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Documents considered by the Committee on 19 June 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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Contents

Meeting Summary 3

Documents not cleared

1	DEFRA	Drinking Water Directive	10
2	Dft	Third mobility package: Regulation setting CO2 emission performance standards for new heavy-duty vehicles	13
3	DIT	EU-Vietnam trade agreement and investment protection agreement	17
4	DIT	Negotiating directives for the modernisation of the Energy Charter Treaty	25
5	FCO	EU development assistance: the Neighbourhood, Development and International Cooperation Instrument 2021–27	29
6	HO	Third country participation in the EU's asylum database: Eurodac	44

Documents cleared

7	BEIS	EU structural funds post-2020	53
8	DEFRA	Water reuse for agricultural irrigation	57
9	DfE	Brexit preparedness: UK participation in Erasmus in the event of a "no deal" exit	60
10	FCO	EU sanctions regime for cyber-attacks	64
11	HO	The EU Emergency Travel Document	70
12	HO	Connecting the European Travel Information and Authorisation System (ETIAS) with other EU security and migration information systems	75

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

List of documents 80

Formal Minutes 84

Standing Order and membership 85

Meeting Summary

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

Brexit-related issues

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

- The Committee has considered the state of play in the negotiations on the EU's development assistance programmes for the 2021–2027 period, noting that the Government has been unsuccessful so far in securing access for the UK to co-management of the EU's new "Neighbourhood, Development & International Cooperation Instrument" after Brexit in return for a financial contribution
- UK participation in Erasmus in the event of a no deal exit
- Proposals on future structural funds and continued UK commitment to the PEACE PLUS financial programme on the island of Ireland
- UK and EU cooperation on development assistance after Brexit

Summary

EU-Vietnam trade agreement and investment protection agreement

In October 2018, the Commission presented

a) an 'EU-only' free trade agreement (FTA), which requires the approval of the Council and European Parliament only (and not Member States) and is expected to enter into force late in 2019 or early 2020; and

b) a 'mixed' investment protection agreement (IPA), covering investment protection and dispute settlement provisions, which will need to be ratified by individual Member States (including in some instances approval by their national parliaments) and is highly unlikely to come into effect for several years.

At its meetings on 19 December 2018 and 15 May 2019, the Committee stressed that these agreements raise significant legal and policy issues for the UK in all Brexit scenarios, whether negotiated or non-negotiated, as they will impact future UK-Vietnam trade and investment relations. It sought further information on the continuity of the proposed FTA post-exit (in both a deal and no deal scenario), its expected potential benefits and costs for UK stakeholders and the Government's approach to investment protection and dispute resolution after exit.

Following a letter from the Minister of State for Trade Policy (George Hollingbery MP) on 31 May 2019, the Committee:

a) draws to the attention of the House that:

- in the event of a no deal exit from the EU, the Minister considers that: progress is being made in ensuring the replication/continuity of the effects of the FTA; the Department does not have any 'priority' replication/ continuity agreements as its priorities are set "dynamically"; and any gap in the continuity of the FTA (assuming it enters into force before exit day) may lead to "some" trade diversion away from the UK, but does not provide any detail on the expected magnitude;

- in the event of a negotiated withdrawal, the Minister now states that EU notification under Article 129 of the draft Withdrawal Agreement (that the UK is to be treated as a Member State for the purposes of international agreements during the transition/implementation period) will "only serve as the basis" for the FTA's continued application to the UK and the parties must demonstrate "a shared intention" [that the UK is to continue to benefit from the agreement]; he further states that such a shared intention "will ultimately be determined by the parties" and is "flexible", ranging from an informal, public statement to a formal written response or being evidenced by "subsequent state practice", but it is unclear whether this approach is legally robust;

- post-exit/transition period, the Minister previously conceded that the Government is simply seeking to replicate the effects of the proposed FTA and does not intend to run negotiations for a more ambitious future UK-Vietnam FTA until after the conclusion of the negotiations determining the future UK-EU relationship; this Committee previously noted that lengthy negotiations on the future UK-EU relationship are likely to significantly delay/impact the negotiation and implementation of new UK-negotiated trade agreements post-exit/transition period;

- the Government intends to vote in favour of the proposed EU-Vietnam IPA, on the basis that it wants to support the EU's trade agenda and remain a constructive partner of the EU whilst still a Member State, but is still unable or unwilling to share its position on the proposed ICS underpinning the agreement;

- that two months after the original exit day (of 29 March 2019), the Government is still considering its approach to investment protection and dispute settlement and can provide no new information to our Committee on the UK's favoured post-exit investment regime with Vietnam, simply reiterating its well-rehearsed, high-level objectives for an investment dispute resolution process that is capable of delivering fair dispute outcomes in a transparent manner, to ethical standards, and in a cost-effective manner; and

b) retains the documents under scrutiny, but grants the Minister a scrutiny waiver to be able to support the proposals in Council on 25 June 2019, on the condition that he:

- informs the Committee of the outcome of the Council meeting, including how Member States voted and any changes to the final text;
- provides a qualitative assessment of how 'low' versus 'high' UK-EU integration post-exit and changes to rules of origin may affect trade flows and the expected net benefits of the proposed EU-Vietnam FTA on the UK, to provide all stakeholders with a better understanding of how the proposed agreement may impact them post-exit;
- shares the Government's view on the proposed ICS underpinning the IPA, including the procedural changes, the 'no u-turn' clause, and the clarifications on substantive investment standards (fair and equitable treatment and indirect expropriation);
- keeps the Committee updated on the Government's intended approach to investment protection and dispute resolution with Vietnam post-exit; and
- in the event of a Withdrawal Agreement, informs the Committee of the EU notification to Vietnam and whether/how Vietnam's acceptance that the UK is to continue to enjoy the rights of the EU-Vietnam FTA (and therefore that the UK will continue to benefit from preferential terms as opposed to reverting to WTO most-favoured nation terms) is confirmed.

Not cleared from scrutiny but scrutiny waiver granted; further information requested; drawn to the attention of the International Trade Committee, the Foreign Affairs Committee and the Committee on Exiting the EU

The EU Emergency Travel Document

EU citizens who are stranded in a third (non-EU) country without travel documents are entitled to request an Emergency Travel Document (ETD) from the diplomatic and consular authorities of any Member State if their own Member State has no local representation. Currently, Member States have the option of issuing an EU ETD or their own national ETD. The Directive proposed by the European Commission would require Member States to issue an EU ETD to an unrepresented EU citizen. The Commission argues that EU ETDs will be more widely recognised and accepted by third countries if they are used by all Member States. Initially, the Government said that it disagreed, would oppose the proposal and intended to continue issuing its own national ETDs. In its latest update, the Government now indicates that it intends to abstain when the proposed Directive is brought to the Council for a vote—expected to be 18 June—rather than vote against it and notes that the UK may not have to implement it, though this will depend on when and how the UK leaves the EU. The European Scrutiny Committee asks the Government to explain why it considers it would no longer be in the UK's best interests to oppose the proposal and whether these interests outweigh any concerns it may have about the security of EU ETDs and the costs involved in planning for their introduction during any post-exit transition period. The Committee also seeks further information on the Government's plans to "roll out" the new arrangements for emergency travel documents.

Cleared from scrutiny; further information requested; drawn to the attention of the Foreign Affairs Committee and the Home Affairs Committee.

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

These proposed Council Decisions would update existing agreements between the EU and Denmark and the EU and the four non-EU Schengen associated countries (Iceland, Norway, Switzerland and Liechtenstein) so that their national law enforcement authorities can access the fingerprint data held in the Eurodac asylum database on the same basis as EU Member States. The Government informs the European Scrutiny Committee that the Decisions authorising the EU to sign new Protocols to the agreements were adopted before it had completed its internal opt-in procedures. The UK did not opt in or vote on their adoption. The Government has since decided to opt into the Decisions authorising the EU to conclude the Protocols to the agreements. These Decisions were formally adopted in May (the UK abstained). The Government apologises for the delay in responding to the concerns raised by the Committee at the beginning of February but does not explain why it took so long to reply or give reasons for the Government's failure to comply with the commitments made in its own Code of Practice on Parliamentary scrutiny of Title V (justice and home affairs) opt-in decisions. The Government makes clear that it does not intend to seek third country access to the Dublin Regulation (the mechanism for determining which EU country should examine an application for asylum made within the EU) after leaving the EU but does not provide a convincing explanation of the type of cooperation that the UK could realistically achieve on asylum outside the Dublin framework. The European Scrutiny Committee requests a full explanation for the shortcomings in the scrutiny process and a clearer analysis of the prospects for future cooperation with the EU on asylum and returns.

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

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

The European Commission has proposed largely 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, would 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 proposals which amend the two EU information systems in which it already participates (the police cooperation elements of the Schengen Information System—SIS II—and a new database—ECRIS-TCN—providing access to the criminal records of third country nationals convicted of an offence in the EU). Despite having told the European Scrutiny Committee that there would be "no obvious operational benefits" if the UK were to participate, the Government has decided that the UK should take part. Asked to clarify the reasons for its decision, the Government points to the risk that the UK might otherwise be at risk of being ejected from SIS II and ECRIS-TCN during any post-exit transition/implementation period and that the UK's non-participation could be prejudicial to negotiations on a future EU/UK security agreement.

The Committee highlights how the Government is using the Schengen opt-out and Title V (justice and home affairs) opt-in Protocols as tactical tools, to safeguard the UK's participation in important EU law enforcement information systems during any post-exit transition/implementation period and to strengthen its hand in future negotiations for a comprehensive security partnership.

Cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee

New EU sanctions regime against cyber-attacks

The Committee has published a report on the EU's new sanctions framework targeting the perpetrators of cyber-attacks against European governments and companies. The Government pushed for this EU-wide response to the attempted Russian hacking of the OPCW in 2018, but it remains unclear what the impact of Brexit will be on the efficacy of British sanctions when the UK loses influence over restrictive measures imposed by the EU as a whole.

The Committee has also urged the Foreign Office to inform Parliament more proactively of important new developments in EU foreign policy where formal deposit of EU legal leaves no time for parliamentary scrutiny before new legislation is adopted.

Cleared from scrutiny; drawn to the attention of the Digital, Media, Culture & Sports Committee, the Defence Committee and the Foreign Affairs Committee

UK and EU cooperation on development assistance after Brexit

The Committee considered an update from the Foreign Office on the EU's funding programmes for development assistance during its next budgetary period (which will run from 2021 to 2027).

While the Government is seeking the option to contribute to the new €89 billion "Neighbourhood, Development & International Cooperation Instrument" even after Brexit—in return for the ability to help run the fund—it has so far failed to persuade the other Member States of the merits of including such an option in the draft legal framework for the Instrument. There are further issues to be resolved, such as the amount of money to be used to tackle migration flows into Europe or to address the consequences of climate change in developing countries.

Not cleared from scrutiny; further information requested; drawn to the attention of the Foreign Affairs Committee and International Development Committee

Brexit preparedness: UK participation in Erasmus in the event of a "no deal" exit

The proposed Regulation is one in a series of contingency measures put forward by the European Commission at the beginning of the year to prepare for a "no deal" Brexit. It would ensure that individuals (and the institutions sending and hosting them) can complete any Erasmus-funded learning mobility activity begun before exit day. The Government recognises that the proposal would provide a degree of certainty, whilst

noting that it is not as extensive in scope as the guarantee it has given to underwrite the funding of Erasmus until the end of 2020. Acknowledging the need to provide reassurance for Erasmus participants studying or working abroad in the event of a no deal exit, the European Scrutiny Committee granted a scrutiny waiver in March to enable the Government to support the adoption of the proposed Regulation but raised a number of questions about its scope, the extent of any funding gap that the UK would have to fill, and how the proposal would be implemented. The Government's latest update confirms that the Regulation was adopted on 19 March (the UK abstained) but says there has been little engagement with/by the European Commission to understand how the Regulation will operate in practice. Uncertainties remain as to the precise scope of the Regulation and the wider implications for the UK which the European Scrutiny Committee draws to the attention of the Education Committee so that they can keep a close eye on developments.

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

EU structural funds post-2020

The Government is supportive of this package of legislation governing the future EU structural funds, and wishes to support it in Council in order send a positive message reflecting the UK's ongoing commitment to post-Brexit participation in the Ireland-Northern Ireland PEACE PLUS programme. The Government is also maintaining an interest in possible UK participation in the wider interterritorial cooperation programme and in the Health strand of the European Social Fund programme. The Committee clears the documents from scrutiny ahead of Council agreement.

Cleared; further information requested; drawn to the attention of the Health and Social Care Committee, the Welsh Affairs Committee, the Scottish Affairs Committee and the Northern Ireland Affairs Committee

Drinking water Directive

The Minister has reported on the outcome of Council deliberation on the recast Drinking Water Directive, on which the Committee submitted a Reasoned Opinion last year. In that Opinion, subsequently adopted by the House, the Committee expressed the view that the provisions on access to water breached the principle of subsidiarity—i.e. action should only be taken at the EU level where it cannot be sufficiently achieved by Member States at national, regional or local levels and there is greater benefit to acting at the EU level. The Minister confirms that the Government successfully advocated amendments to the access to water provisions (Article 13). Notably, the requirement that water fountains be installed in all indoors and outdoors public spaces was removed. The Committee welcomes the outcome of the Council's deliberations but retains the proposal under scrutiny pending negotiations with the European Parliament (EP), particularly as Article 13 is an area of difference between the EP and the Council.

Not cleared; further information requested

Documents drawn to the attention of select committees:

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

Business, Energy and Industrial Strategy Committee: Negotiating directives for the modernisation of the Energy Charter Treaty [Recommended Decision (NC; scrutiny waiver granted)]

Committee on Exiting the European Union: EU-Vietnam trade agreement and investment protection agreement [Proposed Decisions (NC)]

Defence Committee: EU sanctions regime for cyber-attacks [Proposed (a) Decision; (b) Regulation (C)]

Digital, Culture, Media and Sport Committee: EU sanctions regime for cyber-attacks [Proposed (a) Decision; (b) Regulation (C)]

Education Committee: Brexit preparedness: UK participation in Erasmus in the event of a "no deal" exit [Proposed Regulation (C)]

Foreign Affairs Committee: EU sanctions regime for cyber-attacks [Proposed (a) Decision; (b) Regulation (C)]; EU development assistance: the Neighbourhood, Development & International Cooperation Instrument 2021–27 [Proposed Regulation (NC)]; The EU Emergency Travel Document [Proposed Directive (NC)]; EU-Vietnam trade agreement and investment protection agreement [Proposed Decisions (NC)]

Health and Social Care Committee: EU structural funds post-2020 [Proposed Regulations (C)]

Home Affairs Committee: Connecting the European Travel Information and Authorisation System (ETIAS) with other EU security and migration information systems [Proposed Regulations (C)]; Third country participation in the EU's asylum database: Eurodac [Proposed Decisions (NC)]; The EU Emergency Travel Document [Proposed Directive (NC)]

International Trade Committee: EU-Vietnam trade agreement and investment protection agreement [Proposed Decisions (NC)]; Negotiating directives for the modernisation of the Energy Charter Treaty [Recommended Decision (NC; scrutiny waiver granted)]

International Development Committee: EU development assistance: the Neighbourhood, Development & International Cooperation Instrument 2021–27 [Proposed Regulation (NC)]

Northern Ireland Affairs Committee: EU structural funds post-2020 [Proposed Regulations (C)]

Scottish Affairs Committee: EU structural funds post-2020 [Proposed Regulations (C)]

Welsh Affairs Committee: EU structural funds post-2020 [Proposed Regulations (C)]

1 Drinking Water Directive

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested
Document details	Proposal for a Directive of the European Parliament and of the Council on the quality of water intended for human consumption (recast).
Legal base	Article 192(1) TFEU, QMV, Ordinary legislative procedure
Department	Environment, Food and Rural Affairs
Document Number	(39487), 5846/18 + ADDs 1–5, COM(17) 753

Summary and Committee's conclusions

1.1 The EU's "Drinking Water Directive"[1] is designed to ensure that drinking water across the EU is wholesome and clean. While it has been relatively well implemented, its approach to monitoring water quality at the point of consumption uses parameters determined over 20 years ago. Following a review, the European Commission proposed to revise the Directive in order to improve the quality of drinking water, modernise the approach to monitoring water quality and provide both greater access to water and information to citizens.

1.2 When we first considered the proposal, we were concerned that some of its provisions strayed too far into areas best managed at a national or local level. We therefore agreed to issue a Reasoned Opinion, considering that the provisions on access to water breach the principle of subsidiarity—i.e. action should only be taken at the EU level where it cannot be sufficiently achieved by Member States at national, regional or local levels and there is greater benefit to acting at the EU level. More information was set out in our Report from that meeting.[2] The Reasoned Opinion was debated on 26 March 2018[3] and agreed by the House on 28 March 2018.[4]

1.3 We waived the scrutiny reserve at our meeting of 27 February 2019 in order that the Government could support a General Approach in Council should that be deemed to be in the national interest. In our Report, we noted that the UK and other Member States had coalesced around language that would afford greater flexibility at the local level on access to water. We expressed concern about the potential implications of adopting chemical parameters more stringent than recommended by the World Health Organisation, noting the Government's assessment that the original proposal to halve the lead parameter could have severe financial consequences for the UK water industry and consumers. The Parliamentary Under Secretary of State for the Environment (Dr Thérèse Coffey MP)

1 Council Directive 98/83/EC.
2 Eighteenth Report HC 301–xviii (2017–19), chapter 1 (7 March 2018).
3 European Committee A, 26 March 2018.
4 Votes and Proceedings, 28 March 2018.

explained in her letter of 26 February, however, that a further compromise had been tabled, which was closer to the World Health Organisation recommendation and gave more latitude in moving towards a lower concentration of lead.

1.4 In her letter[5] of 23 May 2019, the Minister summarises the outcome of the 5 March Environment Council, where a General Approach[6] was agreed with the UK's support. Debate focused on new Articles 10a and 10b (materials and substances in contact with drinking water) and Article 13 (access to water).

1.5 The UK was one of a group of four Member States along with France, Germany and the Netherlands (known as the 4MS Initiative) that originally proposed the inclusion of Articles 10a and 10b. The purpose of these Articles is to set standardised minimum testing criteria for materials and substances in contact with drinking water. A standardised approach, says the Minister, "would protect public health and have consistent standards across Europe." Following the Council, the Commission issued a statement setting out that, whilst they supported the intention of Articles 10a and 10b, they had concerns with the current drafting and therefore intended to analyse and assess these concerns in time for the next steps of the negotiations. As part of the 4MS Initiative, the UK will be assisting with this process.

1.6 On Article 13 (access to water), Member States all recognised that the text was delicately balanced between those who wanted it strengthened and those who wanted it weakened. The Minister highlighted concerns regarding subsidiarity, and the Reasoned Opinion issued by the House of Commons, but said that the UK could accept the compromise.

1.7 Concerning the other issues where the UK had concerns with the proposal, for example regarding the parameters and parametric levels set in the annexes (such as the lead parameter), the Government judged that the compromise was acceptable.

1.8 Negotiations with the European Parliament are expected later in the year. The Government's initial assessment is that there are some differences between the Council and the European Parliament text, such as on Article 13 (access to water), where the European Parliament text proposes prescriptive measures for Member States to take.

1.9 Regarding the potential implications of the legislation for the UK, should the UK be required to implement the terms of the Directive in the future (at least in part), the Minister explains that a final Impact Assessment will be submitted to the Regulatory Policy Committee before any public consultation on transposition, depending on what the UK is required to implement following EU Exit.

1.10 **We welcome the Minister's detailed explanation of the outcome of negotiations. The success in negotiating more flexible provisions on access to water—the concern that we expressed in our Reasoned Opinion—is pleasing. We note that the most prescriptive of the original elements, such as the requirement to install water fountains in all indoors and outdoors public spaces, have been deleted.**

5 Letter from Dr Thérèse Coffey MP to Sir William Cash, dated 23 May 2019.

6 Council document 6876/19.

1.11 **We are also heartened to see that the Government continues to engage constructively in discussions on EU policy, promoting UK interests. At a time when the precise nature of our future relationship with the EU—and hence with EU law—remains in flux, such engagement is critical.**

1.12 **Given that significant changes could result from negotiations with the European Parliament later in the year, we retain the proposal under scrutiny and look forward to further information on those negotiations in due course.**

Full details of the documents

Proposal for a Directive of the European Parliament and of the Council on the quality of water intended for human consumption (recast): (39487), 5846/18 + ADDs 1–5, COM(17) 753.

Previous Committee Reports

Fifty-sixth Report HC 301–lv (2017–19), chapter 2 (27 February 2019); Thirty-second Report HC 301–xxxi (2017–19), chapter 2 (20 June 2018); Eighteenth Report HC 301–xviii (2017–19), chapter 1 (7 March 2018).

2 Third mobility package: Regulation setting CO2 emission performance standards for new heavy-duty vehicles

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; but scrutiny waiver granted for adoption during June 2019
Document details	Proposal for a Regulation of the European Parliament and of the Council setting CO2 emission performance standards for new heavy-duty vehicles.
Legal base	Article 192(1) TFEU; ordinary legislative procedure; QMV
Department	Transport
Document Number	(39723), 8922/18 ADDs 1–4, COM(18) 284

Summary and Committee's conclusions

2.1 The proposal under scrutiny concerns the introduction of binding Carbon Dioxide (CO2) emission standards for new heavy-duty vehicles (HDVs). The proposal forms part of the Commission's 'third mobility package' of legislative initiatives and non-binding actions (which is focussed on ensuring that Europe's future mobility system is "safe, clean and efficient for all EU citizens").

2.2 The proposal marks the first attempt to regulate CO2 emissions for HDVs at EU-level. Similar measures have been introduced in the United States, Canada, China, Japan and India. The key elements of the proposal can be divided into six main parts: scope (the vehicles to which the Regulation would apply); baseline (the reference values against which reduction standards would be set); targets and timelines; incentives for zero-emission and low-emission vehicles; flexibilities (centred around a credit/debt system for manufacturers); and penalties.

2.3 A full background to the proposal—including the Government's initial legal and political assessment of the Commission's plans—can be found in our Forty-third Report to the House of 31 October 2018.

2.4 Since this time, the Committee has considered the proposal on a further occasion and granted a scrutiny waiver in order for the Government to support a General Approach on the proposal to be sought by the Austrian Presidency at the 20 December 2018 Environment Council.[7] In response to the Committee's request for a summary of the outcome of the December Council (and for further information on a number of points concerning the substance of the proposal), the former Minister of State for Transport, Jesse Norman MP, wrote to the Chairman on 11 April 2019.[8] In addition to covering these issues, the Minister requests that the Committee clear the proposal from scrutiny ahead of it being put before the Council of Ministers for adoption in June.

7 Forty-ninth report HC 301–xlviii (2017–19) chapter 4 (19 December 2018).

8 Letter from Jesse Norman MP to Sir William Cash MP, 11 April 2019.

Minister's letter of 11 April 2019

2.5 In his letter of 11 April, the Minister explains that at the 20 December 2018 Environment Council the Government supported the Austrian Presidency's revised text on the proposal and a General Approach was reached. The Minister goes on to note that following on from the General Approach, the Presidency opened trilogue negotiations with the European Parliament which have recently been concluded.

2.6 Before detailing the substance of the final text to be put for adoption, it is worth highlighting that the Committee requested a report on the outcome of the December Environment Council by 31 January 2019. Although the Minister indirectly raises his delayed response (of some 10 weeks), he seems to suggest that this was planned; in order to cover "…rather fast-moving developments". In the Committee's view, it would have been more helpful and, indeed, courteous of the Minister to write promptly—as is standard practice—after Council and follow this up with further correspondence covering any subsequent developments stemming from Trilogue negotiations.

2.7 On the substance of the provisional text, the key points agreed include:

- a 15% CO2 reduction target for new HDVs from 1 January 2025 to 31 December 2029 (this is in line with the Commission's original proposal);
- a 30% CO2 reduction target for new HDVs from 1 January 2030 (the Commission's original proposal made the 2030 target indicative only which would revert to the lower 2025 target should agreement not be reached on its level during the suggested 2022 review);
- the introduction of a 'minimum sales target' for Zero and Low Emission Vehicles (ZLEVs) of 2% from 2025. Sales targets would be linked to a manufacturer's eligibility for bonuses e.g. between 2–3% less stringent CO2 targets would apply via double vehicle counting (this innovation was originally suggested by the European Parliament but appears to have been combined with the Commission's original proposal for a 'super-credit multiplier' system; whereby ZLEVs would count as more than one vehicle for the purposes of calculating average specific CO2 emissions permissible per manufacturer);
- excess emission penalties set at €4250 per gCO2/tonne-km up to 2029 and €6800 from 2030 (this represents a reduction on the Commission's original proposal that would have seen a penalty of €6800 levied from 2025 onwards);
- zero Emission trucks will be permitted to weigh up to 2 tonnes more than their diesel counterparts to compensate for additional battery weight; and
- an amended review clause covering: whether the 2030 target should be revised upwards; whether the penalty regime should be amended; the possibility of setting targets for vehicle outside of the scope of the Regulation i.e. buses and coaches; the introduction of HDV targets for 2035 and 2040; and an assessment of whether a 'pooling' mechanism between manufacturers and a methodology for including the potential contribution of synthetic and advanced alternative fuels to emissions reductions should be introduced.

2.8 The Minister notes the Government's satisfaction with the final text of the Regulation to be put for adoption and explains how a number of its negotiating objectives have been secured. By way of example, with regard to the introduction of a binding reduction target from 2030, the Minister states that "gaining a binding target now [within in the scope of the proposal under scrutiny] was a key UK objective".

2.9 We must highlight, however, the Minister's suggestion to the effect that the Committee was keen to see the introduction of a binding target for 2030. To clarify, the Committee was pleased that in his letter of 13 December 2018 the Minister outlined *his support* for a binding reduction target.[9] By doing so, the Minister aided the Committee's scrutiny of the Government's negotiating position. The Committee's sole concern in this regard was—and remains—assessing the Government's position(s) on the proposal not, as may be inferred from his letter, forwarding its own views.

2.10 At the request of the Committee, the Minister outlines the Government's plans for the future operation of ZLEVs across the UK's strategic road network. The Minister provides a brief synopsis of his Department's 'Road to Zero Strategy' which sets out the steps that the Government and industry are taking to further reduce Cardon emissions from the road haulage sector.[10] Of particular interest in this regard is the Government's grant funding for the testing of clean commercial vehicle technologies though the 2017 'Low Emissions Freight and Logistics Trial' and the 2018 cycle of the 'Integrated Delivery Programme'.

Further developments

2.11 The Committee notes that the compromise text on the proposal—agreed by Committee of Permanent Representatives (COREPER) on 22 February 2019—contains a significant development with regard to its Article 11 (Real-world CO2 emissions and energy consumption) versus the Commission's original drafting. In part, this is to be expected (as it covers a highly technical and contentious area), however, it does raise some concerns. As per the text to be put for adoption, Article 11 would, in certain circumstances, require manufacturers, national authorities or operators (through direct transfer from vehicles) to provide information on real world CO2 emissions and energy consumption to the Commission. This information would include: vehicle identification number; fuel and/or electrical electricity consumed; total distance travelled; and payload.

2.12 The collection of real world emissions data is an attempt by the Union to ensure that scandals such as 'Dieselgate' do not reoccur and that manufacturer emission claims can be tested and verified. It is unclear whether the means by which this is to be achieved, in particular, through the possibility for direct transfer of relevant information from vehicles, would engage an individual's fundamental rights (especially in light of unique vehicle identification numbers being known). The use of implementing acts, alongside the somewhat opaque process for their adoption, to specify the technical details of how such a system would work, causes further concern. The Minister did not address these proposals in his correspondence of 11 April.

9 Letter from Jesse Norman to Sir William Cash MP, 13 December 2018.

10 Department for Transport, 'Road to Zero: Next steps towards cleaner road transport and delivering our Industrial Strategy' (July 2018).

2.13 **We thank the Minister for his letter of 11 April 2019 and the detailed information he has provided the Committee concerning the current stage of negotiations on the proposal under scrutiny.**

2.14 **In spite of the Minister's engagement in this regard, we note the long delay in responding to our last consideration of the proposal and, as a consequence, the limited time that the Committee has had to scrutinise some of the more technical areas of the proposed Regulation. We note, in particular, those parts of the proposal that have changed substantially between publication and agreement being reached on the final text to be put for adoption.**

2.15 **One such area is that relating to the means by which real world emissions data would be collected under the proposed Regulation. Article 11 of the compromise text agreed by COREPER would require manufacturers, national authorities or operators to provide information on real world CO2 emissions and energy consumption to the Commission. The Committee appreciates that the detail of how this system would operate is yet to be set-out—and will not be for some time—but has some initial questions.**

2.16 **As such, we seek the Government's view on:**

- **whether and, if not, why, the proposal for the direct transfer of real world emissions data from vehicles to the Commission would engage an individual's fundamental rights; and**
- **the suggested use of implementing acts for this purpose.**

2.17 **Owing to these outstanding questions, we do not believe it appropriate to clear the proposal from scrutiny. We do, however, grant a scrutiny waiver in order for the Government to support adoption at Council in June. This is granted on the basis that the Committee is clear on the Government's intention to support adoption.**

2.18 **We request a report on the outcome of the June Council at which the proposal is put for adoption—along with a response to the questions asked above—by no later than 15 July 2019.**

Full details of the documents

Proposal for a Regulation of the European Parliament and of the Council setting CO2 emission performance standards for new heavy-duty vehicles: (39723), 8922/18 + ADDs 1—4, COM(18) 284.

Previous Committee Reports

Forty-third report HC-301–xlii (2017–19) chapter 2 (6 November 2018); Forty-ninth report HC 301–xlviii (2017–19) chapter 4 (19 December 2018).

3 EU-Vietnam trade agreement and investment protection agreement

Committee's assessment	Legally and politically important
Committee's decision	(a)-(d) Not cleared from scrutiny but scrutiny waiver granted; further information requested; drawn to the attention of the International Trade Committee, the Committee on Exiting the EU and the Foreign Affairs Committee
Document details	(a) Proposal for a Council Decision on the signing, on behalf of the EU, of the Free Trade Agreement between the EU and Vietnam; (b) Proposal for a Council Decision on the conclusion of a Free Trade Agreement between the EU and Vietnam; (c) Proposal for a Council Decision on the signing, on behalf of the EU, of the Investment Protection Agreement between the EU and its Member States, of the one part, and Vietnam, of the other part; (d) Proposal for a Council Decision on the conclusion, on behalf of the EU, of the Investment Protection Agreement between the EU and its Member States, of the one part, and Vietnam, of the other part
Legal base	(a) and (b): Articles 91, 100(2), 207 and 218(11) TFEU (in accordance with Opinion 2/15 of the Court of Justice of the EU issued on 16 May 2017), in conjunction with 218(5) (on signing) and 218(6) TFEU (on conclusion) (c) and (d): Article 207 TFEU (in accordance with Opinion 2/15 of the Court of Justice of the EU issued on 16 May 2017), in conjunction with 218(5) (on signing) and 218(6) TFEU (on conclusion)
Department	International Trade
Document Numbers	(a) (40137), 13312/18 +ADDs 1–12, COM(18) 692; (b) (40136), 13313/18 + ADDs 1–12, COM(18) 691; (c) (40135), 13314/18 + ADDs 1–2, COM(18) 694; (d) (40134), 13315/18 + ADDs 1–2, COM(18) 693

Summary and Committee's conclusions

3.1 In October 2018, the Commission presented proposals for:

- an 'EU-only' free trade agreement with Vietnam (the EU-Vietnam FTA), which aims to eliminate over 99% of all bilateral tariffs (with 65% of duties being eliminated at entry into force of the agreement and the remainder over a ten-year period), remove non-tariff barriers in goods and services trade, and includes

provisions on intellectual property protection, investment liberalisation, public procurement, competition and sustainable development. It requires the approval of the Council and European Parliament only (and not Member States); and

- a 'mixed' investment protection agreement with Vietnam (the EU-Vietnam IPA), which aims to establish a common framework for investment protection and dispute settlement, including a new Investment Court System (ICS). It will need to be ratified by individual Member States (including in some instances approval by their national parliaments) and is highly unlikely to come into effect for several years. Once ratified, it would replace existing bilateral investment treaties (BITs) between Vietnam and EU Member States.

3.2 Following consideration of the Government's Explanatory Memoranda of 5 November 2018,[11] letter of 25 February 2019 and publication of its impact assessment of the proposed EU-Vietnam FTA and externally commissioned analysis on 31 March 2019, the Committee has:

- continued to stress that these agreements raise significant legal and policy issues for the UK, as they will impact future UK investment relations with Vietnam after UK exit in all Brexit scenarios, whether negotiated or non-negotiated; and
- sought further information from the Minister of State for Trade Policy (George Hollingbery MP) on the continuity of the proposed FTA post-exit and its expected potential benefits for UK stakeholders in both a no deal and negotiated withdrawal scenario, and the Government's approach to investment protection and dispute resolution after exit.

The Minister's update of 31 May 2019

3.3 In his update letter of 31 May 2019 (summarised below), the Minister responds to the series of questions raised by the Committee in its Report chapter of 15 May 2019 and seeks clearance of all the documents ahead of the expected votes in Committee of Permanent Representatives (COREPER) (Ambassadors) on 19 June 2019 and in the Council on 25 June 2019, stressing that there will be "further opportunities for [Parliament] to scrutinise [the proposed EU-Vietnam IPA]" as it will need to be ratified by all Member States before entering into force.

EU-Vietnam FTA

No deal (non-negotiated) exit from the EU

3.4 In response to the Committee's questions of 15 May 2019 on the progress made by Government officials in ensuring entry into force of a bilateral UK-Vietnam trade deal at the same time as entry into force of the EU-Vietnam FTA, where the agreement 'ranks' in terms of the Government's priorities (noting that major, existing EU agreements such as the EU-Japan Economic Partnership Agreement have yet to be replicated by the UK and third party) and the practical effect on UK stakeholders if there were to be a gap in its continuity, the Minister:

11 See Explanatory Memorandum of 5 November 2018 on the proposed FTA and the Explanatory Memorandum of 5 November 2018 on the proposed IPA.

- reiterates his position that "both the UK and Vietnam are committed to ensuring trade continuity of the prospective EU-Vietnam FTA to avoid disruption for businesses and consumers following the UK's exit from the EU" and that officials "are working closely together…to achieve this", but does not provide any further detail;

- states that the Government is setting it priorities "dynamically, based on a range of factors but also on where our efforts are most likely to be productive and where we are likely to get the best results" and that the progress made in replicating the EU-Vietnam FTA "is not dependent on making progress on other Continuity agreements"; and

- notes that a gap in continuity of this agreement would mean that "UK businesses would continue to trade with Vietnam under WTO Most Favoured Nation terms", and as a result "some trade" in sectors that are expected to gain the most as a result of the FTA entering into force—namely in financial and business services as well as clothing apparel and transport equipment—"could be diverted away from the UK". He considers that the degree of any trade diversion away from the UK "would depend on the extent to which stakeholders had begun to take advantage of preferences under the agreement".

Negotiated withdrawal from the EU (transition period and/or backstop if applied)

3.5 Since December 2018, the Committee has continued to seek clarification on whether and how the UK will secure the benefits of the EU-Vietnam FTA (if it enters into force before or during the transition/implementation period), notwithstanding the 'EU notification' proposed in the footnote to Article 129 of the draft Withdrawal Agreement of 14 November 2018 that the UK is to be treated as a Member State for the purposes of international agreements during the transition/implementation period.

3.6 Whilst the Minister previously maintained that EU notification "means that the UK will be bound by the FTA obligations and will also secure the benefits" he now caveats his earlier statement as follows:

- EU notification "will serve as the basis for the continued application of EU international agreements to the UK during the implementation period"; and

- "the way in which the parties to an international agreement may demonstrate, in accordance with international law, a shared intention that the UK is to be covered by that agreement for the duration of the Implementation Period, is flexible and will ultimately be determined by treaty partners". He highlights "subsequent state practice" and "less formal means, for example through a public statement" as "an alternative to a formal written response."

3.7 In response to the Committee's question on which "'elements that affect the functioning of the backstop' would need to be aligned with the EU until [the UK] moved to the future partnership [with the EU]", the Minister states that for the duration of the

backstop, "the UK would continue to apply the EU's Common External Tariff (CET)", but that "elements that do not affect the functioning of the backstop—such as those aspects related to services and investment" could be implemented by the UK.

3.8 On whether the Government considers that the backstop sets the baseline for the UK's future relationship with EU, the Minister states that the "Political Declaration is clear that the future arrangements will not only build upon what is set out in the backstop but also improve upon them" and "would include both parties negotiating 'alternative arrangements for ensuring the absence of a hard border on the island of Ireland'".

3.9 Post-transition/implementation period, the Minister previously conceded that the Governments "priority is to replicate the EU-Vietnam agreement, whose provisions are deep and comprehensive" and that it does not intend to "run negotiations on a more ambitious UK-Vietnam FTA in parallel to negotiations for the future UK-EU relationship".

The Government's Impact Assessment of the proposed FTA

3.10 At its meeting on 15 May 2019, the Committee noted that the Government's impact assessment of the proposed EU-Vietnam FTA relies on the following key assumptions: that the UK continues to trade with the EU on an equivalent basis after EU exit; that the UK trades with Vietnam on an equivalent basis to the EU-Vietnam FTA after EU exit; and that there are no changes to rules of origin, with 'full diagonal cumulation of EU content in UK exports to Vietnam'. It does not consider different UK-EU relations post-exit as the Minister considers this "outside the scope" of the analysis; yet we previously noted that the baseline scenario does include EU agreements that are not yet into force (namely the EU-Singapore FTA) to ensure that the modelling can provide a more accurate assessment of the proposed agreement between now and 2030.

3.11 The Committee considered that the value of the Impact Assessment was severely diminished by the fact that it does not at the very least provide a qualitative discussion of how 'low' versus 'high' UK-EU integration (in view of the UK's withdrawal) and changes to rules of origin could impact trade flows and the expected net benefits of the trade agreement, and asked the Minister to provide this qualitative analysis in his next update to the Committee.

3.12 The Minister states that the impact assessment is "intended to model the effects of the [EU-Vietnam FTA] rather than of future arrangements between the UK and EU" and the "Department does not have modelling available which answers" how the nature of the UK-EU relationship would affect the impact of the EU-Vietnam FTA.

3.13 In respect of the Committee's question on how the estimated annual trade deficit of £1.214 billion per annum for the UK from the EU-Vietnam FTA translates into expected annual GDP gains of £391 million per annum for the UK and which sectors and regions are expected to gain or lose the most, the Minister states that:

- whilst "the gains in UK imports from Vietnam outweigh the gains in UK exports to Vietnam, other components that contribute to GDP change, such as domestic consumption, investment and government expenditure, result in an overall increase in UK GDP by £391 million in the long run";

- the main sectors in which the UK will export more to Vietnam "are financial and insurance (+£110m), business services (+£80m), air transport (+£80m) and communication (+£50m)";
- the main sectors in which the UK will import more from Vietnam "are wearing apparel (clothes and materials) (+£530m), leather products (+£460m) and motor vehicle and transport equipment (+£400m)"; and
- whilst the external analysis did not model the impact of the proposed agreement across regions, "published data shows UK exports to Vietnam were mostly concentrated in the North West in 2017 relative to the rest of the UK. In comparison, the data shows UK imports from Vietnam were mostly concentrated in the North East in 2017".

EU-Vietnam IPA

3.14 At its meeting on 15 May 2019, the Committee further probed the Minister on the UK's position on the ICS and its intended approach to investment protection and dispute resolution after exit day. In his latest update to the Committee, the Minister:

- restates that the Government is "considering a range of options in the design of future bilateral trade and investment agreements", including whether it will negotiate new investment protection agreements in a BIT or as part of a wider FTA;
- notes that ICS is not yet operational, and there remain a number of practical details to be agreed, including how judges will be appointed";
- considers that wider discussions within UNICTRAL on the EU's proposed Multilateral Investment Court (MIC) (intended to replace bilateral ICS included in EU level agreements with the EU's FTA partners) "are still at an early stage" and the Government "will want to examine the outcomes carefully to ensure that any new reforms, including a possible MIC…achieve [the UK's] outcomes";
- restates the Government's ambitions for supporting an investment dispute resolution process that delivers fair dispute outcomes in a transparent manner, to ethical standards, and in a cost-effective manner; and
- stresses that "it will be up to the UK and future partners to agree a mechanism that is appropriate in a bilateral context".

3.15 **We note that the proposals are due to be adopted by the Council on 25 June, with a view to the parties signing the EU-Vietnam FTA and EU-Vietnam IPA during the G20 summit on 28/29 June 2019.**

3.16 **Following the Minister's recent correspondence, we draw to the attention of the House the following points:**

- **in the event of a no-deal exit from the EU, the Minister stresses that: progress (at official level) is being made in ensuring the replication/continuity of the effects of the FTA; the Department does not have any 'priority' replication/continuity agreements as its priorities are set "dynamically"; and any gap in**

the continuity of the FTA (assuming it enters into force before exit day) may lead to "some" trade diversion away from the UK, but does not provide any detail on the expected magnitude;

- **in the event of a negotiated withdrawal, the Minister previously considered that the EU notification process under Article 129 of the draft Withdrawal Agreement (that the UK is to be treated as a Member State for the purposes of international agreements during the transition/implementation period) would enable the UK to secure the benefits EU international agreements until the end of the transition/implementation period. However, he now qualifies this statement, saying that EU notification will "only serve as the basis" for its continued application to the UK and the parties must demonstrate "a shared intention" [that the UK is to continue to benefit from the agreement]; he states that such a shared intention "will ultimately be determined by the parties" and is "flexible", ranging from an informal, public statement to a formal written response or being evidenced by "subsequent state practice";**

- **post-exit/transition period, the Minister previously conceded that the Government is simply seeking to replicate the effects of the proposed FTA and does not intend to run negotiations for a more ambitious future UK-Vietnam FTA until after the conclusion of the negotiations determining the future UK-EU relationship; this Committee previously noted that lengthy negotiations on the future UK-EU relationship are therefore likely to significantly delay/impact the negotiation and implementation of future UK-negotiated trade agreements post-exit/transition period;**

- **the Government intends to vote in favour of the proposed EU-Vietnam IPA, on the basis that it wants to support the EU's trade agenda and remain a constructive partner of the EU whilst still a Member State, but is still unable or unwilling to share its position on the proposed ICS underpinning the agreement;**

- **that two months after the original exit day (of 29 March 2019), the Government is still considering its approach to investment protection and dispute settlement and can provide no new information to our Committee on the UK's favoured post-exit investment regime with Vietnam, simply reiterating its well-rehearsed, high-level objectives for an investment dispute resolution process that is capable of delivering fair dispute outcomes in a transparent manner, to ethical standards, and in a cost-effective manner; and**

- **the Minister stresses that his Department is not able to model the impact of different UK-EU relations post-exit on the expected net benefits to the UK of the EU-Vietnam FTA. We remind the Minister that we did not ask for him to provide a quantitative analysis, but rather a qualitative discussion outlining the possible impacts.**

3.17 **The Committee's outstanding queries and reservations on these documents relate to the continuity or otherwise of the proposed FTA and IPA post-exit, as opposed to the substance of the proposals themselves. We therefore grant the Minister a scrutiny waiver to be able to vote in favour of the proposals in the Council on 25 June 2019, subject to the Minister:**

- **informing us of the outcome of the Council meeting, which should detail how the Government and other Member States voted and any changes to the final text (compared to the original text shared with this Committee);**
- **in the event of a Withdrawal Agreement, informing us of the EU notification to Vietnam and whether/how Vietnam's acceptance that the UK is to continue to enjoy the rights of the EU-Vietnam FTA (and therefore that the UK will continue to benefit from preferential terms as opposed to reverting to WTO most-favoured nation terms) is confirmed;**
- **providing a qualitative assessment of how 'low' versus 'high' UK-EU integration post-exit and changes to rules of origin may affect trade flows and the expected net benefits of the proposed EU-Vietnam FTA on the UK, to provide all stakeholders with a better understanding of how the proposed agreement may impact them post-exit;**
- **sharing the Government's view on:**
  - **the ICS procedural changes, including the system of appointing arbitrators to a roster, the new transparency requirements, the appeal mechanism and the code of conduct for arbitrators;**
  - **the 'no u-turn' clause in ICS, namely that an investor cannot run parallel claims in the domestic courts and the ICS, but there is no requirement to exhaust domestic remedies first;**
  - **the clarifications in ICS on substantive investment standards (fair and equitable treatment and indirect expropriation); and**
- **keeping us updated on the Government's intended approach to investment protection and dispute resolution with Vietnam post-exit.**

3.18 **In the meantime, we retain the documents under scrutiny and draw the Minister's letter and our conclusions to the attention of the Committee on Exiting the EU, the Foreign Affairs Committee and to the International Trade Committee.**

Full details of the documents

(a) Proposal for a Council Decision on the signing, on behalf of the EU, of the Free Trade Agreement between the EU and Vietnam: (40137), 13312/18 +ADDs 1–12, COM(18) 692; (b) Proposal for a Council Decision on the conclusion of a Free Trade Agreement between the EU and Vietnam: (40136), 13313/18 + ADDs 1–12, COM(18) 691; (c) Proposal for a Council Decision on the signing, on behalf of the EU, of the Investment Protection Agreement between the EU and its Member States, of the one part, and Vietnam, of the other part: (40135), 13314/18 + ADDs 1–2, COM(18) 694; (d) Proposal for a Council

Decision on the conclusion, on behalf of the EU, of the Investment Protection Agreement between the EU and its Member States, of the one part, and Vietnam, of the other part : (40134), 13315/18 + ADDs 1–2, COM(18) 693.

Previous Committee Reports

Sixty-sixth Report HC 301–lxiv (2017–19), chapter 3 (15 May 2019); Forty-ninth Report HC 301–xlviii (2017–19), chapter 5 (19 December 2018).

4 Negotiating directives for the modernisation of the Energy Charter Treaty

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; but scrutiny waiver granted; drawn to the attention of the International Trade and Business, Energy and Industrial Strategy Committees
Document details	Recommendation for a Council Decision authorising the entering into negotiations on the modernisation of the Energy Charter Treaty
Legal base	Articles 207(3) and (4), 194(2), 218(3) and (4) of the TFEU (noting Opinion 2/15 of the Court of Justice)
Department	International Trade
Document Number	(40578),—+ ADD 1, COM(19) 231

Summary and Committee's conclusions

Overview

4.1 The Energy Charter Treaty (ECT) is a plurilateral trade and investment agreement applicable to the energy sector. It covers investment protection, trade in energy materials and products, transit and dispute settlement. The EU and all EU Member States have all signed and ratified the ECT, but Italy is no longer a Contracting Party (applying the ECT) following its withdrawal from the ECT in January 2016. Due to its broad membership, covering many former USSR states in addition to the EU and other major economies such as Japan, more investor-state disputes are adjudicated under the ECT than under any bilateral investment treaty.

4.2 In November 2018, the Energy Charter Conference adopted the Bucharest Energy Charter Declaration stressing the importance of ECT modernisation and approving a list of issues to be addressed, including investment protection provisions, pre-investment protection, transit, dispute resolution provisions and obsolete ECT provisions.

4.3 The Commission considers that the ECT contains outdated provisions (many of which have not been revised since the 1990s) and should be brought in line with the EU's new approach to trade and investment following: the entry into force of the Lisbon Treaty; relevant Commission Communications;[12] the Court of Justice of the EU (CJEU) Opinion

12 See Commission Communication 'Towards a comprehensive European international investment policy' of 8 July 2010 and Commission Communication 'Trade for all: Towards a more responsible trade and investment policy' of 14 October 2015.

of 16 May 2017[13] on the division of competences in respect of the EU-Singapore FTA, which held that the EU has exclusive competence in relation to foreign direct investment (FDI)[14] and competence is shared between the EU and its Member States in respect of non-direct investment (portfolio investment)[15] and investor-state dispute settlement (ISDS); and recently concluded or negotiated EU investment agreements with third countries, including with Canada (CETA) and Singapore.

4.4 The proposed Council Decision authorises the Commission to enter into negotiations on ECT modernisation on behalf of the EU. The proposed negotiating objectives (set out in the annex to the Council Decision) include:

- clarifying and improving definitions related to the standards of protection for investors and investment, including the right to regulate, fair and equitable treatment (by replacing the current broad formulation with a closed-list fair and equitable treatment standard) and expropriation;
- introducing stronger provisions on sustainable development and corporate social responsibility; and
- modifying the transit chapter of the ECT; the Commission's explanatory memorandum states that it 'is not fully in line with the [EU's] concept of liberalised energy markets in the EU' and 'should be adapted to the requirements of integrated energy markets with third party access rights', based on the EU's 2009 Third Energy Package principles of third-party access, unbundling, transparency and non-discrimination.

4.5 The Commission considers that reform of ISDS provisions contained in the ECT should only be considered once "international initiatives" (in relation to ongoing discussions within UNCITRAL on ISDS reforms, including the EU's proposed Multilateral Investment Court—a permanent multilateral investment court to rules on investment disputes, with an appeal mechanism and full-time adjudicators) "deliver tangible results"; ISDS is therefore not within the scope of the proposed negotiating mandate.

The Government's position

4.6 In his Explanatory Memorandum of 5 June 2019, the Minister of State for Trade Policy (George Hollingbery MP) notes that:

- CJEU Opinion 2/15 held that the EU has exclusive competence in relation to FDI and competence is shared in respect of portfolio investment and ISDS and that the Government "will want to ensure that the final mandate accurately reflects this division of competence" between the EU and its Member States; and

13 Opinion 2/15 of 16 May 2017. See the letter from the former Minister (Lord Price) dated 13 July 2017 and letter from the former Minister (Rt Hon. Greg Hands MP) dated 2 May 2018 for a summary of the Government's assessment of the Opinion.

14 Foreign direct investment (FDI) is where an investor sets up or buys or company or a controlling share or interest in a company in another country,

15 Portfolio investment is where an investor buys shares in, or debt of, a foreign company without controlling that company.

- negotiations on ECT modernisation are expected to "commence in Autumn 2019, potentially following the UK's scheduled departure date" from the EU and that as a "Contracting Party to the ECT, the UK will continue to be party to negotiations following [its] exit from the EU".

The Committee's conclusions

4.7 **We note that:**

- **one of the Commission's key objectives is to clarify and modernise the investment protection provisions of the ECT, which it considers would reduce the risk of speculative claims and increase legal certainty (particularly given the large number of notified claims against EU Member States);**

- **the draft Council Decision authorises the Commission to enter into negotiations on behalf of the EU in respect of all issues outlined in the negotiating directives; however, the scope of exclusive competence of the EU in respect of the ECT is unclear and, as highlighted by the Minister, investment protection is part exclusive competence of the EU and part shared competence between the EU and its Member States; and**

- **the Government's own policy is that the EU should only exercise competence in relation to external agreements to the extent that its competence is exclusive, leaving Member States to exercise shared competence. It is therefore seeking to ensure that the final mandate accurately reflects this division of competence between the EU and its Member States.**

4.8 **We grant the Minister a scrutiny waiver to be able to support the negotiating mandate in the Council, subject to the Minister:**

- **informing us of the outcome of the Council meeting, including how the Government and other Member States voted and whether any objections were raised;**

- **confirming that the Government has secured the legally binding changes that are necessary to reflect the division of competences between the EU and Member States. The Minister must provide a copy of the final texts, with a compare version relative to the original documents, explaining how the Government's concerns have been addressed; and**

- **setting out the Government's negotiating objectives for ECT Modernisation, as a Contracting Party in its own right, in the event of a no deal withdrawal from the EU, in particularly in relation to investment protection, ISDS provisions and transit.**

4.9 **In the meantime, we retain the documents under scrutiny and draw the Commission's proposal and our conclusions to the attention of the International Trade and Business, Energy and Industrial Strategy Committees.**

Full details of the documents

Recommendation for a Council Decision authorising the entering into negotiations on the modernisation of the Energy Charter Treaty: (40578),—+ ADD 1, COM(19) 231.

Previous Committee Reports

None.

5 EU development assistance: the Neighbourhood, Development and International Cooperation Instrument 2021–27

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Foreign Affairs Committee and the International Development Committee
Document details	Proposal for a Regulation establishing the Neighbourhood, Development and International Cooperation Instrument
Legal base	Articles 209, 212 and 322(1) TFEU, ordinary legislative procedure; QMV
Department	Foreign and Commonwealth Office
Document Number	(39903), 10148/18 + ADDs 1–2, COM(18) 460

Summary and Committee's conclusions

5.1 In spring 2018, the European Commission tabled proposals for the EU's next long-term budget. Under the so-called Multiannual Financial Framework (MFF), which will span 2021 to 2027, it wants to establish a "Neighbourhood, Development and International Cooperation Instrument" (NDICI) to replace a range of existing EU programmes that financially support the political and economic development of non-EU countries.

5.2 As set out in more detail in "Background" below, the proposed €89 billion (£79 billion)[16] NDICI would provide Official Development Assistance for the world's poorest states, as well as financial support for middle-income countries in areas like Eastern Europe, the Near East and Latin America. Notably, it would merge the European Development Fund—a support scheme for the Member States' former colonies in Africa, the Caribbean and the Pacific which has been run separately since the 1950s[17]—with the EU's other funding programmes for non-EU countries for the first time. Funding would be earmarked for specific geographic regions and thematic areas, with a dedicated pot of money set aside to allow the EU to address unforeseen political or economic crises overseas.

5.3 The Commission proposal for the NDICI, which can still be amended by the EU Member States and the European Parliament before it is formally approved, also contains several novel or controversial provisions.[18] For example, it deviates from the EU's general budgetary rules by allowing unspent funds allocated to the Instrument to be

16 The budget for the NDICI given here is as proposed by the European Commission. This is not final, as the financial allocation will be decided by the Member States and the European Parliament in the context of the wider MFF negotiations.

17 This so-called "ACP" group of states includes over 40 Commonwealth countries, which have been beneficiaries of the European Development Fund since the UK's accession to the EEC in 1973.

18 The Commission proposal is subject to the ordinary legislative procedure.

carried over to be spent into the next financial year, rather than being used to reduce national contributions to the EU budget. The NDICI would also fund measures related to "capacity-building for security and development" (CBSD), where the EU provides support to the military forces of developing countries to allow them "prevent and manage crises" independently, but under civilian control.[19] (However, the Instrument could not be used to finance any EU military missions under the Common Security and Defence Policy.)[20]

5.4 Despite the UK's decision to withdraw from the EU, the proposal to establish the NDICI remains relevant. The Government has repeatedly stated that, as part of a post-Brexit foreign policy partnership with the EU, it would like to be able to contribute financially to the Instrument even as a non-Member State. In return, the UK would need a commensurate level of influence over how the NDICI is used and its budget spent to ensure the money is used as envisaged by the UK and delivers value for money for British taxpayers.[21] As we noted in our previous Reports of 12 September and 24 October 2018, the original Commission proposal contains no legal mechanism for the level of participation for 'third countries' within EU structures as envisaged by the Government, which would therefore need to be introduced during the legislative process with the agreement of the remaining Member States and the European Parliament.

5.5 The Minister for Europe and the Americas (Rt Hon. Sir Alan Duncan MP) wrote to us on 20 May 2019 to provide further information on the state of play in the negotiations to establish the Instrument. His letter notes that the Government had so far been mostly unsuccessful in widening opportunities for UK participation in the NDICI after Brexit, but that efforts to that effect would continue (if necessary as part of the eventual UK-EU negotiations on their future bilateral partnership). Other areas of contention in the talks between Member States include the possibility of ring-fencing specific pots of funding to tackle the migration flows into Europe, and how much of the NDICI's proposed €89 billion budget should be used to address climate change.

5.6 Negotiations between the European Parliament and the Member States on the legal framework for the Instrument are due to begin this autumn: the Parliament adopted its position on the objectives of the NDIC Instrument on 27 March 2019, and the Member States did so in their Committee of Permanent Representatives on 12 June 2019. We have set out our assessment of the implications of the NDICI proposal for the UK in light of this latest update from the Minister below.

19 This is how the European Commission described CBSD measures in December 2017. See European Commission, "Stepping up support for security and sustainable development in partner countries" (7 December 2017). We have discussed the question of EU financial support for the armed forces of developing countries in more detail in our Report of 6 December 2017. Under Article 9 of the proposed NDICI Regulation, CBSD activities could involve "the provision of capacity building programmes in support of development and security for development, including training, mentoring and advice, as well as the provision of equipment, infrastructure improvements and services directly related to that assistance".

20 Article 41(2) TEU prohibits the use of the EU budget for any expenditure with defence or military implications. The European Commission has proposed a separate European Peace Facility, to be funded directly by Member States, for such purposes during the 2021–27 Multiannual Financial Framework.

21 See for example Written evidence by the Department for International Development, "EU exit and future UK/EU development cooperation" (July 2018). The Department for Exiting the EU also published a "future partnership paper" on "Foreign policy, defence and development" in September 2017, which envisaged "collaboration and alignment on development policy and programming" between the UK and the EU.

Our conclusions

5.7 **We are grateful to the Minister for his helpful and frank update on the negotiations on the EU's Neighbourhood, Development and International Cooperation Instrument under the next Multiannual Financial Framework from 2021, and the UK's role in those discussions.**

5.8 **It is clear the Government wants to be able to cooperate closely with the EU on development assistance, even after Brexit. We understand the benefits such cooperation would bring in terms of both policy coherence between the EU and the UK, and the economies of scale that continued UK participation in the EU's external support programmes could generate to deliver value for money in the provision of development assistance. However, the practicalities of such an arrangement when the UK is no longer an EU Member State, and by definition outside the governance structures that will oversee the NDICI, are clearly less straightforward. While the original Commission proposal for the Instrument could potentially allow for British organisations to bid for EU support for development assistance projects on a reciprocal basis, the Department for International Development wants to go much further and contribute directly to the EU programme (in return for involvement in its governance).**[22]

5.9 **Because of this, the UK retains a direct interest in the negotiations, and the extent to which the final Regulation would allow the UK to contribute to the Instrument (and, in return, have sufficient formal levers of influence to ensure its taxpayers' money would be well-spent). Unfortunately, from the Minister's latest update it is clear that the Government's efforts in Brussels to widen participation in the Instrument have, to date, proved unpersuasive. This is not surprising, given that the issue of 'third country' participation in any of the EU's funding programmes under the next Multiannual Financial Framework have effectively been paused ahead of the UK's scheduled date of withdrawal from the EU (now set for 31 October 2019).**

5.10 **We remain sceptical of the Government's chance of success in including more Member State-like rights for 'third country' in the NDICI Regulation given the EU's repeated insistence on protecting its decision-making autonomy. Moreover, even if the legal parameters in the final legislation are more conducive to participation by non-EU countries, there could be additional political hurdles to UK participation in the Instrument after Brexit.**

5.11 **In particular, we consider that the EU is highly unlikely to agree to UK involvement in *any* of its spending programmes until the UK and the EU have resolved the financial issues that have arisen because of the UK's decision to withdraw from the Union (and in particular the EU's insistence that the UK pays for a share of EU spending commitments and liabilities entered into while it was still a Member State, estimated to amount to a net payment of £39 billion). While the draft Withdrawal Agreement contains a comprehensive financial settlement to resolve these issues in a legally binding way, in a 'no deal' Brexit scenario the manner in which the Treasury and the**

22 Written evidence by the Department for International Development, "EU exit and future UK/EU development cooperation" (July 2018).

Commission would deal with the financial question is unclear.[23] In the absence of such a settlement, it seems inconceivable that the remaining Member States would allow UK organisations to receive any funding from the EU budget.

5.12 **Beyond the financial settlement, whichever way it is ultimately resolved, UK participation in specific EU programmes could also become entangled in wider discussions on the future bilateral partnership. The EU's relations with Switzerland show that the it is willing to minimise cooperation with non-Member States in areas of mutual interest to secure concessions in other areas. Notably, the EU suspended Switzerland from participation in the 'Horizon 2020' research programme when Swiss voters rejected free movement of people;[24] more recently, the ability of Switzerland's stock exchanges to operate within the EU was curtailed after the Swiss Government refused to ratify a new framework agreement on alignment with EU law in certain areas.[25] It is not difficult to see that analogous problems could arise in the future UK-EU negotiations, and hamper efforts for the UK to participate in EU programmes of interest.**

5.13 **Should the Government ultimately be successful in persuading both the Member States and the European Parliament of the merits of permitting greater UK participation in the NDICI in return for a financial contribution, it would be necessary to provide more detail and legal clarity over the UK's role in the oversight of the Instrument. We remain of the view that any financial contribution to the NDICI would have to come with a commensurate level of influence for Ministers within the relevant EU bodies over how that money is spent. The Government's own views on the precise arrangements that would be necessary to achieve this remain unclear. The former Secretary of State for International Development, Rt Hon. Penny Mordaunt MP, said in July 2018 that "we are not going to have the existing arrangements but, whatever the future structure looks like, we have to be an active participant". In May 2019, the Minister told us that governance rights had been secured in the 'investment' pillar of the NDICI, should the UK contribute to the new External Action Guarantee as a non-Member State. It is unclear, however, what exactly those 'rights' would consist of (and whether they could, potentially, form a template for wider representation for the UK in other components of the Instrument if it became a financial contributor).**

5.14 **In the absence of legal guarantees about sufficient levels of participation in the Instrument's governance structures, it would of course remain an option for the Government *not* to contribute to the NDICI at all. However, given the possibility of UK participation in the Instrument remains a theoretical possibility, the other elements of the Instrument—its objectives, budgetary management and targets—also remain relevant for our scrutiny work. We note in this respect that the Member States are yet to resolve a number of issues before they are ready to begin negotiations with the European Parliament on the final text of the Regulation. These include the possibility of ring-fencing of funding for measures specifically related to reducing migration into**

23 In April 2019, the European Commission said the UK would be expected to "address the three main separation issues"—the financial settlement, the rights of EU citizens in the UK, and the 'backstop' for the border with Ireland—as a "precondition for discussions on the way forward" in the UK-EU relationship.

24 Science Business, "Switzerland's exile from EU research is a cautionary tale for the UK" (14 December 2017).

25 Reuters, "EU sends ultimatum to Switzerland on stock exchanges" (6 December 2018).

Europe from Africa and the Middle East; the target expenditure on projects related to climate change and the environment; and whether or not to keep the European Development Fund and the Neighbourhood Instrument as separate programmes.

5.15 **The question of the Instrument's overall budget will need to be agreed as part of the wider negotiations on the EU's next Multiannual Financial Framework. We have taken note of the concerns raised by the European Court of Auditors about the proposed 'flexibility' in the NDICI, which would allow unspent funds in one year to be carried over into—and spent—the next financial year. While this is already the practice in the off-budget European Development Fund, it is not normal practice in programmes funded directly from the EU budget. Under the EU's Financial Regulation, money allocated to a specific programme which has remained unspent at the end of the year is 'decommitted' (thereby reducing Member State contributions, because there is less EU expenditure to pay for). The Government's position on the proposed introduction of this type of budgetary flexibility across all parts of the NDICI, rather than those that will replace the European Development Fund, is unclear.**

5.16 **The Committee has also examined the proposed use of the NDICI for CBSD[26] measures in support of the armed forces of developing countries, despite the Instrument's development policy objectives. In August 2016, the Government told Parliament that "any dedicated [EU] CBSD funding instrument over the longer-term" should be run by the Member States "by unanimity" on the basis of a Common Foreign & Security Policy legal base in the Treaties.[27] Under the Commission proposal however, the NDICI would have a CBSD objective for the full length of the 2021–2027 Multiannual Financial Framework, but decisions would be made on the basis of Qualified Majority Voting. As with the question of budgetary flexibility, we do not know how the Government has approached this issue in the negotiations to date. In particular, it is unclear if any concerns have been raised about the use of the Instrument for EU foreign policy measures despite its development policy legal base.**

5.17 **Given the above, we ask the Minister to keep us informed of further developments in the Council's deliberations on the NDICI Regulation as and when necessary. In particular, we would like to receive information on the substance of any 'General Approach' or mandate for negotiations in advance of its adoption by the Member States. We also request he write to us by 3 July 2019 to:**

- **clarify whether the 'budgetisation' of the European Development Fund is likely to have the support of the necessary majority of Member States;**
- **explain the scope of the 'third country' "governance rights" in the investment pillar of the NDICI for non-EU donor countries, and in particular whether this would grant any representation and voting rights in the relevant Committee of Member States that oversees the Instrument; and**
- **set out the Government's position on the use of the NDICI, as a development policy instrument, to fund CBSD measures in support of overseas armed**

26 CBSD stands for Capacity Building for Security and Development.

27 Explanatory Memorandum submitted by the Foreign and Commonwealth Office (2 August 2016), para. 18.

forces, and how this aligns with its previous assertion that "any dedicated CBSD funding instrument over the longer-term would [need to] make decisions by unanimity".

5.18 **Given the uncertainty about the UK's future role in the NDIC Instrument and the EU's development programmes more generally, the Committee has again decided to keep the proposed Regulation under scrutiny. We also draw these latest developments to the attention of the Foreign Affairs and International Development Committees, which may wish to consider in more detail how British involvement in the Instrument might impact on the UK's foreign policy and delivery of development assistance.**

Full details of the documents

Proposal for a Regulation establishing the Neighbourhood, Development and International Cooperation Instrument: (39903), 10148/18 + ADDs 1–2, COM(18) 460.

Background

5.19 The European Union is a major source of development assistance to developing countries.[28] The EU budget is also used to provide other types of financial support for the economic and political development of non-EU countries, for example to aid those seeking EU membership to meet the requirements for accession. Over the 2014–20 period, the EU has earmarked some €90 billion (£80 billion) for spending in non-Member States.[29] At present, this funding is spent via a number of different EU programmes, like the European Development Fund, the Neighbourhood Instrument and the Instrument contributing to Stability & Peace. These each have their own objectives, budget and legal framework.[30]

5.20 For the next long-term EU budgetary cycle, the Multiannual Financial Framework 2021–27 (MFF), the European Commission in May 2018 proposed a new Regulation to consolidate most of the EU's funding programmes for the economic development of non-Member States, in particular official development assistance, into a single legal and financial framework: the Neighbourhood, Development and International Cooperation Instrument (NDICI). Among its key objectives would be to contribute to the implementation of the Sustainable Development Goals and the Paris Climate Agreement, strengthen the EU's relationship with countries in its immediate 'neighbourhood' and support the development of the Least Developed Countries.

5.21 In practical terms, the NDICI would make a number of important changes compared to the EU's current approach to financial support for non-EU countries:

28 Official development assistance from the European Union and its Member States collectively amounted to roughly €74.5 billion in 2018.

29 This includes €58 billion of expenditure under the "Global Europe" heading of the EU budget (the 2014–20 Multiannual Financial Framework), and an additional €30.5 billion of support for the Member States' former colonial territories in Africa, the Caribbean and the Pacific (ACP) under the European Development Fund.

30 Although these programmes are legally distinct, they are mostly managed on a day-to-day basis by the European Commission with ultimate oversight for the Member States and the European Parliament.

- first, as noted, the proposal would replace many of the existing programmes under the 2014–20 EU budget for funding to countries outside of the Union, including the aforementioned Neighbourhood Instrument and the Stability and Peace Instrument;[31]

- secondly, the NDICI would also take over the functions of the European Development Fund (EDF). This is, at present, the most important vehicle for official development assistance to EU countries' former colonies in Africa, the Caribbean and the Pacific (the ACP States) as well as their remaining dependent territories, like the British Overseas Territories.[32] It is funded directly by Member States rather than via the EU budget. This element of the proposal is linked to the wider negotiations between the EU and the ACP on a new framework treaty for their overall economic and political partnership;[33] and

- lastly, the new Instrument has an 'investment pillar' which would take over the functions of two existing 'financial instrument' programmes where the EU budget is not used directly, but instead provides a guarantee for lending and investment outside the EU in support of the Union's external policies (the Guarantee Fund for External Actions[34] and the more recent Fund for Sustainable Development guarantee).[35] These would be amalgamated into a single €60 billion "External Action Guarantee", which would also be used to support measures to help EU candidate countries meet the technical requirements for accession.[36]

5.22 Through amalgamating all these various programmes into a unified legal framework, the Commission wants to "simplify the legislative framework of external action and provide greater flexibility in responding to unforeseen challenges and crises".

31 The major exception to this merger of different funding streams for non-EU countries would be the Pre-Accession Instrument, which finances specific technical support for countries which are in the process of negotiating their entry into the European Union. There is also a parallel proposal for a Nuclear Safety Instrument for the safe decommissioning of nuclear facilities outside the EU, which has a different legal basis and is therefore considered separately. The Humanitarian Aid Instrument for the EU's disaster response overseas would also remain a distinct programme since it has no long-term policy objectives.

32 Under the proposal, only the provision of financial support to the ACP states would be taken over by the NDICI. Support for Member States' dependent territories—like the British Overseas Territories while the UK is an EU Member State—would be hived off into a separate programme under the "Overseas Association Decision".

33 The European Development Fund (EDF), which dates back to the 1950s, has historically been "off-budget" and funded by direct contributions by Member State governments that are separate from their payments into the EU budget and cannot be transferred to other EU spending areas. It is the assistance facility for countries with former colonial ties to current EU Member States, including many Commonwealth countries, under the 2000 Cotonou Agreement. The Commission has recommended that the EDF should be funded directly by the EU budget, rather than via a separate 'off-budget' mechanism for the first time. This would increase the oversight of the European Parliament over how the funding is spent, and end the strict separation of EU development funding for the Member States' former colonies on the one hand and for all other developing countries on the other.

34 The Guarantee Fund for External Actions is used to cover any potential losses from certain loans granted by the EU, Euratom and the European Investment Bank. In particular, it covers macro-financial assistance (MFA) to non-EU countries experiencing balance-of-payment difficulties, as well as the External Lending Mandate (a mechanism whereby the EU budget acts as guarantee for the European Investment Bank to increase its lending in non-EU countries, effectively partially indemnifying the Bank for any losses on risky investments that support wider EU policy objectives such as climate change or addressing the root causes of the migration crisis).

35 The European Fund for Sustainable Development (EFSD) and its Guarantee Fund were set up in 2017 to mobilise additional investment for Africa and the EU's neighbourhood, specifically with the aim of reducing the economic pressures behind the flows of immigration from those regions to the EU.

36 Support for EU candidate countries would be provided under the separate Instrument for Pre-Accession Assistance (IPA). The European Commission proposed an IPA for the 2021–27 Multiannual Financial Framework in May 2018.

5.23 In total, the European Commission has proposed that the NDIC Instrument should have a budget of €89 billion (£81 billion) over the 2021–27 period, inclusive of a contingency 'cushion' of €10.2 billion.[37] The bulk of the available funding—€68 billion—would be earmarked for support to specific geographic areas (primarily the EU's 'neighbourhood' and sub-Saharan Africa), with a smaller portion—€7 billion—dedicated to thematic programmes such as "Human rights an0d democracy" and "Stability and peace". The third main component of the Instrument would be a €4 billion fund to allow the EU to respond to unforeseen political or economic crises overseas via "rapid response actions".[38] The Instrument as proposed would also give the Commission the ability to carry over funds unspent in one year to the next. (This flexibility is feature of the current European Development Fund, but not of EU programmes generally, where unspent funds are 'decommitted'—cancelled—at the end of the financial year, and therefore reducing the size of the EU budget.)[39]

5.24 In addition, the proposed External Action Guarantee could be used to back loans and investments outside the EU up to a total direct exposure of €60 billion (£53 billion), with the necessary provisioning to cover potential losses to be taken from the NDICI budget for the relevant geographic or thematic area.[40]

5.25 The Commission also recommended a number of supplementary targets for the way in which NDICI funding would be spent. In particular, it wants at least 92 per cent of the Instrument's budget should be spent on Official Development Assistance (ODA) as defined by the OECD. Additionally, the draft Regulation contains a number of 'expectations' of how the money would be used, including 25 per cent towards "climate objectives"; 20 per cent to "social inclusion and human development, including gender equality and women's empowerment"; and 10 per cent of funding to be used on projects that seek to address the "root causes of irregular migration and forced displacement", as well as "protection of refugees and migrants' rights". However, the Commission did not propose making these latter three targets binding (a source of contention in the negotiations on the final text of the Regulation, see paragraph 42 below).

5.26 Another element of interest in the NDICI is the proposed level of support for creating more effective armed forces in developing countries. Despite its development policy objective,[41] the new programme would also incorporate the EU's existing "Instrument

37 This "emerging challenges and priorities cushion" of €10.2 billion could only be tapped into with the approval of a Qualified Majority of Member States. The total budget, the Commission says, would be a ten per cent real-terms increase in EU funding for development assistance and support to non-EU countries compared to the budget of the various existing EU development programmes under the current long-term budget (2014–20).

38 The EU's humanitarian assistance would continue to be funded by the existing [Humanitarian Instrument].

39 See article 25(2) of the draft NDICI Regulation. Under Article 15 of the Financial Regulation (Regulation 1046/2018) governing EU spending, unspent EU funds can in principle only be re-used in the following year "in the event of a manifest error attributable solely to the Commission".

40 The provisioning would require the EU to set aside a proportion of its potential total exposure via the Guarantee in case it is not repaid. The proportion would be linked to the overall risk, and range from nine per cent for macro-financial assistance to foreign governments to a maximum of 50 per cent for riskier operations. See for more information Article 26 of the draft NDICI Regulation.

41 The proposal to establish the NDICI has Articles 209 and 212 TFEU as a legal basis, which allow the EU to use its budget to provide development assistance and other types of financial support to non-Member States. Article 41(2) TEU prohibits the use of the EU budget for any expenditure having "military or defence implications", and therefore the new Instrument could therefore not be used to finance any military missions conducted by the EU overseas under the Common Security and Defence Policy (CSDP). To provide for a financial framework for such operations under the 2021–2027 budget, the Commission has proposed a separate "European Peace Facility" where Member States would pool financial and material resources for the EU's military activities.

contributing to Stability and Peace" (IcSP).[42] This scheme was controversially expanded in December 2017 to set aside €100 million in EU funding from 2018 to 2020 for improving the capabilities of developing countries' military authorities (formally referred to as "Capacity Building in support of Security and Development" or CBSD).[43] The Foreign Office told us at the time that decisions on EU support for CBSD was essentially a foreign policy measure, where EU rules normally require decisions by unanimity. It argued that using funding for CBSD operations from a development policy instrument—within which decisions are decided on the basis of a *qualified majority*—was "manageable in the short-term as [it] is not a permanent solution", and the Government would "seek to ensure that any dedicated CBSD funding instrument over the longer-term would make decisions by unanimity". It is not clear how the need for unanimity in decision-making for mobilisation of the NDICI for CBSD measures is reflected in the Commission proposal.

5.27 The draft Regulation establishing the NDICI is subject to the ordinary legislative procedure, meaning it has to be approved jointly by both the European Parliament and a qualified majority of Member States in the Council. Once the Instrument is operational in early 2021, individual funding decisions would be made and monitored by the European Commission. However, it would need to act on the basis of detailed proposals set out in "multiannual indicative programmes" for each geographic and thematic priority area. These would have to be approved by a Qualified Majority of Member States in a specialised committee, which would also scrutinise the Commission's overall management of the NDICI.[44]

Parliamentary scrutiny of the NDICI proposal

5.28 We set out the details of the European Commission's proposals for the EU's external support and development assistance programmes for the 2021–2027 period in more detail in our Reports of 12 September and 24 October 2018 based on an Explanatory Memorandum submitted by the Foreign and Commonwealth Office and the Department for International Development.

5.29 We noted at the time that the NDICI proposal was extremely vague about how the Instrument's budget would be spent, even within the different geographic and thematic areas. Concerns have been raised that this means funding for the EU's domestic political priorities—like reducing migration flows, for example by reinforcing the capacity of local border authorities—could reduce the amounts of support available for official development assistance and the other objectives of the NDICI. As drafted, the precise division of EU funding between these competing priorities would be decided in technical work programmes at a later stage. We therefore concluded that the merger of so many different EU programmes into a single instrument made its overall impact for different countries in receipt of EU assistance difficult to predict:

42 Article 21 TEU requires the EU "to preserve peace, prevent conflicts and strengthen international security". In pursuit of this, the Member States in 2014 established the Instrument contributing to Stability and Peace (IcSP). It is a €2.3 billion (£2 billion) programme which supports the EU's external policies by "increasing the efficiency and coherence of the Union's actions in the areas of crisis response, conflict prevention, peace-building and crisis preparedness, and in addressing global and trans-regional threats".

43 EU funding for military capacity building can only be granted "under exceptional circumstances", and cannot be used to finance "recurrent military expenditure", "the procurement of arms and ammunition" or "training which is designed to contribute specifically to the fighting capacity of the armed forces".

44 The Multiannual Indicative Programmes would take the form of Implementing Acts, which must be approved by a Qualified Majority of Member States. The European Parliament cannot block or amend such Acts.

> "[D]ifferent regions or thematic priorities could […] see changes in their overall allocation, because of the new unified legal framework and the increased flexibility for shifting funding around based on changing needs and priorities. For example, the proposal's geographic programmes clusters countries together that are currently separate for EU funding purposes, such as 'Americas and the Caribbean': Latin American countries at present receive EU development assistance from the Development Cooperation Instrument, whereas Caribbean countries do so from the European Development Fund. The funding for the two cannot currently be transferred from one to the other, but under the Commission proposal they would be entitled to a hypothecated 'block' of joint funding."

Relevance of the proposal for the UK

5.30 In our previous Reports, we also extensively assessed the potential relevance of the NDIC Instrument for the UK in the context of its withdrawal from the EU.

5.31 As a Member State, the UK compulsorily contributes to the EU's existing external funding instruments. However, it also has a vote on how much money they are allocated,[45] and on the work programmes that restrict how that money can be spent. However, having triggered the process of withdrawing from the EU in March 2017 the UK is currently to cease being a Member State on 31 October 2019. As the NDICI is to be funded from the EU budget, the UK would by default not be a participant in, or contributor to, the NDICI if it is no longer a Member State when the new Instrument becomes operational in January 2021.[46] This also means the British Overseas Territories will automatically cease to qualify for assistance from the European Development Fund or its successor, because they do so only because of their constitutional link to the UK as an EU Member State.[47]

5.32 Brexit does not automatically mean that British organisations will be unable to bid for funding from the NDICI. In the Commission proposal, article 24 establishes that organisations based in an OECD member country would could be given support for projects in a "Least Developed Country" or a "Highly Indebted Poor Country". For other types of funding from the Instrument, entities from third developed countries"—like the UK after Brexit—"may only be recipient of funds under this Regulation on the basis of reciprocity of access to their own development assistance". The existence of such reciprocity would have to be formally recognised by "a Commission decision" (although it is unclear

45 The UK as a Member State has a veto over the Multiannual Financial Framework, which sets spending caps on broad areas of EU policy over a longer-term period. It also has a vote on the annual EU budget, where specific commitment and payment appropriations for each EU funding instrument are decided by qualified majority.

46 The NDICI is due to launch in early 2021, after the UK has ceased to be a Member State and after the end of the proposed transitional period (during which the Government would continue to co-finance the EU budget). If there were to be an extension to the transition, the Brexit financial settlement would have to be revisited and the UK could end up continuing as contributor to the EU budget for longer.

47 A number of dependent territories of France, the UK, the Netherlands and Denmark qualify for support from the EDF because they are listed in the EU Treaties and included in the so-called "Overseas Association Decision". Because of this, the six British territories which qualify for EDF funding for the duration of the UK's EU membership are Anguilla, the Falkland Islands, Montserrat, Pitcairn, St. Helena and the Turks and Caicos Islands. See our predecessors' Report of 22 March 2017 for more information on EU financial assistance for its Member States' dependent territories. Under the Commission's proposals for the 2021–27 EU budget, development assistance for the Member States' overseas territories would not be paid for under the NDICI, but from a ring-fenced budget under a separate Overseas Association Instrument.

what the procedural requirements for that would be). In practice, that means EU-based organisations would have to be eligible to bid for funding from the UK Government used to support the economic and political development of developing countries.

5.33 However, the Government has made clear it wants to further cooperation on the basis of reciprocity between distinct UK and EU funding programmes. The Department for International Development has said it would consider making a financial contribution to the NDICI in return for "an appropriate role [for the UK] in the relevant decision-making mechanisms" about how the EU spends the money, and provided British organisations would then be "eligible to deliver EU programmes and receive funding".[48] In July 2018, the Department stated that it was making the case in Brussels that "future financing instruments [e.g. the NDICI] should be open to third parties to allow for the broadest possible range of development partnerships in the future".[49]

5.34 The Commission proposal for the NDIC Instrument is problematic in this regard, because there is no general mechanism for a 'third country' to make a financial contribution in return for involvement in its governance structures. The process in article 24, as referred to above, is limited to establishing reciprocal access to funding for civil society organisations from both sides to sources of public funding for development assistance. In addition, non-EU countries like the UK could contribute to the External Action Guarantee, which provides backing for loans and investments outside the EU.[50] However, under the draft legislation, any such contributions from countries outside the European Economic Area would "require the prior approval by the Commission" on the basis of a specific bilateral legal agreement.[51]

5.35 Given the clear difference between the Commission proposal and the Government's preferences, we concluded last year that crucial matter for the UK would be to what extent the European Parliament and the other Member States were willing to make the NDICI more "open to third parties". We retained the proposal establishing the Instrument under scrutiny to follow progress in the legislative negotiations in Brussels, and in particular to monitor the extent to which the Government—in the context of the wider Brexit negotiations—was able to secure modifications to the Regulation to create more possibilities for voluntary close UK cooperation with the EU on development assistance as a non-Member State.

Developments since October 2018

5.36 As of June 2019, negotiations on the final substance of the NDIC Instrument and its budget are still on-going.[52] They are unlikely to be formally concluded until spring 2020 at the earliest, when the Member States and the European Parliament are due to agree on the overall size of the Multiannual Financial Framework 2021–27. At that point, they will allocate specific amounts within the EU budget to various broad policy areas (including the "Neighbourhood and the World" heading, which would fund the NDICI).

48 Department for Exiting the EU, "Framework for the UK-EU Security Partnership" (May 2018), p. 33. See also Oral evidence by Rt Hon Penny Mordaunt MP to the International Development Committee (17 July 2018), Q4.

49 Written evidence by the Department for International Development, "EU Exit and Future UK/EU Development Cooperation" (July 2018).

50 Article 28 of the draft NDICI Regulation.

51 This is set out in the European Commission's Explanatory Memorandum accompanying its legislative proposal.

52 The Nuclear Safety Instrument, which has a different legal basis from the NDICI Regulation, requires the unanimous approval of all EU Member States, and is not subject to co-decision by the European Parliament.

5.37 In December 2018, the European Court of Auditors (ECA) issued a formal Opinion on the proposed NDICI Regulation. The auditors judged that, overall, the proposal "achieves its goals of simplifying the legislative framework of [EU] external action and enhancing flexibility" through the allocation of funding for "emerging challenges and priorities cushion". However, they also warned that by making it easier to carry over unspent money to the following year (which is not possible under EU funding programmes in other areas) "introduces additional legal complexity".[53] The Court therefore called on the Parliament and Member States to assess the impact of greater budget flexibility "against the potential loss of accountability and a diminished responsibility for the management of funds". It also recommended increased use of performance-based approaches to measure the impact of NDICI-funded projects on the ground.[54]

5.38 The European Parliament adopted its position on the objectives of the NDIC Instrument at its Plenary Session on 27 March 2019. This will be its negotiating position in talks with the Member States on the final text of the Regulation. It is likely a number substantive issues will need to be resolved during those, potentially difficult, negotiations. For example, MEPs—while accepting the basic premise of the Commission proposal—want to increase the Instrument's budget by €4 billion to €93.2 billion, while the Member States tend to favour more restraint in EU expenditure.

5.39 The Parliament also proposed to ring-fence funding for specific geographic and thematic programmes differently, reducing the budget for rapid response actions and emerging challenges by €3.7 billion to provide more financing for the thematic programmes on "civil society", "human rights" and "global challenges" in particular. Across the various components of the Instrument, MEPs also want to change specific funding pots for particular objectives. In particular, they suggested an increase in the proportion of NDICI funding that must be spent on Official Development Assistance from 92 to 95 per cent; legally ring-fence 20 per cent of its funding for "social inclusion and human development", such as projects to improve the provision of healthcare and education in developing countries; and require at least 85 per cent of all NDICI-funded projects to have gender equality and women's empowerment as a "principal or significant objective".

5.40 Under the Parliament's proposal, the Commission would also have the power to suspend payments to or in a partner country in cases of "serious or persistent degradation of democracy, human rights and rule of law", subject to the agreement of both the Council and the Parliament.[55] Finally, MEPs also wanted to require the Commission to adopt work programmes—which determine how it spends the NDICI's budget—by Delegated Act, rather than Implementing Act, the two types of statutory instrument under EU law. This is more than a technical adjustment, since the European Parliament can veto the former but not the latter.

5.41 As noted, the final set of negotiations between the Parliament and the Member States on the substance of the NDICI Regulation can only take place when the latter agree on a mandate for the talks. On 20 May 2019, the Minister for Europe and the Americas (Rt Hon. Sir Alan Duncan MP) wrote to the Committee with an update on the

53 It is a general principle in EU budgetary law that funds must be spent in the year for which they are committed. This is referred to as "budgetary annuality".

54 In particular, the ECA recommended broadening the use of performance-indicators from only Neighbourhood Area programmes to all geographic and thematic programmes under the NDICI.

55 Such suspensory measures would be adopted by means of a Delegated Act, which can be vetoed either by the European Parliament or by a qualified majority of Member States.

negotiations. He explained that Member States have divided their internal discussions on the proposed Regulation into thematic "packages" which are discussed separately, including "Governance", "Least Developed Countries" and "Peace Building", with the aim of reaching provisional agreement at official level where possible and highlight areas of contentious for further political guidance. Some weeks later, on 12 June 2019, the Member States adopted their negotiating position for talks with the European Parliament at a meeting of the Committee of Permanent Representatives (COREPER). This will form the basis for negotiations between the Finnish Presidency of the Council with the European Parliament this autumn.

5.42 Within the mandate for negotiations approved by the Member States, no decision has been taken about the inclusion of either the European Development Fund or the Neighbourhood Instrument within the NDICI (or whether those should remain separate, with their own ring-fenced budgets).[56] The possibility of legally-binding targets for Instrument funding to tackle climate change and, most controversially, reduce migration flows into the EU, have also proved contentious. The Member States have so far avoided discussing in detail the overall budget of the NDICI, or the way in which 'third countries'—like the UK after Brexit—could be involved in its operations.[57]

The UK's role in the negotiations

5.43 The Minister's letter of 20 May touched specifically on the UK's position within the negotiations. He noted that, despite the Brexit process, civil servants are "constructively contributing to the working group's discussions" because "the EU with its member states is the world's largest block of development actors and the EU's external actions and development strategies are important to [the UK]". He adds, at this stage, the text of the NDICI Regulation as re-drafted by the Member States "does not include provision for non-member contributors to receive governance rights in pillars to which they have contributed".[58] However, the Minister explains that the other Member State would "allow third country contributors to receive such rights in NDICI's investment pillar" (i.e. if the UK were to contribute to the External Action Guarantee as a non-Member State, it could be represented on the Committee of Member States that oversees the Commission's management of the Guarantee).[59] It is unclear whether the UK would have voting rights on the Committee as a contributing non-Member State.

5.44 Overall, the Minister says, "UK attempts to alter this text to extend third party contributors' governance rights to all the instruments' pillars have so far been unsuccessful" and there is "unlikely to [be] much progress on this" in the immediate future, and indeed

56 Council document 14759/18, containing the so-called 'Negotiating Box' (the most contentious issues) for the 2021–27 Multiannual Financial Framework.

57 The precise budgetary allocation for the Instrument, and the way it is divided between different geographic and thematic priorities, discussions are contingent on overall political guidance from the EU's Heads of State and Government on the total financial allocation for different areas of the EU budget like official development assistance, but also the Common Agricultural Policy and structural funds. The issue of 'third country' participation has been parked for the time being since the UK is still present in the negotiating room while it remains a Member State.

58 The proposed revised legal text of the Regulation as drafted by the Romanian Presidency of the Council is not publicly available.

59 This refers to the elements of the proposal that relate to the EU budget being used as a guarantee against investments or lending by the European Investment Bank in support of the EU's foreign policy objectives, which is currently done via the European Fund for Sustainable Development and the Guarantee Fund for External Action.

no such provisions are contained in the mandate for negotiations adopted by COREPER on 12 June. Although the text of the NIDCI Regulation is not final until it has been agreed jointly by the Parliament and Council, and the Government "continue to pursue this line of action", the Foreign & Commonwealth Office anticipate that "the terms of any possible UK future contribution to NDICI will need to be addressed at future UK-EU talks" (i.e. the negotiations on the post-Brexit relationship).

5.45 We have drawn conclusions about the continued relevance of the NDICI proposal for the UK in paragraphs 7 to 18 above, and have asked the Minister to clarify various elements of the negotiations of particular interest to the Committee.

List of current EU external funding instruments to be amalgamated in the NDICI

5.46 Under the Commission proposal, the six external action programmes listed below would be amalgamated into one legal framework under the NDICI:[60]

- the European Development Fund (EDF), which is the main development assistance vehicle for EU countries' former colonies in sub-Saharan Africa, the Caribbean and the Pacific (the ACP bloc), as well as their existing dependent territories in those regions;[61]
- the European Neighbourhood Instrument (ENI), which supports countries in the EU's 'neighbourhood' (i.e. Eastern Europe, the Near East and North Africa);[62]
- the Development Cooperation Instrument (DCI), the main instrument for funding aid to developing countries covering Asia, Central Asia and Latin America;
- the European Instrument for Democracy and Human Rights (EIDHR), a thematic programme that funds EU activities to support, develop and consolidate democracy in third countries;
- the Instrument contributing to Stability and Peace (IcSP), which funds the EU's rapid response to crisis and instability in developing countries, including limited support for long-term military capacity building;[63] and
- the Partnership Instrument for cooperation with third countries in fields other than development assistance, such as research, climate change and migration.

5.47 In addition, the Regulation would also establish replacements for the functions of two 'financial instrument' programmes where the EU budget is used to provide a guarantee against European Investment Bank (EIB) lending outside the EU in support of the EU's external policies, for example on climate change or migration flows:

60 The European Development Fund and the Neighbourhood Instrument could potentially remain separate, depending on the outcome of the legislative negotiations.

61 From 2021, assistance for the EU's Overseas Countries and Territories would split off from the EDF, and be provided separately under the Overseas Association Decision.

62 There are 16 countries eligible for assistance under the ENI: Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Palestine, Syria, Tunisia and Ukraine.

63 The IcSP operates as a subsidiary or complementary Instrument, meaning that it can only be mobilised in situations where an adequate and effective response cannot be provided by other EU programmes.

- the External Lending Mandate, a mechanism whereby the EU budget acts as guarantee for the European Investment Bank to increase its lending in non-EU countries using the Guarantee Fund for External Actions;[64] and
- the European Fund for Sustainable Development (EFSD) and its Guarantee Fund, which were set up in 2017 to mobilise additional investment for Africa and the EU's neighbourhood with the aim of reducing the economic pressures behind the flows of immigration from those regions to the EU.

5.48 The following EU external instruments would remain separate under the Commission proposal:

- the European Instrument for Nuclear Safety, which will be used to promote the establishment of effective and efficient nuclear safety standards in third countries;
- support for the Overseas Countries and Territories (OCTs) of the Member States, which would be split off from the European Development Fund and provided under a separate Overseas Association Decision;[65]
- the Instrument for Pre-Accession Assistance (IPA), which funds technical assistance to countries which are candidates for accession to the European Union to meet the entry requirements; and
- the Humanitarian Aid Instrument, used to provide "assistance, relief and protection to people affected by natural or manmade disasters and similar emergencies".

Previous Committee Reports

Thirty-eighth Report HC 301–xxxvii (2017–19), chapter 16 (12 September 2018) and Forty-first Report HC 301–xl (2017–19), chapter 3 (24 October 2018).

64 The External Lending Mandate covers EIB activities in pre-accession countries, the Eastern and Southern Neighbourhood, Asia, Latin America and South Africa.

65 References to the British Overseas Territories will be removed from the Overseas Association Decision from the moment EU law ceases to apply to the UK. They would no longer be eligible for support from the European Development Fund or the Neighbourhood, Development & International Cooperation Instrument (whichever is operational at the point where EU law ceases to apply).

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

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee
Document details	(a) Proposal for a Council Decision on the signing, on behalf of the European Union, of a Protocol to the Agreement with Iceland and Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway regarding access to Eurodac for law enforcement purposes (b) Proposal for a Council Decision on the conclusion of a Protocol to the Agreement between the European Community and Iceland and Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway regarding access to Eurodac for law enforcement purposes (c) Proposal for a Council Decision on the signing, on behalf of the European Union, of a Protocol between the European Union, the Swiss Confederation and the Principality of Liechtenstein to the Agreement concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland regarding access to Eurodac for law enforcement purposes (d) Proposal for a Council Decision on the conclusion of a Protocol between the European Union, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland regarding access to Eurodac for law enforcement purposes (e) Proposal for a Council Decision on the signing, on behalf of the European Union, of a Protocol to the Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention extending that agreement to law enforcement (f) Proposal for a Council Decision on the conclusion of a Protocol to the Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention extending that agreement to law enforcement

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

Summary and Committee's conclusions

6.1 Eurodac is an EU database containing the fingerprints of third country nationals who have made an application for asylum within the European Union or who have been apprehended in connection with an irregular border crossing. It forms an integral part of the "Dublin system", a set of EU rules for determining which Member State is responsible for examining an application for international protection. The rules are intended to discourage "asylum shopping" and secondary movements within the EU. All EU Member States participate in Eurodac and the Dublin system. As Denmark has a longstanding opt-out of EU asylum policy (dating back to 1999), its participation is based on an international agreement concluded with the EU.[66] The four non-EU countries participating in the Schengen free movement area—Iceland, Norway, Switzerland and Liechtenstein—have also concluded international agreements with the EU enabling them to take part in Eurodac and the Dublin system.[67] These international agreements pre-date the current Eurodac Regulation which was adopted in 2013 and allows designated national law enforcement authorities and Europol to access the fingerprint data held in Eurodac where necessary to prevent, detect or investigate terrorism or other serious crimes.[68]

6.2 Iceland, Norway, Switzerland, Liechtenstein and Denmark all wish to participate in the provisions of the 2013 Eurodac Regulation on law enforcement access to Eurodac. These provisions are outside the scope of their existing agreements with the EU. The Council authorised the European Commission to negotiate new Protocols to the agreements so that all five countries would be able to access the fingerprint data held in Eurodac for law enforcement as well as asylum purposes. The negotiations have now concluded. The proposed Council Decisions would authorise the EU to sign and conclude the Protocols. They include a recital stating that the UK has opted into the proposed Decisions and will therefore be bound by the Protocols once concluded.

6.3 In his Explanatory Memorandum of 29 January 2019, the Minister for Policing and the Fire Service (Rt Hon. Nick Hurd MP) underlined the Government's strong support for cross-border data sharing to help prevent terrorism and serious crime, subject to appropriate data protection safeguards, and indicated that extending law enforcement access to Eurodac data to Denmark and the four non-EU Schengen associated countries

66 See the Agreement with Denmark, 21 February 2006.

67 See the Agreement with Iceland and Norway, the Agreement with Switzerland and the Protocol extending the Agreement to Liechtenstein 'concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State'

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

would "enhance both their security and ours". He confirmed that the UK's Title V (justice and home affairs) opt-in Protocol applied to the proposed Council Decisions, adding that no decision had yet been taken, despite the recitals indicating the contrary.

6.4 We raised a series of questions in our Report agreed on 6 February 2019 about the application of the UK's Title opt-in Protocol and the prospects for the UK to participate in Eurodac and the Dublin system as a third country after leaving the EU.

6.5 We asked first whether the inclusion in each proposed Council Decision of a recital stating that the UK had opted in was an oversight on the part of the European Commission or reflected a different view on the application of the Title V opt-in Protocol. We also asked the Minister to tell us when the three-month deadline for opting in would expire.

6.6 We noted that the 2013 Eurodac Regulation does not generally provide for the participation of third (non-EU) countries in the Eurodac database, except for those applying the 2013 Dublin (III) Regulation, and prohibits Member States or Europol from transferring personal data obtained from the Eurodac Central System outside the EU. As third country participation in the Dublin Regulation has so far been limited to the four non-EU countries associated with the Schengen rule book on free movement and the removal of internal border controls,[69] we asked the Minister:

- whether he considered that full participation in the Schengen rule book was a necessary pre-condition for participating in the Dublin system and Eurodac database as a third (non-EU) country; and
- whether there was a realistic prospect for the UK to secure an agreement on participation in Dublin and Eurodac, given that the Government has made clear that it has no intention of participating in the Schengen free movement area post-exit.

6.7 We contrasted the aspiration set out in the Government's July 2018 White Paper on *The Future Relationship Between the United Kingdom and the European Union* for a security partnership with the EU post-exit encompassing "a new legal framework to return illegal migrants and asylum-seekers to a country they have travelled through, or have a connection with, in order to have their protection claim considered", underpinned by "access to Eurodac (the biometric and fingerprint database used for evidencing secondary asylum claims) or an equivalent system" and the less specific wording of the November 2018 Political Declaration (accompanying the draft EU/UK Withdrawal Agreement) which refers only to cooperation in tackling illegal migration, whilst recognising the need to protect the most vulnerable. Given the difference in language and tone, we asked the Minister:

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

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

- if the EU were open to UK participation, whether the agreements with Iceland and Norway and with Switzerland and Liechtenstein would provide an appropriate model for the UK in terms of their substance, the governance arrangements and the formula for calculating their contribution to the administrative and operational costs of Eurodac; and
- in the absence of an EU-wide agreement, whether it would be open to the UK to enter into bilateral agreements on the return of irregular migrants or asylum applicants to individual EU Member States in which they have made a prior application for international protection.

6.8 In his letter of 22 May 2019, the Minister apologises for the delay in responding to our questions. He acknowledges that the Council and the UK take a different view on the application of the Title V opt-in Protocol to the proposed Council Decisions:

> […] the Council has confirmed that as these Council Decisions relate to agreements to allow third countries access to an EU tool (the Eurodac Regulation 603/2013) in which the UK currently participates, the Council considers that the UK is automatically bound by the adoption of these Council Decisions and has included a recital in the text along those lines. As you will be aware, the Government disagrees with this position. Nothing in Protocol (No. 21) to the Treaties limits the application of the JHA opt-in in this way. As the measures cite JHA legal bases, it is clear that Protocol (No. 21) applies, and the Government will take opt-in decisions in the usual way.

6.9 The deadline for deciding whether to opt into the proposed Council Decisions expired on 18 March. Despite this, the Decisions authorising the EU to sign the Protocols to the agreements with Iceland and Norway, Switzerland and Liechtenstein, and Denmark were adopted at the Justice and Home Affairs Council on 7/8 March. The Minister explains:

> Due to the Presidency's approach, the Government did not have time to complete its internal opt-in procedures and so did not opt into these Decisions at that time. The UK therefore did not vote on the adoption of the Council Decisions on signature of these agreements.

6.10 The Government did, however, decide to opt into the proposed Council Decisions authorising the EU to conclude the Protocols and notified the Council Presidency of its decision on 15 March. The Council formally adopted the Decisions on 13 May. The UK abstained from voting "due to the outstanding parliamentary scrutiny reserve". The Minister confirms that the UK will be bound by the agreements, as supplemented by the new Protocols, adding:

> […] whilst there are no substantive impacts on the UK, we support wider data sharing for law enforcement purposes. In addition, giving access to EU databases to third countries is potentially useful to the UK in relation to our future security relationship negotiations, and not opting in would potentially leave a lack of legal clarity about the UK's relationship to these states in the context of exchanging data through Eurodac.

6.11 The Minister does not address the specific questions we raised in our earlier Report about the conditions that might apply if the UK were to seek continued participation in

Eurodac and the Dublin system after leaving the EU, in particular some form of association with the Schengen rule book. Instead, he makes clear that the Government "is not seeking third country access to the Dublin Regulation":

> Rather, the UK is seeking to negotiate a new reciprocal returns agreement with the EU to explicitly ensure that third country illegal migrants and asylum seekers can be returned to the country they entered the UK/EU from or have a connection with (for example a student visa). This agreement would be underpinned by a biometric system, such as Eurodac, which would be used to verify travel through or connection to the EU or the UK. This agreement would mirror the EU's readmission agreements with third countries. Underpinning this, agreement with Eurodac would provide a seamless and efficient way of monitoring secondary movements. This would be reflective of the UK's unique geographical position in relation to the EU, and the ongoing need for consistent and continuous messaging to migrants about secondary movements between the EU and the UK. The Government believes that agreeing a new returns relationship would deliver a clear and strong message to migrants that if they make an illegal journey between the EU and the UK, they will be returned and the journey will be wasted.
>
> The UK and the EU have discussed ongoing cooperation on migration and returns; however, agreements in these areas are subject to ongoing negotiations which I am unable to comment on further at this time. The UK and EU will continue to consider the future relationship on the issue of returns throughout the Implementation Period, in a deal scenario. In the absence of an EU-wide agreement, or in a no deal, the UK would seek bilateral agreements with key EU Member States.

Our Conclusions

6.12 **We do not take issue with the reasons given by the Minister for the Government's decision to opt into the proposed Council Decisions authorising the EU to conclude the Protocols to the agreements with Iceland and Norway, Switzerland and Liechtenstein, and Denmark. We nonetheless have substantial concerns about the Government's handling of these documents and its analysis of their wider Brexit implications.**

Compliance with the Government's Code of Practice on Parliamentary scrutiny of justice and home affairs opt-in decisions

6.13 **In the time it has taken the Minister to respond to the questions we raised in our** earlier Report agreed on 6 February 2019 **concerning the application of the UK's Title V opt-in Protocol, the Government has notified the Council Presidency of its decision to opt into the three Council Decisions authorising the EU to conclude the Protocols to the agreements with Iceland and Norway, Switzerland and Liechtenstein, and Denmark and the Decisions have been formally adopted by the Council. The Minister's Explanatory Memorandum of 29 January gave no indication that the Council Presidency was intent on securing swift adoption of the proposals.**

6.14 **It is particularly disappointing that the Minister makes no reference to the Government's Code of Practice on scrutiny of EU justice and home affairs opt-in decisions which includes the following commitments:**

- **to inform the Scrutiny Committees "as soon as possible" of the date on which the three-month opt-in deadline will expire, as well as the eight-week deadline for expressing a view on the opt-in decision;**
- **to inform the Scrutiny Committees of the progress of any negotiations during the three-month opt-in period;**
- **to take account of the views of Parliament when deciding whether to opt in;**
- **to inform the Scrutiny Committees in writing of the Government's decision to opt in "as soon as the Presidency has been notified"; and**
- **to report opt-in decisions to the House in a Written or Oral Ministerial Statement setting out the reasons why the Government believes the decision is in the national interest.**[70]

6.15 **We ask the Minister to explain:**

- **why he has not fulfilled the commitments made by the Government in the Code of Practice;**
- **why his Explanatory Memorandum did not make clear (as his letter does) that the Council does not accept that the UK's Title V opt-in Protocol applies, with the consequence that the Government's opt-in decision is immaterial, as a matter of EU law, in determining whether the UK is bound by the Protocols to the agreements;**
- **whether the UK made a minute statement when the Council Decisions were adopted setting out its position on the application of the Title V opt-in Protocol;**
- **whether the Government intends to challenge the Council's position in the Court of Justice, given the Minister's assertion that "it is clear" that the Title V opt-in Protocol applies;**
- **whether (and if so how) the UK objected to the early adoption of the proposed Council Decisions authorising the EU to sign the Protocols; and**
- **when the Government intends to issue a Written Ministerial Statement informing Parliament of the reasons for its opt-in decisions.**

Future cooperation with the EU on asylum and illegal migration

6.16 **The Minister is clear that the Government "is not seeking third country access to the Dublin Regulation" but will seek to negotiate "a new reciprocal returns agreement with the EU to explicitly ensure that third country illegal migrants and asylum seekers**

70 The Code of Practice forms part of the Government's Guidance for Departments on Parliamentary Scrutiny of European Union Documents.

can be returned to the country they entered the UK/EU from or have a connection with […] underpinned by a biometric system, such as Eurodac, which would be used to verify travel through or connection to the EU or the UK". He adds that the agreement envisaged "would mirror the EU's readmission agreements with third countries".

6.17 **We do not consider it helpful to conflate illegal third country migrants with asylum seekers, not least because the EU operates within a legal framework which draws a clear distinction between the two. Nor do we consider that the Minister has provided a convincing explanation of the type of cooperation that the UK could realistically achieve on asylum outside the Dublin framework. The Dublin Regulation is an internal EU measure establishing a mechanism to transfer asylum seekers from one Dublin-participating State to another as part of a formal process to ensure that there is a single State responsible for examining the merits of an application for international protection made within the EU or wider Schengen area. EU readmission agreements are international agreements entered into by the EU with third (non-EU and non-Schengen) countries. They only apply at the very end of the asylum process, once it has been established that an asylum seeker does *not* qualify for international protection and so does not fulfil the conditions for lawful entry, residence or stay. The agreements do not provide a legal basis for the removal and return of asylum seekers *before* a decision has been reached on the merits of their application for international protection. We therefore do not see how they can provide a suitable model for the type of agreement which the Government appears to envisage.**[71]

6.18 **We noted in our earlier Report that the language on illegal migration in the Political Declaration accompanying the draft EU/UK Withdrawal Agreement does not reflect the scale of the Government's ambition. It offers no prospect of continued cooperation on asylum post-exit. We doubt whether this is an oversight on the part of the EU. The more likely explanation is that cooperation in this area would have to be on standard third country terms, based largely on the provisions of the Dublin Regulation. Third country participation in the Dublin Regulation has so far been limited to the four non-EU countries associated with the Schengen rule book on free movement and the removal of internal border controls.**[72] **The Government has repeatedly underlined its commitment to ending free movement after leaving the EU and made clear that it will not be part of the Schengen free movement area. This makes UK participation in the Dublin Regulation on third country terms highly unlikely. We also consider it unlikely that the EU would allow the UK to continue to access Eurodac data while remaining outside the Dublin system, since the Eurodac database exists primarily as a tool to assist Member States in applying the Dublin rules.**[73]

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71 The more recent EU readmission country agreements expressly provide that they are without prejudice to various international refugee and human rights laws. See Article 18 of the EU/Turkey readmission agreement, Article 17 of the EU/Georgia readmission agreement and Article 2 of the EU/Armenia and EU/Azerbaijan readmission agreements.

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

73 See Article of the 2013 Eurodac Regulation which provides: "A system known as Eurodac is hereby established, the purpose of which shall be to assist in determining which Member State is to be responsible pursuant to Regulation (EU) 604/2013 for examining an application for international protection lodged in a Member State by a third country national or a stateless person …"

6.19 **We ask the Minister whether he agrees with our analysis. We also ask him to address directly the question raised in our earlier Report when we asked whether he considered full participation in the Schengen rule book to be a necessary pre-condition for participating in the Dublin system and Eurodac database as a third (non-EU) country.**

6.20 **The Minister indicates that the Government will seek bilateral agreements with key EU Member States if the UK is unable to secure an EU-wide agreement or leaves the EU without a deal. We ask him whether the Government has broached with the EU the possibility of a "reciprocal returns agreement" to take effect after the UK leaves the EU or approached individual EU Member States to scope out the terms of a bilateral agreement.**

6.21 **Although the proposed Council Decisions have been adopted, we intend to keep them under scrutiny pending a full explanation from the Minister for the shortcomings in the scrutiny process and a clearer analysis of the prospects for future cooperation with the EU on asylum and returns. We draw this chapter to the attention of the Home Affairs Committee.**

Full details of the documents

(a) Proposal for a Council Decision on the signing, on behalf of the European Union, of a Protocol between the European Union, the Republic of Iceland and the Kingdom of Norway to the Agreement between the European Community and Iceland and Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway regarding access to Eurodac for law enforcement purposes: (40276), 15658/18, COM(18) 827; (b) Proposal for a Council Decision on the conclusion of a Protocol between the European Union, the Republic of Iceland and the Kingdom of Norway to the Agreement between the European Community and Iceland and Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway regarding access to Eurodac for law enforcement purposes: (40277), 15653/18 + ADD 1, COM(18) 826; (c) Proposal for a Council Decision on the signing, on behalf of the European Union, of a Protocol between the European Union, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland regarding access to Eurodac for law enforcement purposes: (40278), 15638/18, COM(18) 831; (d) Proposal for a Council Decision on the conclusion of a Protocol between the European Union, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland regarding access to Eurodac for law enforcement purposes: (40279), 15626/18 + ADD 1, COM(18) 828; (e) Proposal for a Council Decision on the signing, on behalf of the European Union, of a Protocol to the Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin

Convention extending that agreement to law enforcement: (40290), 15680/18, COM(18) 836; and (f) Proposal for a Council Decision on the conclusion of a Protocol to the Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention extending that agreement to law enforcement: (40291), 15676/18 + ADD 1, COM(18) 835.

Previous Committee Reports

Fifty-fourth Report HC 301–liii (2017–19), chapter 6 (6 February 2019).

7 EU structural funds post-2020

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; further information requested; drawn to the attention of the Health and Social Care Committee, the Welsh Affairs Committee, the Scottish Affairs Committee and the Northern Ireland Affairs Committee
Document details	(a) Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument; (b) Proposal for a Regulation of the European Parliament and of the Council on the European Regional Development Fund and on the Cohesion Fund; (c) Proposal for a Regulation of the European Parliament and of the Council on the European Social Fund Plus (ESF+); (d) Proposal for a Regulation of the European Parliament and of the Council on specific provisions for the European territorial cooperation goal (Interreg) supported by the European Regional Development Fund and external financing instruments.
Legal base	(a) Articles 177, 322(1)(a) and 349, TFEU (b) Articles 177, 178 and 349, TFEU (c) Articles 46(d), 149, 153(2)(a), 164, 168(5), 175(3) and 349, TFEU (d) Articles 178, 209(1), 212(2) and 349 TFEU; Ordinary legislative procedure; QMV
Department	Business, Energy and Industrial Strategy
Document Numbers	(a) (39801), 9511/18 + ADD 1, COM(18) 375; (b) (39807), 9522/18 + ADDs 1–2, COM(18) 372; (c) (39808), 9573/18 + ADDs 1–2, COM(18) 382; (d) (39811), 9536/18 + ADD 1, COM(18) 374

Summary and Committee's conclusions

7.1 The EU's European Structural and Investment (ESI) Funds[74] aim to reduce economic, social and regional disparities across the EU, and to address the impacts of migration. In line with proposals for EU financing—the Multiannual Financial Framework (MFF)—from 2021 until 2027 inclusive, the Commission has proposed revised rules governing the ESI Funds for that period.

74 European Regional Development Fund (ERDF), European Social Fund Plus (ESF +), Cohesion Fund (CF), European Maritime and Fisheries Fund (EMFF), Asylum and Migration Fund, Internal Security Fund and the Instrument for Border Management and Visa.

7.2 The UK does not expect to participate in the Funds over the period 2021–27, with the possible exception of the European Territorial Cooperation (ETC) programmes, health elements of the European Social Fund and the asylum and migration-related programmes.

7.3 We set out further details on the proposals in our Report of 5 September[75] and we reported again on the ETC programme on 17 October.[76] The ETC goal of the ESI Funds (otherwise known as "Interreg"—inter-regional cooperation) is a long-established strand, designed to promote regional cooperation across borders within the EU. It includes the PEACE PLUS Programme, specifically designed to support cooperation across the Irish border.

7.4 We granted a scrutiny waiver at our meeting of 21 November 2018 in order that the Government could support a partial general approach at the 30 November Council meeting. We noted that our earlier requests for information on the progress of negotiations and on progress in determining future UK engagement remained outstanding.

7.5 The Parliamentary Under-Secretary of State (Lord Henley) has since written three times to update the Committee on the progress of negotiations. Discussions have taken place on the separate proposals concerning the European Regional Development Fund (ERDF), European Social Fund Plus (ESF+) and the ETC Regulation, as well as the Common Provisions Regulation (CPR)—which sets out provisions covering all of the ESI Funds. The CPR negotiation has been broken down into seven blocks.

7.6 In his letter of 12 January, he explained that agreement was reached on two elements of the CPR: Block 1 (Programming and Strategic Planning); and Block 5 (Management and Control). The Government supported the partial general approach in order to send a positive signal to other Member States regarding the UK's continued commitment to the PEACE PLUS Programme under the next MFF.

7.7 In his most recent update,[77] of 5 June 2019 (which supersedes that of 29 April), he requests that the Committee waive the scrutiny reserve in advance of agreement at the 25 June General Affairs Council.

7.8 The Minister summarises the negotiations thus far. Since the partial general approach, Member States have agreed on Block 2 (Enabling Conditions and Performance Framework), Block 3 (Monitoring, evaluation, communication & visibility), Block 4 (Financial support from the funds) and Block 6 (Financial Management) of the CPR, as well as the fund-specific Regulations for the ERDF and ESF+.

7.9 Ahead of the Council, there remain two elements of the package up for discussion: Block 7 (Subject matter and definitions & final provisions) of the CPR and the full ETC Regulation, which includes the future PEACE PLUS programme between Northern Ireland and Ireland. Agreement on these texts is expected and the UK is seeking to vote in favour of the whole ESI Funds legislative package at the Council. The Minister believes that voting in favour will send further positive signals to other Member States and the European Commission that the UK intends to honour its commitment to take part in the future PEACE PLUS programme.

75 Thirty-seventh Report HC 301–xxxvi (2017–19), chapter 2 and chapter 3 (5 September 2018).
76 Fortieth Report, HC 301–xxxix (2017–19), chapter 1 (17 October 2018).
77 Letter from Lord Henley to Sir William Cash MP, dated 5 June 2019.

7.10 In addition, says the Minister, the UK has an interest in the future ETC programme as a whole, beyond PEACE PLUS. While no decisions have yet been made on the UK's potential participation in this cross-border programme, the proposed text and the amendments which were made to it are favourable to, or have no significant impact on, the UK. As a result, the UK would also seek to support this element of the proposed legislative package.

7.11 Amendments that have been made since the original ETC text that are positive for the UK include the addition of references to regional organisations, which would facilitate the participation of UK Devolved Administrations in the programme. Another positive example is that the "interregional innovation investments" strand of ETC has been opened up to third countries including the UK, thus aligning the ETC programme further with domestic priorities such as increasing support to innovation.

7.12 In addition, says the Minister, the Government has continued to express an interest in continued participation in the Health strand of ESF+. The proposal for the Health strand as it stands allows for UK participation as a third country under a bilateral agreement. It is envisaged that the UK will continue to influence the Health strand while the UK remains a Member State. The UK does not expect, however, to take part in other aspects of the ESF+, nor in the ERDF.

7.13 **We note that the UK remains committed to post-2020 participation in the future PEACE PLUS Programme, as well as wider participation in European Territorial Cooperation and in the Health strand of the future European Social Fund Plus (ESF+). The UK does not, though, intend to participate in other aspects of either the ESF+ or the European Regional Development Fund post-2020.**

7.14 **The Minister's summary of the negotiation is very helpful. On future UK participation in certain aspects of these Programmes, we are aware that third country participation in all Programmes under the Multi Annual Financial Framework is being negotiated separately.**

7.15 **We are content to clear this package of documents from scrutiny and look forward to an update on further progress after the General Affairs Council and once negotiations with the European Parliament are underway. In the meantime, we request an update by 3 July on preparations for the UK's new Shared Prosperity Fund—the domestic replacement for the structural funds post-Brexit. Given the interest shown by the Government in future participation in the Health strand of the ESF+ and in inter-territorial cooperation, we draw this chapter to the attention of the Health and Social Care Committee, the Welsh Affairs Committee, the Scottish Affairs Committee and the Northern Ireland Affairs Committee.**

Full details of the documents

(a) Proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument: (39801), 9511/18 + ADD 1, COM(18) 375; (b) Proposal for a Regulation of the European Parliament and of

the Council on the European Regional Development Fund and on the Cohesion Fund: (39807), 9522/18 + ADDs 1–2, COM(18) 372; (c) Proposal for a Regulation of the European Parliament and of the Council on the European Social Fund Plus (ESF+): (39808), 9573/18 + ADDs 1–2, COM(18) 382; (d) Proposal for a Regulation of the European Parliament and of the Council on specific provisions for the European territorial cooperation goal (Interreg) supported by the European Regional Development Fund and external financing instruments: (39811), 9536/18 + ADD 1, COM(18) 374.

Previous Committee Reports

Forty-fifth Report, HC 301–xliv (2017–19), chapter 2 (21 November 2018); Fortieth Report, HC 301–xxxix (2017–19), chapter 1 (17 October 2018); Thirty-seventh Report HC 301–xxxvi (2017–19), chapter 2 and chapter 3 (5 September 2018).

8 Water reuse for agricultural irrigation

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; further information requested
Document details	Proposal for a Regulation of the European Parliament and of the Council on minimum requirements for water reuse.
Legal base	Article 192(1) TFEU, QMV, Ordinary legislative procedure
Department	Environment, Food and Rural Affairs
Document Number	(39791), 9498/18 + ADDs 1–3, COM(18) 337

Summary and Committee's conclusions

8.1 Water over-abstraction, in particular for agricultural irrigation but also for industrial use and urban development, is one of the main threats to the EU water environment. One way in which water scarcity could be alleviated is through greater water re-use, particularly for agricultural irrigation. At the moment, however, there is limited water re-use due to the lack of common EU environmental or health standards for water re-use and the potential obstacles to the free movement of agricultural products irrigated with reclaimed water. The Commission therefore proposed a set of minimum requirements for water re-use in order to establish a safe framework within which water re-use can develop.

8.2 We considered the proposal and the Government's Explanatory Memorandum at our meeting of 27 June 2018.[78] We noted that the UK might be obliged to transpose the legislation during any extended post-Brexit implementation period and that the legislation might facilitate post-Brexit UK-EU trade in crops irrigated with reused water. We retained the proposal under scrutiny and requested the Government's further assessment of the potential impact and desirability of this draft legislation.

8.3 The Parliamentary Under-Secretary of State (Dr Thérèse Coffey MP) has responded,[79] setting out the state of the negotiations and the Government's position.

8.4 She explains that the 26 June Environment Council will be invited to adopt a General Approach on this file and she therefore asks us to consider clearing the proposal from scrutiny. Based on the latest compromise text available, she notes that the main amendments proposed are:

- to limit the impact of the proposal on those Member States with no plans for reuse; and
- to clarify activities to be covered in water reuse risk management plans and roles and responsibilities in implementation and compliance checks.

8.5 Other changes the Presidency has proposed include the removal of Article 7 which set detailed rules around the granting of permits in order to give Member States flexibility

78 Thirty-third Report HC 301–xxxii (2017–19), chapter 3 (27 June 2018).
79 Letter from Dr Thérèse Coffey MP to Sir William Cash MP, dated 23 May 2019.

in their implementation of the proposal and the removal of Article 12 on access to justice, as this duplicated existing legal requirements. The Presidency is also proposing that the Regulation would apply four years after entry into force (rather than one year as proposed by the Commission). Some of the amendments proposed by the European Parliament (EP), particularly in the areas of risk management and compliance, are reflected in the compromise text. The EP, however, proposed that the Regulation should apply two years after its entry into force. That will therefore be an area in which the two institutions will need to resolve their difference.

8.6 The Government has consulted stakeholders on the proposal. Of the responses received, says the Minister, stakeholders expressed support in principle for the aims of the proposal in seeking to alleviate water scarcity and for the promotion of reuse for agricultural irrigation. Most commented on the need to ensure that roles and responsibilities under the proposal were clear and straightforward and that any burdens on end users were minimised if the objective of increasing reuse was to be achieved.

8.7 The Minister indicates that water companies are considering reuse as part of their long-term water resource management plans, drawing on European and global experiences of such schemes. The focus of reuse schemes within the UK is currently for drinking water purposes. So, although the Government would expect the level of reuse to increase within the UK in the future, it will likely be for purposes not within the scope of this legislation.

8.8 Regarding the regulatory burden on Member States, the Government envisages that costs associated with permitting and monitoring would be recovered in line with existing arrangements for permitting within the UK. The Government is satisfied that the detailed arrangements for permitting and charging set out in the draft Regulation allow Member States to decide how best to implement the proposal.

8.9 In general, the UK continues to support the intention to promote waste water reuse for agricultural purposes, within the context of future water scarcity. The UK has supported most of the Presidency amendments as they reflect the UK's negotiating priorities for a clear framework for permitting and compliance checks, for minimising burdens on Member States and for minimising any duplication in the proposal with existing EU law and international conventions.

8.10 **We note the proposal that the deadline for application of the Regulation be extended from one year to four years but that the European Parliament has proposed two years. That being the case, and given that the EP and Council have yet to negotiate a final position, it remains possible that the deadline will fall within a post-Brexit transition period extended until 31 December 2022.**

8.11 **We thank the Minister for her summary of the progress to date. Given the Government's support for the legislation, including the amendments proposed by the Presidency, we are content to clear the proposal from scrutiny ahead of the Environment Council. We look forward to an update after the Council confirming the position and setting out the prospects for agreement with the European Parliament.**

Full details of the documents

Proposal for a Regulation of the European Parliament and of the Council on minimum requirements for water reuse: (39791), 9498/18 + ADDs 1–3, COM(18) 337.

Previous Committee Reports

Thirty-third Report HC 301–xxxii (2017–19), chapter 3 (27 June 2018).

9 Brexit preparedness: UK participation in Erasmus in the event of a "no deal" exit

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Education Committee
Document details	Proposal for a Regulation laying down provisions for the continuation of ongoing learning mobility activities under the Erasmus+ programme in the context of the UK's withdrawal from the European Union
Legal base	Articles 165(4) and 166(4) TFEU, ordinary legislative procedure, QMV
Department	Education
Document Number	(40351), 5892/19, COM(19) 65

Summary and Committee's conclusions

9.1 The proposed Regulation is one in a series of contingency measures put forward by the European Commission earlier this year to prepare for the UK leaving the EU without a deal. Its purpose is to ensure that certain activities funded by the EU's Erasmus+ programme which will be underway on exit day are not brought to an abrupt end. The current Erasmus+ programme for education, training, youth and sport runs from 2014–20 and provides EU funding for three types of action:

- learning mobility;
- cooperation on innovation and the exchange of good practice; and
- support for policy reform.

9.2 The proposed Regulation would only apply to the learning mobility activities set out in Articles 7 and 13 of the 2013 Erasmus+ Regulation.[80] These enable participants (primarily students, trainees, teaching staff and young people involved in volunteer or youth work) to pursue their education and learning in another Member State or participating country. The European Commission estimates that there are likely to be around 14,000 Europeans from other EU Member States studying, training, teaching, volunteering or participating in youth exchanges in the UK on exit day—originally expected to be 29 March 2019—and around 7,000 individuals from the UK involved in Erasmus activities in the remaining 27 EU Member States.[81] The proposed Regulation would guarantee funding for these participants (and the institutions sending and hosting them). As it is a contingency measure, designed to be "temporary in nature and limited in scope", the European Commission has made clear that it is intended only to safeguard the position

80 Regulation (EU) No 1288/2013.

81 See p.1 of the Commission's explanatory memorandum accompanying the proposed Regulation.

of those already abroad on an Erasmus-funded project on exit day.[82] The Commission has proposed a separate contingency measure to enable the UK to participate in the current Erasmus+ and other EU programmes for the remainder of 2019, but participation would be contingent (amongst other things) on the UK making a formal commitment to continue paying into the 2019 EU budget and applying EU controls and audits of expenditure.[83]

9.3 The Minister for Universities, Science, Research and Innovation (Chris Skidmore MP) confirmed in his Explanatory Memorandum of 18 February 2019 that the proposed Regulation would only take effect if the UK were to leave the EU without an exit deal. It would avoid any disruption to learning mobility activities which were "ongoing at the time of the UK's withdrawal from the EU and started before the exit date". It would not cover calls or bids for funding in 2019 or 2020. He indicated that the Government would seek to clarify the scope of the proposed Regulation, since it was unclear whether the proposal would extend to mobility projects under the European Solidarity Corps (a pool of young people who volunteer to take part in projects of community benefit), as well as the financial implications. He noted also that the proposal would overlap with, but was narrower in scope than, the Government guarantee which will cover all elements of the Erasmus+ programme and the European Solidarity Corps and ensure the payment of awards to UK organisations that have submitted a successful bid for funding to the European Commission before the UK's exit from the EU, even if the grant agreements are only signed post-exit.[84] For the guarantee to be effective, the Minister recognised that the UK would need to reach an agreement with the EU on the UK's continued participation in Erasmus+ or engage directly with individual Member States in which partner organisations are based. He anticipated that a Statutory Instrument would be necessary to give domestic legal effect to the Regulation in the UK post-exit.

9.4 Recognising the benefits of the proposed Regulation for individuals participating in an Erasmus-funded activity in the event of a "no deal" exit from the EU, we granted a scrutiny waiver to enable the Government to support its adoption. We asked the Minister to report back to us following its adoption by the Council to explain how the UK voted and to respond to the questions raised in our Report agreed on 13 March 2019 which asked:

- whether the proposed Regulation would apply only to those already abroad at the time of a "no deal" exit or whether it would also encompass activities for which funding had been agreed by exit day but which had not yet begun;
- whether the Government accepted that the UK should continue to be bound by EU rules on the control and audit of expenditure in the event of a no deal exit, how long they were likely to apply, and what consequence there would be for UK beneficiaries of Erasmus+ funding if the European Commission were to determine that there was a serious deficiency in the UK's application of the rules;

82 See the press release issued by the European Commission on 30 January 2019 and its fact sheet on the impact of Brexit on the Erasmus+ programme.

83 See our Fifty-ninth Report HC 301–lvii (2017–19), chapter 6 (13 March 2019) and our Sixty-second Report HC 301–lx (2017–19), chapter 1 (3 April 2019) on Brexit: UK contributions to the EU budget in 2019 in a 'no deal' scenario.

84 See the guidance issued by the Government on 29 January 2019: Erasmus+ in the UK and the European Solidarity Corps (ESC) if there's no Brexit deal.

- what assessment the Government had made of the funding gap between Erasmus+ activities covered by the proposed Regulation (which would be funded from the EU budget) and those covered by its own Erasmus+ guarantee (which would have to be funded by the Exchequer);
- whether the 2013 Erasmus+ Regulation had been (or would soon be) revoked with effect from exit day; and
- whether a Statutory Instrument would be necessary both to give effect to the proposed Erasmus+ contingency Regulation and to implement the Government's guarantee.

9.5 In his letter of 6 June 2019,[85] the Minister confirms that the Regulation was adopted by the Council on 19 March.[86] The UK abstained and asked the Council to note the minute statement made at an earlier Committee of Permanent Representatives (COREPER) meeting reiterating the Government's position that all Brexit-related EU contingency measures should apply to Gibraltar if Gibraltar had previously been covered by the relevant area of EU law. The Regulation itself makes no reference to Gibraltar but other Brexit EU contingency measures have done so. The Minister says that the UK has "consistently set out its position on Gibraltar across the span of EU contingency measures".

9.6 As the European Commission has yet to provide further advice to Erasmus+ participants or national administering agencies on how they will be affected by the Regulation, the Minister says he is unable to respond fully to all our questions. Taking each in turn, the Minister:

- reiterates his understanding that "the Regulation would only apply to those individuals already abroad at the time of a 'no deal' exit" and "would not encompass activities for which funding may have been agreed before exit day, but which have not yet begun";
- says that the Government has not been able to engage the European Commission in a discussion on the EU rules on control and audit and their implications for the UK but will continue to use "every available channel to seek clarity on this, and other details about the Regulation";
- indicates that the Government is "unable to provide a full assessment" of any shortfall in funding resulting from the different scope of the Regulation and the Government's own Erasmus+ guarantee until it has "further details on the full scope of the Commission's Regulation and how this would be administered"; and
- advises that he wrote to the (former) Chair of the Parliamentary Business and Legislation Committee (Rt Hon Andrea Leadsom MP) on 7 March to set out the Government's intention to "keep Erasmus+ on the statute book for the purpose of contingency arrangements in the event of 'no deal', and to allow more time to resolve the question of future participation in Erasmus+".

85 Letter from Chris Skidmore MP to Sir William Cash MP, dated 6 June 2019.
86 Regulation (EU) 2019/499.

Our Conclusions

9.7 **The Erasmus+ contingency Regulation will not be affected by delays in the UK's exit from the EU as it will only apply on "the day following that on which the Treaties cease to apply to the United Kingdom pursuant to Article 50(3) TEU".[87] The delays do mean, however, that some uncertainty remains as to the precise scope of the Regulation, how it will be administered, how long the UK will be bound by EU rules on the control and audit of expenditure after a "no deal" exit from the EU and how much of a funding gap the Government may have to make up under the terms of its Erasmus+ funding guarantee. We note also the Government's intention to "keep Erasmus+ on the statute book", not only to ensure that the "no deal" contingency arrangements set out in the Regulation can be implemented, but to allow more time to consider future UK participation in the Erasmus+ programme.**

9.8 **As the Regulation has been adopted and, it seems, no further changes will be necessary to take account of the existing (and any future) delay in the Brexit process, we clear it from scrutiny but draw our observations to the attention of the Education Select Committee in the expectation that they will wish to keep a close eye on developments.**

Full details of the documents

Proposal for a Regulation laying down provisions for the continuation of ongoing learning mobility activities under the Erasmus+ programme in the context of the withdrawal of the United Kingdom of Great Britain and Northern Ireland ("United Kingdom") from the European Union: (40351), 5892/19, COM(19) 65.

Previous Committee Reports

Fifty-ninth Report HC 301–lvii (2017–19), chapter 3 (13 March 2019). See also our earlier Reports on the proposed Regulation establishing a successor Erasmus programme for the years 2021–27: Thirty-seventh Report HC 301–xxxvi chapter 13 (5 September 2018) and Forty-fourth Report HC 301–xliii (2017–19), chapter 7 (14 November 2018).

87 Article 4 of the Regulation.

10 EU sanctions regime for cyber-attacks

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Digital, Media, Culture & Sport Committee, the Defence Committee and the Foreign Affairs Committee
Document details	(a) Council Decision (CFSP) 2019/797 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States; (b) Council Regulation (EU) 2019/796 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States.
Legal base	(a) Article 29 TEU; unanimity; (b) Article 215 TFEU; QMV
Department	Foreign and Commonwealth Office
Document Numbers	(a) (40581),—; (b) (40582),—

Background and Committee's conclusions

10.1 An increasing reliance of modern economies and societies on digital systems and infrastructure has made them more susceptible to disruption from cyber-attacks. Such threats emanate not only from individuals or organisations with commercial motives, but can also be directed by foreign governments as a form of hybrid warfare.

10.2 For example, involvement of foreign companies in the roll-out of new 5G mobile telecommunications infrastructure across Europe has been singled out as a vulnerability, and a source of potential economic and political disruption.[88] The European Commission has therefore urged EU countries to consider carefully whether to allow foreign companies—especially Chinese firm Huawei—to control such systems, or have access to its security-sensitive components. The revelations in October 2018 that the Dutch Government had expelled four Russian undercover operatives after they tried to hack into the systems of the Hague-based Organisation for the Prevention of Chemical Weapons (OPCW) also underline the political motivations that can drive state-sponsored cyber-attacks or interference.[89] Russia is also widely held responsible for interference in democratic processes of other countries, including by hacking into the computer systems of candidates during elections, and may be behind the recently-revealed hacking of the EU's delegation in Moscow.[90]

10.3 In recent years, the EU has already adopted several pieces of legislation in defence of its Member States' digital infrastructure. A new Cyber-Security Act, due to take effect in 2021, will create a new cyber-security certification framework to enhance the protection of digital products and services sold within the EU. The Member States have also agreed

88 European Commission document JOIN(2019) 5.

89 The attempted hacking of the OPCW in autumn 2018 was itself triggered by the organisation's investigation into the Russian chemical attack in Salisbury in March 2018. In September, the Prime Minister (Theresa May) had already told the House of Commons that the Russian Government had "mounted a sustained campaign of cyber espionage and election interference".

90 Buzzfeed News, "The EU Found Out That Its Embassy In Moscow Had Been Hacked But Kept It A Secret" (5 June 2019).

a new Regulation on screening of foreign direct investment, which aims to prevent non-EU countries from building up ownership of critical infrastructure or assets in a way that poses a security risk. In addition, a proposal is under consideration in Brussels to modernise the EU's Export Control Regulation, allowing Member States to halt the sale of cyber-security and surveillance technology to non-EU countries where such equipment could be used against Europe.

10.4 Since 2017, the EU's Member States have also been formally considering the use of sanctions under the Common Foreign & Security Policy against perpetrators of cyber-attacks as a deterrent. In June that year, the EU's Foreign Affairs Ministers—including then-Foreign Secretary Boris Johnson—unanimously agreed a "Cyber Diplomacy Toolbox" to underpin their collective diplomatic response to instances of malicious cyber-activities.[91] This envisaged the possibility of "restrictive measures"—like travel bans and asset freezes—as a way of "encouraging cooperation, facilitating the mitigation of immediate and long-term threats, and influencing the behaviour of potential aggressors in the long term". Any such sanctions, the Ministers said, would need to "take into account the broader […] relations" with the country from where the cyber-attack was carried out, and be proportionate to its "scope, scale, duration, intensity, complexity, sophistication and impact". Crucially, as a foreign policy measure, any restrictive measures would ordinarily need to be approved unanimously by all Member States.[92]

10.5 As part of the Cyber Diplomacy Toolbox, the European External Action Service (EEAS) was asked to produce a draft legal framework for the imposition of sanctions for cyber-attacks within the parameters set out by Ministers. On 5 September 2018, the Prime Minister (Rt Hon Theresa May MP) told the House of Commons that the Government was actively pushing for "new EU sanctions regimes against those responsible for cyber-attacks and gross human rights violations", citing Russia's "sustained campaign of cyber espionage and election interference" as a particular source of concern. In October 2018, the European Council—composed of the EU's Heads of State and Government—reiterated that further action to strengthen its "deterrence and resilience" against cyber threats was needed, again calling for a new legal framework to impose EU-wide sanctions on the perpetrators of such attacks.

The new EU sanctions framework against cyber-attacks

10.6 The EEAS circulated a discussion paper with options for a new sanctions framework in November 2018.[93] Following informal negotiations, by early March 2019 these had been turned into draft legal acts—a Council Decision and Regulation—that would allow

91 This was at the Foreign Affairs Council of 19 June 2017. The Member States noted at the time their "concerns about the increased ability and willingness of State and non-State actors to pursue their objectives by undertaking malicious cyber activities and affirmed the growing need to protect the integrity and security of the Union, its Member States and their citizens against cyber threats and malicious cyber activities".

92 The legal framework for sanctions regimes are adopted on the legal basis of Article 29 TEU (which requires the unanimous agreement of all Member States), but amendments to listings under sanctions regimes—once established by unanimity—could in theory be done by Qualified Majority under Article 31(2) TEU. In October 2018, the European Commission proposed that Member States should start adopting sanctions under the Common Foreign & Security Policy by Qualified Majority rather than by unanimity. There appears to have been little appetite for this among Member State Governments.

93 Council document 14377/18 (not publicly available).

the Member State to impose restrictive measures in response to cyber-attacks under the Common Foreign & Security Policy.[94] They were ultimately adopted by the Foreign Affairs Council on 17 May 2019, and published in the Official Journal the same day.

10.7 Under the new sanctions regime, the Member States in the Council can impose restrictive measures in the form of an EU-wide asset freeze and travel ban imposed against persons and entities who are responsible for cyber-attacks or attempted cyber-attacks,[95] and those who provide them with "financial, technical or material support" or are otherwise "involved in […] planning, preparing, participating in, directing, assisting, or encouraging such attacks, or facilitating them whether by action or omission". The restrictive measures could also be invoked against those "associated with" any person or entity that fall into those categories. While of course primarily aimed at attacks against EU Member States, the legal framework also allows the EU to apply sanctions in response to "cyber-attacks with a significant effect against third States or international organisations". That would include the UK after it leaves the European Union.

10.8 As is usual practice, the new legislation only provides the overall legal framework for restrictive measures; it does not currently list any specific persons or entities against whom the sanctions apply. Article 6 of the Council Decision provides that the Member States "acting by unanimity" can impose sanctions on persons and organisations by listing them in the annex to the legislation. While EU law continues to apply in the UK, any proposals to make such changes would be subject to parliamentary scrutiny via this Committee in the usual way. Those listed will be able to challenge the sanctions applied to them before the General Court of the European Union. It is unclear at this stage when the first listings under the new sanctions framework may take place.

10.9 In addition, mindful of the potential diplomatic impact of sanctions being imposed on nationals of a particular non-EU country, the legal acts specify that its "targeted restrictive measures" should not be construed as an "attribution of responsibility for cyber-attacks" to a particular Government. Such attribution, it says, remains a "sovereign political decision taken on a case-by-case basis [by] every Member State". While the legislation therefore does not refer to any specific countries considered responsible for directing cyber-attacks against Europe, Russia is clearly a likely target for sanctions under the new regime. Similarly, the European Commission's March 2019 strategy paper on China also pointedly referred to the threat of Chinese firm Huawei exploiting "vulnerability in 5G networks […] and digital infrastructure", and drew attention to the then on-going negotiations on the new sanctions framework without explicitly naming the Chinese Government as being responsible for cyber-attacks.

10.10 The new sanctions framework will remain in force for at least 12 months, until 18 May 2020, after which it would need to be extended by a further unanimous Decision of the remaining Member States (the UK being due to withdraw as a Member State on 31 October 2019). If it is not extended, any sanctions applied under it would expire automatically.

94 The new sanctions framework would complement the recent EU restrictive measures against perpetrators of chemical attacks, and the Union's more traditional restrictive measures that already apply against countries including Russia, Syria and North Korea.

95 Cyber-attacks are defined in the legislation as "actions involving […] access to information systems; information system interference; data interference; or data interception where such actions are not duly authorised by the owner or by another right holder of the system or data or part of it, or are not permitted under the law of the Union or of the Member State concerned".

The Government's position

10.11 The Foreign & Commonwealth Office submitted the new sanctions framework for parliamentary scrutiny on 23 May 2019, after the legislation had already been adopted, accompanied by an Explanatory Memorandum.

10.12 In this Memorandum, the Minister for Europe and the Americas (Rt Hon Alan Duncan MP) welcomes the restrictive measures, calling it "an important step forward in responding to and deterring cyber-attacks". Saying that the Member States had recognised "the threat posed and importance of standing together", they had "acted at speed to deliver the […] regime" that "will assist us in collectively defending against cyber threats". Adding that "hostile actors have been threatening the EU's security through disrupting critical infrastructure, stealing commercial secrets and stealing money running to billions of Euros", the Minister notes the Government is pushing for travel bans and asset freezes to be introduced speedily "against those we know have been responsible for these actions".

10.13 In a separate letter, the Minister apologised for the fact the new sanctions framework was deposited for scrutiny after its adoption (meaning Parliament had no opportunity to assess the legal or political importance of this new EU approach before it had already become law). He explained that "technical discussion around this regime has been complex", meaning the legal texts were only finalised—and therefore available for deposit in Parliament—after a meeting on 13 May 2019. He noted that, "unfortunately, due to time constraints, undertaking pre-adoption parliamentary scrutiny would mean the UK delaying the adoption of this important regime", which the Government did not want to do considering its strong political support for the new policy.

Our assessment

10.14 **We thank the Minister for the information he has provided on the EU's new sanctions regime against cyber-attacks, which makes clear the Government's strong support for the new legal framework.**

10.15 **We note that no specific persons or entities are listed under the new regime at this time, and ask that proposals for new listings are submitted for parliamentary scrutiny in a timely way in due course. At this stage, it is difficult to judge the likely effectiveness of the new regime and how comprehensively it will be applied. In particular, it remains to be seen if any Chinese nationals or organisations will be targeted, given that the Member States must still unanimously agree to the imposition of sanctions on specific people and organisations and will be mindful on the diplomatic repercussions of doing so.[96] As with the parallel EU sanctions regime against perpetrators of chemical attacks, the listing process is therefore likely to remain politically charged.[97]**

10.16 **The Minister in his letter also highlights the importance of European countries "standing together" to address the risks posed by cyber-attacks. However, the UK**

96 The European Commission recently suggested the European Council should take a decision under a so-called "passerelle" clause in the Treaty to allow EU sanctions regimes to be adopted and amended by Qualified Majority. We are awaiting an Explanatory Memorandum from the Foreign Office on this Commission document, and plan to make a Report to the House in due course.

97 For example, it was reported in September 2018 that the new Italian Government had blocked the addition of a new name to the EU's sanctions regime targeting those responsible for Russia's annexation of Crimea in Ukraine.

is currently in the process of withdrawing from the European Union and will, as a consequence, cease to have formal input into EU sanctions under the Common Foreign & Security Policy once it is no longer a Member State. By extension, after EU law ceases to apply in the UK,[98] the Government would also no longer be bound to apply restrictive measures agreed in Brussels. The full implications of this shift, including for the Government's ability to coordinate coherent sanctions with its EU partners—especially against larger countries like Russia and China—will take some time to become apparent. The Committee will continue to monitor the discussions on the future UK-EU relationship in the field of foreign policy closely, and may assess the implications of any new institutional architecture in this area for the autonomy of UK foreign policy.

10.17 **We have also taken note of the Minister's explanation of the submission of this new EU legislation for parliamentary scrutiny only after it had already been agreed by the Council and taken effect. We underline again the importance of this Committee being able to assess, on behalf of the House of Commons, the legal and political implications of new EU laws before they are adopted. That applies equally to important new proposals under the Common Foreign & Security Policy that are not in the public domain before they are formally adopted by Ministers; the Government can, and should, in those cases keep the Committee informed of relevant developments by means of correspondence before formal deposit of the finalised CFSP legislation for scrutiny takes place.[99] In this instance, the development of the cyber-attacks sanctions framework was first announced publicly in June 2017, and negotiations in Brussels accelerated from November 2018 onwards. The initial drafts for the legal acts that were subsequently approved by Ministers on 17 May were circulated as far back as 8 March 2019.[100] We did not receive any update from the Foreign & Commonwealth Office on any of these developments while the negotiations were still on-going.**

10.18 **While we accept the technical complexity of the file meant finalised legal acts were only available for deposit shortly before their adoption, the Government has the option to write to the Scrutiny Committees to inform them of important new foreign policy developments where the formal deposit of documents is likely to leave too little time for scrutiny ahead of final approval being given by Member States (including the UK). We are disappointed that the Government missed the opportunity to do so on this occasion, and hope the Minister will be more pro-active in this regard in the future. In light of this, we also ask the Minister to write to us by 27 June 2019 with an update on the Government's efforts in Brussels to secure an additional thematic EU sanctions regime against those held responsible for serious human rights violations.**

98 The draft Withdrawal Agreement on the UK's exit from the EU contains a transitional arrangement during which the UK would have to continue to apply EU foreign policy sanctions. If the Agreement is ratified by the House of Commons, this transition would last until at least 31 December 2020 and potentially until 31 December 2022.

99 Proposals for legislation under the Common Foreign & Security Policy, unlike those in other areas of EU competence, are not publicly available until they are formally agreed. As such, these proposals cannot be deposited in Parliament because that would make them public. The Foreign & Commonwealth Office therefore shares the final text due for rubberstamping by Ministers with the Committee when it is available, which is often only shortly before final approval is given (limiting opportunities for scrutiny).

100 Council document 7301/19 (not publicly available).

10.19 **We now clear the EU framework for restrictive measures against cyber-attacks from scrutiny, and draw these developments to the attention of the Defence Committee, the Foreign Affairs Committee and the Digital, Media, Culture & Sport Committee.**

Full details of the documents

(a) Council Decision (CFSP) 2019/797 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States: (40581),—; (b) Council Regulation (EU) 2019/796 of 17 May 2019 concerning restrictive measures against cyber-attacks threatening the Union or its Member States: (40582),—.

Previous Committee Reports

None.

11 The EU Emergency Travel Document

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; further information requested; drawn to the attention of the Foreign Affairs Committee and the Home Affairs Committee
Document details	Proposal for a Council Directive establishing an EU Emergency Travel Document and repealing Decision 96/409/CFSP
Legal base	Article 23 (second paragraph) TFEU, special legislative procedure, QMV
Department	Home Office
Document Number	(39850), 9643/18 + ADDs 1–4, COM(18) 358

Summary and Committee's conclusions

11.1 One of the rights associated with EU citizenship is the right to diplomatic and consular protection outside the EU. EU citizens who are stranded in a third country in which their own Member State of nationality is not represented (through an embassy or consulate) are entitled to seek assistance from the diplomatic or consular authorities of *any* EU Member State as if they were nationals of that State. This assistance may include the issuing of an Emergency Travel Document ("ETD") to enable an EU citizen whose passport or travel documents have been lost, stolen or destroyed to return home. The current rules on the issuing of emergency travel documents are set out in an intergovernmental Decision adopted in 1996.[101] They prescribe a uniform format and common security features for an EU Emergency Travel Document, but do not make its use mandatory—Member States remain free to issue their own (national) emergency travel documents rather than an EU ETD to unrepresented EU citizens who seek their assistance. The UK (along with France and Germany) issues national ETDs as the Government believes they are more secure than the EU ETD.

11.2 The European Commission considers that the continued use of national ETDs creates a risk of fragmentation and "forum shopping", as unrepresented EU citizens may request assistance from a Member State whose emergency travel documents are more widely recognised, or are cheaper or easier to obtain.[102] It has therefore proposed a Directive establishing an EU Emergency Travel Document which would repeal the 1996 Decision and make it *mandatory* for Member States to issue an EU ETD instead of a national ETD. The Commission anticipates that the changes it has proposed would make the EU ETD more secure, more cost-efficient and, by increasing the use of EU ETDs, make it more likely that they would be recognised and accepted by third countries.

11.3 In her Explanatory Memorandum of 4 July 2018, the Immigration Minister (Rt Hon. Caroline Nokes MP) told us that the Government supported the introduction of "a higher integrity" EU ETD and clearer processes for obtaining it, but would oppose making its

101 See Decision 96/409/CFSP on the establishment of an emergency travel document.

102 See p.4 of the Commission's explanatory memorandum accompanying the proposed Directive.

use mandatory. Even with the changes proposed by the Commission, she considered that the EU ETD would be less secure than the current UK ETD which "significantly exceeds" the minimum standards set by the International Civil Aviation Organisation (ICAO) and is widely accepted. She added that the costs would be disproportionate to the benefits, given the small number of emergency travel documents issued each year—in 2017, the UK issued national ETDs to 123 unrepresented EU citizens and only around 1,000 emergency travel documents are issued each year across all EU Member States. The Government would therefore seek to "maintain the right to opt out of issuing EU ETDs".

11.4 Asked to comment on the Commission's view that greater use of the EU ETD—including by Member States such as the UK with the largest global reach and representation outside the EU—would increase the recognition and acceptance of the EU ETD by third countries and border control authorities, ensuring greater benefits for more EU citizens, the Minister told us:

> With only 1,000 citizens requiring support annually the numbers going through any specific border will be low so even a uniform document will be seen infrequently. Indeed, border officers may be more familiar with national documents since they are issued to countries' own citizens, as well as unrepresented EU citizens.
>
> There is concern that British Embassies, High Commissions and Consulates would issue so few EU ETD it is likely that the quality and instances of error are likely to be higher. The UK has already repatriated passport production to the UK in part to ensure consistency and maintain costs. The Foreign and Commonwealth Office (FCO) is also looking at its approach to delivering UK ETD for similar reasons.[103]

11.5 The Minister noted also that it was unlikely the UK would have to implement the proposed Directive as the date on which it was expected to take effect would be outside the post-exit transition/implementation period provided for in the original (March 2018) draft EU/UK Withdrawal Agreement ending on 31 December 2020.[104] She added that if the Directive were to be adopted while the UK was still a member of the EU, the UK would notify the Council that "it does not intend to introduce the measures, even if mandatory, as the introduction period would be beyond the implementation period".[105]

11.6 In our Report agreed on 12 September 2018, we asked the Minister to alert us if the Government's position changed, either as a result of the transition/implementation period being extended or the deadline for giving effect to the Directive in national law being shortened during negotiations. We also noted that the Commission's proposal would allow (but not require) Member States to issue an EU ETD to third country national family members travelling with an EU citizen. We requested further information on the Government's position and the Minister's assessment of the potential benefits for UK nationals post-exit who might be able to obtain an EU ETD if stranded abroad with a family member who is an EU citizen.

103 See our Thirty-sixth Report HC 301–xxxv (2017–19), chapter 6 (18 July 2018) and the Minister's response in her letter of 23 August 2018 to the Chair of the European Scrutiny Committee.

104 The later draft endorsed by Prime Minister Theresa May and the European Council in November 2018 includes provision (in Article 132) for a further (single) extension of the transition period "for up to 1 or 2 years".

105 See the Minister's letter of 23 August 2018.

11.7 In her letter of 6 June 2019, the Minister updates us on the progress of negotiations within the Council:

> In our previous report to you we advised that the matter would be agreed under qualified majority voting [QMV] and that the UK would be opting out of issuing the EU ETD as we believed that the UK ETD was a more secure and internationally recognised document which the UK believed met international standards. At that time we believed that there were sufficient objections to the proposals that they would not progress under QMV. Subsequent discussions have resulted in other Member States now being sufficiently satisfied as to the proposals and willing to support agreement. In light of negotiations on the UK exit from the EU and other matters before the EU committees the FCO [Foreign and Commonwealth Office] believe that abstaining or objecting to the proposals is no longer in the UK's best interests.

11.8 The Minister says that the FCO now consider the proposed Directive to be "workable" and are "working towards potential roll out". Member States will have 36 months in which to complete their preparations for implementing the Directive (rather than the 24 months envisaged in the original proposal). The Government will "work towards this timescale" but has not been able to estimate the costs involved "as they will be dependent upon a number of factors including the costs of producing the EU ETD, combining resources with other EU Member States and the actual numbers issued". Should the UK leave the EU before the deadline for implementing the Directive, the FCO will focus instead on establishing "alternative arrangements" to enable consular assistance between the UK and EU Member States to continue. The Minister anticipates that, in these circumstances, the UK would continue to issue its own UK ETDs and the remaining EU 27 Member States EU ETDs.

11.9 The Minister acknowledges that the proposed Directive could be of benefit to UK nationals travelling with EU citizen family members post-exit as they may also be able to obtain an EU ETD from the diplomatic or consular authorities of an EU Member State if they are legally resident within the EU. This would be in addition to the consular assistance already available from Commonwealth States.

11.10 In a further letter dated 11 June 2019, the Minister tells us that COREPER—the body on which each EU Member State is represented—will be asked to vote on a final Presidency text so that the proposed Directive can be brought to Council on 18 June 2019 for formal adoption. She now says that the UK intends to abstain.[106]

Our Conclusions

11.11 **There has been a substantial shift in the Government's position. In July 2018, the Minister told us that neither the Foreign and Commonwealth Office nor the Home Office accepted that the EU ETD should be made mandatory and that the Government would not support the proposed Directive.[107] A month later, she made**

106 Officials have provided a copy of the final Presidency compromise text. As is it marked *limité*, we are unable to make its contents public but the Minister has not drawn to our attention any substantive changes to the text originally proposed by the European Commission.

107 See para 9 of the Minister's Explanatory Memorandum of 4 July 2018.

clear that the Government would not take steps to implement the Directive, if adopted while the UK remained a member of the EU, as the obligation to give effect to it in domestic law would only crystallise after 31 December 2020, the date on which the post-exit transition period envisaged in the original (March 2018) draft of the EU/UK Withdrawal Agreement would expire.

11.12 **Several months on, the UK remains a member of the EU and the latest (November 2018) draft of the EU/UK Withdrawal Agreement includes provision for a further extension of the post-exit transition period to the end of 2022. EU law, including this Directive if adopted within the coming weeks, would apply to the UK during an extended transition period. A failure by the UK to implement it domestically would put the UK in breach of EU law and at risk of legal and financial sanction. We appreciate that uncertainty as to the date on which the UK will leave the EU, whether there will be a transition period and how long it might last are bound to affect the Government's assessment of the costs and benefits of specific legislative proposals for the UK and the degree of risk should the Government decide not to implement them. None of these factors, however, explains why the Government now intends to abstain on a proposal which it previously opposed and then told us it would actively support.**

11.13 **The main reasons initially given by the Minister for opposing the proposed Directive were security and cost. She stated that UK ETDs would be more secure than EU ETDs, even allowing for the changes proposed by the European Commission, and that the costs entailed in introducing the EU ETD would be "significant" and "disproportionate" given the small number likely to be issued each year.[108] There is nothing in the Minister's recent letters to suggest that these concerns have been addressed in the final Presidency compromise text which the Council is expected to agree on 18 June. The Government appears not to have undertaken any analysis of the likely costs of introducing (or preparing to introduce) EU ETDs or to have obtained any assurance that EU ETDs will be at least as secure as the UK ETDs they will replace. The Minister tells us only that "the FCO and DExEU believe that objecting to the proposal is no longer in the UK's best interests". This belief appears to stem from a perception that UK support for the proposal will smooth the path towards continued cooperation with the EU on consular matters post-exit. We ask the Minister whether she shares this view and whether this outweighs any concerns she might have about the security of EU ETDs and the costs involved in planning for their introduction during any post-exit transition period.**

11.14 **When the Minister wrote to us last August, she explained that the FCO had already "repatriated" passport production to the UK, in part to ensure consistency and maintain costs. She indicated that the FCO was reviewing its approach to the production of UK ETDs for similar reasons.[109] We ask her to clarify the arrangements envisaged for the production of EU ETDs and the mechanisms available to the UK to contain production costs.**

11.15 **In light of the Government's decision to abstain when the Directive is brought forward for adoption, we agree to clear the proposal from scrutiny. We nonetheless look forward to receiving a further report from the Minister following the Council**

108 See paras 8, 16 and 21 of the Minister's Explanatory Memorandum.

109 See the Minister's letter of 23 August 2018 to the Chair of the European Scrutiny Committee.

meeting on 18 June confirming how the UK voted and providing the information we have requested. We draw this chapter to the attention of the Foreign Affairs Committee and the Home Affairs Committee.

Full details of the documents

Proposal for a Council Directive establishing an EU Emergency Travel Document and repealing Decision 96/409/CFSP: (39850), 9643/18 + ADDs 1–4, COM(18) 358.

Background

11.16 The proposed Directive is based on Article 23 of the Treaty on the Functioning of the European Union (TFEU) which provides:

> "Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection.
>
> "The Council, acting in accordance with a special legislative procedure and after consulting the European Parliament, may adopt directives establishing the coordination and cooperation measures necessary to facilitate such protection."

Previous Committee Reports

Thirty-eighth Report HC 301–xxxvii (2017–19), chapter 25 (12 September 2018) and Thirty-sixth Report HC 301–xxxv (2017–19), chapter 6 (18 July 2018).

12 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	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

12.1 The EU is developing a new European Travel Information and Authorisation System ("ETIAS") to assist Member States in identifying individuals whose presence would pose "a security, illegal immigration or high epidemic risk".[110] Once operational (likely to be after 2021), all visa-exempt third country nationals—including UK nationals once any post-exit transition period has ended—will have to apply online for a travel authorisation ahead of 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 and Interpol databases.[111] The automated checks required for ETIAS to operate effectively can only be carried out if the ETIAS Central System is able to communicate with other EU information systems.

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

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

In January 2019, the European Commission put forward two proposals to amend the Regulation setting up ETIAS as well as 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.[112] It considered that two Regulations were needed as 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 Regulations are nonetheless intended to "work seamlessly together to enable the comprehensive operation and use of the [ETIAS] system".[113]

12.2 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 told us in March that the three-month deadline for deciding whether to participate would expire on 13 April 2019.[114]

12.3 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 are built 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.

12.4 In her Explanatory Memorandum of 29 January 2019, the Immigration Minister (Rt Hon. Caroline Nokes MP) expressed support for the proposals and 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.

12.5 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.

112 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).

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

114 Seer the letter of 13 March 2019 from the Immigration Minister (Rt Hon. Caroline Nokes MP) to the Chair of the European Scrutiny Committee. The three-month opt-in and opt-out period starts from the date on which the last language version of the proposal is published.

12.6 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. 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. She indicated in her response of 13 March 2019 that there would be "no obvious operational benefits" for the UK and that a decision *not* to participate would *not* 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 these systems post-exit under a future EU/UK security agreement. Based on this information, we inferred that the UK was unlikely to participate but held both proposals under scrutiny pending confirmation of the Government's decision.

12.7 In her subsequent letter of 11 April 2019, the Minister informed us that the first proposed Regulation—document (a)—had 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 remained unchanged. She added that the deadline for reaching a decision was now 12 April[115] and that, contrary to earlier indications, having given "further detailed consideration to the advantages and disadvantages", the Government had decided to participate in both. She reiterated that there were "no obvious operational or public protection benefits for the UK" but expressed concern that a decision not to participate could jeopardise UK access to SIS II and ECRIS-TCN, with "detrimental consequences" for UK law enforcement agencies and for the UK's future security relationship with the EU.[116]

12.8 In our Report agreed on 1 May 2019, we expressed surprise at the Government's apparent *volte-face* and questioned why its assessment of risk had changed so fundamentally in a matter of weeks. We asked the Minister whether it was a consequence of further discussions with the European Commission and other Member States on the possible implications of a decision not to participate on the UK's future internal security relationship with the EU. We also requested a further update on the prospects for reaching a political agreement within the Council and on the position of the European Parliament.[117]

12.9 In her latest letter dated 23 May 2019, the Minister says that the Government gave "further detailed consideration to the technical, practical and legal implications of not participating in the ETIAS proposal (and so not sharing data with the ETIAS Central Unit)". Preliminary discussions with the Council and the Commission and with operational stakeholders involved in the management of SIS II and ECRIS-TCN indicated that "the UK's non-participation could give rise to inconsistencies in the operation of these systems". She continues:

> Such inconsistencies could lead to challenges around [the] UK's participation in these systems overall. Specifically, the obligation on the Commission

115 The latest date by which the UK had to obtain a further extension of its membership of the EU or risk leaving without a deal.

116 See also the Minister's Written Ministerial Statement of 24 April 2019 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".

117 See our Sixty-fourth Report HC 301–lxii (2017–19), chapter 4 (1 May 2019).

> and the Council in Article 5(3) of Protocol (No. 19) to the EU Treaties [the Schengen opt-out Protocol] to consider the impact of the UK's decision not to participate, and the obligation in Article 4(a) 2 of Protocol (No. 21) [the Title V opt-in Protocol] to consider the operability of a measure, could put the UK at risk of no longer being able to participate in SIS II and ECRIS-TCN.
>
> The Government, therefore, decided that the prudent course of action was to avoid any risk of the UK being unable to continue to operate SIS II and ECRIS-TCN because of a failure to participate in Regulation 5071/19 [document (a)]. This is something the Government is clear we must avoid as it would be detrimental for the UK's law enforcement agencies.

12.10 The Minister confirms that the Government informed the Council Secretariat of its decision to participate in document (a)—now split into two separate proposals—on 12 April 2019. She provides copies of the proposals and says she expects Coreper (the body on which Member States' representatives to the EU sit) to consider the final texts on 22 May.

Our Conclusions

12.11 **The Government's decision to participate in document (a), the first proposed Regulation (now split into two separate Regulations), despite the Minister's assessment that "there are no direct operational or public protection benefits for the UK", illustrates how, as Brexit approaches, the Government is using the Schengen opt-out and Title V (justice and home affairs) opt-in Protocols as tactical tools, to safeguard the UK's participation in important EU law enforcement information systems during any post-exit transition/implementation period and to strengthen its hand in future negotiations for a comprehensive security partnership. The draft Political Declaration setting out the framework for the future relationship between the EU and the UK refers to both instruments covered by document (a)—the police component of the Schengen Information System and ECRIS-TCN:**

> **The Parties should consider further arrangements appropriate to the United Kingdom's future status for data exchange, such as exchange of information on wanted or missing persons and objects and of criminal records, with the view to delivering capabilities that, in so far as is technically and legally possible, and considered necessary and in both Parties' interests, approximate those enabled by relevant Union mechanisms.**[118]

12.12 **As the Minister has clarified the Government's reasons for participating in document (a) and provided an assurance that the substance remains unchanged, despite having been split into two separate measures, we are content to clear the proposals from scrutiny. We do so in the expectation that further changes are unlikely, given the technical nature of the proposed Regulations. We ask the Minister to alert us if any substantial changes are made during the remainder of the legislative process and to confirm how the Government has voted once they are brought to the Council for formal adoption. We draw this chapter to the attention of the Home Affairs Committee.**

118 See paragraph 87 of the Political Declaration.

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.

Previous Committee Reports

Sixty-fourth Report HC 301–lxii (2017–19), chapter 4 (1 May 2019), 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). Our earlier Reports on the proposed ETIAS Regulation (and consequential changes to the Europol Regulation) are also 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 (13 November 2017) and Fifty-fourth Report HC 301–liii (2017–19), chapter 4 (6 February 2019).

13 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

(40395) 6588/19 COM(2019) 83	REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT The European Research Area: advancing together the Europe of research and innovation.
(40411) 6832/19 COM(19) 87	Report from the Commission to the Council and the European Parliament on the implementation and functioning of Directive 2014/33/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to lifts and safety components for lifts
(40508) 8182/19 + ADD 1 COM(19) 175	REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE, THE COMMITTEE OF THE REGIONS AND THE EUROPEAN INVESTMENT BANK Fourth report on the State of the Energy Union.
(40510) 8462/19 COM(19) 225	Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Renewable Energy Progress Report.
(40511) 8461/19 COM(19) 224	Report from the Commission to the European Parliament and the Council 2018 assessment of the progress made by Member States towards the national energy efficiency targets for 2020 and towards the implementation of the Energy Efficiency Directive as required by Article 24(3) of the Energy Efficiency Directive 2012/27/EU.
(40535) 9281/19 COM(19) 229	Proposal for a Council Decision on the position to be taken on behalf of the European Union in the International Partnership for Energy Efficiency Cooperation (IPEEC) with regard to the extension of the Terms of Reference for the IPEEC for the period from 24 May until 31 December 2019
(40574) — —	Court of Auditors 2019 Special Report No6: Tackling fraud in EU cohesion spending: managing authorities need to strengthen detection, response and coordination.

Department for Digital, Culture, Media and Sport

(40497) 8068/19 COM(19) 2335	Commission Recommendation of 26.3.2019 Cybersecurity of 5G networks.

Department for Environment, Food and Rural Affairs

(40587) 9694/19 + ADD 1 COM(19) 243	Proposal for a Council Regulation amending Regulation (EU)2019/124 as regards certain fishing opportunities.

Department for Exiting the European Union

(40572) 9433/19 COM(19) 217	REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT on the use made in 2017 by the institutions of Council Regulations No 495/77, last amended by Regulation No 1945/2006 (on standby duty), No 858/2004 (on particularly arduous working conditions), and No 300/76, last amended by Regulation No 1873/2006 (on shift work).
(40586) 9436/19 —	Letter to the attention of Minister-delegate for European Affairs Mr Ciamba signed by EP Vice-President Guillaume and Commission First-Vice President Timmermans including the "Annual Report on the operations of the Transparency Register in 2018".

Department for Transport

(40563) 9198/19 COM(19) 211	REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the exercise of the power to adopt delegated acts conferred on the Commission pursuant to Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU.
(40564) 9362/19 COM(19) 223	Proposal for A Decision of the European Parliament and of the Council empowering Italy to negotiate and conclude an agreement with Switzerland authorising cabotage operations in the course of international road passenger transport services by coach and bus in the border regions between the two countries.
(40565) 9361/19 COM(19) 221	Proposal for a Decision of the European Parliament and of the Council empowering Germany to amend its existing bilateral road transport agreement with Switzerland with a view to authorising cabotage operations in the course of international road passenger transport services by coach and bus in the border regions between the two countries.

Foreign and Commonwealth Office

(40560) 9188/19 JOIN(19) 8	Hong Kong Special Administrative Region: Annual Report 2018
(40561) 9186/19 JOIN(19) 7	Macao Special Administrative Region: Annual Report 2018
(40568) 9348/19 JOIN(19) 9	Joint Communication to the European Parliament and the Council—The EU and Central Asia: New Opportunities for a Stronger Partnership.
(40583) 8795/19 —	Council Recommendation of 14 May 2019 assessing the progress made by the participating Member States to fulfil commitments undertaken in the framework of Permanent Structured Cooperation (PESCO).
(40608) — —	Proposal for a Council Decision extending the duration of Decision 2017/2302/CFSP, in support of the OPCW activities at the former chemical weapons storage site in Libya, by 12 months.
(40623) 9563/19 —	Proposal for a Council Decision amending Joint Action 2005/889/CFSP on establishing a European Union Border Assistance Mission for the Rafah Crossing Point (EU BAM Rafah).
(40624) 9570/19 —	Proposal for a Council Decision amending Decision 2013/354/CFSP on the European Union Police Mission for the Palestinian Territories (EUPOL COPPS).
(40665) — —	Draft Council Regulation repealing Council Regulation (EU) No. 2018/1001 of 16 July 2018 concerning restrictive measures in view of the situation in the Republic of Maldives
(40666) — —	Draft Council Decision (CFSP) repealing Decision 2018/1006/CFSP of 16 July 2018 concerning restrictive measures in view of the situation in the Republic of Maldives

HM Treasury

(40558) 9200/19 COM(19) 213	Report from the Commission on the application and review of Directive 2014/59/EU (Bank Recovery and Resolution Directive) and Regulation 806/2014 (Single Resolution Mechanism Regulation)

Ministry of Justice

(40549) 8912/19 COM(19) 198	Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions the 2019 EU Justice Scoreboard.

Formal Minutes

Wednesday 19 June 2019

Members present:

Sir William Cash, in the Chair

Martyn Day	Kelvin Hopkins
Geraint Davies	Darren Jones
Richard Drax	Mr David Jones
Mr Marcus Fysh	Michael Tomlinson
Kate Hoey	Dr Philippa Whitford

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 13 read and agreed to.

Summary agreed to.

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

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

[Adjourned till Wednesday 26 June at 1.45 p.m.

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*)