted on the basis that the Committee was satisfied that the Government had fully explained its position(s) on the proposals and had adequately addressed the Committees questions and requests for further information.

1.3 By way of background, as per its final form ahead of adoption, document (a) (on work-life balance) would introduce rights to: ten working-days of paternity leave (compensated at a level equivalent to at least sick pay); a payment or allowance for a minimum of two months parental leave per parent, per child, compensated at a level to be determined by Member States; and a minimum of five days carers' leave (the details of which are to be defined by Member States).

1 See, respectively, Fifty-seventh Report HC 301–lvi (2017–19) chapter 1 (6 March 2019) and Sixtieth Report HC 301–lviii (2017–19) chapter 1 (20 March 2019).

1.4 Likewise for document (b) (on transparent and predictable working conditions), the proposal would, primarily, serve to update the Written Statements Directive (which requires new employees to be informed in writing about their conditions of employment).[2] It does, however, also seek to introduce new substantive employment rights. In no particular order, these include: setting a flexible definition of a 'worker'; providing an 'enhanced' written statement of employment terms; limiting probationary periods to six months; protecting a worker's right to undertake parallel employment; providing a minimum level of work predictability; ensuring that mandatory training is provided free of charge; and extending the right to request a contract variation to all workers falling under the purview of the Directive.

1.5 The Minister with charge over both proposals, Minister for Small Business, Consumers and Corporate Responsibility (Kelly Tolhurst MP), wrote to the Committee on 21 April 2019.[3] The Minister explains that neither the Work-Life Balance Directive nor the Transparent and Predicable Working Conditions Directive were put for adoption at the March EPSCO Council. This is said to be because the requisite legal checks were not completed in time. The Minister believes it likely that both proposals will now be put for adoption in either May or June. On the content of the proposals, the Minister states that both draft Directives have not been amended and, therefore, as per her previous correspondence, the Government's position remains unchanged: in that it wishes to support adoption.

1.6 **We thank the Minister for her letters of 21 April 2019 and are grateful for receiving her request for scrutiny to be lifted on both files in good time ahead of adoption. Given that both proposals—and the Government's intention to support their adoption—remains unchanged since the Committee last considered each, we grant the requested waivers. Owing to the domestic legal and political context against which the proposals are set to be adopted, in particular, their potential interaction with the forthcoming 'Withdrawal Agreement Bill', the requested waivers are made only until the end of May 2019.**

1.7 **In our previous Reports on each proposal we request further information on the Government's plans to report to Parliament on changes to EU law covering workers' rights after the UK's withdrawal from the EU. In this regard, we sought clarity on whether the Government will begin consultations with stakeholders and start the reporting process once an EU legal instrument has been published in the Official Journal or, alternatively, whether it would have discretion as to when such a report is made, for example, up to or beyond the deadline for Member States to ensure that the legal act in question is given effect to.**

1.8 **In both letters, the Minister provides useful information on how the Government's so-called 'consultation commitment' on workers' rights will operate in practice. The Minister explains that "under our proposed legislation on changes to EU law on workers'**

2 Council Directive of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (91/533/EEC).

3 Letter from Kelly Tolhurst MP to Sir William Cash MP, 21 April 2019; and Letter from Kelly Tolhurst MP to Sir William Cash MP, 21 April 2019.

rights",[4] a system of reporting periods will be established. The first reporting period will take place six months from the end of the transitionary/implementation period (currently the end of December 2020). This system will operate on a six-monthly cycle where new legislation is adopted at EU-level, however, where none is adopted, a report will be made after 12 months. The Minister clarifies that the reporting commitment will be triggered when an EU legal act covering workers' rights is adopted and published in the Official Journal (not when it takes effect in Member States).

1.9 **On a linked point, the Minister states that the proposed Work-Life Balance Directive will be subject to this procedure. This is in spite of the fact that—if adopted—the Directive will be published in the Official Journal before the end of the transitionary period. It appears from the Minister's statements that legislation that is adopted before or during the transitionary period—but that will take effect in Member States after the transitionary period ends—will be included in the first round of reports (six months after the end of the transitionary period).**

1.10 **As such, and in the absence of any Government commitment to the contrary, it is unlikely that either the proposed Work Life Balance Directive or the Transparent and Predictable Working Conditions Directive will be given effect to in UK law until 2022 at the earliest (taking into account the current end of the transitionary period, the Government's proposed reporting cycle under its workers' rights commitment and the subsequent consultation it will run with employers' associations and trade unions).**

1.11 **We request a full report on the outcome of the Council at which the proposals are put for adoption detailing how the Government voted and any changes to the text of the Directives versus the compromise agreements reached between the Romanian Presidency and European Parliament.**

1.12 **We retain both files under scrutiny and draw this chapter to the attention of the Business, Energy and Industrial Strategy Committee, the Women and Equalities Committee, and the Work and Pensions Committee.**

Full details of the documents

(a) Proposal for a Directive on work-life balance for parents and carers and repealing Council Directive 2010/18/EU: (38689), 8633/17 + ADDs 1–3, COM(17) 253; (b) Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions: (39396), 16018/17 + ADDs 1–2, COM(17) 797.

Previous Committee Reports

(a) Forty-sixth Report HC 301–xlv (2017–19) chapter 2 (28 November 2018); Thirty-first Report HC 301–xxx (2017–19) chapter 1 (13 June 2018); Twelfth Report HC 301–xii (2017–19) chapter 3 (31 January 2018); Third Report HC 301–iii (2017–19) chapter 1 (29 November 2017); and Fifty-seventh Report HC 301–lvi (2017–19) chapter 1 (6 March 2019); (b) Twelfth Report HC 301–xii (2017–19), chapter 5 (31 January 2018); Thirty-first Report HC 301–xxx (2017–19), chapter 2 (13 June 2018); Fifty-seventh Report HC 301–lvi (2017–19), chapter 2 (6 March 2019); and Sixtieth Report HC 301–lviii (2017–19) chapter 1 (20 March 2019).

4 The reference to 'proposed legislation on changes to EU law on workers' rights' is curious in that it appears to imply that specific legislation will be brought forwards to establish the promised consultation mechanism (this can be inferred from workers' rights forming the object of the proposal for legislation). This suggestion differs from other suggestions that the Government will give effect to its commitments on future EU worker's rights in the 'Withdrawal Agreement Bill' (which is designed to give direct legal effect to parts of the Withdrawal Agreement).

2 Third mobility package: electronic freight transport information

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested
Document details	Proposal for a Regulation of the European Parliament and of the Council on electronic freight transport information
Legal base	Article 91, 100(2) and 192 (1) TFEU, ordinary legislative procedure, QMV
Department	Transport
Document Number	(39731), 9060/18 + ADDs 1–4, COM(18) 279

Summary and Committee's conclusions

2.1 The proposal under scrutiny would create an obligation for public authorities in Member States to accept freight transport documentation in electronic form. The proposal would cover documents relating to the transportation of goods across all modalities. It also aims to ensure that the obligation to accept such information—in electronic form—is implemented in a uniform and consistent manner.

2.2 According to Commission estimates, at present, roughly 99% of cross-border transport operations on the territory of the Union involve paper-based documentation. This is said to be the case inspite of the fact that digital solutions are available and are increasingly being made use of for business-to-business information exchange (e.g. from manufacturers to freight forwarders). The Commission argues that the slow uptake of digital solutions by public authorities is a hinderance to the efficiency of transport and, ultimately, the smooth functioning of the Single Market.

2.3 The substance of the proposal relates to the measures that the Commission considers necessary in order to ensure that public authorities effectively implement the obligation of acceptance in a uniform manner. Towards this end, the measures set-out in the proposal are centred around providing for the interoperability of the IT systems and IT solutions to be adopted by competent authorities in Member States. Of these measures, the most important relates to the requirement for Member States to cooperate on aligning their (future) digitised processes. This includes cooperation over the data sets national authorities specify as necessary for fulfilling the requirements of relevant EU law and national acts.

2.4 For the avoidance of doubt, the proposal does not require uniformity in requesting this information or, put in another way, the proposal does not harmonise the types of information that Member States can—or are required to—collect.

2.5 The proposal was first considered by the Committee alongside that for a 'European Maritime Single Window' (EMSWe) on 14 November 2018.[5] A full background to the proposal—including the Committee's initial legal and political assessment and a summary of the Government's explanatory memorandum—can be found in our Forty-forth Report to the House of Session 2017–19. Since this Report, the Government has written to the Committee on two separate occasions (23 November 2018 and 16 January 2019).[6] This correspondence is considered below and, where relevant, set against current thinking on the proposal (most notably, in light of the European Parliament Transport Committee's report on the file).

Ministerial correspondence

2.6 In response to our questions and requests for further information—as raised in our Forty-fourth Report to the House—Parliamentary Under Secretary of State at the Department for Transport (Ms Nusrat Ghani MP), wrote to the Committee on 23 November 2018. The Minister provides welcome detail on the key issues and areas of uncertainty highlighted by the Committee.

2.7 Of these, we questioned the necessity—as suggested by the Commission—of developing new technical specifications for the interoperability of IT systems when similar standards already exist—such as the UN/CEFFACT e-CMR protocol—which stakeholders have argued could be amended for the purposes of business-to-administration communication. The Minister explains that some Member States have attempted to tackle the problem of a lack of standardisation of acceptance of electronic freight documents by ratifying the UN protocol, however, many Member States remain non-signatories (including, as recognised by the Minister, the UK).

2.8 The Minister states that it is unclear whether the aims of the proposal could be met by all Member States ratifying the protocol and, as such, supports concerted action at Union-level. The Minister also provides helpful background information on the relationship between the proposal and protocol: informing the Committee that the proposal would exceed the scope of the protocol to cover modes of transport other than road (citing rail, maritime and aviation as examples).

2.9 The Committee also queried the choice of using implementing acts—rather than delegated acts—for setting data standards and requirements under the proposal. The Minister informs the Committee that restrictions on the adoption of delegated acts—to the amendment of non-essential elements of secondary EU legislation—would make their use inappropriate for setting future data standards and requirements.

2.10 This having been said, the European Parliament Transport Committee's report on the file suggests the use of delegated acts.[7] This choice is justified on the grounds that common data sets, and procedures for accessing and processing transport information

5 By way of background, the proposal for an EMSWe would bring together, in a coordinated and harmonised manner, all reporting obligations associated with ship port calls. A full background to the proposal for an EMSWe can be found in chapter 4 of our Forty-fourth Report to the House of Session 2017–19.

6 Letter from Ms Nusrat Ghani MP to Sir William Cash MP, 23 November 2018; and Letter from Ms Nusrat Ghani MP to Sir William Cash MP, 16 January 2019.

7 European Parliament Committee on Transport and Tourism, 'Draft report on the proposal for a regulation of the European Parliament and of the Council on electronic freight transport information' (25 October 2018).

are non-essential elements of the proposal. As such, the Commission and Parliament appear to hold different views on—or have applied different tests for determining—what constitutes an essential element of the proposal.

2.11 This issue of is of significant importance regarding the determination of which parts of the proposal are essential—and which are not—and will have direct implications for the type of legal acts that can be used by the Commission to amend the final Regulation (i.e. whether changes can be made by way of delegated act or implementing act). The Committee shares the Commission's view: that in order to facilitate the electronic acceptance of goods-related documentation, common standards for the interoperability of Member State IT systems and IT solutions are absolutely necessary. This is evidenced by the substance of the draft Regulation—e.g. Recitals 12, 13, 14 and 15 and Articles 7, 8 and 9—outlining the requirements, rules and procedures for setting electronic freight transport information (eFTI) datasets and for accessing the eFTI platform. As such, it appears entirely appropriate for implementing acts to be used for amending these parts of the Regulation.

2.12 The last substantive query raised by the Committee was why—as suggested in the Government's Explanatory Memorandum accompanying the proposal—the requirement for information exchange platforms to be assessed for conformity could place the UK at a disadvantage versus EU Member States. In the context of the UK's withdrawal from the EU, the Minister explains that the Commission views non-acceptance of electronic documents by third countries (non-Member States) as a barrier to their use. The Commission have, however, suggested the use of bilateral agreements with third countries as a way of mitigating this risk. The Minister raises concerns that this approach—of a bilateral agreement between the UK and EU—could mandate conformity assessment of relevant systems only by bodies registered in an EU Member State, in effect, locking out UK assessment bodies and making UK freight operators subject to EU oversight in exchange for market access.

2.13 The aforementioned European Parliament Transport Committee report also suggests a number of substantive amendments to the proposal. These are focussed on its scope, in particular, the legal persons the proposal would apply to and the types of documents that would fall under its purview. The European Parliament has suggested amending the proposal to make it mandatory for economic operators to submit regulatory information electronically to Member State authorities (as opposed to participation being voluntary). It has also suggested that the Commission look more closely at requiring public authorities to accept regulatory information other than that relating to the transportation of goods, for example, with regard to roads, covering Community licences, roadworthiness assessments, and driver qualifications.

2.14 On a final, linked point, the European Parliament has also suggested amending Article 8 of the draft Regulation to allow national competent authorities to have access, in real-time, to all relevant information stored on the eFTI platform. This change has been suggested as a way of enhancing the efficient and effective enforcement of Union transport law (such as that on cabotage, the posting of drivers, driver qualifications and vehicle safety).

2.15 The Minister also wrote to the Committee on 16 January 2019 with an update on the progress of negotiations on the proposal. Negotiations are said to have been limited with only two working groups having taken place. The Minister informs the Committee that the Commission has called for a General Approach to be agreed on the proposal by June 2019.

2.16 **We thank the Minister for her letters of 23 November 2018 and 16 January 2019. The Committee is grateful for the detailed answers the Minister has provided to the questions it raised in its first consideration of the proposal.**

2.17 **In light of recent developments concerning the proposal—most notably the European Parliament Transport Committee's report—we seek further information from the Government on the following points:**

- **Whether those parts of the proposal relating to the requirements, rules and procedures for setting electronic freight transport information (eFTI) datasets and for accessing the eFTI platform are 'essential' elements of the draft Regulation within the meaning of Article 290 TFEU:**
  - **What are the criteria against which this determination is made, for example, have the Commission published guidance or is there any relevant case law of the Court of Justice of the European Union.**
- **The European Parliament's suggestion to extend the scope of the proposal to:**
  - **place an obligation on economic operators to submit regulatory information electronically to Member State authorities;**
  - **cover regulatory information other than that relating to the transportation of goods, for example, with regard to roads, covering issues such as driver qualifications; and**
  - **allow national competent authorities to have access, in real-time, to all relevant information stored on the eFTI platform for the purposes of ensuring the effect enforcement of Union transport law.**
- **We retain the proposal under scrutiny and request a response to our enquiries by 5 June 2019.**

Full details of the documents

Proposal for a Regulation of the European Parliament and of the Council on electronic freight transport information: (39731), 9060/18 + ADDs 1–4, COM(18) 279.

Previous Committee Reports

Forty-fourth Report HC 301–xliii (2017–19) chapter 4 (14 November 2018).

3 Upgrading the EU Visa Information System

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee and the Joint Committee on Human Rights
Document details	Proposal for a Regulation amending the Visa Information System and related measures
Legal base	Articles 16(2), 77(2)(a), (b), (d) and (e), 78(2)(d), (e) and (g), 79(2) (c) and (d), 87(2)(a) and 88(2)(a) TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Number	(39714), 8853/18 + ADDs 1–3, COM(18) 302

Summary and Committee's conclusions

3.1 The proposed Regulation would amend various EU measures concerned with the operation of the Visa Information System ("VIS")—a Schengen-wide database containing information on third country nationals applying for short-stay Schengen visas.[8] VIS enables visa issuing authorities in the consulates of Member States around the world to share information on visa applicants and connects them with border control officials at the EU's external borders. The collection and storage of biometric information—a facial image and fingerprints—makes it easier to verify the identity of visa applicants, prevent fraud and carry out security checks.

3.2 The changes proposed would make VIS fully interoperable with other EU security and migration information systems, ensuring that more thorough (and mandatory) background checks are carried out on visa applicants. They would also:

- lower the age for fingerprinting visa applicants from 12 to six years—the Commission anticipates that this would not only reduce identity fraud but also enhance child protection, making it possible to identify child victims of human trafficking, missing children and unaccompanied asylum-seeking children;
- include information on long-stay visas and residence documents issued by Member States[9] so that border control authorities can check their validity and reduce the risk of identity fraud—this information is not routinely stored in any of the EU's security and migration information systems;

8 Short-stay visas entitle the holder to enter and move around the border-free Schengen area for a maximum of 90 days in any 180-day period.

9 These documents are similar to short-stay visas in that they entitle their holder to move freely within the border-free Schengen area for 90 days in any 180-day period.

- include copies of each visa applicant's travel document to facilitate the identification, readmission and return of undocumented irregular migrants; and

- ensure that national law enforcement authorities and Europol can access VIS to prevent, detect and investigate terrorism and other serious crime, as well as to search for and identify individuals who are missing or who have been abducted and victims of trafficking.

3.3 The European Commission considers that these changes will remove "blind spots" and close information gaps, ensuring that visa-issuing, border control and law enforcement authorities have the information they need to act on security risks without hindering legitimate travel within the border-free Schengen area. The multiple legal bases cited in the proposed Regulation reflect the breadth of its objectives as a tool for implementing the EU's common visa policy, supporting EU asylum and return procedures, identifying victims of human trafficking, strengthening internal security, and ensuring that personal data are protected.

3.4 The UK is not entitled to participate in VIS or in the proposed amending Regulation as it builds on parts of the Schengen rule book on a common visa policy and on external border control in which the UK does not take part. In her Explanatory Memorandum of 8 June 2018, the Immigration Minister (Rt Hon. Caroline Nokes MP) told us that the proposed Regulation would therefore have no direct legal, financial or policy implications for the UK. She did not address the possibility that the biometric information of UK nationals could be collected and stored in VIS if the EU were to introduce visa requirements at the end of any post-exit transition period—an eventuality likely to depend on decisions the Government takes on the future immigration status of EU citizens in the UK. We asked the Minister to write to us once the Government had published its Immigration White Paper setting out policy options on the future status of EU citizens who are not protected by the provisions on citizens' rights in the draft EU/UK Withdrawal Agreement, and to provide further details of the Government's preferred approach.[10]

3.5 We noted also that changes to VIS might have implications for UK law enforcement authorities. Although the UK currently has no direct access to information held in VIS, UK law enforcement authorities are nonetheless able to request indirect access to VIS data by routing a request through VIS-participating Member States.[11] As it was unclear whether this possibility would remain post-exit and post-transition, we asked the Minister to explain:

- how the UK's status as a third (non-EU and non-Schengen) country post-exit/transition would affect the ability of law enforcement authorities in the UK to access information held in VIS; and

- what assessment the Government had made of the operational impact.

3.6 In her letter of 24 April 2019, the Minister confirms that the Government does not intend to introduce visa requirements for EU citizens travelling to the UK post-exit and notes that an EU legislative proposal to "allow British citizens visa-free access in both a

10 Command Paper 9722 published on 19 December 2018.

11 See recital (15) of Council Decision 2008/633/JHA on law enforcement access to VIS data. The proposed Regulation would incorporate the main provisions of this Decision and repeal it.

deal and no-deal scenario" is in the final stages approval by the European Parliament.[12] She notes also that the EU Free Movement Directive[13] "will be preserved by the European Union (Withdrawal Act) until the regulations are repealed and replaced by new rules and legislation".

3.7 The Minister indicates that "the most frictionless method" to allow the continued flow of personal data between the EU and the UK after the end of any post-exit transition period would be through a European Commission "adequacy decision" confirming that UK data protection laws are "essentially equivalent" to those of the EU. She continues:

> In the absence of an adequacy decision, law enforcement authorities in other Member States will be able to transfer personal data to an equivalent authority in the UK pursuant to the Data Protection Directive 2016/680, which provides for Member States to transfer data to third countries as long as the specified conditions are met. Article 37 allows for transfers subject to appropriate safeguards. This could be that safeguards are provided in the form of a legally binding instrument or where the controller has assessed the circumstances around the transfer and considers that they exist. There are also derogations for specific situations such as protecting the vital rights of the individual or another person, the prevention of threats to national or public security and the exercise or defence of legal claims. We are confident our data protection legislation, which implements EU standards, would provide the safeguards needed for Member States to continue to share data. The UK has already taken steps to maintain existing outgoing flows of data as an interim measure in a no deal scenario from the UK to the EU. This is through the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 which were debated and approved by Parliament. They would come into force on exit day in a 'no deal' scenario.

3.8 If the UK leaves the EU on the terms set out in the draft EU/UK Withdrawal Agreement, the Minister notes that the status quo would prevail at least until the end of December 2020, meaning that "data flows between the UK and the EU [would] continue as present". She reiterates the Government's intention to negotiate "a comprehensive and legally binding agreement on internal security which would enable continuing cooperation based on EU measures", adding that "the precise terms of any future agreement will be dictated by the outcome of those negotiations".

Our Conclusions

3.9 **We welcome the Government's commitment to visa-free travel for EU citizens after the UK has left the EU and any post-exit transition/implementation period has ended. We also welcome the recent adoption of Regulation (EU) 2019/592 which will ensure visa-free access for UK nationals travelling to the EU once EU free movement rights cease to apply. Whilst the Minister indicates that the EU Free Movement Directive (2004/38/EC) "will be preserved by the European Union (Withdrawal) Act […] until repealed and replaced by new rules and legislation", we note that the Immigration and**

12 The Regulation has been formally adopted and was published in the Official Journal on 12 April 2019.

13 Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

Social Security Coordination (EU Withdrawal) Bill demonstrates the Government's intention to end free movement rights post-exit, though at a date yet to be determined by Statutory Instrument. We draw attention to the concern expressed in the recent Report by the Joint Committee on Human Rights that the main provisions of the Bill, unless amended, will remove *all* EU free movement of persons rights, without addressing the rights of those who currently benefit from rights of free movement of persons under EU law, or social security rights.[14]

3.10 **We thank the Minister for clarifying the possibilities for the EU and the UK, once a third country post-exit, to continue sharing personal data under the EU's Law Enforcement Data Protection Directive (2016/680). We nonetheless ask her to confirm our understanding that neither an adequacy decision nor the provisions of this Directive would allow a third country or its law enforcement authorities to access data held in an EU information system if the instrument establishing it does not permit such access.**

3.11 **We note that the changes to the proposed Regulation agreed by the European Parliament in its legislative resolution of 13 March 2019 would make explicit that "personal data obtained from the VIS by a Member State or by Europol for law enforcement purposes shall not be transferred or made available to any third country, international organisation or private entity established in or outside the Union" and that this prohibition should also apply "where those data are further processed at national level or between Member States pursuant to Directive (EU) 2016/680". We note also that Article 8 of the draft EU/UK Withdrawal Agreement stipulates that the UK "shall cease to be entitled to access any network, any information system and any database established on the basis of Union law" once any post-exit transition/implementation period has ended. Does the Minister agree with us that there is little prospect of securing law enforcement access to personal data held in or obtained by Member States from EU information systems such as VIS post-exit except through the negotiation of an agreement with the EU providing for such access and setting out the terms of access? Does she share our concern that the Political Declaration which is intended to accompany the draft EU/UK Withdrawal Agreement is equivocal on the scope of "further arrangements" for data sharing, underlining the need to reflect the UK's future status as "a non-Schengen third country that does not provide for the free movement of persons" and only to approximate, "in so far as is technically and legally possible", the relevant EU mechanisms?**

3.12 **As well as responding to our questions, we ask the Minister to inform us of the progress of trilogue negotiations and of the eventual compromise reached by the Council and the European Parliament on third country access to personal data held in the VIS information system. Meanwhile, the proposed Regulation remains under scrutiny. We draw this chapter to the attention of the Home Affairs Committee, the Exiting the European Union Committee and the Joint Committee on Human Rights.**

14 *Legislative Scrutiny: Immigration and Social Security Co-ordination (EU Withdrawal) Bill,* HC 569, HL 324, published 26 March 2019.

Full details of the documents

Proposal for a Regulation amending Regulation (EC) No 767/2008, Regulation (EC) No 810/2009, Regulation (EU) 2017/2226, Regulation (EU) 2016/399, Regulation XX/2018 [Interoperability Regulation], and Decision 2004/512/EC and repealing Council Decision 2008/633/JHA: (39714), 8853/18 + ADDs 1–3, COM(18) 302.

Background

3.13 The Visa Information System is one of six existing or planned centralised EU migration and security information systems.[15] The Commission intends to make these systems interoperable so that the authorities entitled to access each one can do so simultaneously, in a single search through the European Search Portal. The operational management of these systems is entrusted to eu-LISA, an EU agency established in 2012 to oversee large-scale EU justice and home affairs information systems. The table shows which of these information systems are open to UK participation.

Existing information systems managed by eu-LISA	Schengen or non-Schengen	UK position
Visa Information System—VIS	Schengen	UK excluded
Schengen Information System—SIS II (border control component)	Schengen	UK excluded
Schengen Information System—SIS II (police cooperation)	Schengen	UK participates
Eurodac	Non-Schengen	UK participates in the existing Eurodac database. The UK has opted into the Commission's proposal to expand its scope
New information systems to be managed by eu-LISA	**Schengen or non-Schengen**	**UK position**
EU Entry/Exit System—EES	Schengen	UK excluded
European Travel Information and Authorisation System—ETIAS	Schengen	UK excluded
European Criminal Records Information System—extension to third country nationals (ECRIS-TCN)	Non-Schengen	UK participates in ECRIS and has opted into a supplementary proposal creating a central database to assist Member States in obtaining criminal record information on third country national offenders in the EU

15 See the European Commission's fact sheet on EU Information Systems—Security and Borders.

3.14 The proposed Regulation would repeal a 2008 Decision on law enforcement access to VIS and amend the following measures in which the UK does not participate:

- a 2004 Council Decision establishing the Visa Information System;
- a 2008 Regulation setting out the purpose and functionalities of VIS and the procedures for exchanging information;
- a 2009 Regulation establishing the EU Visa Code;
- a 2016 Regulation establishing the Schengen Borders Code; and
- a 2017 Regulation establishing an EU Entry-Exit System.

3.15 It would also amend one new measure in which the UK has chosen to participate and on which negotiations have recently concluded—a proposed Regulation establishing a framework for interoperable EU migration and security databases.[16]

Previous Committee Reports

Thirty-eighth Report HC 301–xxxvii (2017–19), chapter 23 (12 September 2018) and Thirty-fifth Report HC 301–xxxiv (2017–19), chapter 7 (11 July 2018).

16 See our Fifty-sixth Report HC 301–lv (2017–19), chapter 11 (27 February 2019).

4 Connecting the European Travel Information and Authorisation System (ETIAS) with other EU security and migration information systems

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 Regulation establishing the conditions for accessing other EU information systems and amending Regulation (EU) 2018/1862 and Regulation (EU)—(the Schengen Information System and the European Criminal Records Information System—ECRIS-TCN) (b) Proposal for a Regulation establishing the conditions for accessing other EU information systems for ETIAS purposes and amending Regulation (EU) 2018/1240, Regulation (EC) No 767/2008, Regulation (EU) 2017/2226 and Regulation (EU) 2018/1861 (ETIAS, Visa Information System, EU Entry/Exit System, Schengen Information System)
Legal base	(a) Articles 82(1)(d) and 87(2)(a) TFEU, ordinary legislative procedure, QMV (b) Article 77(2)(a), (b) and (d) TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Numbers	(a) (40318), 5071/19, COM(19) 3; (b) (40317), 5072/19, COM(19) 4

Summary and Committee's conclusions

4.1 In September 2018, the EU adopted a Regulation establishing the legal framework for a new European Travel Information and Authorisation System ("the ETIAS Regulation") which is expected to be operational after 2021. The Regulation will require all visa-exempt third country nationals—those who are not EU citizens and do not need a visa for short stays of up to three months in the Schengen area—to apply online for a travel authorisation before their journey. The personal information they provide when making their application will be stored in the ETIAS Central System and cross-checked against information held in other EU security and migration information systems, Europol data

and Interpol databases.[17] The purpose of these checks is to identify individuals whose presence in an EU Member State would pose "a security, illegal immigration or high epidemic risk".[18]

4.2 The automated checks required under the ETIAS Regulation can only be carried out if the ETIAS Central System is able to communicate with other EU information systems. The proposed Regulations would amend the ETIAS Regulation and the Regulations establishing the EU Entry/Exit System ("EES"), the Visa Information System ("VIS"), the Schengen Information System ("SIS II") and the European Criminal Records and Information System (ECRIS-TCN) to make all these systems interoperable.[19] The proposals also set out the conditions under which the ETIAS Central System can access, search and cross-check data held in these other information systems.

4.3 Two Regulations are needed to reflect the fact that most of the EU information systems which the ETIAS Central System will consult are only open to countries participating in the Schengen free movement area and therefore exclude the UK. The European Commission nonetheless envisages that the Regulations will "work seamlessly together to enable the comprehensive operation and use of the [ETIAS] system".[20]

4.4 The first proposed Regulation, document (a), would amend the EU information systems in which the UK does participate—the police component of the Schengen Information System and ECRIS-TCN, a new database to determine which Member State/s hold criminal record information on third country nationals convicted of an offence within the EU. As the first, SIS II, is a Schengen measure and the second, ECRIS-TCN, is not, two Protocols relevant to the UK apply. Under the Schengen Protocol, the UK will be bound by those parts of the proposal relating to SIS II *unless the UK decides to opt out*. Under the Title V (justice and home affairs) opt-in Protocol, the UK will only be bound by those parts of the proposal relating to ECRIS-TCN *if the UK decides to opt in*. The Government has three months in which to make a decision.[21]

4.5 The second proposed Regulation, document (b), would amend four EU information systems in which the UK does not participate—ETIAS itself, the external borders component of the Schengen Information System, the EU Entry/Exit System and the Visa Information System. As these information systems build on parts of the Schengen rule book on border control and visas in which the UK has chosen not to take part, the UK is not entitled to participate in (and will not be bound by) the proposed Regulation. The proposal also provides for the conclusion of a cooperation agreement with Interpol on ETIAS access to the relevant Interpol databases and the necessary safeguards for protecting personal data.

4.6 In her Explanatory Memorandum of 29 January 2019, the Immigration Minister (Rt Hon. Caroline Nokes MP) expressed the Government's support for the proposed Regulations:

17 The relevant Interpol databases are the Stolen and Lost Travel Document database ("SLTD") and the Travel Documents Associated with Notices database ("TDAWN").

18 See Article 1 of Regulation (EU) 2018/1240 and Regulation (EU) 2018/1241.

19 Further changes will need to be made at a later stage to enable ETIAS to be interoperable with the EU's Eurodac information system (a proposal to amend the current Eurodac Regulation remains under negotiation).

20 See p.4 of the Commission's explanatory memorandum accompanying the proposed Regulations.

21 The three-month opt-in and opt-out period runs from the date on which the last language version of each proposal has been published.

> They enhance efforts to improve the security of the external Schengen border of the EU by supplementing the amount of information available to ETIAS, which will allow for the EU to revoke a grant of admission to a third country national if a relevant alert is identified from EU information systems.

4.7 She indicated that the Government would undertake "a full analysis of the advantages and disadvantages" of participating in the first proposed Regulation—document (a)—with particular regard to:

- the operational benefits for the UK;
- the fact that the UK does not participate in the ETIAS Regulation; and
- the potential impact on UK nationals once the UK has left the EU and UK nationals are required to seek ETIAS approval to travel to the UK.

4.8 The Minister drew 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 once it leaves the EU and that UK nationals will accordingly be treated as third country nationals. As part of its preparations for Brexit, the EU has adopted a Regulation to enable UK nationals to travel to the EU and wider Schengen area without a visa after leaving the EU. It will take effect the day after EU law ceases to apply to the UK. UK nationals will nonetheless be required to obtain an EU travel authorisation under the ETIAS system once it becomes operational.

4.9 The Minister acknowledged that the proposed Regulations could result in some UK nationals being refused a travel authorisation to enter the Schengen area post-exit but considered that UK nationals with relevant criminal convictions in ECRIS-TCN or alerts in the Schengen Information System "should be subject to the rules of entry into the EU". She added that the UK's future relationship with the various EU information systems covered by the proposed Regulations had yet to be determined and would be considered in negotiations on the UK's future partnership with the EU. She referred us to the Government's December 2018 White Paper, *The UK's future skills-based immigration system*, which envisages the introduction of an Electronic Travel Authorisation scheme applicable to visitors to the UK, including EU citizens.[22]

4.10 In our Report agreed on 13 February 2019, we asked the Minister to explain what operational benefits participation in the first proposed Regulation—document (a)—would bring the UK, given that the UK does not participate in the ETIAS Regulation. We also asked whether a decision *not* to participate would in any way prejudice the UK's participation in the Schengen Information System and ECRIS-TCN during any post-exit transition/implementation period or damage the UK's prospects for securing access to these information systems under a future EU/UK security agreement.

4.11 In her response of 13 March 2019, the Minister told us that there were "no obvious operational benefits" for the UK if the Government were to decide to participate. Nor did she consider that a decision *not* to participate would put the UK at risk of being ejected from the Schengen Information System and ECRIS-TCN while it remained bound by EU law or damage the UK's prospects for securing access to the Schengen Information System

22 Command Paper 9722 published on 19 December 2018.

and ECRIS-TCN post-exit under a future EU/UK security agreement. She confirmed that the three-month deadline for deciding whether to participate in document (a) would expire on 13 April 2019.

4.12 Based on this information, we inferred that the UK was unlikely to participate in the first proposed Regulation—document (a)—but held both proposals under scrutiny pending confirmation of the Government's decision.

4.13 The Minister informs us in her latest letter of 11 April 2019 that the proposed Regulation has been split into two separate Regulations, one concerning ETIAS access to information held in the law enforcement component of SIS II (and subject to the Schengen opt-out Protocol), the other ETIAS access to data held in ECRIS-TCN (and subject to the UK's Title V opt-in Protocol). The substance nonetheless remains unchanged. She indicates that the decisions on UK participation in the proposed Regulations must be taken no later than 12 April. Contrary to our expectations, having given "further detailed consideration to the advantages and disadvantages", the Government has decided to participate in both.

4.14 Given that the Government's decision to participate in the proposed Regulations has been taken after the original date (29 March 2019) on which the UK was expected to leave the EU, we set out the Minister's explanation in full:

> Whilst there are advantages to the EU from ETIAS having access to UK's data, there are no obvious operational or public protection benefits for the UK given it involves the provision of data to a scheme that the UK does not participate in. However, a significant argument in favour of participating is to prevent our non-participation from giving rise to issues around UK's access to SIS II and potentially ECRIS-TCN. If the UK exercises its opt-out in respect of the SIS II element of the proposal (i.e. does not participate) we would not be allowing the ETIAS Central Unit (managed by the European Border and Coast Guard Agency, EBCGA) access to UK SIS II data, when EBCGA already accesses SIS II as a result of the 2018 SIS II Regulation (which the UK is participating in). The Commission could argue that this makes the operation of the EBCG provisions in SIS II either impossible or significantly compromised. In this case, [the] UK could be at risk of ejection from SIS II, an outcome that would have detrimental consequences for UK law enforcement agencies and negatively impact our future security relationship with EU.
>
> In our initial examination of the implications of the access of ETIAS to UK data on ECRIS-TCN we have concluded that the potential financial and resource implications for ACRO Criminal Records Office (ACRO)—the UK agency that operates the ECRIS-TCN database—will be low, given that the technical requirements ETIAS introduces to ECRIS-TCN have already been considered under the ECRIS-TCN Regulation and will need to be implemented before that Regulation goes into force.
>
> The decision to participate in the proposed Regulation will also send a strong message that [the] UK is supportive of [the] EU's border security

> initiatives and underlines the UK's efforts to collaborate with [the] EU on a security partnership once [the] UK leaves the EU, including on SIS II and ECRIS-TCN in any implementation period.

4.15 Since writing to us, the Minister has published a Written Ministerial Statement confirming the Government's decision to participate and stating:

> A significant argument in favour of participating is to prevent the UK's non-participation from giving rise to issues around UK access to SIS II or ECRIS-TCN in future.[23]

Our Conclusions

4.16 **This appears to be quite a *volte-face* since the Minister last wrote to us in March indicating that there would be "no obvious operational benefits to the UK from participating in the proposed Regulation" (now split into two separate measures) and explaining why a decision not to take part would neither prejudice the UK's continued participation in the Schengen Information System and ECRIS-TCN during any post-exit transition/implementation period nor the UK's prospects for securing access to these information systems under a future EU/UK internal security agreement. The Government now appears to believe that non-participation would pose a significant risk to the UK's ability to remain part of these information systems post-exit. It is far from clear why the Government's assessment has changed so fundamentally in a matter of weeks. We ask the Minister whether it is a consequence of further discussions with the European Commission and other Member States on the implications of non-participation on the UK's future internal security relationship with the EU.**

4.17 **We note the Minister's assurance that the substance of the first proposed Regulation—document (a)—remains unchanged, despite having been split into two separate measures. We ask her to provide us with a copy of these measures as well as a further update on the prospects for reaching a political agreement within the Council and on the position of the European Parliament.**

4.18 **Pending further information, we retain both proposals under scrutiny. We draw this chapter to the attention of the Home Affairs Committee.**

Full details of the documents

(a) Proposal for a Regulation of the European Parliament and of the Council establishing the conditions for accessing other EU information systems and amending Regulation (EU) 2018/1862 and Regulation (EU) yyyy/xxx: (40318), 5071/19, COM(19) 3; (b) Proposal for a Regulation of the European Parliament and of the Council establishing the conditions for accessing other EU information systems for ETIAS purposes and amending Regulation (EU) 2018/1240, Regulation (EC) No 767/2008, Regulation (EU) 2017/2226 and Regulation (EU) 2018/1861: (40317), 5072/19, COM(19) 4.

23 Participating in new legislation governing the EU's European Travel Information and Authorisation System (ETIAS): Written Statement HCWS1518, published on 24 April 2019.

Previous Committee Reports

Sixtieth Report HC 301–lviii (2017–19), chapter 7 (20 March 2019) and Fifty-fifth Report HC 301–liv (2017–19), chapter 5 (13 February 2019). See also our earlier Reports on the proposed ETIAS Regulation (and consequential changes to the Europol Regulation) are relevant: Twenty-fifth Report HC 71–xxiii (2016–17), chapter 12 (11 January 2017), Thirty-first Report HC 71–xxix (2016–17), chapter 12 (8 February 2017), Thirty-fifth Report HC 71–xxxiii (2016–17), chapter 7 (15 March 2017), Fortieth Report HC 71–xxxvii (2016–17), chapter 18 (25 April 2017), First Report HC 301–i (2017–19), chapter 23 (21 November 2017) and Fifty-fourth Report HC 301–liii (2017–19), chapter 4 (6 February 2019).

5 The EU's strategy towards China

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Business, Energy and Industrial Strategy Committee, the Foreign Affairs Committee and the International Trade Committee
Document details	Joint Communication: EU-China—A strategic outlook
Legal base	-
Department	Foreign and Commonwealth Office
Document Number	(40471), 7566/19, JOIN(19) 5

Background and Committee's conclusions

5.1 The relationship between the EU's individual Member States and China as a growing economic and political power is a matter of some controversy. Despite German opposition, Italy has recently become the largest EU country to date to sign up to Beijing's "Belts and Roads" initiative (a government-backed investment project aimed at reinforcing China's physical trading infrastructure with countries across the world).[24] In April 2019, it became clear the UK Government is also seeking to secure investment from the initiative. Reflecting its political interests, China also pursues engagement with Eastern Europe—including 11 EU Member States—outside formal EU structures in the "16+1 format".[25]

5.2 This fragmentation notwithstanding, many European governments do share concerns about China's internal and external economic policies, including subsidies for its domestic manufacturers and investment in key infrastructure in other countries. For example, the EU currently maintains anti-dumping duties on a variety of Chinese imports including bicycles, steel products and solar panels.[26] In order to galvanise the Member States behind a more unified EU approach, to be able to address such concerns more effectively, the European Commission and EU's High Representative for Foreign Affairs (Federica Mogherini) in March 2019 jointly published a new strategy for the EU's engagement with China.

5.3 The policy paper identifies a number of key areas of cooperation between the EU and China, such as implementation of the Paris Climate Change Agreement, working together within the United Nations to support peace, security and economic development, and continued collaborative efforts to work with Iran to end its nuclear programme under the so-called Joint Comprehensive Plan of Action. Mostly, however, the Commission paper is critical of Chinese government policies. This is especially true in relation to the closed nature of China's domestic market—restricting access for European competitors and favouring domestic businesses when enforcing intellectual property rights—and Beijing's extensive use of financial support for domestic businesses operating in overseas markets (including the EU). The Commission also expresses serious concerns about the country's

24 The UK Government is reportedly also involved in the Belts and Roads Initiative.

25 The 16+1 countries are EU Member States Bulgaria, the Czech Republic, Croatia, Estonia, the Baltic States, Poland, Romania, Slovakia, Slovenia, Hungary, plus Albania, Bosnia-Herzegovina, North Macedonia, Montenegro and Serbia. The EU participates in this forum as an observer.

26 See for more information the European Commission website on trade defence investigations.

overseas investment policies, both within the EU itself and elsewhere, which it says "frequently neglect socioeconomic and financial sustainability and may result in high-level indebtedness and transfer of control over strategic assets and resources" to China.

5.4 The Commission also singled out the need to protect Europe's critical digital infrastructure from being controlled directly or indirectly, implicitly referring to the dominant position of Chinese telecommunications firm Huawei.[27] The Commission notes that substantial foreign investment or involvement in strategic sectors "can pose risks to the EU's security". This relates primarily, though not solely, to Huawei's efforts to supply Europe's infrastructure for 5G, the most recent international mobile communications technology. Echoing concerns that are widely shared internationally, for example by Australia, Canada and the US,[28] the Commission therefore recommended a "common EU approach to the security of 5G networks". (Although the UK Government's Oversight Board for Huawei's Cyber Security Evaluation Centre in Oxfordshire concluded in a recent report that it can "provide only limited assurance that […] long-term security risks can be managed in the Huawei equipment currently deployed in the UK",[29] the Government—like Germany[30]—in April 2019 decided to allow the company to be involved in the roll-out of the UK's 5G infrastructure.)

5.5 Finally, although the Commission does not accuse China of orchestrating cyber-attacks on European targets directly, its paper does pointedly refer to a draft new EU sanctions regime against perpetrators of cyber-attacks "regardless of whether they are carried out by state or non-state actors".[31]

5.6 In light of the economic and political effects of these concerns about Chinese policies and practices, the European Commission has made a number of recommendations for how the EU should achieve a more "balanced and reciprocal economic relationship" with China. The priorities are contained in 10 "actions", the most important ones of can be summarised as follows:

- the EU should encourage the Chinese government to open its national markets for agricultural products, financial services and public procurement to EU businesses, and reduce competitive distortions created by Beijing's industrial subsidies for Chinese manufacturing sectors, especially in high-tech industries. In this context, the Commission urges the Member States and the European Parliament re-start discussions on a draft Regulation that could restrict access by 'third countries' to EU public procurement tenders (the International Procurement Instrument) as a means to increase access for European companies to overseas procurement markets.[32] The Commission also signalled its ambition

27 Directly by acquisition of the infrastructure, or indirectly by acting as the supplier—and maintenance provider—for such infrastructure.

28 The European Parliament also passed a Resolution in March 2019 on security threats connected with the rising Chinese technological presence in the Union, which called on the Commission and Member States to take action at Union level.

29 Huawei cyber security evaluation centre oversight board: annual report 2019 (published 28 March 2019).

30 The German regulator recently allowed Huawei to be involved in Germany's roll-out of 5G, but is consulting on new security guidelines.

31 The draft legislation, which is based on the EU's Common Foreign & Security Policy, was submitted to the Member States on 8 March 2019. The Government has not yet deposited the text for parliamentary scrutiny, but we are in contact with the Foreign Office and expect such deposit shortly.

32 The International Procurement Instrument remains under scrutiny. It is opposed by the UK Government, which—as our predecessors noted in their Report of 16 March 2016—believes it could "[harm] value for money, provoked retaliatory action by third countries and could be seen as protectionist".

to sign a comprehensive EU-China Investment Agreement in 2020 to secure a legally-binding commitment to "fair and equal treatment for EU companies operating in China";

- action should be taken at EU-level to address the effects of China's industrial subsidy policies on the European Single Market,[33] by considering how to "appropriately deal" with these unfair market practices to limit the effects they have on domestic businesses (including patchy enforcement of intellectual property laws by the Chinese authorities).[34] The Commission has said it will publish a report on "how to fill existing gaps in EU law" on ensuring an economic level playing field for European and Chinese businesses by the end of 2019;[35]

- the EU and its Member States should seek to counter the emergence of Chinese dominance in strategic industrial sectors through increased cross-border cooperation between European firms in areas like Artificial Intelligence and batteries,[36] and on industrial research more generally (including financial support in the form of EU funding, in particular via the Framework Programme for Research);[37]

- the Commission highlights the need to protect the security of the EU's critical infrastructure, especially for 5G networks, against vulnerabilities to foreign interference, and address economically-motivated cyber-attacks. Having issued a specific Recommendation on the security of 5G infrastructure,[38] the Commission also calls for the rapid implementation of the EU's new Foreign Direct Investment Screening Regulation[39] and Cyber-security Act, and for the establishment of a new EU sanctions framework against perpetrators of cyber-attacks against European targets;[40] and

- finally, the Commission argues strongly in favour of continued EU financial and technical assistance in those countries, especially in the Union's eastern and southern "neighbourhood", which the Chinese are also targeting with investment and loans as part of the aforementioned "Belts and Roads" initiative. In view of the end of the EU's current long-term budget in December 2020, the Commission calls on the Member States and the European Parliament to agree

33 The tension between strict EU State aid laws and competition from publicly-supported Chinese companies was highlighted recently in the European Commission's decision to block the merger of France's Alstom and Germany's Siemens Mobility to create a European rival to Chinese train-manufacturing companies.

34 The draft Regulation on 'third country' access to the EU's public procurement market (the International Procurement Instrument) was published in January 2016, based on an earlier proposal dated 2012. It is unclear when the legislation might be adopted as negotiations between Member States do not appear to be taking place. The UK has "longstanding concerns" with the Commission proposal because the Government sees "real risks of reducing competition and value for money in procurement with no evidence that it can leverage the desired improvement in third country markets".

35 Specific 'gaps' in EU law mentioned by the Commission in its strategy paper relate to merger control of overseas companies which buy up EU competitors with the help of government subsidies, and the inadequacies of the EU's current trade defence instruments to cover "all potential effects of unfair subsidies".

36 European Commission policy papers on both artificial intelligence and batteries were published in April 2019.

37 A proposal for the EU's post-2020 Framework Programme for Research, called Horizon Europe, is currently being negotiated between the Council and the European Parliament. The UK wants to participate in that Programme after Brexit as a 'third country'. See for more information our Report of 21 November 2018.

38 The Commission Recommendation remains under scrutiny. It has not yet been considered by the Committee.

39 See for more information on the Foreign Direct Investment Regulation our Report of 23 January 2019.

40 We understand the legislative proposal for the cyber-attacks sanctions framework, which is under discussion in the Council but classified as LIMITE, is due to be deposited for scrutiny shortly.

on the legal framework and budget for the EU's external support instruments for other countries under its 2021–2027 'Multiannual Financial Framework' as soon as possible (in particular the proposed Instrument for Pre-Accession Assistance and the new Neighbourhood, International Development & Cooperation Instrument, the primary financial support mechanisms for countries in the EU's eastern and southern 'neighbourhood').

5.7 Addressing these priorities, the Commission said, would require the Member States to act both individually and jointly within the EU, because "full unity" is necessary to "achieve their aims with China" in a way that shows "consistency with EU law, rules and policies". The EU's Heads of State and Government, meeting as the European Council in Brussels on 21 March 2019, discussed the Commission's policy paper. While the leaders—including the Prime Minister—endorsed its substance, in their public conclusions, however, the leaders noted only that they "exchanged views on overall relations with China in the global context". However, at a formal EU-China summit on 9 April 2019—where the matters raised by the European Commission were discussed further in a diplomatic bilateral setting—the EU extracted commitments from Beijing on WTO-compliant industrial subsidies and protection of geographical indications for European food products sold in China.[41]

5.8 The Foreign and Commonwealth Office submitted an Explanatory Memorandum on the Commission policy paper on 29 March 2019. In it, the Minister for Europe (Rt Hon. Sir Alan Duncan MP) stated the document with respect to trade policy issues "broadly aligns with the UK's objectives", and welcomed its endorsement by the European Council the week previously. The Government's Memorandum makes no detailed assessment of the likely implications of the Commission proposals in the context of the UK's withdrawal from the European Union, either on for the UK directly (insofar as the "actions" are likely to affect non-EU countries generally in their trade relations with the bloc), or in its bilateral relations with China once it is no longer a member of the EU.

Our conclusions

5.9 **We thank the Minister for his Explanatory Memorandum on the European Commission's paper setting out a draft EU strategy for engagement with China. We consider the European Commission document to be of political importance, because the engagement between these two economic blocs is likely to have ramifications for the UK as it begins the process of acting independently of the EU both in multilateral settings and bilaterally after Brexit, and pursues a trade policy outside of the EU's Common Commercial Policy.**

5.10 **In particular, how the EU aims to address China's competitive distortions and protectionist policies—and the extent to which it succeeds—will be of major importance to UK businesses both domestically, faced with Chinese competition, and when trying to access China's domestic market as exporters. While the EU's efforts may reinforce the UK's ability to pursue similar liberalising policies with Beijing once outside the Single Market and Customs Union, it also raises the possibility that EU-based businesses could benefit from improved economic relations with China to the detriment of British competitors, which would not be covered by any bilateral EU-**

41 See also the formal EU-China communiqué issued at the end of the summit on 9 April 2019.

Chinese agreements. The UK, for example, would not automatically be covered by any future EU-China Investment Agreement, or commitments relating to access to procurement markets or protection of intellectual property. Similarly, the way in which the EU-27 countries approach the involvement of Chinese companies in their critical infrastructure networks will remain a useful comparator for the UK Government's stance, for example in relation to the decision to permit Huawei involvement in Britain's 5G network.

5.11 **The Government will soon have to address these political and economic issues with Beijing bilaterally, rather than in consultation with the 27 other countries of the European Union. Under EU law, they must in some cases act jointly, for example on matters where EU legislation has been adopted and where it has exclusive competence by virtue of the Treaties; in other cases, they may choose to do so because of the increased economic clout they wield as a group. While the UK will have increased flexibility to act once it is no longer sharing competence with the EU for certain trade and economic policies, its actions alone will carry less weight due to its smaller size. For example, the potential economic consequences to trading partners of British retaliatory measures—like anti-dumping duties or other restrictions on market access—would be less than those taken by the European Union's Member States collectively.**

5.12 **Moreover, given the uncertainty about the post-Brexit trading arrangements not only with the EU itself but also with major economic partners like South Korea and Japan,[42] the promise of Chinese investment—despite the longer-term political and economic risks—may also be more attractive to the Government than it would otherwise have been. We know Parliament will want to follow the Government's involvement in China's Belt and Road Initiative closely.**

5.13 **Similarly, the Commission's strategy paper also shows the extent to which the EU's policies—both internal and external—are driven by concerns about economic and political competitors elsewhere in the world. The UK, as a large economy and close geographic neighbour to the Union, will have to be prepared for the fact that the EU may take—and in many cases already has taken—a similarly unsentimental approach in its post-Brexit engagement with the UK. Any steps taken by the EU to leverage its own economic weight to increase market access opportunities for its business elsewhere—for example by means of the International Procurement Instrument or beefed up trade defence instruments—would apply to the UK as a 'third country' as well. The potential repercussions of being a 'third country' vis-à-vis the EU in these areas will inevitably inform the Government's position on its economic and industrial policy post-Brexit. Regrettably, the Minister's Explanatory Memorandum does not touch on these issues in any detail.**

5.14 **Given the implications of the EU's approach to China for the UK in its post-Brexit future, we draw the EU's strategy paper to the attention of the Business, Energy and Industrial Strategy Committee, the International Trade Committee and the Foreign Affairs Committee, in the context of the latter's recent inquiry into China and the rules-based international order.**

42 There is as of April 2019 no certainty about the post-Brexit roll-over of trade agreements with many countries to which the UK is party only by virtue of its EU membership. In addition, there is of course no clarity about the UK's future trading arrangements with the EU-27, whether in a 'no deal' scenario or following the transitional period foreseen by the draft Withdrawal Agreement.

Full details of the documents

Joint Communication: EU-China—A strategic outlook: (40471), 7566/19, JOIN(19) 5.

Previous Committee Reports

None. This is a new document.

6 Operation SOPHIA: EU anti-trafficking mission in the Mediterranean

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Defence Committee, the Foreign Affairs Committee and the International Development Committee
Document details	Council Decision of 29 March 2019 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA)
Legal base	Articles 42(4) and 43(2) TEU; unanimity
Department	Foreign and Commonwealth Office
Document Number	(40492),—

Background and Committee's conclusions

6.1 In June 2015, the EU's Member States launched the Naval Force Mediterranean Mission (EUNAVFOR MED)—since renamed Operation SOPHIA[43] in June 2015—to counter people-trafficking in the Southern Central Mediterranean.[44]

6.2 As part of the Common Security & Defence Policy (CSDP), the mission's vessels were instructed to patrol the high seas between Libya and Italy (the latter of which plays a key role in the mission, hosting the operational headquarters in Rome). When established, its core mandate was to identify, capture and dispose of vessels and other assets being used by migrant smugglers or traffickers, thus disrupting the business model of human smuggling and trafficking networks in the Southern Central Mediterranean, and in doing so prevent the further loss of life at sea.[45] Since June 2016, it has also provided training to Libya's Coast Guard and naval forces. The Operation was conceived as one element of a broader EU comprehensive response to increasing inflow of refugees into Europe, including other initiatives to address its root causes, including conflict, poverty, climate change and persecution.[46]

6.3 In July 2017, the Foreign Office told us that Operation SOPHIA had by that point saved 38,000 people at sea (of which 12,000 by UK ships), and that it had destroyed 463

43 The operation was rechristened 'SOPHIA' in 2015, named after a baby born to a Somali woman aboard a German vessel which had rescued her and 453 others in the Mediterranean.

44 See Council Decision (CFSP) 2015/778 of 18 May 2015.

45 The Operation was conceived to consist of four phases: first, deployment of forces to build a comprehensive understanding of smuggling activity and methods; secondly, boarding, search, seizure and diversion of smugglers' vessels on the high seas, which would be extended into Libyan territorial waters once authorised by the Libyan authorities and United Nation Security Council; thirdly, further expansion of phase 2 to include taking operational measures against vessels and related assets suspected of being used for human smuggling or trafficking inside the coastal states territory; and finally, withdrawal of forces and completion of the operation.

46 See for example our Report of 8 February 2017 on the EU Strategy for the Sahel.

smuggling vessels.[47] It also noted that the initial phases of training the Libyan coast guard and navy have been completed, but that further training was delayed because the Libyan authorities were unable to pay their trainees the necessary stipend. Overall, it was the Government's position that the training provided by the EU would enable the Libyans to save more migrants at risk of drowning, ensure that individual officers act in conformity with human rights norms, reduce overall migratory flows and disrupt human trafficking activities.

6.4 However, that same month the House of Lords EU External Affairs Sub-Committee published a report on Operation SOPHIA. This concluded that the Operation had failed to achieve its objective of disrupting human trafficking from Africa to Europe, because "meaningful EU action" would require action against those organising these activities on the ground in Libya (which has not been possible since there has not been an effective government of the territory since the removal of its former President, Muammar Gaddafi, in 2011). Based on these findings, the report recommended closure of Operation SOPHIA, and its replacement with a naval operation focused solely on search and rescue for migrants at sea.[48]

6.5 Despite these concerns, in July 2017 the Member States unanimously agreed to extend until December 2018.[49] We reported that decision to the House in our Report of 13 December 2017.[50] The Minister for Europe (Rt Hon. Sir Alan Duncan MP) provided the following justification for the UK's support for the Operation:

> [Operation] Sophia's primary goal is to break the business model of the smugglers and traffickers. HMG remains of the view that this is the right objective. The military assets deployed are the most effective means of gathering the intelligence and conducting the surveillance needed to develop an understanding of smuggling networks and patterns of operation. Moreover, it would not make sense to end the mandate while numbers crossing the Central Mediterranean continue to increase.

6.6 By September 2017, the Government still maintained that the UK's contribution to the Operation, and efforts to ensure its effectiveness, "remain an important part of a whole-of-government approach to addressing the migration challenge, including humanitarian assistance and action to tackle smugglers". However, it also conceded that the operation had "not delivered all that we had hoped" and acknowledged that, in order to stem the

47 Explanatory Memorandum submitted by the Foreign and Commonwealth Office (13 July 2017), p. 2. In June 2016, the Council extended Operation SOPHIA's mandate until July 2017, and added two supporting tasks: training the Libyan coastguards and navy; and contributing to the implementation of the UN arms embargo on the high seas off the coast of Libya.

48 In fact, the House of Lords found that the practice of destroying smugglers' boats had resulted in refugees being sent to sea in less seaworthy vessels, resulting in more deaths. The Committee recorded that Operation SOPHIA vessels had rescued over 33,000 people since June 2016, but that nonetheless the number of recorded casualties on the central Mediterranean route "increased by around 42% in 2016".

49 The Foreign & Commonwealth's Office Explanatory Memorandum on the decision to extend the Operation in July 2017 made clear the UK's support for the extension, stating that the Government "remains of the view" that disrupting the business model of smugglers and traffickers "is the right objective" for Operation SOPHIA. However, Government recognised that the political conditions in Libya have precluded the Operation from moving its activities to inside Libyan territory where it "would have the greatest impact against the smugglers' business model".

50 The mission was given a budget of €6 million (£5.5 million) for the July 2017—December 2018 period. Under the Athena mechanism for financing CSDP missions, the UK is expected to be liable for 16.7% (€1 million or £920.000) of the common costs.

flow of people trying to cross the Mediterranean, the priority needs to be "interventions upstream in countries of origin and transit" (including, crucially, Libya), which would "reduce the need of individuals and families to leave their home country or move on from a safe third country in their region".

Proposal to wind down Operation SOPHIA

6.7 At their meeting in Brussels in June 2018, the EU's Heads of State and Government (including the UK Prime Minister) called for "efforts to stop smugglers operating out of Libya or elsewhere" via the Central Mediterranean to be "further intensified". This would include "regional disembarkation platforms" that essentially would sequester migrants and refugees in transit countries—like Libya—before they cross the sea and reach Europe.

6.8 A confidential Strategic Review of the EU's security operations in Libya drawn up by the European External Action Service—and leaked to *Statewatch*—concluded that Operation SOPHIA had "played a decisive role in improving overall maritime security" in the region.[51] In light of this, the EEAS recommended that the Operation should be extended by another 18 months (until the end of 2020).[52] It said its mandate should also be expanded to authorise it to expect vessels on the high seas to counter oil smuggling and share information on its activities with the United Nations, and enabling it to carry out "monitoring activities ashore" in Libya to supervise the country's coast guard.

6.9 However, this recommendation was not accepted by the Member States, and the longer-term future of Operation SOPHIA has been the subject of intense behind-the-scenes negotiations in Brussels for some time. The new Italian Government in particular has taken a harder line on the need to stem the flow of people crossing the Mediterranean, whether after being rescued by vessels associated with the Operation or otherwise. This political impasse meant that the Member States agreed on a three-month extension of its activities under its existing mandate, to provide more time to deliberate on the EU's next steps in the Mediterranean. The formal legal Decision for this extension was only taken on 21 December 2018—ten days before the Operation's legal mandate would otherwise expire.[53]

6.10 The short-term prolongation of SOPHIA agreed in December 2018 ended on 31 March 2019. On 29 March, the Member States—the UK included—unanimously approved a further six-month extension of the Operation, but this time with a severely reduced legal mandate and remit.[54] In particular, after threats by Italy—the principal destination for people who cross the Mediterranean from Libya—to veto *any* extension, SOPHIA no longer has an actual naval presence.[55] The lack of vessels means that the Operation can no longer rescue people at sea (and, by extension, allow them to disembark on European territory).[56] Instead, from 1 April 2019, the mission's activities have focussed only on aerial

51 Council document 11471/18 on Strategic Review on EUNAVFOR MED Operation Sophia, EUBAM Libya & EU Liaison and Planning Cell.

52 The same applied to the EU's Border Assistance Mission in Libya (EUBAM Libya).

53 Council Decision (CFSP) 2018/2055 of 21 December 2018, on a European Union military operation in the Southern Central Mediterranean.

54 See Council Decision (CFSP) 2019/535 of 29 March 2019m on a European Union military operation in the Southern Central Mediterranean The decision was taken by written procedure, rather than at a formal meeting of Ministers.

55 The "deployed units" section of Operation SOPHIA's website now only lists six aircraft (as of 23 April 2019).

56 The Italian Government had threatened to use its veto under Article 42(4) to shut down Operation SOPHIA altogether from 1 April 2019 unless its demands in relation to the picking up of migrants were accepted.

surveillance and continued training of the Libyan maritime authorities. This decision to withdraw the vessels was strongly condemned by human rights groups including Amnesty International, which said that "EU governments [were] removing their own ships, leaving no-one to save the lives of women, men and children in peril".

6.11 The Minister for Europe (Rt Hon. Sir Alan Duncan MP) deposited the Council Decision extending SOPHIA until September 2019 for scrutiny on 2 April 2019, alongside an Explanatory Memorandum (four days after it was formally adopted by Member State Governments in Brussels).[57] In it, the Minister argues that "the increased capacity of the Libyan Navy and Coastguard to secure Libya's maritime border" thanks to EU assistance "should reduce the impact of the suspension of naval assets", although he does not refer to numerous allegations that Libya's maritime authorities are not fit for purpose and place those attempting to cross the Mediterranean in "arbitrary, indefinite and abusive detention".[58] The political situation in Libya itself has since also deteriorated further, with the UK embassy in Tripoli recently being moved to Tunisia following attacks on the capital by insurgent forces against the country's UN-backed government.

6.12 The legal mandate for Operation SOPHIA's residual activities will expire on 30 September 2019, unless a formal Council Decision to the contrary is adopted by unanimity by the EU's Foreign Affairs Ministers before then. The UK will be involved in those discussions, and have a formal vote on the outcome, for as long as it remains a Member State. Given Italy's position in particular, the longer-term future of the mission and its remit beyond September remain unclear at this stage.

UK participation in Operation SOPHIA following Brexit

6.13 The UK Government has supported the launch of Operation Sophia and its various extensions since 2015. British personnel has also been involved in the operational aspect of SOPHIA on the ground, after the Government committed HMS Echo to its patrols until December 2018.[59] In April 2018, the Foreign Office also confirmed that the Ministry of Defence had seconded six personnel to the mission (out of the Operation's total staff count of 963). As of May 2019, the Ministry of Defence does not deploy any British assets as part of the mission.[60]

6.14 In March 2017, the Government notified the European Council of the UK's decision to withdraw from the EU. When it ceases to be a Member State, Britain will by default no longer be involved in the management of Operation SOPHIA, and any staff still seconded to it would be withdrawn. As a non-EU country, the Government will not have the right to be present at—or vote during—meetings of EU institutions like the Foreign Affairs Council or the Political & Security Committee, including with respect to any future decisions on whether to extend SOPHIA (which, as a Member State, it could veto as Italy threatened to do in March 2019).

57 The delay in deposit for scrutiny was explained by the Minister as resulting from the fact that the final decision on the extension and remit of the operation was not taken until shortly before the Decision had to be formally adopted in light of the expiry of SOPHIA's mandate on 31 March 2019.

58 Human Rights Watch, "France gifts boats to abusive Libyan coast guard" (13 March 2019).

59 This commitment was made by the Prime Minister at the June 2017 European Council.

60 See the "deployed units" section of the Operation SOPHIA website.

6.15 However, under the draft Withdrawal Agreement on the UK's exit from the EU, it would still be involved indirectly in the Common Foreign & Security Policy (and therefore Operation SOPHIA) for some time after Brexit. In particular, the UK would enter a post-Brexit transitional period until at least 31 December 2020.[61] During this time, it would be bound as if it were a Member State by decisions under the EU's Common Foreign & Security Policy, for example in relations to sanctions.[62] While the UK would also be required to contribute financially to the EU's CSDP operations during that period,[63] including SOPHIA, it could not be forced to contribute materiel or troops to any EU military or civilian operations overseas.[64] It would be bound by the principle of 'sincere cooperation', which would prohibit the Government from taking any "action or initiative which is likely to be prejudicial to the [EU's] interests".[65]

6.16 Beyond the transitional period, or in a 'no deal' scenario where the UK leaves the EU without a Withdrawal Agreement in place, there would be no automatic link between the UK's foreign policy and the EU's external action (either in the Mediterranean or elsewhere). However, the direction of the EU's Common Foreign & Security Policy and the deployment of civilian and military personnel under the Common Security & Defence Policy will remain important for the UK given the overlapping foreign policy objectives in many areas, including not only the migrant crisis, piracy off the Horn of Africa[66] or containing Russian aggression. In light of this, the Government has stated on a number of occasions that, despite Brexit, it "remain[s] committed to European Security".

6.17 The Political Declaration on the future UK-EU relationship of 14 November 2018, which sits alongside the draft Withdrawal Agreement governing the immediate consequences of the UK's exit from the European Union, contains a relatively lengthy section on the post-Brexit security partnership. It commits the UK and the EU to "ambitious, close and lasting cooperation on external action", including steps to "address the root causes of global challenges such as terrorism or illegal migration". This would be done via "structured consultation and regular thematic dialogues", but without formal UK involvement in the EU's decision-making structures (or, of course, vice versa). The Government has also committed to considering UK participation in CSDP missions and operations—like SOPHIA—on a "case by case basis" at its own discretion. The Political Declaration does not contain any obligation on the UK to participate in specific EU military operations.

61 The draft Withdrawal Agreement foresees, in Article 132, the possibility of extending the transitional period until 31 December 2022 by mutual agreement between the UK and the EU.

62 Article 127 of the draft Withdrawal Agreement.

63 Article 155 of the draft Withdrawal Agreement. Although Article 132 of the draft Withdrawal Agreement foresees the possibility of an extension of the transitional period until 31 December 2022 at the latest, during any such extension the UK would not participate in the EU's budgetary mechanisms. Instead, it would have to agree an ad-hoc lump sum payment to the EU in return for continued participation in the Customs Union and Single Market.

64 Indeed, Article 129(7) of the draft Withdrawal Agreement prohibits the UK from providing "commanders of civilian operations, heads of mission, operation commanders or force commanders for missions or operations […] nor […] provide the operational headquarters for such missions or operations" during the transitional period.

65 Article 129 of the draft Withdrawal Agreement.

66 The UK provided the operational headquarters for Operation Atalanta, the EU's anti-piracy mission off the Somali coast. The OHQ was moved to France and Spain in early 2019 as a consequence of Brexit.

Our conclusions

6.18 **We thank the Minister for his Explanatory Memorandum on the EU's decision to wind down Operation SOPHIA. While it was widely known that the effectiveness of the Operation in stopping human trafficking in the Mediterranean was limited, the removal of the maritime aspect of the EU's *naval* mission will remove one of the safety nets for those who seek to reach Europe via Libya, while no new comprehensive measures are in place to address the push factors leading them to attempt to cross the Mediterranean in the first place.**

6.19 **We note the concerns expressed by various human rights groups about the implications of removing the EU's naval presence in the waters between Italy and Libya, which are likely to lead to increased casualties among those attempting the crossing. The continued deterioration in the political stability of Libya itself, and therefore its Government's effective control of, and oversight over, its Coast Guard—whose conduct is already controversial—are likely to compound this humanitarian crisis further. Given the need for unanimity in the EU's decision-making on foreign policy, and Italy's effective veto over the future re-deployment of naval assets in the Mediterranean as part of any CSDP operation, the political impasse over the future of the EU's policy to address the immediate consequences of the flow of immigrants from Libya to Europe is likely to persist. We will continue to monitor further EU decisions in this area closely, given the UK's interest in the stability of Northern Africa and the routes of migration into the EU via the Mediterranean.**

6.20 **The political implications of the EU's decision with respect to the future Operation SOPHIA for the UK are less easy to quantify. After Brexit, whether or not the Withdrawal Agreement is ratified, the UK will not be involved in the decision-making processes governing the Operation, or any other aspect of the EU's Common Foreign & Security Policy. However, as set out in the Political Declaration on the future UK-EU relationship, the Government is seeking a close partnership and participate—voluntary—in EU military missions even as non-Member State. It is not clear from the Minister's Memorandum whether the Government will seek to remain associated with SOPHIA after the UK ceases to be an EU Member State (should the Operation, or a successor mission, still be active at that stage).**

6.21 **Given it is the Government's intention to continue participating in CSDP missions and operations as a 'third country', including mandate development and operational planning, it is paramount that Parliament is aware of the scope of activities in which the UK might become involved. Post-Brexit, parliamentary scrutiny of EU foreign policy making—and the Government's participation in those discussions as a 'third country'—will remain necessary. Parliament will also need to consider how it wants to hold the Government to account for any decision to contribute to EU military operations once the UK is no longer an automatic participant by virtue of its EU membership, whether in terms of troops, material or financial support.**

6.22 **We draw these developments to the attention of the Foreign Affairs Committee and the International Development Committee.**

Full details of the documents

Council Decision of 29 March 2019 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA): (40492),—.

Previous Committee Reports

None on this proposed Council Decision. We last considered Operation SOPHIA in our Fifth Report HC 301–v (2017–19), chapter 15 (13 December 2017).

See also: Second Report HC 342–ii (2015–16), chapter 2 (21 July 2015), Seventh Report HC 342–vii (2015–16), chapter 1 (28 October 2015), Ninth Report HC 342–ix (2015–16), chapter 1 (18 November 2015), Twenty-first Report HC 342–xx (2015–16), chapter 10 (27 January 2016); and (37881): Seventh Report HC 71–v (2016–17), chapter 17 (6 July 2016).

7 European System of Financial Supervision: powers of the EU's supervisory authorities

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Treasury Committee
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): Article 114 TFEU, ordinary legislative procedure; QMV; (b) and (c) Articles 53(1) and 62 TFEU; ordinary legislative procedure, QMV
Department	Treasury
Document Numbers	(a) (39052), 12420/17 + ADDs 1–2, COM(17) 536; (b) (39053), 12422/17, COM(17) 537; (c) (39056), 12431/17, COM(17) 539

Background and Committee's conclusions

7.1 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),[67] 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.

7.2 The ESAs have far fewer direct supervisory responsibilities than national regulators like the Bank of England or the Financial Conduct Authority. Instead, they focus on assisting the European Commission in drafting technical regulations.[68] Although the Authorities can—as a last resort—exercise powers to override a national regulator if they believe it is not properly applying EU financial legislation, this power has never been used. This can be explained, to a large extent, by the fact that a decision to invoke such a 'breach

67 The EBA has been based in London since its establishment, but it has moved to Paris due to the UK's withdrawal from the EU.

68 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 E; and exercising direct supervisory powers, notably authorisation and ongoing supervision of specific types of financial firms.

of Union law' procedure against a Member State's regulator must be taken by the Board of Supervisors of an ESA, where only the EU's national regulators themselves have voting rights.[69] The political hurdles this creates was shown recently by the decision of the Board of the European Banking Authority to reject a recommendation to censure both the Danish and Estonian banking regulators for their role in the €200 billion Danske Bank money-laundering scandal, thought to be one of the largest supervisory failings in recent European banking history.

Review of the European System of Financial Supervision

7.3 The European Commission carried out a comprehensive evaluation of the European System of Financial Supervision between 2014 and 2017. 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. The Commission 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. Principal among these changed circumstances was the UK's decision to withdraw from the EU.

7.4 Given the UK's status as Europe's largest financial centre and a major exporter of financial services to the rest of the European Union, the Commission reasoned Brexit was likely to result in a substantial proportion of financial services to EU clients being provided from a 'third country', outside the remit of European law on prudential and conduct standards for banks, investment firms and insurers.[70] While an exit from the Single Market means British financial services firms will lose their 'passporting' rights to operate into any other EU Member State on a cross-border basis,[71] existing EU legislation contains variety of mechanisms that could enable them to continue offering a more limited range of services in the remaining 27 Member States from their UK base. The principal mechanism for such continued cross-border activity into the EU from the UK as a 'third country' is 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

69 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, these are also dominated by a sub-set of national supervisors (rather than acting independently of them), and they have few direct responsibilities that impact on the ESA's substantive regulatory work.

70 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.

71 While part of the Single Market, British firms have the ability to provide a variety of financial services throughout the European Economic Area without the need for licences or authorisations in 'host' countries, based on their regulatory permissions issued in the UK. This system of 'passporting' is based on the application of EU law, and oversight by the European Commission and the Court of Justice. After Brexit, as and when the UK leaves the Single Market, those limitations on the UK's legal autonomy will no longer apply; while this means it is in principle free to diverge from European law on financial services, it also entails the automatic loss of the right to 'passport' into other countries, raising barriers to market access that in many cases necessitate the establishment of separate operations in an EU Member State to continue providing services.

by the European Commission, making it easier for those firms to access the EU market or reducing barriers for EU regulated entities like banks to engage in financial transactions with British counterparts.[72]

7.5 Building on its review of the EFSF, and in light of the UK's decision to withdraw from the EU, the European Commission in September 2017 tabled a package of legislative proposals to amend the 2010 Regulations that established the Supervisory Authorities.[73] It also suggested changes to the European Systemic Risk Board, a macro-prudential supervisory body which monitors the build-up of risks in the EU's financial system, and issues warnings and recommendations to national and EU regulators if it believes action is necessary to preserve the stability of that system.[74] 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 (including the Danske Bank money-laundering revelations referred to above).[75]

7.6 As we set out in more detail in our Reports of 13 December 2017, 16 January 2019 and 6 February 2019, the Commission proposals on the European Supervisory Authorities would make a number of changes to both the role and governance of the ESAs:

- first, the Commission wanted to reinforce the Authorities' role in overseeing the activities of non-EU financial companies within the Single Market. Based on the assumption that the UK's exit from the EU could lead to a significant increase in the volume of financial services provided in the EU from outside the Union, the ESFS review proposals would give the ESAs new powers to monitor and report on the regulatory regimes of 'third countries' seeking 'equivalence' to access the EU market; obtain data from national regulators about their extent to which 'third country' firms operate within the EU, for example via branches; and allow them to prevent EU-based firms from outsourcing or delegating activities to non-EU entities (for example, an EU-based investment bank delegating portfolio management for institutional investors to an asset manager in London);[76]

- secondly, the proposals would expand the direct supervisory powers of the European Securities & Markets Authority (ESMA),[77] making it the responsible

72 EU law also permits outsourcing and delegation, where an EU-based firm—possibly a subsidiary of a UK firm—effectively contracts a British entity to provide the actual services, for example portfolio management for an investor, and the establishment of branches in specific EU countries where they want to provide services, under the national legislation of those countries.

73 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.

74 We cleared the proposals for changes to the European Systemic Risk Board from scrutiny on 13 December 2017.

75 We cleared this amending proposal from scrutiny in January 2019.

76 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.

77 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).

regulator for certain investor prospectuses, financial benchmarks and investment funds across the EU (and stripping those supervisory powers from the Member States' national regulators in the process);[78] and

- thirdly, the Commission wanted to make substantial changes to 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).[79]

7.7 Following extensive discussions throughout 2018, the EU's Member States in the Council adopted their joint position on the ESFS review proposals on 12 February 2019. A majority of Member States wanted to water down 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; removing the proposed power for the ESAs to "approve or challenge" individual EU-based firms plans for outsourcing, delegation and risk transfer arrangements to firms based in non-EU countries;[80] and removing 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).[81] The European Parliament's Economic & Monetary Affairs Committee adopted its position on the ESFS reform proposals on 10 January 2019.[82]

7.8 So-called 'trilogue' negotiations between MEPs and the Member States commenced in February 2019 with a view to agreeing a joint legislative text. When we last considered the ESFS proposals that month, it was unclear how long those discussions between the Member States and the European Parliament would take. While both institutions were aiming for adoption of the legislation before the European elections in May 2019, the

78 The original Commission proposal would make ESMA the regulator responsible for European Venture Capital Funds (EuVECA), 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.

79 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. The Commission also proposed a reform of the way in which the ESAs are funded, calling for a new 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. National contributions are currently 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).

80 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).

81 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. Instead, the 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).

82 See European Parliament document A8–0013/2019.

Treasury previously told us that the UK wanted to "delay the main [ESFS] proposal from being agreed" before the European Parliament is dissolved in April, delaying its eventual entry into force.[83]

Developments since February 2019

7.9 The ESFS reform proposals are subject to the EU's ordinary legislative procedure, meaning they have to be agreed jointly between the European Parliament and a qualified majority of Member States in the Council to take effect. By letter dated 3 April 2019, the Economic Secretary to the Treasury (John Glen MP) informed us that a political agreement between the two institutions on the ESFS review had been reached on 21 March. The final text, he said, "meets the UK's negotiating objectives".

7.10 In substance, the amendments to the basic Regulations establishing the ESAs—and the consequential amendments to the EU's sectoral financial services legislation—will make the following changes:

- in line with the Member States' position of February 2019, the new legislation creates a larger role for the Supervisory Authorities in monitoring continued compliance with the conditions for equivalence by 'third countries' with EU financial services legislation, including the impact the provision of financial services from outside the EU has on the "functioning of the internal market". The ESAs will issue a confidential report on their assessment to the EU institutions each year, on the basis of which the Commission decides whether to maintain, modify or withdraw an existing equivalence decision;

- to foster supervisory convergence (i.e. ensuring that different Member States apply EU financial services legislation in the same way, to avoid the possibility of regulatory arbitrage by both EU and non-EU firms), coordination groups will be established within each ESA. These are informal platforms for competent authorities to exchange information and experiences, and replace the Commission's original proposal to give the Authorities veto powers over decisions by national regulators to allow firms in their jurisdiction to outsource or delegate activities to 'third country' parties (like British firms after the UK's exit from the Single Market);[84]

- the ESAs will also be given a new supervisory tool called 'No Action Letters', enabling them to recommend forbearance to Member States' national regulators and the European Commission with respect to the application of EU law "when market confidence, consumer protection, the orderly functioning of financial

83 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.

84 The coordination groups were originally intended to replace the Commission's proposal to give the ESAs the power to approve and challenge firms plans for delegation and outsourcing to non-EU firms (which has been deleted in full). However, the Minister notes that in practice the groups have a much broader remit, and "can cover anything within the remit of the ESAs competency [...] if there is a need for [national regulators] to coordinate in response to market developments". The Economic Secretary described this as a "very significant improvement over the original proposals".

markets or the stability of the Union is at risk". This does not give them the power to reform or suspend EU legislation unilaterally, but limits them to issuing non-binding recommendations (including suggestions for amendments to EU law, for consideration by the European Commission);[85]

- the direct supervisory responsibilities of the European Securities & Markets Authority (ESMA) will be expanded to cover certain financial benchmarks, including those administered by 'third country' firms but used within the EU. The Minister notes that this "will create a simpler process for third country recognition applications by removing the complex member state of reference rules",[86] and that the new Regulation—if it applied directly to the UK before it leaves the Single Market, see paragraphs 13 and 14 below—would leave the crucial LIBOR benchmark under the jurisdiction of the Financial Conduct Authority in London; and

- ESMA will also become the pan-EU supervisor for data reporting service providers (DRSPs)—which provide market transparency in the investment sector—which are "deemed to be of significance to the internal market".[87] The Minister says this is an acceptable compromise with the European Parliament because "national competent authorities will still have immediate access to the data required for market monitoring".[88] A proposal by the European Parliament to make ESMA the supervisor for non-EU Central Security Depositories (part of the post-trade infrastructure for securities transactions) was rejected,[89] and replaced by a requirement for a review into this matter every three years.[90]

85 In his letter, the Economic Secretary noted that Member States "worked closely with the Commission and Council Legal Services to ensure that any forbearance power is adequately framed" so that the ESAs "can only suggest [...] when they think new legislation, including delegated or implementing acts, are needed". The Government supported this because it would address "numerous precedents of ill-calibrated and unworkable [delegated or implementing] measures being adopted that have a negative effect on supervision and competition".

86 The Minister's letter also notes that "ESMA has not been given competence for third country endorsement applications, which was covered in the original proposal but would have led to dual supervision of firms".

87 The final legislation goes further than the Member States' initial position, which gave ESMA competence for consolidated tape providers instead of all DRSPs. The classification of DRSPs according to their significance for the internal market will be based on criteria that will be set out in a European Commission Delegated Act.

88 The original Commission proposal argued that data reporting services are "an inherently Union-wide business", and that regulatory and supervisory problems in this sector "cannot be addressed by Member State action alone". It therefore wanted to consolidate the collection of trading data within ESMA, replacing the current system where each NCA must gather data from multiple operators throughout the EU, which is then transmitted to ESMA for compilation and analysis, and then sent back to the competent authorities to be used as part of their supervisory responsibilities.

89 These structures are governed by the EU's CDS Regulation, which regulates the market infrastructure that allows for the settlement of securities transactions in the EU.

90 The Government previously told us it wanted to use the trilogue negotiations to counter the European Parliament's demand that ESMA should be given "direct supervision of third country Central Security Depositories and Trading Venues" under the EU's CSD Regulation. 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. According to the Minister, the final compromise—a three-yearly review—is "to some degree insubstantial" since the European Commission could already carry out such a review, although it "not ideal" because it " inaccurately implies that trading venues are globally systemic". In December 2018, the European Commission adopted a pre-emptive equivalence decision for the UK under the CSD Regulation to allow the UK-based central securities depository to continue offering services in the EU even in a 'no deal' Brexit scenario.

> Similarly, the Commission's original suggestion to make ESMA the responsible regulator for certain investor prospectuses and investment funds was also discarded.[91]

7.11 In addition to watering down the Commission proposals for new substantive powers for the ESAs, the Member States also succeeded in almost completely blocking any significant reforms of the way the Authorities are managed and run. Power to take key decisions will remain in the hands of the Boards of Supervisors, which are dominated by the EU's national financial regulators. There will be no 'Executive Boards' that are run independently, so that 'breach of Union law' procedures—such as the putative one against the Danish and Estonian regulators over *Danske Bank*—are likely to remain elusive since it effectively requires national supervisors to take action against themselves.[92] However, the European Parliament will gain the power to block the appointment of the Chairperson of each Supervisory Authority (a decision which is made by the Member States).

7.12 The European Parliament approved the new legislation on financial supervision at its Plenary Session on 16 April 2019. Formal adoption by the Member States in the Council is expected to follow in May, after the new rules were endorsed at political level by the Permanent Representatives in Brussels in early April. The legislation is mostly due to take effect in January 2020, with the final elements—the transfer of supervisory responsibility over benchmarks and DRSPs to ESMA—becoming applicable in early 2022. The compromise text also foresees the need for further delegated and implementing measures to be adopted by the European Commission in the coming years, to give full effect to the reforms.

7.13 The consequences of these changes for the UK are closely intertwined with the process of, and timetable for, fully leaving the European Union. If the draft Withdrawal Agreement on the UK's exit from the EU is ratified by the House of Commons, the UK would enter a post-Brexit transitional period during which it would remain bound by EU law (and stay part of the Single Market) without representation in the EU institutions. That transition would last until at least 31 December 2020, but possibly—by mutual agreement with the EU—until the end of 2022. That means that, in such a scenario, the revised financial supervisory rules that take effect in January 2020 would apply to and in the UK for at least a year and possibly longer. If the transitional period is extended for the maximum period foreseen under the withdrawal treaty, the full EFSF review—including the transfer of certain supervisory responsibilities away from the Bank of England and the Financial Conduct Authority to ESMA—would apply in the UK until the end of 2022.

7.14 Even beyond the end of the transitional period or, in the absence of a draft Withdrawal Agreement, without one, the new supervisory rules will have an impact on the UK financial services industry. Once outside the Single Market, UK will firms will lose their 'passporting' rights to provide banking, investment and insurance services on a cross-border basis throughout the EU based on their British-issued licences and authorisations.

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91 The Council and Parliament also reached agreement on the new role for the European Banking Authority with respect to anti-money laundering rules, where the two institutions were already largely in agreement and the Parliament moved towards the Member States' position as outlined in our Report of 16 January 2019. Under the final legislative text, the EBA will coordinate pan-EU workstreams to tackle money-laundering and collate information on weaknesses identified by national regulators.

92 Similarly, a Commission proposal to create an industry levy to fund the operations of the ESAs was rejected in its entirety. Instead, they will remain funded by a combination of EU and national contributions, with a review by the Commission in 2022 as to whether this should be changed.

Instead, they will have to seek market access by means of equivalence—where the European Commission judges to what extent British law and practice delivers the same regulatory outcomes as EU law—or other means, like delegation, outsourcing and 'reverse solicitation'. Under the new legislation, the role of the ESAs in monitoring how these 'third country' mechanisms for market access work will be reinforced.

Our conclusions

7.15 **We thank the Economic Secretary for his latest letter on the EU's efforts to reform its financial Supervisory Authorities. In our previous Reports on these EU proposals, we have drawn the attention of the House to the fact that they are likely to have an impact on the UK despite its decision to withdraw from the EU (and therefore, ultimately, from the direct jurisdiction of the EU's agencies), and irrespective of whether that exit is subject to a formal Withdrawal Agreement or not.**

7.16 **Should the House of Commons ratify the Withdrawal Agreement before the UK ceases to be a Member State,[93] the UK would enter a post-Brexit transitional during which it would stay in the Single Market until at least 31 December 2020.[94] 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 and UK public bodies would lose their current representation and voting rights at EU-level (meaning, for example, that the Bank of England and the Financial Conduct Authority would cease to be part of the ESA's Boards of Supervisors). During the transition therefore, the Government would have no formal influence over the substance of any Delegated or Implementing Acts put forward by the European Commission to fully implement the ESA reforms.[95]**

7.17 **Any new powers the ESAs gain in the coming years—for example the transfer of supervisory responsibility for benchmarks or and DRSPs from Member States to ESMA—would extend to the UK financial services industry if they become applicable while the UK is still bound by EU law, either as a Member State or by virtue of the post-Brexit transitional period. Similarly, the ESA's new ability to issue 'No Action Letters'—in addition to existing powers such as the 'breach of Union law' procedure—would apply to the UK's regulators, even though they would not be represented in Board meetings where decisions to that effect are discussed or taken. While the draft Withdrawal Agreement allows the UK to be invited to meetings of EU bodies where acts "to be addressed […] to the United Kingdom" are discussed—which would presumably include decisions by the ESAs addressed directly to British regulators or financial firms—such invitations are extended at the EU's sole discretion. The extent**

93 In April 2019, the Government and the EU agreed on an extension of the UK's membership of the EU until 31 October 2019, provided the UK organises elections to the European Parliament on 23 May 2019.

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

95 Delegated Acts—known as regulatory technical standards in EU financial services law—can be vetoed by the European Parliament or by a qualified majority of Member States in the Council. Implementing Acts—known as implementing technical standards—must be actively approved by a qualified majority of Member States in the relevant 'Comitology' committee. The UK will not be represented in either the Council or the Comitology committees during and after any post-Brexit transitional period.

to which this lack of representation will see the ESAs act—both in general terms and *vis-à-vis* the UK specifically—in a manner which the Bank and FCA would formerly have prevented remains to be seen.

7.18 **The new powers of the ESAs are, moreover, also 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 in 2019).**

7.19 **First, 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 is a sectoral legal framework that would allow the European Commission to declare the UK's regulatory approach in a specific financial industries as equivalent to the EU's, which provides enhanced market access rights or other benefits that make engaging with EU-based customers easier.[96] As the ESFS review will give the ESAs a greater role in monitoring to what extent a non-EU country has maintained adequate regulation of specific financial sectors after 'equivalence' has been granted, both the Treasury and the industry itself have an interest in how the Authorities will fulfil those new responsibilities. 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, but the annual report produced by the ESAs will be confidential and shared only with the Commission, Parliament and Council.**

7.20 **Second, from January 2022 the European Securities & Markets Authority is gaining direct new supervisory responsibilities for a number of market-related activities carried out within the EU by non-EU firms, namely larger Data Reporting Service Providers and certain benchmarks used in financial contracts. Its powers will therefore extend to the European activities of the relevant UK sectors after the reforms take effect and the UK has left the Single Market. In the next few years, there will also be a further assessment of whether ESMA should start supervising 'third country' Central Securities Depositories (CSD) used within the EU, a post-trade infrastructure which is largely provided from the UK at present.[97] We note that the European Commission has already put in place a temporary equivalence decision allowing the UK's CSD to continue operating within the EU until March 2021 in a 'no deal' Brexit scenario.[98]**

7.21 **Third, the legislative reform of the ESAs is included in the scope of the Government's own Financial Services (Implementation of Legislation) Bill currently awaiting its third reading in the House of Commons. This Bill would give the Treasury the power to implement a number of pending 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 abruptly, without a transitional period).**

7.22 **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. As we already concluded in our previous Report on this**

96 The exact benefits that derive from being declared 'equivalent' differ based on the sectoral EU legislation in question. It ranges from full cross-border market access to any EU Member State for wholesale investment services under Markets in Financial Instruments Regulation (MiFIR), to certain prudential reliefs for EU-based banks who deal with an 'equivalent' third country financial institution under the Capital Requirements Regulation.

97 The UK CSD is Euroclear UK and Ireland (EUI). The Bank of England is the competent authority for the authorisation, supervision and policy for EUI.

98 See Commission Implementing Decision (EU) 2018/2030 of 19 December 2018.

matter, 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 the [it] consider appropriate". The Economic Secretary's latest letter does not add any further explanation for the inclusion of the ESFS review in the Bill. However, we understand this would allow the Treasury to implement changes allowing financial markets to continue functioning as "smoothly as possible" in a 'no deal' Brexit scenario. For example, it could make regulations allowing the Financial Conduct Authority to share confidential information with the ESAs in return for EU investment firms being able to continue outsourcing certain operations to UK-based entities after Brexit, rather than needing to pass primary legislation to that effect.

7.23 **We urge the House to monitor closely how the Treasury may use its powers under the Bill to implement the ESFS reforms in due course, and the extent to which they could be used to keep UK legislation aligned with EU financial services law by means of regulations—rather than Acts of Parliament—to obtain 'equivalence' with the EU once the UK is outside the Single Market.**

7.24 **For the reasons given above, the changes to the powers of the European Supervisory Authorities are 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 a key British economic sector, we welcome the Minister's reassurance that the compromise reached between the Member States and the European Parliament largely meets the Government's objectives. We now clear the proposals from scrutiny, given the finalisation of the legislative process, and draw these developments to the attention of the Treasury Committee.**

Full details of the documents

(a) Proposal for a Regulation on the European Supervisory Authorities: (39052), 12420/17 + ADDs 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 + ADDs 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) Fifty-first Report HC 301–l (2017–19), chapter 5 (16 January 2019); and Fifty-forth Report HC 301–liii (2017–19), chapter 3 (6 February 2019).

8 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

Other

(40440) 7186/19 + ADDs 1–2	Commission Delegated Regulation (EU) …/... of 26.2.2019 supplementing Directive 2003/87/EC of the European Parliament and of the Council with regard to the operation of the Innovation Fund.

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Department for Environment, Food and Rural Affairs

(40504) 8263/19 COM(19)167	Proposal for a Council Decision on the position to be taken on behalf of the EU in the International Grains Council with respect to the extension of the Grains Trade Convention, 1995

Department for International Development

(40475) 7610/19 COM(19) 139	Proposal for a Council Decision concerning the allocation of funds decommitted from projects under the 10th European Development Fund for the purpose of replenishing the African Peace Facility.

Department for International Trade

(40293) 15682/18 COM(18) 852	Report from the Commission to the European Parliament and the Council on the implementation of Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.
(40391) 6472/19 COM(19)79	Commission Report on the exercise of the power to adopt delegated acts conferred on the Commission pursuant to Regulation (EU) 2015/936 of the European Parliament and of the Council of 9 June 2015 on common rules for imports of textile products from certain third countries not covered by bilateral agreements, protocols or other arrangements, or by other specific Union import rules

(40489)
7873/19
COM(19)148

Proposal for a Council Decision on the position to be taken on behalf of the EU in the EPA Committee established under the stepping stone Economic Partnership Agreement between the Côte d'Ivoire, of the one part, and the European Community and its Member States, of the other part, as regards the adoption of Protocol 1 concerning the definition of the concept of 'originating products' and methods of administrative cooperation (including Annex)

Foreign and Commonwealth Office

(40526)
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Council Decision (CFSP) 2018/2054 of 21 December 2018 amending Decision 2013/184/CFSP (the Principal Council Decision) concerning restrictive measures against Myanmar/Burma.

(40527)
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Council Implementing Regulation (EU) 2018/2053 of 21 December 2018 implementing Regulation (EU) No 401/2013 (the Principal Council Regulation) concerning restrictive measures in respect of Myanmar/Burma.

(40528)
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Council Decision (CFSP) 2019/… of [dd/04/2019] amending Decision 2013/184/CFSP (the Principal Council Decision) concerning restrictive measures against Myanmar/Burma.

(40529)
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Council Implementing Regulation (CFSP) 2019/… of [dd/04/2019] implementing Regulation (EU) No 401/2013 (the Principal Council Regulation) concerning restrictive measures in respect of Myanmar/Burma.

HM Revenue and Customs

(40424)
7072/19
COM(19)124

Proposal for a Council Decision on the EU position to be taken in the World Customs Organisation in relation to the classification of Novel Tobacco Products

HM Treasury

(40343)
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Court of Auditors Special Report no.3: 2019: European Fund for Strategic investments: Action needed to make EFSI a full success.

(40417)
6701/19
COM(19) 150

Communication from the Commission 2019 European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of indepth reviews under Regulation (EU) No 1176/2011.

(40418)
6729/19
SWD(19) 1027

Commission Staff Working Document Country Report United Kingdom 2019 Accompanying the document Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank and the Eurogroup 2019 European Semester: Assessment of progress on structural reforms, prevention and correction of macroeconomic imbalances, and results of in-depth reviews under Regulation (EU) No 1176/2011.

Home Office

(40479)
7434/19
+ ADDs 1–2
COM(19) 145

Communication from the Commission to the European Parliament, the European Council and the Council Eighteenth Progress Report towards an effective and genuine Security Union.

Formal Minutes

Wednesday 1 May 2019

Members present:

Sir William Cash, in the Chair

Martyn Day	Kelvin Hopkins
Richard Drax	Mr David Jones
Marcus Fysh	

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 8 read and agreed to.

Summary agreed to.

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

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

[Adjourned till Wednesday 8 May 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*)