House of Commons

European Scrutiny Committee

Seventh Report of Session 2017–19

Documents considered by the Committee on 19 December 2017 including the following recommendations for debate:

EU defence: Permanent Structured Cooperation

Draft EU budget for 2018

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/.

Staff

The staff of the Committee are Dr Lynn Gardner (Clerk), Kilian Bourke, Alistair Dillon, Leigh Gibson, Nishana Jayawickrama and Foeke Noppert (Clerk Advisers), Arnold Ridout (Counsel for European Legislation), Françoise Spencer (Deputy Counsel for European Legislation), Joanne Dee (Assistant Counsel for European Legislation), Mike Winter (Second Clerk), Sarah Crandall (Senior Committee Assistant), Sue Beeby, Rob Dinsdale and Beatrice Woods (Committee Assistants), Ravi Abhayaratne and Paula Saunderson (Office Support Assistants).

Contacts

All correspondence should be addressed to the Clerk of the European Scrutiny Committee, House of Commons, London SW1P 3JA. The telephone number for general enquiries is (020) 7219 3292/5465. The Committee's email address is escom@parliament.uk.

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Meeting Summary

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

Brexit-related issues

The Committee is now looking at documents in the light of the UK 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:

EU budget for 2018

- The Committee takes note of the draft Article 50 agreement, which includes the parameters for the UK's financial settlement of EU budgetary obligations undertaken during its EU membership. We recommend that the EU budget for 2018, adopted on 30 November, should be debated in Committee in light of its implications for the overall financial settlement, estimated to exceed £35 billion.

Permanent Structured Cooperation

- The EU has launched Permanent Structured Cooperation (PESCO) in the field of defence, with the 25 participating EU countries committing to joint projects to develop and enhance their military capabilities. The Government has ensured that the UK, after Brexit, could voluntarily seek participation in specific PESCO projects, but any such participation would have to be agreed by the EU and the specific conditions for "third country" involvement are yet to be defined. In view of the political significance of the launch of PESCO, the Committee recommends that the Council Decision launching this new framework for defence cooperation should be debated on the Floor of the House.

European standardisation work programme 2018

- The Government provided helpful clarification of its position on European standards-making processes: UK industry appears to support the current approach to standardisation, and the Government does not currently have any plans to diverge from the status quo.

Public procurement

- What would be the effect on levels of UK access to EU27 procurement markets of a shift from being an EU Member State to accessing these markets solely on the basis of the WTO Agreement on Government Procurement (GPA)?

International Vine and Wine Organisation

- Government confirms that post-Brexit UK membership of the International Vine and Wine Organisation is under active consideration by the Government.

Linkage of EU and Swiss Emissions Trading Systems

- What lessons can be learned for the future EU-UK relationship from the seven-year negotiation to link the EU and Swiss Emissions Trading Systems?

Common rules for EU internal gas market

- How will the UK be able to diverge from common EU gas market rules under a new Commission proposal to extend EU rules to pipelines with third countries?

Traceability of tobacco products

- Brexit may allow detailed rules on the traceability of cigars, cigarillos, pipe tobacco and snuff to be amended and delayed, while still respecting the UK's international commitments.

Law enforcement cooperation—Exchanging information on criminal convictions

- Does the Government intend the European Criminal Records Information System—ECRIS—to be amongst the measures included in a future EU/UK agreement on security, law enforcement and criminal justice cooperation?

Summary

Coordination of insolvency proceedings across the EU

The Committee reports on the Government's decision to opt into this technical Regulation. The proposal simply amends the annexes of the main 2015 Insolvency Proceedings Coordination Regulation to reflect changes to the national insolvency laws of Belgium, Bulgaria, Latvia and Portugal, as well as Croatia (as originally proposed). The UK already participates in the 2015 Regulation. A Written Ministerial Statement has been issued to that effect.

Cleared from scrutiny; request for further information on Brexit-related questions from our chapter of 13 November.

Digital Single Market: Free flow of data

The Commission has proposed a regulation to liberalise non-personal data flows within the EU, by prohibiting data localisation requirements other than on grounds of public security. The Minister (Matt Hancock MP) wrote to the Committee to explain that the Estonian Presidency is seeking an "informal negotiating mandate" from COREPER (the Committee of Permanent Representatives to the European Union) to start trilogue negotiations with the European Parliament, in order to speed up adoption of the proposal.

This is concerning because the Government has provided almost no information about the proposed mandate based on its involvement in Council working parties, and significant disagreements exist on key aspects of the text – notably the exemptions from the principle of the free movement of non-personal data. Furthermore, if the informal mandate is agreed, the scrutiny reserve will have no purchase on any part of the procedure until the concluding vote in the Ministerial Council, when there is little scope to influence the outcome, rendering scrutiny irrelevant. The Committee requests that the Government ask the Permanent Representation to ensure that an informal mandate is not agreed in COREPER to request that a decision be taken in Ministerial Council instead, when parliamentary scrutiny has concluded.

Not cleared from scrutiny; further information requested.

Public procurement

As part of its Single Market Strategy, the Commission has proposed a procurement package which consists of light touch non-legislative measures, which is focused on improving implementation of existing rules. The Government supports the proposals. The wider implications of Brexit for public procurement are important - cross-border intra-EU procurement accounts for approximately 2.5% of UK GDP - but not addressed by the Government in any of its three explanatory memoranda regarding the proposals. We retain the file under scrutiny and seek further information about current UK-EU procurement trade flows and the extent to which the WTO Agreement on Government Procurement (GPA) provides a substitute for current EU access, as well as other routes to EU procurement markets.

Not cleared from scrutiny; further information requested; drawn to the attention of the Business, Energy and Industrial Strategy and Exiting the European Union Committees.

European standardisation work programme 2018

The Committee is using the annual EU Standardisation Work Programme to scrutinise the implications of Brexit for standards making. Standards differ from regulation in that conformity with them is voluntary, and they are developed by industry, experts and stakeholders from national standards bodies. In response to the Committee's questions, the Minister (Margot James) emphasises that standards are not the same as EU regulations and UK industry appears to support the current approach to standardisation. She states that the Government does not currently have any plans to diverge from the status quo. The Minister adds that it is up to the BSI to negotiate with the members of CEN and CENELEC to secure the statute changes necessary for its membership to continue.

Cleared from scrutiny; drawn to the attention of the Business, Energy and Industrial Strategy Committee and the Committee for Exiting the European Union.

Permanent Structured Cooperation

Twenty-five of the EU's Member States have launched Permanent Structured Cooperation (PESCO) in the field of defence, committing to joint development of their military capabilities and making resulting improvements available for use by EU military missions. The Government has not joined PESCO, but it has sought to ensure that the UK, after

Brexit, could seek to participate in PESCO projects on a case-by-case basis. The modalities for such "third country" participation are to be adopted by the participating EU countries next year.

In view of the political significance of the launch of PESCO, the Committee recommends that the Council Decision launching this new framework for defence cooperation should be debated on the Floor of the House. It has, in parallel, recommended for debate an EU decision to establish a Military Planning and Conduct Capability (MPCC) unit for the EU's advisory military missions. The Committee considers this new unit could be the first stage of an EU operational headquarters for its military activities after the UK loses its veto over such matters post-Brexit.

Not cleared from scrutiny; recommended for debate on the Floor of the House; drawn to the attention of the Defence Committee and the Foreign Affairs Committee.

Common rules for EU internal gas market

The proposal extends existing EU law on the gas market to pipelines from third countries, which would include the UK post-Brexit. Noting the Minister's welcome for the proposal as it will require the EU to apply EU rules to pipelines with the UK, the Committee asks whether third countries, such as the UK, would be consulted on changes to EU rules that would effectively be applicable to them; and how far the proposal will allow the UK to diverge from EU rules in the future, particularly in order to meet the commitments made in respect of the island of Ireland.

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

Linkage of EU and Swiss Emissions Trading Systems

After several years of negotiations, the EU and Switzerland have agreed to link their Emissions Trading Systems – the main policies in place to cut greenhouse gas emissions. Noting that negotiations stalled as a result of the Swiss referendum in 2014 introducing quotas for EU workers in Switzerland, the Committee asks the Government why it took seven years to negotiate this agreement and asks if any lessons can be learned for the future relationship between the UK and the EU ETS.

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

Tobacco product traceability and security

The EU has adopted detailed rules to put in place a track and trace system to tackle the illicit trade in tobacco products. The rules—which are in line with an international agreement—need to be implemented by 2019 for cigarettes and hand-rolling tobacco and by 2024 for other tobacco products (OTPs), such as cigars, cigarillos, pipe tobacco and snuff. Following receipt of a number of submissions from the OTP sector highlighting the sector's concern that the rules are disproportionately burdensome, the Committee draws the concerns to

the attention of the Government. The Committee also notes that, post-Brexit, the UK may have the opportunity to amend the rules and extend the implementation deadline, while respecting the UK's international commitments.

Cleared; drawn to the attention of the Treasury and Health Committees.

Exchanging information on criminal convictions

The European Criminal Records Information System—ECRIS—was established in 2012. It enables Member States to exchange information on the previous convictions of EU citizens so they cannot escape their criminal past by offending in a different Member State. The UK has participated fully in ECRIS since it became operational in April 2012 and is one of the most active users. The Commission has put forward two legislative proposals (a Directive and a Regulation) to make ECRIS a more efficient tool for exchanging information on the previous convictions of third country (non-EU) offenders in the EU. The UK has opted into both proposals. A general approach was agreed at the Justice and Home Affairs Council on 7/8 December before the Committee had the opportunity to consider the new texts. The Committee asks the Government why it was not informed sooner of the Presidency's intention to seek an agreement; to provide an assessment of changes to the provisions on third country access to criminal records information and how they are likely to affect the UK once it leaves the EU; to indicate whether the longer timeframe for implementing changes to ECRIS and developing ECRIS-TCN (around three years) will affect the UK's preparations for implementing the proposed legislation; and to clarify whether the Government intends to produce an Impact Assessment.

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

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: Common Rules for EU Internal Gas Market [Proposed Directive (NC)]; Linkage of EU and Swiss Emissions Trading Systems [(a) and (b) Proposed Council Decisions (NC)]; European standardisation work programme 2018 [Commission Communication (C)]; Public procurement [(a) Commission Communication (NC), (b) Commission Communication (C) and (c) Commission Recommendation (C)]

Defence Committee: Military mobility in the EU [Joint Communication (C)]; EU defence: Permanent Structured Cooperation [Council Decisions (NC)]

Environmental, Food and Rural Affairs Committee: International Vine and Wine Organisation [Proposed Council Decision (C)]

Environmental Audit Committee: Linkage of EU and Swiss Emissions Trading Systems [(a) and (b) Proposed Council Decisions (NC)]

Exiting the European Union Committee: European standardisation work programme 2018 [Commission Communication (C)]; Public procurement [(a) Commission

Communication (NC), (b) Commission Communication (C) and (c) Commission Recommendation (C)]; Managing EU migration and security databases [Proposed Regulation (NC)]; Exchanging information on criminal convictions [(a) Proposed Directive (NC), (b) Proposed Regulation (NC)]

Health Committee: Tobacco product traceability and security [(a) Commission Implementing Regulation (C), (b) Commission Delegated Regulation (C) and (c) Commission Implementing Decision (C)]

Home Affairs Committee: Managing EU migration and security databases [Proposed Regulation (NC)]; Exchanging information on criminal convictions [(a) Proposed Directive (NC), (b) Proposed Regulation (NC)]

Justice Committee: Exchanging information on criminal convictions [(a) Proposed Directive (NC), (b) Proposed Regulation (NC)]

Treasury Committee: Tobacco product traceability and security [(a) Commission Implementing Regulation (C), (b) Commission Delegated Regulation (C) and (c) Commission Implementing Decision (C)]

1 EU defence: Permanent Structured Cooperation

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; recommended for debate on the Floor of the House; drawn to the attention of the Defence Committee
Document details	(a) Council Decision establishing Permanent Structured Cooperation (PESCO); (b) Council Decision 2017/971 determining the planning and conduct arrangements for EU non-executive military CSDP missions
Legal base	(a) Articles 42(6), 46 TEU and Protocol 10; special legislative procedure; QMV (see paragraph 0.24); (b) Article 42(4) and 43(2) TEU; unanimity
Department	Foreign and Commonwealth Office AND Ministry of Defence
Document Numbers	(a) (39354), 14866/17,—; (b) (38852),—

Summary and Committee's conclusions

1.1 On 11 December 2017, 25 EU Member States signed up to "Permanent Structured Cooperation" (PESCO) on defence matters, a mechanism introduced by the Lisbon Treaty in 2009.[1] PESCO is essentially an EU-level framework for Member States to establish mutual commitments, for example by jointly developing defence capabilities, investing in shared projects, and enhancing the operational readiness and contribution of their armed forces. The European Commission will produce an assessment each year of how the participating countries are meeting the targets they have set themselves.

1.2 The participating Member States have also adopted a declaration, which welcomes the political agreement identifying an initial list of 17 projects to be undertaken under PESCO.[2] These projects cover areas such as training, capability development and operational readiness in the field of defence. The full list of projects to be considered as part of PESCO are listed in the Annex to this Report.

1.3 The UK, alongside Malta and Denmark, did not join PESCO, but it did vote in favour of its launch at the Foreign Affairs Council. As the Decision establishing PESCO was only finalised shortly before its adoption, the Committee was unable to scrutinise the document in the usual way. We had, however, received correspondence from the Minister for Europe (Sir Alan Duncan) informing us of the timetable for the PESCO launch process, setting out the Government's approach to the UK's role in this new framework and confirming that, because of the truncated timetable, it would override scrutiny to support the proposal.

1 Council Decision establishing Permanent Structured Cooperation (PESCO) and determining the list of Participating Member States (11 December 2017).

2 Foreign Affairs Council, "Declaration on PESCO projects" (11 December 2017).

1.4 The launch of PESCO took place in the context of wider efforts at EU-level to make Member States' defence policies more coherent. In particular, earlier this year the Council also adopted a Decision establishing a Military Planning and Conduct Capability (MPCC) unit for the EU's non-executive military Common Security and Defence Policy (CSDP) missions (which are currently in place in Somalia, Mali and the Central African Republic). Further proposals are expected in 2018 to increase the ease with which national troops and material can be transported throughout the EU.[3]

1.5 The Government has supported both the launch of PESCO and the establishment of the MPCC. With respect to the former, the Minister noted that the Government was of the view that PESCO could address military capability shortfalls in the EU, and that it was satisfied that the legal framework would allow for participation by the UK defence industry after Brexit (although the exact conditions for such participation are to be determined at a later stage, without formal UK input).

1.6 As regards the MPCC, the Minister informed us that the remit of the new unit was agreed "within UK parameters", notably as regards limiting its scope to non-executive (advisory) missions only.

1.7 **We are grateful for the Minister's letters of 23 November and 8 December informing us of the next steps in the PESCO launch process, given that the formal scrutiny process could not be applied to the Council Decision. We accept that scrutiny override was unavoidable given the short period of time between the finalisation of the legal text and its adoption by the Council.**

1.8 **The launch of PESCO, irrespective of Brexit, would have been a major political development. It has become more so now in light of the Government's clear interest in safeguarding its ability to participate in projects of mutual benefit under the PESCO aegis. As a non-Member State, the UK will lose the ability—open to the other non-participating EU countries under Article 46 TEU—to request participation in PESCO. In terms of the practical impact of the projects to be launched under PESCO, we consider that the improvements sought to the participating countries' military capability will take many years to develop. In addition, we remain to be convinced that PESCO itself will lead to a greater willingness among Member States to engage in more joint operations coordinated at EU-level.**

1.9 **Nevertheless, there could be value in the UK's case-by-case participation in specific PESCO projects, on a voluntary basis. Although the Minister has said that the PESCO legal framework as adopted met the UK's requirements regarding participation by UK industry after Brexit, the Decision defers the establishment of the general conditions for such participation to a later stage. Both those conditions, and a specific decision on UK participation in particular projects, would have to be agreed unanimously by the PESCO Member States.**

1.10 **We must therefore await further information on the role third countries will be allowed to play, and we expect the Minister to keep us informed of any developments**

3 See the Chapter in this Report on "military mobility". This is also one of the priority areas identified by the PESCO participating countries (see Annex).

in this area promptly. In particular, we would be grateful to know when the Decision establishing the conditions for third country participation is expected to be considered by the Council, and to be informed as soon as possible about its likely substance.

1.11 **In the context of UK participation in PESCO after Brexit we will also follow closely any future trilogue negotiations on the new European Defence Industrial Development Programme (EDIDP), which will co-finance specific PESCO projects from the EU budget.**

1.12 **The establishment of the MPCC is also a significant development. It centralises decision-making for CSDP missions to a degree not previously seen, albeit only—at this stage—for non-executive military training missions in Africa. At present, the UK has a veto over expanding the role and remit of the MPCC. After the UK ceases to be a Member State, the other Member States could revisit the structure and limit of the unit, potentially extending its role to also cover executive military CSDP missions.**

1.13 **Given the above, we recommend these Council Decisions be debated on the Floor of the House. That debate should, ideally, cover the launch of PESCO and the MPCC; the broader possibilities for UK-EU cooperation on defence matters after Brexit; and the implications of PESCO and the European Defence Fund for international defence structures outside of the EU framework, in particular NATO. We also draw these documents to the attention of the Defence Committee.**

Full details of the documents

(a) Council Decision establishing Permanent Structured Cooperation (PESCO) and determining the list of Participating Member States: (39354), 14866/17,—; (b) Council Decision 2017/971 of 8 June determining the planning and conduct arrangements for EU non-executive military CSDP missions and amending Decisions 2010/96/CFSP on a European Union military mission to contribute to the training of Somali security forces, 2013/34/CFSP on a European Union military mission to contribute to the training of the Malian armed forces (EUTM Mali) and (CFSP) 2016/610 on a European Union CSDP military training mission in the Central African Republic (EUTM RCA): (38852),—.

Background

1.14 This Report deals with two related aspects of increased cooperation on defence matters at EU-level established in 2017: Permanent Structured Cooperation (PESCO) and a new Military Planning and Conduct Capability Unit (MPCC). We will discuss these in turn.

Permanent Structured Cooperation

1.15 Articles 42 and 46 of the Treaty on European Union, as amended by the Lisbon Treaty, allow a group of EU Member States to launch "permanent structured cooperation" (PESCO) in the field of defence.

1.16 PESCO is essentially an EU-level framework for Member States to cooperate on defence matters, with the aim of jointly developing their military capabilities and making them available for EU military operations (the launch of which would still require

unanimity among all Member States, not just those participating in PESCO). However, the commitments made under PESCO are binding, in the sense that the European Commission will produce an assessment each year of how the participating countries are meeting the targets they set themselves.

1.17 PESCO will be organised at two levels: the political level and the project level. At the political level, the framework will be directed through existing EU structures, including the Political Security Committee (PSC) and meetings of the Foreign Affairs Council attended by EU Defence Ministers. At project-level, only PESCO participating Member States will exercise voting rights when to establish and manage specific programmes of cooperation, which will normally be subject to unanimity of participating Governments.

1.18 There are also explicit links between PESCO and the new European Defence Fund, which will fund both defence research and the development of military prototypes. The proposed European Defence Industrial Development Programme (EDIDP, which is part of the Fund), will co-finance projects for joint development of defence technology that are agreed as part of PESCO by 30 per cent, whereas for other projects the co-financing rate is limited to 20 per cent.[4]

1.19 The original Commission proposal for the EDIDP would severely curtail the ability of the UK defence industry to participate in projects its funds after Brexit, as participation would be limited to organisations established in the EU and majority-owned by EU nationals. On 12 December, the Council adopted a general approach which would allow for some, but only limited, third country participation in EDIDP-funded projects.[5] We discuss this further in the context of Brexit in paragraphs 1.49 below.

Formal launch of PESCO

1.20 The process for PESCO's launch took place as part of the EU's wider Security and Defence Implementation Plan.[6] At the June 2017 European Council, the EU's Heads of State and Government committed themselves to drawing up within three months a "common list of criteria and binding commitments" in the field of defence.

1.21 In July 2017, France and Germany released a draft notification letter. On 28 September, France, Germany, Italy, and Spain, supported by the European External Action Service (EEAS), submitted a draft notification on PESCO, expanding on the July version. UK officials from both the Ministry of Defence and Foreign and Commonwealth Office have attended PESCO workshops at both the technical and policy level and "have engaged closely in PESCO's development".[7]

1.22 In November 2017, twenty-three Member States submitted their formal notification of their intention to launch PESCO, with the UK—alongside four other countries—not participating at that stage.[8] That notification also contained a list of proposed commitments, which include increasing participating countries' spending on defence research; investing jointly in defensive technologies, with harmonised requirements

4 For more information on the European Defence Fund, see our Report of 13 November 2017.
5 See Council document 15536/17 (8 December 2017).
6 See the previous Committee's Report of 14 December 2016.
7 Explanatory Memorandum submitted by the Foreign and Commonwealth Office (13 December 2017).
8 Notification regarding Permanent Structured Cooperation (13 November 2017).

across all participating Member States; providing the necessary in-kind support for EU CSDP missions; simplifying the cross-border transport of military personnel and materiel within the EU; and expanding the use of EU Battle Groups.

1.23 In early December, two additional countries (Portugal and Ireland) obtained parliamentary consent for their participation. This leaves only the UK, Denmark and Malta outside the scope of PESCO.

1.24 The formal Council Decision to establish PESCO was adopted at the Foreign Affairs Council on 11 December 2017, before it was deposited with the Committee (see paragraph 1.29 below). The participating Member States have also adopted a declaration, which welcomes the political agreement identifying an initial list of 17 projects to be undertaken under PESCO.[9] These projects, which are listed in full in the Annex to this Report, cover areas such as training, capability development and operational readiness in the field of defence. As required by the Treaty, the voting procedure for the Decision was what is known as a reinforced qualified majority, meaning the UK had no veto.[10]

1.25 A decision to formally establish specific PESCO projects, in line with the common list endorsed at the December 2017 Foreign Affairs Council, is expected to be adopted by the Council in early 2018. The participating countries will also draft a common set of governance rules for projects and the general conditions under which "third States" could be invited to participate in individual projects. These further Council Decisions will require unanimity among the participating countries only, meaning the UK will not have a vote. The first PESCO projects are scheduled to be launched in 2018.

The Government's view

1.26 The Minister for Europe (Sir Alan Duncan) initially wrote to the Committee on 23 November 2017 to provide information on the PESCO launch process ahead of the formal vote in the Council.

1.27 He explained that, although the Government would not participate in PESCO as a Member State, it wants the process to strengthen the EU's partnership with NATO; address gaps in Europe's security capabilities; and promote an "open and competitive" European defence industry. He also added that the higher co-financing rate under the EDIDP for PESCO projects could have the effect of making PESCO the "primary avenue for military capability development between Member States".

1.28 With respect to the possibility of UK participation in specific PESCO projects after Brexit, the Government has encouraged the other Member States to allow for third country participation so that the UK defence industry can benefit from any opportunities PESCO affords even after Brexit. In November, the Minister noted that "detailed discussions on third party access have been deferred until after the launch of PESCO".

1.29 On 8 December (the week before PESCO's formal launch), the Minister wrote to the Committee with further information. He explained that the UK had "negotiated

9 Foreign Affairs Council, "Declaration on PESCO projects" (11 December 2017).

10 When the Council acts without a Commission proposal, or one from the High Representative (as is the case for PESCO), the qualified majority must include at least 72% of the members of the Council representing 65% of the EU's population. This is set out in Article 238(3)(b(), TFEU.

a satisfactory outcome to the draft Council Decision on PESCO, which addresses key Government concerns, including the participation of third countries and third country industry". He added:

> "Although the UK is not joining PESCO, we will vote in favour of the Council Decision now that we are satisfied our requirements regarding third country industry access have been met. I regret that the pace of negotiations has not allowed sufficient time for your Committee to scrutinise the Council Decision and that overriding scrutiny is, therefore, necessary in this case, but the short timescales are such that this is unavoidable."

1.30 In a further letter of 13 December, the Minister confirmed the scrutiny override, stating that "a delay in agreeing the Council Decision would have had significant political and reputational consequences for the UK".

1.31 The Foreign and Commonwealth Office and the Ministry of Defence formally deposited the Council Decision establishing PESCO on 13 December. In the accompanying Explanatory Memorandum, the Minister for Europe reiterated the Government's support for PESCO as it "recognise[d] its potential to help drive up defence investment in Europe and to strengthen capability". He also explained the UK was of the view that projects carried out under PESCO arrangements should remain Member State-owned, and that the capabilities delivered are available not only to the EU but can also be used in support of NATO and UN operations.

1.32 The Minister added that the Government's key objective in the negotiations on the PESCO legal framework had been to "ensure third State access to PESCO" and therefore "allow our defence industry to be able to participate in PESCO projects after EU Exit". The Council Decision adopted on 11 December allows the PESCO Member States to permit such participation on a project-by-project basis, subject to unanimity. The Minister acknowledges that "much of the detail on third State access has been deferred to a future Council Decision", the timing of which is uncertain (and on which the UK will not have a vote).

1.33 However, it is clear the Government still has concerns over the UK's access to PESCO projects after Brexit. In particular, the Minister highlighted in his Memorandum the requirement that cooperation programmes "must only benefit entities which demonstrably provide added value on EU territory". In response to this formulation, the UK has laid a statement to the minutes of the 6 December meeting of COREPER, at which the Council Decision was informally approved. This statement reads:

> "The Council Legal Service noted that in point 20 of the annex to the Council Decision establishing PESCO the requirement that cooperation programmes must only benefit entities "which demonstrably provide added value on EU territory" does not limit such entities to those established in the Union."

1.34 The Government's third objective with respect to PESCO was to ensure the legal framework acknowledged the importance of EU-NATO cooperation. In his Memorandum, the Minister explains that there are a number of proposed PESCO projects that "would

benefit from cooperation with NATO if they are developed". As a result, the PESCO Council Decision includes a commitment to "agree on common technical and operational standards of forces" which must "ensure interoperability with NATO".

1.35 The Minister concludes:

> "For the UK, NATO remains the cornerstone of Euro-Atlantic Security. We will continue to champion greater cooperation between the EU and NATO, in accordance with the 2016 Joint Declaration and Implementation Plan signed by the Presidents of the Council and Commission and the NATO Secretary General."

Military Planning and Conduct Capability unit

1.36 In addition to PESCO, another significant development in the integration of the EU's defence structures took place earlier this year. In May 2017, the EU Member States unanimously agreed to establish a Military Planning and Conduct Capability (MPCC) unit for non-executive[11] Common Security & Defence Policy missions.

1.37 Previously, planning for executive CSDP operations[12] has been conducted primarily through one of the five national headquarters (including one in the UK) that have been designated for use by the EU for its autonomous operations. In parallel, for non-executive military operations, Member States forewent the use of any Operation Headquarter (OHQ) at the military strategic level. Instead, the military strategic, operational and tactical levels of command have been merged in the position of the Mission Commander (who is based in the field), with central support from Brussels.[13]

1.38 However, concerns arose that the existing structures, with responsibility concentrated with the Mission Commander, provided too little strategic guidance to non-executive missions. The EEAS has argued that the decision to allocate responsibility for strategic, operational and tactical levels of command to the mission commander in the field "created difficulties in both planning and conduct, sometimes leaving missions deployed in dangerous locations in need of more proactive support from a strategic level headquarters with access to more assets".[14]

1.39 In November 2016, the Foreign Affairs Council adopted conclusions[15] on the implementation of the EU's new "Global Strategy on Foreign and Security Policy" (EUGS).[16] It invited the EU's High Representative to present proposals to establish "a permanent operational planning and conduct capability at the strategic level for non-executive military missions", "as a short-term objective, and in accordance with the principle of avoiding unnecessary duplication with NATO".

1.40 On 18 May 2017, EU Defence Ministers unanimously adopted a Council Decision which established a Military Planning and Conduct Capability (MPCC) unit within the

11 Non-executive operations are operations that provide an advisory role to the host nation only.

12 Executive operations are operations mandated to conduct actions in replacement of the host nation's own armed forces.

13 For more information on the MPCC, please refer to this article by the EU's Institute for Security Studies.

14 https://eeas.europa.eu/sites/eeas/files/mpcc_factsheet.pdf.

15 Foreign Affairs Council, "Council conclusions on implementing the EU global strategy in the area of security and defence" (14 November 2016), p. 12.

16 The EUGS was cleared from scrutiny by the previous Committee on 14 September 2016.

European External Action Service (EEAS).[17] This unit will, for the first time, establish centralised EU-level command of existing EU non-executive military missions. At present, such missions are active in Somalia, the Central African Republic and Mali. The MPCC will be responsible for the operational control and conduct of these (and any future) non-executive missions.

1.41 The MPCC will be based within the EU Military Staff and work under the political control and strategic guidance of the Political and Security Committee (PSC), which is composed of EU member states' ambassadors and is based in Brussels. The unit will be composed initially of up to 25 staff and benefit from the support of other departments of the EU Military Staff in the EEAS. It will also coordinate its activities with the European Commission and liaise with international organisations such as NATO and the UN.

1.42 While some Member States, led by France, have consistently called for an EU military headquarters, the UK has always opposed any moves towards the establishment of an Operational Headquarters at EU-level.[18] Indeed, according to the EU's Institute for Security Studies, the momentum towards the creation of the MPCC was, at least in part, driven by Brexit and the UK's impending exit from the EU's foreign policy structures.[19]

The Government's view

1.43 The Minister submitted an Explanatory Memorandum on the creation of the MPCC on 23 June. He noted that the Government had overridden scrutiny on the proposal as it was taken to Council on the day of the 2017 general election.

1.44 With regards to the substance of the Decision, he wrote that the UK had "approached the negotiations constructively" (given its previous opposition to any form of operational control at EU-level), and that the MPCC was agreed "within UK parameters" (notably as regards limiting its scope to non-executive missions and the limited authority of the unit's Director). He added that the MPCC is "not an operational headquarters or the first step to an EU army".

1.45 In the context of Brexit, the Minister reiterated that the Government will continue to seek to shape the EU's Common Security and Defence Policy in line with UK objectives after Brexit. In particular, the UK wants to avoid the EU's CSDP duplicating NATO efforts, and it wants to retain the option of participating voluntarily in future CSDP missions as a non-EU country.

Our assessment

1.46 The further integration of European defence capabilities and deployment is a development of major political significance. In terms of the practical impact of the projects to be launched under PESCO, we consider that the improvements sought to the participating countries' military capability will take many years to develop. Nevertheless, we remain to be convinced that PESCO itself will lead to a greater willingness among Member States to engage in more joint operations coordinated at EU-level.

17 See Council Decision

18 Foreign Policy Balance of Competences Review, p. 62.

19 https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief%2017%20MPCC.pdf.

1.47 The Government had already set out in its policy paper on UK-EU foreign policy that it will seek continued UK involvement in specific EU CSDP missions. Given the possible efficiencies and economies of scale that PESCO could foster, the Government has now also expressed an interest in UK participation in specific PESCO projects (on a case-by-case basis). Brexit will undoubtedly complicate any such involvement, as the barriers to participation by a non-EU country will be higher than for Member States.

1.48 In this respect, we have taken note of the Minister's assurances about the ability for non-EU countries to apply for participation in specific PESCO projects. However, the Council Decision launching PESCO itself only establishes the principle that such participation is possible. The participating Member States will need to establish, at some point in the future, "the general conditions under which third States could be invited to participate in individual projects".

1.49 The Government is still concerned about the possibility of nationality restrictions in those detailed rules. With respect to potential restriction of PESCO equipment development programmes to organisations based in EU countries only, the UK laid a statement arguing that "the requirement that cooperation programmes must only benefit entities "which demonstrably provide added value on EU territory" does not limit such entities to those established in the Union".

1.50 Moreover, although PESCO projects are likely to benefit from a higher co-financing rate from the proposed new European Defence Industrial Development Programme, it is not yet clear whether UK-based companies would be eligible for participation in any projects funded by that Programme after Brexit. We note from the Minister for Defence Procurement's recent letter on the EDIDP proposal that substantial restrictions on third country participation are still in place.[20]

1.51 The creation of the MPCC is also a significant event. While it is difficult to establish the counterfactual, we are not convinced that the Government would have supported this development in May 2017 if the UK had not made the decision to leave the EU. The functions of the MPCC will need to be factored into the Government's proposals for any institutional machinery necessary to support the "deep and special partnership" with the EU on foreign policy after Brexit. The Government has explicitly said it would like to continue to contribute to specific CSDP missions, including possibly non-executive missions led by the MPCC, as a non-EU country.

1.52 The European Council has underlined its long-term objective of concluding with the UK a new partnership on security and defence matters after Brexit. We still await further information from the Government about its concrete proposals on the scope and parameters of this partnership, which will have to take into account PESCO, the MPCC and the new European Defence Fund.

1.53 Given the importance of the launch of PESCO and the establishment of the MPCC, especially in the context of the UK's exit from the EU, we have recommended these documents for debate on the Floor of the House. We would hope that the debate would cover:

- The desirability of, and the scope for, UK participation in specific initiatives to develop or enhance military capabilities under the PESCO umbrella;

20 Letter from Harriett Baldwin to Sir William Cash (11 December 2017).

- The list of PESCO commitments, with a view to identifying those where UK interests are most engaged and where UK participation could be in both sides' mutual interest;
- The opportunities for the UK defence industry arising from PESCO projects which could be co-funded from the new European Defence Industrial Development Programme;[21] and
- The consequences of the launch of PESCO and the MPCC for NATO, in particular the possibility of duplication of efforts or a decreased role for NATO in European defence matters if the MPCC's remit is expanded in the future.

Previous Committee Reports

None.

21 See our Report of 13 November 2017 for more information on the European Defence Fund and the EDIDP.

Annex: List of initial PESCO projects

- - European Medical Command;
- - European Secure Software defined Radio (ESSOR);
- - Network of logistic Hubs in Europe and support to Operations
- - Military Mobility;
- - European Union Training Mission Competence Centre (EU TMCC);
- - European Training Certification Centre for European Armies;
- - Energy Operational Function (EOF);
- - Deployable Military Disaster Relief Capability Package;
- - Maritime (semi-) Autonomous Systems for Mine Countermeasures (MAS MCM);
- - Harbour & Maritime Surveillance and Protection (HARMSPRO);
- - Upgrade of Maritime Surveillance;
- - Cyber Threats and Incident Response Information Sharing Platform;
- - Cyber Rapid Response Teams and Mutual Assistance in Cyber Security;
- - Strategic Command and Control (C2) System for CSDP Missions and Operations;
- - Armoured Infantry Fighting Vehicle / Amphibious Assault Vehicle / Light Armoured Vehicle;
- - Indirect Fire Support (EuroArtillery);

  - EUFOR Crisis Response Operation Core (EUFOR CROC).

2 Draft EU budget for 2018

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; recommended for debate in European Committee B
Document details	Draft EU budget for 2018
Legal base	Article 314 TFEU; special legislative procedure; QMV
Department	Treasury
Document Number	(38836), 10812/17, SEC(17) 250

Summary and Committee's conclusions

2.1 On 13 November 2017 the Committee considered the draft EU budget for 2018.[22] It was retained under scrutiny, pending a reply by the Chief Secretary to the Treasury (Elizabeth Truss) to our questions relating both to the spending commitments foreseen by that budget, and to the links between those commitments and the "financial settlement" being negotiated as part of the EU withdrawal talks under Article 50 TEU.

2.2 The European Parliament and the Council reached agreement on the 2018 budget in the early hours of 18 November. On 29 November, at the Minister's request, we granted a scrutiny waiver to allow the Government to take part in its formal adoption at the Competitiveness Council the following day.[23]

2.3 The Minister has provided us with her reply to the questions we had put to her earlier that month.[24] With respect to the substance of the 2018 budget, the Chief Secretary explained that, while reductions to the draft budget had been made, these were—in the Government's eyes—not sufficiently substantial. She therefore indicated the Government would abstain rather than vote against the budget. We have set out the Minister's position on specific aspects of the budget, in response to our questions, in more detail in paragraphs 2.14 to 2.31 below.

2.4 We had also raised with the Minister the issue of the financial settlement as part of the UK's negotiations on withdrawal from the EU. As we set out in some detail in our Report of 13 November, there has been no official information about the extent of the financial commitments the Government may be willing to honour, or how the size of that settlement is likely to be affected by both the 2018 EU budget or by the post-Brexit transitional period (during which the UK would, in all likelihood, participate in and contribute to EU spending programmes in the same way it does now as a Member State).

2.5 In her letter the Minister refused to be drawn on any aspect of the Government's negotiating position. However, in the same week the media reported that the Government and the EU had struck a provisional agreement on the scope of the financial settlement.[25]

22 See our Report of 13 November 2017.
23 Competitiveness Council, "2018 EU budget adopted" (30 November 2017).
24 Letter from Elizabeth Truss to Sir William Cash (29 November 2017).
25 The *Daily Telegraph*, "Britain and the EU agree Brexit divorce bill" (28 November 2017); the *Financial Times*, "UK bows to EU demands with breakthrough offer on Brexit bill" (28 November 2017).

Details of the draft settlement were leaked to the press in early December, and subsequently confirmed by the Government on 8 December, after the Prime Minister and the EU's Chief Negotiator reached an agreement on the "phase 1" withdrawal issues.[26] The draft agreement was submitted for consideration by the European Council at its meeting of 15 December.[27]

2.6 The provisional agreement includes a commitment by the UK to pay, in annual instalments, for a share of the EU's expenditure commitments agreed under the current Multiannual Financial Framework, many of which will only become due for payment well into the next decade (see paragraph 2.26 below for more details). The provisional deal does not include an overall figure for the size of the settlement, as this cannot yet be calculated. Although the Government has stated on the record it expects the sums involved to total between £35 and £39 billion,[28] the final settlement will also depend on the decommitment rate for the EU budget, the extent to which contingent liabilities crystallise in the future, and "off-budget" contributions (primarily to the European Development Funds).

2.7 Although there is an agreement on the table, its links to the broader Article 50 negotiations is still unclear. The Chief Secretary told the House in late November that "any settlement that we make is contingent on us securing a suitable outcome" in the negotiations on a transitional arrangement and a comprehensive trade agreement.[29] By contrast, the EU's position is that "the discussion on liabilities and commitments from the past" should not be "mixed up" with a discussion on the future relationship.[30] It subsequently emerged that the EU is looking to include only a "political declaration" on the future UK-EU free trade agreement in the Withdrawal Agreement, but not any legally-binding commitments.[31]

2.8 **We thank the Minister for her swift and comprehensive reply to our questions about the substance of the 2018 EU budget. We note that the Government abstained from the vote on the budget at the Council meeting of 30 November.**

2.9 **With respect to the financial settlement, we appreciate that the Article 50 negotiations were at a sensitive stage when the Chief Secretary last wrote to us. However, details of the settlement emerged that same week, and it has since been provisionally agreed by both the Prime Minister and the European Commission.**

2.10 **The draft financial settlement is clearly of major financial and political significance. It commits the UK to substantial financial contributions to the EU well beyond the end of its membership (although less than if it had elected to remain a Member State). In return, UK organisations will remain eligible for EU funding on current terms in 2019 and 2020. We are concerned in this respect that the EU budget for 2020 will be decided when the UK is no longer represented in the Council or the European Parliament, reducing opportunities for the Government to reduce the EU's spending commitments in that year. The legal and policy implications of continued**

26 Joint Report from the negotiators of the European Union and the United Kingdom Government (8 December 2017).
27 European Council conclusions, 15 December 2017.
28 Business Insider, "The UK government says it will pay a £39 billion Brexit divorce bill" (8 December 2017).
29 HC Deb 29 November 2017, vol 632, col 327.
30 Introductory remarks by Michel Barnier at the press conference following the General Affairs Council (25 September 2017).
31 See the draft European Council guidelines on transition, paragraph 6.

participation in EU funding programmes are also intimately bound up with the scope of the transitional arrangement, which the Government hopes to negotiate with the EU in 2018.

2.11 **Although the Government insists that formal agreement on the financial settlement will be conditional on "securing a suitable outcome" in discussions on the future UK-EU relationship, in practice it will be extremely difficult for the Government to re-open the substance of the settlement further down the line. We also reiterate our conclusion that the Government's "implementation period" after March 2019 will likely trigger further financial obligations vis-à-vis the EU if it lasts beyond the current MFF.**

2.12 **In light of these considerations, we recommend the 2018 budget for a debate in European Committee B, and consider that Members may want to use that debate to also discuss the details of the Article 50 financial settlement. The Committee will consider separately how this settlement, involving substantial UK payments into the EU budget after March 2019, should be subject to parliamentary scrutiny. To inform its thinking, and to further assess the scrutiny implications of the draft settlement, we have invited the Government to give oral evidence early in the new year.**

Full details of the documents

Draft EU budget for 2018: (38836), 10812/17, SEC(17) 250.

Background

2.13 The European Commission presented the draft EU budget for 2018 in June 2017. It proposed commitment appropriations of €160.6 billion (£140.3 billion),[32] and payment appropriations of €145.4 billion (£127.0 billion).

2.14 The Chief Secretary to the Treasury (Elizabeth Truss) submitted an Explanatory Memorandum on the draft budget in July 2017.[33] This reiterated the Government's well-established position that it "wants to see real budgetary restraint in the EU", to which end it is "committed to continue to work hard to limit EU spending, reduce waste and inefficiency, and ensure that where EU funds are spent they deliver the best possible value for money for taxpayers". She has also said that "the UK has been very clear in working group discussions that substantial savings can be made in a number of areas", in particular by ensuring that "any new proposals [are] funded entirely from reallocations away from lower priority spending".

2.15 The Council agreed its position on the draft budget on 4 September, proposing various changes (mainly reductions) to the draft tabled by the Commission. The European Parliament established its line-by-line position on 25 October. Based on the respective positions of each institutions, the Committee considered the draft budget on 13 November and put various questions to the Chief Secretary about the Government's priorities.

2.16 In particular, we asked if there were any specific increases or reductions sought by the Government which had not materialised; whether the draft budget left enough flexibility for unforeseen events for which additional expenditure might be needed; its position on

32 £1 = €1.336, or £0.8821 = €1 as at 31 October.

33 Explanatory Memorandum submitted by HM Treasury (6 July 2017).

the Youth Employment Initiative, the budget for which has ballooned from €3.2 to €4.4 billion; the proposed reductions in the budget for Horizon 2020, the EU's research and development funding instrument; and the substantial cut in funding for justice & home affairs programmes.

2.17 On 29 November, the Minister replied that the final budget as agreed on 17 November is lower than both the European Parliament's proposal and the Commission's draft budget. Despite this, she indicated that the Government would abstain on the final vote on 30 November, on the basis that it had consistently argued for further commitments cuts across all headings and a higher margin of unallocated commitments.

2.18 The Chief Secretary also reiterated the Government's support for the use of the Flexibility Instrument (provided it respected the expenditure ceilings established by the Multiannual Financial Framework)[34] to meet unforeseen demands, and noted that there had been no need to increase the money available for citizenship and security policies under heading 3 of the budget, since similar increases for the 2017 budget went unused.[35]

2.19 The Committee had also asked the Minister for the Government's position on the substantial increase in the budget for the Youth Employment Initiative (YEI), and the reduction in funding for Horizon 2020, the research & development programme of which the UK is the largest beneficiary. As regards the YEI, the Minister explained that the UK will not directly benefit from the increased budget, "as the scheme is focused in regions that are hardest hit by youth unemployment". She also noted that the Government had not signed up to a joint statement[36] welcoming the increased resources for this initiative.

2.20 With respect to Horizon 2020, the Minister explained that, while the Council proposed cuts in this area, the overall level of funding it put forward "still represented a real term increase in both commitment and payment appropriations for Horizon 2020 in comparison to 2017's budget". In the final agreement on the budget, commitment appropriations were set €110 million (£96.7 million) higher than the Commission's original draft budget.

Brexit implications

2.21 In addition to scrutinising the substance of specific spending commitments set out in the draft EU budget for 2018, we also assessed the budget in light of the wider negotiations between the UK and the EU on a "financial settlement" relating to the UK's withdrawal from the Union. In particular, we noted the specific demands made by the other Member States, represented by the European Commission, for the UK to make payments for a share of EU financial commitments made under every annual budget—including the 2018 budget—covered by the 2014–2020 Multiannual Financial Framework.[37]

34 Regulation 1311/2013.

35 In response to a particular question about the substantial reduction in funding for the Asylum, Migration & Integration Fund (AMIF) under heading 3, the Minister explained that delays in the implementation of the new Dublin IV Regulation on asylum applications has meant that commitment appropriations were decreased to provide a more "realistic, deliverable figure that can be fully utilised". Some of the money originally earmarked for the AMIF will now be spent on "increasing the operational capacity for integration, improving cooperation on return/readmission within third countries and enriching the equipment pool available to the European Border and Coast Guard Agency".

36 See Council document 14587/17, p. 6. The UK was the only Member State not to support the joint statement.

37 Due to the EU's dual budgeting system of commitments and payments, many of its spending plans agreed to in recent years will only become due for payment after the UK's formal exit from the Union in March 2019.

2.22 We therefore asked the Chief Secretary to clarify, broadly speaking, when the Government's assessment of financial commitments to the EU would be completed and shared with Parliament, and to set out the likely or potential budgetary implications of the post-Brexit "implementation period", during which EU law would continue to apply and the UK would continue to participate in EU programmes and policies.

2.23 In her letter of 29 November, the Chief Secretary acknowledged that "discussions on the EU's annual budget for 2018 take place in the context of the UK's negotiations on withdrawal from the EU", but added that "these matters are separate". With respect to the Brexit financial settlement, the Minister noted that the Government and the EU are "currently making progress in building a common technical understanding on every item", and reiterated that none of the EU-27 "will need to pay more or receive less over the remainder of the current budget plan as a result of our decision to leave, and that the UK will honour commitments we have made during the period of our membership". However, the Minister refused to address the substance of our questions. Most importantly, she did not indicate whether the Government's reference to "the current budget plan" means that it recognises (or not) that the UK will have outstanding commitments which flow directly from that "budget plan", i.e. the 2014–2020 Multiannual Financial Framework, but which become due for payment after 2020.

Provisional agreement on the financial settlement

2.24 On 28 November, the day before we received the Minister's letter, it was reported that the Government and the EU had struck a provisional agreement on the scope of the financial settlement.[38] The resulting net payments from the UK to the EU, which would cover primarily outstanding expenditure commitments, pensions liabilities and a share of contingent liabilities should they crystallise, were said to total between €45 and €55 billion (£40 to £49 billion), although they would be spread out over many years, as and when the relevant payments come due.

2.25 On 29 November, the Chief Secretary to the Treasury told the House that "any settlement that we make is contingent on us securing a suitable outcome", which she described as "an implementation period followed by an ambitious future economic partnership". She did not dispute reports that a provisional agreement had been reached on the budgetary issue.[39]

2.26 Indeed, on 8 December the Government and the European Commission announced that provisional agreement had been reached on the financial settlement. The settlement, which would only be made legally binding as part of the overall Withdrawal Agreement, contains the following elements:

- The UK would make payments to the EU in 2019 and beyond to cover its share of budgets agreed under the current or previous Multiannual Financial Frameworks (MFF), including the *Reste à Liquider* (RAL) for the entire 2014–2020 MFF period still outstanding in December 2020. These RAL payments would fall due gradually well into the next decade;

38 The *Daily Telegraph*, "Britain and the EU agree Brexit divorce bill" (28 November 2017); the *Financial Times*, "UK bows to EU demands with breakthrough offer on Brexit bill" (28 November 2017).

39 HC Deb 29 November 2017, vol 632, col 327.

- In 2019 and 2020, the UK contributions would be calculated as if it were still an EU Member State (e.g. the budgetary abatement would apply), and the UK would remain eligible for participation in EU spending programmes;
- The UK would remain a party to the off-budget European Development Funds which provide economic assistance to 78 countries in Africa the Caribbean and the Pacific until the end of 2020;[40]
- The EU is to reimburse the UK's €3.5 billion of paid-in capital to the European Investment Bank, but the UK would remain liable for the repaid portion of that amount until the outstanding stock of EIB operations equals €3.5 billion, after which the liability will decrease as EIB loans are paid off. Similarly, the Government would provide a guarantee for its uncalled capital (totalling a maximum of €35.7 billion), which the EIB can legally call on if it cannot meet its financial obligations otherwise;
- The Government would continue to shoulder a share of the EU's existing liabilities and contingent liabilities as at the date of withdrawal, such as the €1.8 billion macro-financial loan to Ukraine as pensions on EU officials, as and when those liabilities become due; and
- Payments would be made in annual instalments rather than as a lump sum, and be denominated in euros.

2.27 The provisional agreement does not include an overall figure for the total size of the settlement, as this cannot yet be calculated. However, the Government has stated it expects the settlement to amount to £35 to £39 billion. This figure could be higher depending on the decommitment rate of the EU budget (i.e. cancelled projects for which funding does not have to be paid), the crystallisation of contingent liabilities, and the inclusion of "off-budget" contributions to the European Development Funds.

2.28 With respect to continued UK participation in EU funding programmes, UK public and private sector organisations would continue to be eligible for funding on the same terms as they are now in 2019 and 2020. The provisional agreement states:

> "The UK will continue to participate in the Union programmes financed by the MFF 2014–2020 until their closure (excluding participation in financial operations which give rise to a contingent liability for which the UK is not liable as from the date of withdrawal). Entities located in the UK will be entitled to participate in such programmes. Participation in Union programmes will require the UK and UK beneficiaries to respect all relevant Union legal provisions including co-financing. Accordingly, the eligibility to apply to participate in Union programmes and Union funding for UK participants and projects will be unaffected by the UK's withdrawal from the Union for the entire lifetime of such projects."

40 For more information on the European Development Fund and Brexit, see our predecessors' Report of [date]. We also wrote to the Department for International Development about the implications of Brexit for UK development policy more broadly on 22 November 2017.

2.29 The exact policy and legal implications of this are unclear. Continued participation in the Common Agricultural Policy (CAP) would, for example, preclude the UK or devolved governments from introducing domestic agricultural support regimes. These issues will also be closely linked to the scope of any transitional arrangement. The draft European Council guidelines on such an arrangement state the UK would effectively have to follow EU law for its duration, including those establishing EU funding programmes, as if it were a Member State (but without political representation in the EU institutions).[41] That would clearly run counter to the flexibility sought by the Government in introducing domestic reforms after March 2019.

2.30 Participation in EU programmes after 2020 would need to be negotiated separately, either as part of the "implementation period" or through programme-by-programme agreements with the EU as part of the new "deep and special partnership". This would trigger further financial liabilities not covered by this provisional agreement, which relates only to financial obligations arising before 31 December 2020.

2.31 The full implications of this financial settlement are clearly far-reaching, and require further attention. We will therefore analyse the provisional financial settlement in more detail with respect to its financial, legal and scrutiny implications. We have also invited the Government to give oral evidence to us to assist us in that process. In addition, we have recommended the 2018 annual EU budget for debate in European Committee B, and consider that Members may also want to discuss the implications of the provisional financial settlement at that point.

Previous Committee Reports

First Report HC 301–i (2017–19), chapter 20 (13 November 2017).

41 See the draft European Council guidelines on transition, paragraph 6.

3 Linkage of EU and Swiss Emissions Trading Systems

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Business, Energy and Industrial Strategy and Environmentals Audit Committees
Document details	(a) Proposal for a Council Decision on the conclusion, on behalf of the European Union, of an Agreement between the European Union and the Swiss Confederation on the Linking of their Greenhouse Gas Emissions Trading Systems; (b) Proposal for a Council Decision on the signing, on behalf of the European Union, of an Agreement between the European Union and the Swiss Confederation on the linking of their Greenhouse Gas Emissions Trading Systems
Legal base	(a) Articles 191(1) and 218(6)(a), TFEU; EP consent; QMV; (b) Articles 192(1) and 218(5) TFEU;—; QMV
Department	Business, Energy and Industrial Strategy
Document Numbers	(a) (38987), 11699/17 + ADD 1, COM(17) 427; (b) (38988), 11700/17 + ADD 1, COM(17) 428

Summary and Committee's conclusions

3.1 Emissions trading systems (ETSs) are designed to reduce greenhouse gas emissions cost-effectively. They include both a cap on total emissions and the potential to trade emissions allowances so that a company that is taking steps to reduce its emissions can sell its allowances to a company that continues to emit. Linking one ETS to another expands the market and enhances the cost-efficiency of emissions trading.

3.2 The EU introduced its Emissions Trading System (EU ETS) in 2003, including the possibility to link with other ETSs provided they are mandatory, have an absolute cap on emissions and are compatible. The Swiss ETS began in 2008 and became mandatory in 2013 for large, energy-intensive entities. It puts an absolute cap on emissions and has a very similar design to the EU ETS.

3.3 In December 2010 the European Commission was authorised to launch negotiations with a view to linking the EU ETS and Swiss ETS. Technical negotiations concluded in January 2016, but final agreement was stalled as a result of the Swiss referendum in 2014 on the introduction of quotas for EU workers in Switzerland. Following resolution of those concerns through the adoption of new Swiss legislation in December 2016, the Commission proposed the conclusion (document (a)) and the signature (document (b)) of the agreement linking the two ETSs. The agreement mandates alignment between the two systems on a range of issues, such as: the cap, the minimum level of ambition, the

gases and activities covered, limits on international credit use, penalties, and monitoring, reporting and verification. The Swiss ETS will mirror the EU ETS provisions on aviation before the agreement enters into force.

3.4 The agreement is overseen by a Joint Committee of the two Parties, which should also be the first avenue for the resolution of disputes. Otherwise, disputes should be referred to the Permanent Court of Arbitration.

3.5 The Minister of State for Climate Change and Industry (Claire Perry) indicated in her Explanatory Memorandum that the UK took an active role in negotiating the text of the agreement. It was in line with UK objectives for global carbon markets, she said, as expanding the market and increasing the availability of reduction opportunities enhances the cost-efficiency of emissions trading.

3.6 The Minister has since written again, explaining that the Decisions were adopted on 10 November 2017, which was before the Committee was able to consider the document. Acknowledging that the Committee had not granted scrutiny clearance, the Minister reports that she nevertheless voted in favour of the proposals. Given the UK support for the proposals, and its efforts to negotiate them, the Minister did not wish to be isolated in either abstaining or opposing the agreement. The Minister emphasises that the UK's position is without prejudice to the nature of the future UK-EU relationship.

3.7 **We are pleased to note the UK's engagement in the negotiation of this agreement. As the Minister notes, a larger market increases the availability of emissions reduction opportunities and enhances the overall cost-efficiency of emissions reduction. On that basis, the development is a welcome one.**

3.8 **Of greatest interest to us—and, we believe, the House—is the Brexit context. We appreciate that the Government is yet to finalise its approach to emissions trading post-Brexit, but we assume that creating a UK ETS and then linking it to the EU ETS would be an option. We would welcome the Minister's assessment of the extent to which the EU ETS-Swiss ETS linkage agreement may prove a helpful model to the UK. It would also be helpful to understand from the Minister why—other than the Swiss referendum on free movement—it took seven years from authorising the start of negotiations to reaching this final stage. Taking into account the various factors, including the need to resolve the free movement of workers, what lessons can be learned from the process with a view to establishing the relationship between the UK and the EU ETS?**

3.9 **Following the General Election, we were unable to consider the draft Decisions before they were adopted on 10 November. We recognise the Minister's reasons for supporting the proposals before scrutiny clearance had been secured and we take no issue with the Government's approach.**

3.10 **In the light of the important issues raised in relation to the UK's exit from the European Union, we retain these documents under scrutiny and draw them to the attention of the Business, Energy and Industrial Strategy and the Environmental Audit Committees. We look forward to the Minister's response within one month.**

Full details of the documents

(a) Proposal for a Council Decision on the conclusion, on behalf of the European Union, of an Agreement between the European Union and the Swiss Confederation on the Linking of their Greenhouse Gas Emissions Trading Systems: (38987), 11699/17 + ADD 1, COM(17) 427; (b) Proposal for a Council Decision on the signing, on behalf of the European Union, of an Agreement between the European Union and the Swiss Confederation on the linking of their Greenhouse Gas Emissions Trading Systems: (38988), 11700/17 + ADD 1, COM(17) 428.

Background

3.11 The European Commission is proposing two related Council Decisions: one is to sign and the other is to conclude, on behalf of the European Union (EU), an Agreement between the EU and Switzerland to link greenhouse gas Emission Trading Systems (ETSs). The proposals are straightforward and will give permission to the European Commission to sign and conclude the Agreement which will link the ETSs.

3.12 The EU ETS has been operating for more than a decade. It was the world's first major carbon market and remains the biggest one. A cap is set on the total amount of certain greenhouse gases that can be emitted by installations and aviation operators covered by the system. The cap is reduced over time so that the total emissions fall. Within the cap, companies receive or buy emissions allowances which they can trade with one another on the secondary market as needed. After each year, a company must surrender enough allowances to cover all its emissions, otherwise enforcement action is taken. In this way, the EU ETS both sets a target to reduce the emissions from the EU over time and aims to effect change by incentivising a shift towards low carbon development.

3.13 Article 25 of the Directive establishing the EU ETS allows for the EU ETS to be linked with other ETSs. In the past, the EU ETS has been linked with Norway, Liechtenstein and Iceland which are now fully integrated into the EU ETS. In December 2010, the European Council adopted a Decision authorising the Commission to open negotiations with the Swiss Confederation for a link between the EU and the Swiss ETS. This was part of a package of wider EU-Swiss negotiations. Negotiations at the technical level concluded in January 2016.

3.14 In order for ETSs to be linked they must meet three basic conditions: they are mandatory, have an absolute cap on emissions; and are compatible. The Swiss ETS became mandatory in 2013 for large, energy intensive entities and puts an absolute cap on greenhouse gas emissions and so meets two of the basic conditions for linking with the EU ETS. It has also met the third basic condition of compatibility. The proposed linking agreement mandates alignment between the two ETSs on a range of issues, such as: the cap, the minimum level of ambition, the gases and activities covered, limits on international credit use, penalties, and monitoring, reporting and verification. EU Allowances (EUAs) will be eligible for surrender in the Swiss ETS, and vice versa. Switzerland will mirror the EU ETS provisions on aviation in the Swiss ETS before the Agreement enters into force.

The Minister's Explanatory Memorandum of 6 September 2017

3.15 The Minister reported that the UK took an active role in negotiating the text of the Agreement to be signed between the EU and the Swiss Confederation. She described the agreement as "in line with UK objectives for global carbon markets, as expanding the market and increasing the availability of reduction opportunities enhances the cost-efficiency of emissions trading".

3.16 The Minister went on to set out the details of the main considerations that had underpinned the negotiations: the EU 2030 emissions target; Phase IV of the ETS; and the price of EU ETS allowances:

> "On the first issue, the EU collectively has a domestic greenhouse gas emissions reduction target for 2030 of at least 40% below 1990 levels. The EU ETS is the cornerstone of this policy and covers around 45% of the EU's greenhouse gas emissions. Emissions from other sectors will be covered by the EU Effort Sharing Regulation. We are confident that the link to the Swiss ETS will not have a detrimental impact on the EU's ability to meet its domestic climate target as: there is a review clause in paragraph 13(7) which provides member states with the flexibility to assess the link in 2020 and understand its implications on the EU's emissions reduction target; and both systems are capped preventing any increase in overall emissions.
>
> "Secondly, like the EU ETS's Phase IV negotiations, the Swiss ETS is currently undergoing review for its next period, from 2021 to 2030. The Agreement to link the Swiss ETS and EU ETS includes provisions to ensure a continued compatibility between the systems for the link to be maintained in the 2021–2030 period. The proposed linking will not impact on the UK position in negotiations relating to Phase IV of the EU ETS or negotiations relating to the future of aviation in the EU ETS, both of which are currently in the EU trilogue process.
>
> "Finally, the impact on the price of EU ETS allowances is likely to be negligible. This is because of the relatively small size of the Swiss ETS compared to the EU ETS and the fact that the Swiss ETS allowance price is only slightly higher than the EU ETS allowance price. The price of Swiss allowances was CHF6.50 (£5.23) as of March 2017, compared with an EU allowance price of €5.10 (£4.70)."

3.17 On the timing, the Minister expected that the proposal would go to the Environment Council on 13 October 2017 to be agreed through a vote. The Agreement would then be ready for signature in November, prior to the 23rd Conference of the Parties to the UNFCCC with the conclusion at a later date.

The Minister's letter of 11 December 2017

3.18 The Minister writes to indicate that, on 10 November 2017, the Council adopted the Decisions. The signing of the agreement between the EU and Switzerland is planned to take place soon.

3.19 On her decision to override scrutiny, the Minister says:

> "Unfortunately, because of the General Election, you will have not had time to consider the proposal before the vote. I therefore took the decision to vote in favour of the proposal, despite not having received scrutiny clearance from the European Scrutiny Committee. As noted in the Explanatory Memorandum, the agreement is in line with the long term policy goal for the UK in supporting global carbon markets as a mechanism for facilitating cost-effective decarbonisation globally. As such, the UK had taken an active role in negotiating the text of the agreement between the EU and the Swiss Confederation and was content with the text of the Agreement. Furthermore, no other Member State abstained or voted against the proposal and so, combined with our wider policy interests, I judged it better for the UK not to be isolated in abstaining. The UK's position on this matter is without prejudice to the nature of the future UK-EU relationship. While the UK remains a member of the EU, we will continue to exercise the rights and obligations of membership.
>
> "I regret that a scrutiny override was required in this instance. As you know this is a situation that we seek to avoid if at all possible and I will do everything I can to avoid this happening in future."

Previous Committee Reports

None.

4 Common Rules for EU Internal Gas Market

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Business, Energy and Industrial Strategy Committee
Document details	Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal gas market
Legal base	Article 194(2) TFEU; Ordinary Legislative Procedure; QMV
Department	Business, Energy and Industrial Strategy
Document Number	(39220), 14204/17 + ADD 1, COM(17) 660

Summary and Committee's conclusions

4.1 The EU's internal gas market aims to guarantee security of gas supply in EU by ensuring that gas can flow freely between Member States to where it is needed most and at a fair price. The interconnection of gas networks between Member States, and non-discriminatory access to these networks, are the basis for the market to function efficiently. It is also a prerequisite for gas deliveries during emergencies, both between Member States and with neighbouring third countries. While the EU is to a large extent dependent on gas imports from third countries, the Gas Directive[42] (Directive 2009/73/EC) does not explicitly set out a legal framework for gas pipelines to and from third countries. This means that such pipelines are subject to an array of differing national rules, including different rules between those EU countries through which a pipeline passes. The Commission proposes through this proposal to rectify that anomaly.

4.2 With the proposed amendments, the Gas Directive in its entirety will become applicable to pipelines to and from third countries, including existing and future pipelines, up to the border of EU jurisdiction. This includes the respective provisions on third-party access, tariff regulation, ownership unbundling and transparency. The Commission acknowledges that, as a consequence, pipelines to and from third countries would consequently be subject to at least two different regulatory frameworks. Where this results in legally complex situations, the appropriate instrument for ensuring a coherent regulatory framework for the entire pipeline will often be an international agreement with the third country or third countries concerned.

4.3 The Minister for Energy and Industry (Richard Harrington) signals the Government's support for the proposal as it will increase legal clarity. He notes that the catalyst for the proposal was the proposed Nord Stream 2 pipeline from Russia to Germany.

4.4 On EU exit, the Minister adds that the proposed amendment would apply to gas pipelines between the EU and the UK post-Brexit. The Minister considers that the

42 Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas.

amendment would benefit the UK by making it clear that Member States must apply the EU rules to interconnectors with the UK. It would therefore provide a framework for agreeing a post-EU exit regulatory regime applicable to both existing and future gas interconnectors, enabling the efficient flow of gas between the UK and the EU.

4.5 **This proposed amendment appears welcome and uncontentious. Especially helpful, as the Minister notes, is the establishment of a regulatory regime that would apply to gas flows between the UK and the EU post-Brexit. We note that the text includes an obligation on EU regulatory authorities to consult and cooperate with the relevant third country authorities in relation to the operation of gas pipelines to and from those third countries with a view to ensuring that the provisions of the Directive are applied consistently up to the EU's border. We ask the Minister to explain whether this would extend to consultation on potential future changes to the Directive, or related legal acts such as network codes, so that third countries are fully involved in the development of new EU rules affecting them.**

4.6 **In terms of future UK regulatory autonomy, to what extent would this Directive bind the UK to existing EU rules, and future EU changes to them? Should the UK wish to diverge in the future, how satisfied is the Government that the Directive as drafted provides sufficient guarantees for flexibility in that circumstance?**

4.7 **The recent EU-UK Joint report on progress during phase 1 of the UK's EU withdrawal negotiations included specific commitments in relation to Ireland and Northern Ireland, including those to be met in the absence of agreed solutions. Would the Government consider rules on the gas market to fall within the category of rules to which the UK has committed to retaining full alignment in order to support North-South cooperation, the all-island economy and the protection of the 1998 agreement? What degree of divergence in gas market rules would be possible while meeting those commitments?**

4.8 **The Minister notes that the negotiations have already begun and will continue during the Bulgarian Presidency during the first half of 2018. We would welcome an update on the progress of negotiations, as well as a summary of the views of other Member States. We note that some, including Bulgaria, are particularly dependent on third country gas supplies. It would also be helpful if the Minister could set out any views that have been expressed by affected third countries.**

4.9 **The proposal remains under scrutiny. We consider it to be of political importance and to be of particular interest to the House due to its relevance to the future relationship between the EU and the UK. We draw the document to the attention of the Business, Energy and Industrial Strategy Committee.**

Full details of the documents

Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal gas market: (39220), 14204/17 + ADD 1, COM(17) 660.

Background

4.10 This proposal amends the definition of "interconnector" and other relevant provisions in the Gas Directive in order to clarify the regulatory framework applicable to gas pipelines connecting Member States with third countries. The definition of "interconnector", which currently means a pipeline which crosses or spans a border between Member States, is changed so that it will mean "a transmission line which crosses or spans a border between Member States or between Member States and third countries up to the border of Union jurisdiction". The proposed amendment will make it clear that the Gas Directive (as well as the related legal acts such as the Gas Regulation, network codes and guidelines, unless otherwise specified in these acts) will be applicable to existing and future pipelines to and from third countries, up to the border of EU jurisdiction.

4.11 The proposal also includes amendments to other provisions in the Gas Directive which are applicable to pipelines from third countries, namely on: unbundling (independence of the system operator from supply and production); derogations from certain provisions of the Directive; and consultation with the authorities of third countries in order to ensure consistent application of this Directive up to the border of EU jurisdiction.

The Minister's Explanatory Memorandum of 27 November 2017[43]

4.12 The Government supports the proposal as it will increase legal clarity as regards the regulatory framework applicable to gas pipelines connecting Member States with third countries and will ensure that EU rules apply up to the border of EU territory (including territorial waters). The Minister observes that this is similar to the approach proposed for electricity interconnectors in the revised Electricity Directive 2009/72/EC which is currently being negotiated as part of the Commission's Clean Energy Package.

4.13 The catalyst for this proposal, notes the Minister, is the proposed Nord Stream 2 pipeline (NS2) which would double the capacity of the current pipeline from Russia to Germany and raises questions of wider energy security—but to which the internal energy legislation would not currently apply effectively.

4.14 On the relevance to the UK's withdrawal from the EU, the Minister says:

> "If agreed, the proposed amendment would apply to gas pipelines between the UK and the EU after EU exit. The Government's view is that amending the Gas Directive in this way would benefit the UK as a third country by making it clear that Member States must apply the EU rules to interconnectors with us. It would therefore provide a ready framework for agreeing a post-EU exit regulatory regime applicable to both existing and future gas interconnectors which will enable the efficient flow of gas between the UK and our neighbours to continue."

Previous Committee Reports

None.

43 Explanatory Memorandum of 27 November 2017.

5 Public procurement

Committee's assessment	Politically important
Committee's decision	(a) Not cleared from scrutiny; further information requested; (b) and (c) cleared from scrutiny; drawn to the attention of the Business, Energy and Industrial Strategy and Exiting the European Union Committees
Document details	(a) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Making Public Procurement work in and for Europe; (b) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Helping investment through a voluntary ex-ante assessment of the procurement aspects for large infrastructure projects; (c) Commission Recommendation on the professionalisation of public procurement Building an architecture for the professionalisation of public procurement
Legal base	(c) Article 292 TFEU
Department	Cabinet Office
Document Numbers	(a) (39116), 13286/17, COM(17) 572; (b) (39088), 12977/17, COM(2017) 573; (c) (39101), 12977/17573 + ADD 1, COM (17)

Summary and Committee's conclusions

5.1 On 3 October 2017 the European Commission adopted a procurement package, consisting of a non-legislative Communication setting out the overall policy framework for its proposals, and two additional non-legislative proposals.[44] The overall aim of the package is to make European procurement more efficient, to maximise use of digital technologies, and to simplify and accelerate existing procedures.

5.2 The Communication[45] identifies six priorities for action. It encourages the Member States to apply strategic criteria more systematically when awarding public contracts, with a targeted approach for certain priority sectors. It also advocates improving procurement skills for public buyers; improving access to procurement markets (particularly SMEs); increasing transparency and integrity of procurement processes through the collection and dissemination of good quality data; digitising procurement processes; and increasing cooperation among public buyers across the EU.

44 European Commission, Increasing the impact of public investment through efficient and professional procurement (3 October 2017).

45 Communication from the Commission to the Institutions: Making Public Procurement work in and for Europe COM (2017) 572.

5.3 Two separate documents develop particular aspects of this strategic approach: a recommendation[46] identifies steps Member States should take to ensure that public buyers have the necessary knowledge to comply with EU rules, and a Communication on the voluntary ex-ante assessment of large infrastructure projects[47] establishes a Commission-run voluntary scheme to help public authorities assess whether a project is compatible with the EU regulatory framework before taking further steps.

5.4 On 10 November 2017 the Minister for Government Resilience and Efficiency at the Cabinet Office (Caroline Nokes) submitted three explanatory memoranda relating to these proposals.[48] The Minister indicates that the Government supports the proposed strategy, and welcomes the proposal for a voluntary ex-ante assessment of procurement aspects of large-scale infrastructure projects and the benefits that it will bring.

5.5 The Government does not provide any comment on the implications of leaving the European Union for UK-EU public procurement. This needs to be addressed as cross-border public procurement is economically significant: one academic calculates that bilateral UK-EU procurement-related trade represents 15% of the total value of all UK procurement, amounting to approximately 2.5% of GDP.[49]

5.6 UK businesses are currently able to secure contracts through procurement launched in other EU Member States on the basis the EU procurement rules. EU public procurement law ensures that UK businesses have full access to the public sector markets of all other EU Member States, and that EU businesses have full access to UK public sector markets.

5.7 The WTO procurement regime is known as the Agreement on Government Procurement (GPA).[50] While there are significant overlaps between the GPA and the EU procurement regime in terms of content, the extent to which the GPA would provide an adequate substitute for current levels of access to EU27 procurement markets is unclear: one commentator has noted that the WTO GPA does not cover private utilities, defence procurement or concessions.[51]

5.8 The UK currently participates in the WTO GPA through the EU Schedule, which will no longer apply post-withdrawal since the UK will no longer be part of the EU. On 11 October 2017 the UK Government and the EU jointly wrote to the WTO membership to propose that the UK adopts a Schedule that is identical to that of the EU.[52]

5.9 **We note the Commission's procurement package and the Government's support for the proposed reforms. We regret that the Government has not provided any**

46 Commission Recommendation on the professionalisation of public procurement: Building an architecture for the professionalisation of public procurement C(2017) 6654.

47 Communication from the Commission to the Institutions: Helping investment through a voluntary ex-ante assessment of the procurement aspects for large infrastructure projects COM(2017) 573 .

48 Explanatory Memorandum on Making Public Procurement work in and for Europe submitted by the Cabinet Office (10 November 2017) EM 13286/17.
Explanatory Memorandum on the professionalisation of public procurement submitted by the Cabinet Office (10 November 2017) EM 12941/17.
Explanatory Memorandum on a voluntary ex-ante assessment of the procurement aspects for large infrastructure projects submitted by the Cabinet Office (10 November 2017).

49 Dr Albert Sanchez-Graells, Bristol University- Written evidence submitted to the House of Lords EU Internal Market Sub-Committee (TAS0083) (December 2016).

50 WTO, Agreement on Government Procurement https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

51 Victoria Moorcroft, Brexit: the end of public procurement rules or business as usual? (26 September 2017) .

52 Letter from the the UK and the European Commission have written to the WTO membership (11 October 2017).

substantive analysis of the implications for cross-border UK-EU procurement in the context of the UK's withdrawal from the EU. This issue requires close scrutiny as, despite the limitations of the available data, we understand that bilateral UK-EU cross-border trade in procurement represents around 15% of the total value of all UK public procurement—close to 2.5% of UK GDP—and affects a wide range of sectors.

5.10 **EU public procurement law ensures that UK businesses have full access to the public sector markets in all EU Member States, and vice versa. This ensures free trade in the context of public procurement under conditions of transparency, equal treatment and non-discrimination. This arrangement is based on the UK's membership of the Single Market, which the Government has determined to leave.[53] In parallel, the Government and the European Commission have written to the membership of the WTO with the intention of creating a UK-specific Schedule to the WTO Agreement on Government Procurement (GPA).[54]**

5.11 **The extent to which current levels of access to procurement markets will be reduced when the UK leaves the EU depends on the nature of the future relationship. EFTA countries that are signatories to the European Economic Area (EEA) Agreement participate fully in the Single Market for public procurement, but the Government has ruled out this option. There is some precedent for non-EFTA countries acquiring high levels of access to the EU procurement market: the recent EU-Ukraine Deep and Comprehensive Free Trade Area (DCFTA)[55] provides such access as part of a wider Association Agreement, which would require compliance with EU procurement rules. The WTO GPA will provide some access to the procurement markets of the EU27 and other participants, although this requires further clarification.**

5.12 **We ask the Government to respond to the following questions:**

- **What is the Government's best estimate of procurement trade flows and the balance of trade between the UK and the EU (including direct and indirect trade)?**
- **In which sectors is cross-border UK-EU27 procurement most significant?**
- **Bird & Bird suggest that there has already been a closing off to UK bidders of certain European Union-led projects, particularly those which require an ongoing EU presence, or for projects that are strategically significant.[56] Does the Government recognise this phenomenon? Does the Government have any data about the total value of EU-led procurement project contracts which UK businesses have secured?**

5.13 **We ask for responses to the following questions about the implications of the different models for retaining access to the Single Market for procurement:**

53 Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union (8 December 2017) .

54 Letter from the the UK and the European Commission have written to the WTO membership (11 October 2017) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/651033/Letter_from_EU_and_UK_Permanent_Representatives.pdf.

55 European External Action Service, EU-Ukraine Deep and Comprehensive Free Trade Area (reading guide) .

56 Victoria Moorcroft, Brexit: the end of public procurement rules or business as usual? (26 September 2017) .

- **What would be the effect on levels of UK access to EU27 procurement markets of a shift from the status quo to accessing these markets exclusively on the basis of the WTO Agreement on Government Procurement (GPA)? Is discrimination (e.g. on the basis of nationality / country of establishment) permitted in the context of the GPA? Would direct and indirect procurement trade be differently affected?**

- **Has the Government received any feedback concerning the procurement aspect of its proposal to adopt a WTO Schedule identical to that of the EU?[57] Does the Government intend to retain EU procurement rules in domestic law in order to demonstrate the UK's continuing compliance with the GPA?**

- **In terms of access to Government procurement markets, how do the access commitments that Canada must make to the EU, as part of CETA,[58] compare to those the UK currently makes as a Member State? What level of access to the EU procurement market does Canada receive in return, relative to that of EU Member States?**

- **In addition to the EU-Ukraine agreement, what precedents are there for non-signatories of the EEA Agreement securing full access to the EU procurement market? Could the Deep and Comprehensive Free Trade Area (DCFTA) which forms part of the Ukraine agreement provide a basis for the "deep and special partnership" that the Government envisages, or can an agreement of this kind be ruled out?**

5.14 **We ask the Government to respond to these questions by 7 February 2017. In the meantime, we retain document (a) (Making Public Procurement work in and for Europe) under scrutiny, while clearing documents (b) and (c). We draw this chapter to the attention of the Committees for Exiting the European Union and for Business, Energy and Industrial Strategy.**

Full details of the documents

(a) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Making Public Procurement work in and for Europe: (39116), 13286/17, COM (17) 572; (b) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Helping investment through a voluntary ex-ante assessment of the procurement aspects for large infrastructure projects: (39088), 12977/17, COM(17) 573; (c) Commission Recommendation on the professionalisation of public procurement Building an architecture for the professionalisation of public procurement: (39101), 12977/17+ ADD 1, COM(17) 573.

57 Letter from the the UK and the European Commission have written to the WTO membership (11 October 2017).
58 European Commission, CETA explained (accessed 11 December 2017).

Background

EU procurement acquis

5.15 EU law sets out minimum harmonisation public procurement rules. EU directives on public procurement cover tenders that are expected to be worth more than a given threshold. These rules organise the way public authorities and certain public utility operators purchase goods, works and services. They are transposed into national legislation. The core principles of these directives are transparency, equal treatment, open competition, and sound procedural management. They are designed to achieve a procurement market that is competitive, open, and well regulated. For tenders of lower value, national rules apply. Nevertheless, these national rules also have to respect the general principles of EU law.

5.16 By 18 April 2016, EU countries had to transpose the following four directives into national law:

- Directive 2014/24/EU on public procurement;[59]
- Directive 2014/25/EU on procurement by entities in the water, energy, transport and postal services sectors;[60] and
- Directive 2014/23/EU on the award of concession contracts.[61]

5.17 Dr Albert Sanchez-Graells (Bristol University), states that, taken as a whole, EU public procurement law "ensures that UK businesses have full access to the public sector markets of all other EU Member States, and that EU businesses have full access to the UK public sector markets. This ensures free trade in services in the context of public procurement under conditions of transparency, equal treatment and non-discrimination. No tariff or non-tariff measures are allowed."[62]

WTO Agreement on Government Procurement (GPA)

5.18 The GPA is a plurilateral agreement within the framework of the WTO, meaning that not all WTO members are parties to the Agreement. At present, the Agreement has 19 parties comprising 47 WTO members. Another 31 WTO members participate in the GPA Committee as observers. Out of these, ten members are in the process of acceding to the Agreement.

5.19 The fundamental aim of the GPA is to mutually open government procurement markets among its parties. As a result of several rounds of negotiations, the GPA parties have opened procurement activities worth an estimated US $ 1.7 trillion annually (globally) to international competition (i.e. to suppliers from GPA parties offering goods, services or construction services).

59 Directive 2014/24/EU on public procurement .
60 Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors.
61 Directive 2014/23/EU on the award of concession contracts.
62 Dr Albert Sanchez-Graells, Bristol University- Written evidence submitted to the House of Lords EU Internal Market Sub-Committee (TAS0083) (December 2016)..

5.20 The GPA is composed mainly of two parts: the text of the Agreement[63] and parties' market access Schedules of commitments.[64]

5.21 The text of the Agreement establishes rules requiring that open, fair and transparent conditions of competition be ensured in government procurement. However, these rules do not automatically apply to all procurement activities of each party. Rather, the coverage Schedules play a critical role in determining whether a procurement activity is covered by the Agreement or not. Only those procurement activities that are carried out by covered entities purchasing listed goods, services or construction services of a value exceeding specified threshold values are covered by the Agreement.

5.22 As a binding international treaty, the GPA is administered by the Committee on Government Procurement which is composed of representatives of all its parties. The enforcement of the Agreement is realized through two mechanisms: the domestic review mechanism at the national level and the WTO dispute settlement mechanism at the international level.

5.23 Dr Albert Sanchez-Graells (Bristol University) explains that EU public procurement rules are coordinated with the EU's international obligations under the WTO GPA, and compliance with EU law therefore allows its Member States to benefit from the advantages of the WTO GPA.[65] Therefore, through compliance with the EU public procurement acquis, the UK benefits from access to the EU internal market and to the public procurement markets of WTO GPA signatories.

5.24 The UK and the EU wrote to the WTO membership on 11 October outlining the UK and the EU's desire to retain their membership of the WTO Agreement on Government Procurement (GPA) on the same terms:

> "The UK and EU will work together on the UK's objective of remaining, upon leaving the EU, subject to the rights and obligations it currently has under the Agreement on Government Procurement as an EU Member State on the basis of the commitments currently contained in the EU schedule of commitments."[66]

The proposal

5.25 On 3 October 2017, in line with a previous Communication on the Single Market Strategy,[67] the Commission adopted a package of non-legislative measures on public procurement. The package is comprised of three main elements:

i) *A communication which identifies priority areas for improvement*[68]—Member States are encouraged to develop a strategic approach to procurement policies, focusing on six priorities: greater uptake of innovative, green and social criteria

63 WTO, Agreement on Government Procurement—text of the agreement.
64 WTO, Agreement on Government Procurement—coverage schedules.
65 Dr Albert Sanchez-Graells, Bristol University- Written evidence submitted to the House of Lords EU Internal Market Sub-Committee (TAS0083) (December 2016).
66 Letter from the the UK and the European Commission have written to the WTO membership (11 October 2017)
67 European Commission, Communication: Upgrading the Single Market: more opportunities for people and business COM/2015/0550 final.
68 Communication from the Commission to the Institutions: Making Public Procurement work in and for Europe COM (2017) 572.

in awarding public contracts; professionalisation of public buyers; improving access by SMEs to procurement markets in the EU and by EU companies in third countries; increasing transparency, integrity and quality of procurement data; digitisation of procurement processes; and more cooperation among public buyers across the EU.

ii) *A communication on the voluntary ex-ante assessment of large infrastructure projects*[69] –The Communication introduces a new, three-pronged, voluntary scheme proposed by the Commission to help public authorities assess whether a project is compatible with the EU regulatory framework before taking further steps.

A *helpdesk* will be available to national authorities and contracting authorities/entities to provide guidance, answer questions, and clarify specific public procurement issues at an early stage in preparing public procurement decisions. The helpdesk will be available for projects whose total estimated value is at least EUR 250 million.

A *notification mechanism* will be created which will allow public authorities to notify the Commission about overall procurement plans for infrastructure projects whose total estimated value exceeds EUR 500 million. The Commission will then provide an assessment of whether the procurement plan complies with EU procurement rules. The mechanism is voluntary, the Commission's advice is nonbinding, and information will be handled subject to strict confidentiality requirements.

An *information exchange mechanism* will provide a widely accessible database containing all document types relevant to the procurement process of large infrastructure projects, managed by the Commission and subject to the agreement of authorities involved. An IT platform for professionals involved in developing large infrastructure projects in the EU will also exchange views and information.

iii) *A recommendation on professionalisation of public buyers*[70]—The Commission recommends steps to be taken by Member States to ensure that public buyers have the business skills, technical knowledge and procedural understanding needed to comply with the rules and make sure that taxpayers get the best goods and services for their money. The Commission will facilitate the exchange of good practices and innovative approaches.

The Government's view

5.26 On 10 November 2017 the Minister for Government Resilience and Efficiency at the Cabinet Office (Caroline Nokes MP) submitted explanatory memoranda in relation to the three documents that comprise the procurement package.

69 Communication from the Commission to the Institutions: Helping investment through a voluntary ex-ante assessment of the procurement aspects for large infrastructure projects COM(2017) 573.

70 Commission Recommendation on the professionalisation of public procurement: Building an architecture for the professionalisation of public procurement C(2017) 6654.

5.27 In relation to the communication (Making public procurement work in and for Europe)[71] the Minister states that the Government "supports the strategy and welcomes the Commission's focus on making public procurement more strategic".[72] She also noted that the UK has a number of existing programmes in place that are aligned with these priorities.

5.28 Of the Commission's communication on the voluntary ex-ante assessment of large infrastructure projects[73] the Minister states that the Government welcomes the new system and will engage with the Commission to influence its elements as they develop.[74] She adds that the Government supports other Member States developing best practice in less developed procurement markets through the offer of an ex ante assessment of procurement projects, and that the proposals could improve opportunities for UK firms seeking to enter other Member States' procurement markets.

5.29 The Minister does not provide any comment on the policy implications of the Commission's recommendation on the professionalisation of public buyers.[75]

Brexit implications

5.30 The Government provides no substantive analysis of the implications of the UK's withdrawal from the European Union for public procurement. Each of the three explanatory memoranda from the Government, on the three Commission documents, contains the standard paragraph about exiting the European Union:

> "On 23 June 2016, the EU referendum was held and the people of the United Kingdom voted to leave the European Union. The Government respected the result and, on 29 March 2017, in accordance with Article 50 (2) of the Treaty on European Union, notified its intention to withdraw from the European Union. Until exit, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will also continue to implement and comply with EU law."

Brexit implications for UK-EU procurement

5.31 Possibly the most substantive account to date of the implications of Brexit for UK-EU procurement, from an economic and trade, as well as a purely legal, perspective, has been produced by Dr Albert Sanchez-Graells (Bristol University). In written evidence submitted to the House of Lords EU Internal Market Sub-Committee,[76] Dr Sanchez made the following points:

71 Communication from the Commission to the Institutions: Making Public Procurement work in and for Europe COM (2017) 572.

72 Explanatory Memorandum on Making Public Procurement work in and for Europe submitted by the Cabinet Office (10 November 2017) EM 13286/17.

73 Communication from the Commission to the Institutions: Helping investment through a voluntary ex-ante assessment of the procurement aspects for large infrastructure projects COM(2017) 573.

74 Explanatory Memorandum on a voluntary ex-ante assessment of the procurement aspects for large infrastructure projects submitted by the Cabinet Office (10 November 2017).

75 Explanatory Memorandum on the professionalisation of public procurement submitted by the Cabinet Office (10 November 2017) EM 12941/17 .

76 Dr Albert Sanchez-Graells, Bristol University- Written evidence submitted to the House of Lords EU Internal Market Sub-Committee (TAS0083) (December 2016).

- Bilateral UK-EU procurement-related trade can be estimated at around 15% of the total value of procurement, or close to 2.5% of GDP. This includes both direct and indirect cross-border procurement-related trade;
- The UK's exposure to public procurement-related trade in services in the EU is particularly relevant; the UK alone accounts for 84 % of the total value procured at EU level in awards of more than 100 million euros (approx. £85 million);
- Losing the possibility of this cross-border trade would be detrimental to the UK public sector; UK businesses would also be negatively affected if they lost the option of direct and indirect trade in services to the EU;
- EU public procurement law ensures that UK businesses have full access to the public sector markets of all other EU Member States, and that EU businesses have full access to the UK public sector markets. This ensures free trade in services in the context of public procurement under conditions of transparency, equal treatment and non-discrimination. These advantages would be limited or lost if the UK were to lose access to the EU internal market;
- The extent of that restriction or loss of free public procurement-related trade in services would depend on the future relationship between the UK and the EU, as well as its impact on the UK's status under the WTO Agreement on Government Procurement (GPA);
- EEA membership would require full compliance with the EU public procurement acquis and would entail no changes in access to EU and GPA procurement markets. A tailor-made Free Trade Agreement (FTA) like the recent EU-Ukraine Deep and Comprehensive Free Trade Area (DCFTA), would also require full compliance with the EU public procurement acquis;
- If the UK sought to rely on the WTO GPA only, it would need to clarify whether it can retain its status as a party in its own right or, having lost derived membership linked to EU membership, seek fresh accession; and
- If the UK sought to reach a solution similar to CETA, it could be at risk of having to provide more stringent access commitments to the EU than currently. This has been the case of CETA, which is based on the WTO GPA mechanism, and where only Canada made additional coverage concessions to the benefit of EU (including UK) businesses.

5.32 Victoria Moorcroft, an associate of law firm Bird & Bird, has also produced an analysis of the implications of Brexit for UK-EU procurement,[77] post-withdrawal, which includes the following points:

- Post-withdrawal, it may no longer be possible for UK authorities to publish notices in the Official Journal (OJEU), meaning that the procedures for contract notices, contract award notices, etc. become difficult practically to comply with;
- The WTO GPA does not cover private utilities, defence procurement or concessions; the GPA requires the implementation of a remedies regime but does not go into the same detail as the EU rules;

77 Victoria Moorcroft, Brexit: the end of public procurement rules or business as usual? (26 September 2017).

- One area where there has been an immediate effect is in a closing off to UK bidders of certain European Union-led projects, particularly those which require an ongoing EU presence, for example, or for projects that are strategically significant; and
- If it starts to become clearer that the UK will not remain part of some form of free trade arrangement with the EU, UK companies may need to consider setting up an entity within the EU to ensure that they continue to benefit from access to those markets, whilst they still have the unrestricted freedom to do so.

Previous Committee Reports

None.

6 Digital Single Market: Free flow of data

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested
Document details	Proposal for a Regulation of the European Parliament and of the Council on a framework for the free flow of non-personal data in the European Union
Legal base	Article 114 TFEU; ordinary legislative procedure; QMV
Department	Digital, Culture, Media and Sport
Document Number	(39028), 12244/17, COM (17) 495 final

Summary and Committee's conclusions

6.1 On 13 September 2017 the European Commission proposed a regulation to liberalise non-personal data flows within the European Union, by prohibiting data localisation requirements[78] (other than on grounds of public security).[79] The Government welcomed the Commission's proposal but also indicated that it would seek further clarification of a wide range of its effects (see Background).[80]

6.2 In its report of 29 November 2017[81] the Committee asked the Government to provide it with these clarifications when it received them, and expressed concern as to whether the Regulation's provisions were sufficient to ensure that Member States repealed existing data localisation requirements other than where genuine public security grounds existed. The Committee also asked questions about the proposed regulation's implications in the context of the UK's withdrawal from the European Union. The Committee retained the file under scrutiny, and asked for an update by 17 January 2017, or sooner if progress in Council required it.

6.3 On 13 December 2017 the Minister of State for Digital at the Department of Digital, Culture, Media and Sport (Matt Hancock MP) wrote to the Committee[82] to indicate that the Estonian Presidency intended to seek an "informal [negotiating] mandate" from COREPER (the Committee of Permanent Representatives to the European Union) at its meeting on 20 December, which would enable it to start inter-institutional negotiations with the EP in due course.

6.4 The Minister does not provide the Committee with the clarifications that he previously indicated the Government was seeking. He provides limited information about a discussion which took place at Telecommunications Council on 4 December 2017. He indicates that there has been a push among some Member States to increase exemptions

78 Data localisation requirements oblige data processors to locate data storage and processing facilities on national territory.

79 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Building a European Data Economy SWD (2017) 2 final.

80 Explanatory memorandum from DCMS (12 October 2017).

81 Second Report HC 301–iii (2017–18), chapter 4 (29 November 2017).

82 Letter from the Minister to the Chairman of the European Scrutiny Committee (13 December 2017).

from the principle of the free movement of non-personal data flows, raising concerns that the proposal's liberalising effect will be diminished. He indicates that the Government will continue to support the Commission's proposal and to resist changes that could weaken its scope and impact.

6.5 The compromise text which is likely to form the basis of the mandate became available online on 14 December 2017.[83] It proposes new exemptions from the principle of free movement of data for public authorities and also for reasons of public policy of "imperative grounds". It is not possible to reach a clear assessment of the policy effects of these exemptions and the extent to which they weaken the proposal without further explanation from the Government.

6.6 On 15 December 2017 officials provided staff with an internal departmental document which included information that will in due course form the basis of the Government's response to the Committee's report on this proposal. The briefing was shared on a confidential basis and so it is not possible to share its contents with the Committee. The document did not provide the clarifications that the Government had previously indicated it was seeking, did not provide a clear account of changes to the original proposal, and did not provide any more detail about how the Government intended to proceed in COREPER.

6.7 COREPER proceeding to grant a mandate in these circumstances, without effective scrutiny having taken place, would clearly undermine parliamentary scrutiny of the proposal.

6.8 **Regardless of the outcome of negotiations in COREPER, the Committee does not support the Government instructing the UK's permanent representation to support the agreement of an informal mandate on the proposed regulation in COREPER, for the following reasons:**

- **The Minister in his previous letter undertook that the Government would seek further clarification in relation to numerous aspects of the proposal, and the Committee requested to receive these clarifications. These clarifications have not yet been received;**
- **Little information has been provided about the discussions which took place in Telecommunications Council on 4 December 2017: in particular, no information has been provided about the discussions of provisions governing cross-border data access; and the Government's comment on the discussion of the proposed regulation's scope indicates that there are significant unresolved disagreements among the Member States regarding exemptions;**
- **Substantial changes to the proposal were brought forward on 14 December 2017.[84] The proposed exemptions narrow the proposal's scope, and clearly warrant further scrutiny. If the Government was aware from Council Working Parties of the likely changes, it should have informed the Committee about these in advance, as is customary, along with its position. If the Government was not aware of the proposed changes, then it is clearly inappropriate for COREPER to agree a mandate without time having been provided for Government to consult with parliament; and**

83 Politico Pro, Estonia floats compromise text on free flow of data (14 December 2017) (paywall).
84 Politico Pro, Estonia floats compromise text on free flow of data (14 December 2017) (paywall).

- **The Government has not provided a clear account of the basis on which it will instruct its representative how to vote in COREPER, other than to state, in the most general terms, that it will resist changes to the text that could weaken its scope/impact. This level of vagueness falls short of the standards that the Committee expects.**

6.9 **While the scrutiny reserve resolution does not strictly apply to the agreement of an informal negotiating mandate in COREPER, in practice such mandates act as substitutes for general approaches in Ministerial Council—agreements to which the reserve applies. The agreement of informal mandates instead of general approaches therefore means that the scrutiny reserve has no purchase at this important juncture in the legislative process, and will only do so when the Ministerial Council comes to consider the text agreed in trilogue negotiations, by which stage the scope for parliamentary scrutiny to influence the eventual outcome is negligible.**[85]

6.10 **For the reasons given above, we consider that agreeing a mandate for the proposed regulation in COREPER on 20 December would seriously deprecate parliamentary scrutiny of the proposal. The Estonian Presidency's desire to reach agreement on this proposal, and the desire of the Member States to hasten the progress of the Digital Single Market, while understandable, do not provide grounds for the Government to disregard parliamentary scrutiny in this manner.**

6.11 **We therefore request that the Government instruct the UK's Permanent Representation to request in COREPER that the decision be deferred until sufficient scrutiny of the proposed mandate has taken place, and that, instead of an informal mandate, a general approach be agreed in Ministerial Council in due course.**

6.12 **We retain this proposal under scrutiny. We ask for the Minister to provide an update, including answers to the questions in the Committee's previous chapter on this proposal,**[86] **as well as an account of proceedings in COREPER, by 17 January 2018.**

Full details of the documents:

Proposal for a Regulation of the European Parliament and of the Council on a framework for the free flow of non-personal data in the European Union: (39028), 12244/17, COM (17) 495 final.

Background

6.13 On 13 September 2017, after repeated delays, the Commission finally adopted its proposal for a Regulation governing the free flow of non-personal data (hereafter 'the Regulation').[87] The proposed Regulation aims to:

- prohibit public bodies from imposing data localisation requirements, with an exception where reasons of public security apply;

85 See paragraphs 39 and 44 of our report on Transparency of EU Council decision making (26 May 2016).
86 Second Report HC 301–iii (2017–18), chapter 4 (29 November 2017).
87 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Building a European Data Economy SWD (2017) 2 final.

- require Member States to repeal existing data localisation requirements which do not comply with the Regulation as adopted, and to notify the Commission of any draft data localisation requirements that are proposed in future;
- ensure that public bodies can access data on a cross-border basis for regulatory control purposes; and
- facilitate data portability in a business-to-business context, with a view to making it easier for data service users to switch data service provider, by requiring industry to develop a self-regulatory code of conduct for data porting.

6.14 The proposed Regulation would also require Member States to designate a 'single point of contact' to deal with issues concerning the application of the Regulation, and would establish a free flow of data comitology committee.

6.15 On 12 October 2017, the Minister of State of the Department for Digital, Culture, Media and Sport (Matt Hancock) provided the Committee with an explanatory memorandum in relation to the Commission's proposal.[88] The Minister stated that the Government welcomed the Commission's proposal, and that it had consistently called for it to tackle unjustified data localisation, which can be anti-competitive, recognising the need for limited exemptions.

6.16 The Minister indicated that the Government would seek further clarification in relation to numerous aspects of the proposal, including the following aspects of Article 4 (Free movement of data within the Union):

- the treatment of datasets that contain personal and non-personal data, and exempted and non-exempted data, including where these are difficult to separate out;
- the mechanism for assessing notified exemptions: the criteria, including any proportionality test, and the process in the event of a Member State challenging a negative decision;
- how the proposed notification system would capture localisation that occurs as a result of practices, guidance and procurement; and
- how the proposed transparency model will work in relation to sensitive data that is exempted.

6.17 The Minister also sought clarification regarding the scope of Article 5 (Data availability for competent authorities), including examples of the information that would apply, and the degree to which it would support public authorities seeking to access data held in non-public organisations.

6.18 The Minister also sought further clarification of the following aspects of Article 6 (Data porting):

- the evidence in the impact assessment to support action on data porting; and
- how the proposed code of conduct would have the desired impact on facilitating switching and increased market competition; and what appeared to be an ambitious 12 month deadline.

88 Explanatory memorandum from the Department of Digital, Culture, Media and Sport (12 October 2017).

6.19 In its report on 29 November 2017,[89] the Committee:

- asked the Government to provide the Committee with updates in relation to each of the points in its explanatory memorandum on which it had indicated that it would seek clarification;
- given concerns about Article 4(3), which did not specify the mechanism for assessing notified exemptions, asked whether the Government was confident that the proposed Regulation's provisions were sufficient to require Member States to repeal existing data localisation requirements other than where genuine public security grounds existed, or whether countries would be free to obstruct proper implementation of the Regulation once adopted on the basis of tenuous and weakly justified public security grounds; and
- expressed its regret regarding the lack of substantive analysis from the Government of the implications of the UK's impending withdrawal from the European Union in relation to the proposed Regulation, urged it to provide a thorough analysis of these implications in future explanatory memoranda, and asked a number of questions about these implications.[90]

6.20 The Committee retained the proposal under scrutiny and asked for a response to the above questions, and any further updates on progress in Council, by 17 January 2018, or sooner if progress in Council required it.

Letter from the Minister of 13 December 2017

6.21 The Minister of State for Digital (Matthew Hancock MP) writes to inform the Committee that the Estonian Presidency intends to seek to obtain an informal mandate to begin trilogue negotiations with the European Parliament at the 20 December meeting of COREPER.

6.22 The Minister informs the Committee that a debate on the proposal took place at the Telecommunications Council on 4 December 2017. He states that there was "general consensus on the importance of the proposal for the digital economy" and said that the discussion focussed on three aspects of the Regulation: scope; inclusion of the public sector data; and provisions governing cross-border data access.

6.23 The Minister provides the following information about the discussions which took place on each of these points:

- as regards public sector data, he states that "the UK, along with several Member States, argued that public authorities should set an example by limiting their use of data localisation measures", seeming to imply that some Member States desire an exemption for public authorities, but not providing any further detail;
- with respect to scope, the Minister indicates that there is disagreement among the Member States: "There was some debate about creating additional exemptions to

89 Second Report HC 301–iii (2017–18), chapter 4 (29 November 2017).
90 See Paragraph 4.14 of Second Report HC 301–iii (2017–18), chapter 4 (29 November 2017).

data localisation provisions, where we and other member states expressed doubts about agreeing extensive exemptions"; the proposed exemptions, and the extent of UK concerns about different exemptions, are not explained in any detail; and

- no information is provided about the discussion which took place of the provisions governing cross-border data access.

6.24 The Minister indicates that the Government has not yet received a copy of the proposed mandate and states that as soon as he receives a copy of that text he will send it to the Committee.

6.25 The Minister states that there will be further negotiation of the proposal at working party level, "where we will continue to support the Commission's proposal and resist changes to the text that could weaken its scope and impact". This, and the Minister's previously noted concern about adding further exemptions to the application of the Regulation, is the only information available to the Committee about the Government's position in advance of COREPER.

6.26 The Minister justifies the urgency in granting the Presidency an informal negotiating mandate with reference to the fact that "most Member States, including the UK, highlighted the importance of a speedy adoption of this file, as set out in the conclusions of the October European Council[91] which called for the file to be concluded in the first half of next year" and adds that "the digital agenda has been a high priority for the Estonian Presidency". On this basis, he states that the Presidency "has confirmed its plan to seek to obtain an informal mandate for trilogue at the 20 December meeting of COREPER".

6.27 The Minister, presumably seeking to anticipate and assuage the Committee's concerns about the scrutiny reserve not applying to the agreement in COREPER, states that "no final decision will be taken on this file without political agreement by Ministers". This is not particularly reassuring, as the text the Council will eventually vote on will be the outcome of trilogue negotiations between the European Parliament and the Presidency, and the scope for scrutiny to exercise influence at this stage is negligible. The Committee's greatest scope to exert influence is at the present stage in the legislative process when the Member States agree their position. Ordinarily this agreement would take the form of a General approach in the Ministerial Council, to which the scrutiny reserve would apply.

Draft mandate

6.28 On 14 December 2017 Politico Pro published an article[92] which stated that the Estonian Presidency had floated a draft compromise text for COREPER, which would form the basis of the mandate proposed for 20 December. The article provides a link to an amended text of the regulation.

6.29 According to Politico, the text expands the scope of exceptions from the regulation, which allow governments to require certain data to stay inside their borders. Specific changes that are cited include the provision that data localization measures "should be banned unless they are justified based on the imperative grounds of public security or public policy". The term "public policy", the text goes on to say, "covers the protection

91 European Council conclusions (19 October 2017).

92 Politico Pro, Estonia floats compromise text on free flow of data (14 December 2017) (paywall).

against a genuine and sufficiently serious threat affecting one of the fundamental interests of society and may include, in particular, issues relating to human dignity, the protection of minors and vulnerable adults".

6.30 According to Politico, the changes are described as aimed at convincing countries including Germany and France to back the Council's position. Annex 1 of the document summarises all of the changes to the proposal, of which the following are potentially significant:

- A further exemption on grounds of "public policy" is added which can only be invoked on "imperative grounds". New recitals state that the meaning of this term is based on CJEU jurisprudence and covers protection against a genuine and sufficiently serious threat affecting one of the fundamental interests of society and may include, in particular, issues relating to human dignity, the protection of minors and vulnerable adults. Imperative grounds means a threat to public security or policy that is of a particularly high degree of seriousness.
- A further exemption is added for activities under Article 51 TFEU (exercising official authority). This change is intended to provide greater flexibility to the public sector while keeping the obligation to communicate draft acts to the Commission.
- The transition period for Member States to review, repeal and notify existing localisation requirements is changed from 12 months to 24 months;
- Member States are given the power to impose sanctions for failure to comply with an obligation to provide data. The principle of the free movement of non-personal data within the Union can be suspended in such instances.

Previous Committee Reports

Second Report HC 301–ii (2017–19), chapter 4 (29 November 2017).

7 Exchanging information on criminal convictions

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, the Justice Committee and the Committee on Exiting the European Union
Document details	(a) Proposal for a Directive amending Council Framework Decision 2009/315/JHA as regards the exchange of information on third country nationals and as regards the European Criminal Records Information System (ECRIS) and replacing Council Decision 2009/316/JHA (b) Proposal for a Regulation establishing a centralised system for the identification of Member States holding conviction information on third country nationals and stateless persons (TCN) to supplement and support the European Criminal Records Information System (ECRIS-TCN) and amending Regulation No 1077/2011
Legal base	(Both) Article 82(1)(d) TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Numbers	(a) (37463), 5438/16 + ADDs 1–2, COM(16) 7 (b) (38886), 10940/17 + ADD 1, COM(17) 344

Summary and Committee's conclusions

7.1 The European Criminal Records Information System—ECRIS—enables Member States to exchange information on the previous convictions of EU citizens, ensuring that they cannot escape their criminal past by offending in a different Member State. Each Member State operates as a central repository for all criminal records information concerning its nationals, including criminal convictions handed down in other Member States. ECRIS provides a mechanism for notifying Member States of relevant convictions and exchanging criminal records information. The UK has participated fully in ECRIS since it became operational in April 2012 and is one of the most active users.

7.2 ECRIS can be used to obtain details of previous convictions recorded against third county national offenders in the EU but the procedures are cumbersome. As there is no central criminal records repository, a Member State seeking a full criminal history must

send a request for information to *all* other Member States. Few choose to do so in practice as the administrative burden of sending blanket requests, as well as the danger of clogging up the ECRIS system, outweighs the benefits.[93]

7.3 In early 2016, the Commission proposed a Directive—document (a)—to make ECRIS a more effective tool for exchanging information on third country national offenders. It envisaged that this information would be held on interconnected systems at national level. Following the completion of a feasibility study, EU justice and home affairs Ministers decided that this decentralised model would be too burdensome and costly to implement. In July, the Commission proposed a Regulation—document (b)—which would establish a centralised EU information system containing biographical information, fingerprints and facial images of third country national offenders who have been convicted of a criminal offence in the EU. This central system—ECRIS-TCN—would enable a Member State to discover whether any relevant criminal records information is held elsewhere in the EU and, if it is, to obtain access to that information by submitting a request to the relevant Member State(s) through the decentralised ECRIS system.

7.4 The proposed Directive and Regulation are both subject to the UK's Title V (justice and home affairs) opt-in. The Government opted into the proposed Directive in May 2016, shortly before the referendum in which the UK decided to leave the UK. The Government informed us this October that it had also decided to opt into the proposed Regulation. In a Written Ministerial Statement issued on 2 November the Home Secretary (Amber Rudd) said that opting in would increase the efficiency of ECRIS and "help ensure that our law enforcement agencies have more information available to them when they encounter third country nationals than they do at present".[94]

7.5 We considered the ECRIS package on 13 November. We asked the Government to provide:

- a full explanation of its reasons for deciding to opt into the proposed Regulation;
- its assessment of the prospects for agreeing and implementing the proposed changes to ECRIS and establishing the new ECRIS-TCN system before the UK leaves the EU (the Commission expects it to take around two years to develop and implement the system once the proposed Regulation has been adopted);
- further information on its approach to Article 14 of the proposed Regulation concerning third country access to criminal records information; and
- details of the Government's position on future UK participation in ECRIS and ECRIS-TCN, both during any transitional/implementation period agreed as part of the UK's exit negotiations and post-exit.

7.6 We also asked the Government:

- how easy or difficult it would be to obtain criminal records information on EU and third country national offenders from Member States on a bilateral basis, in the absence of an overarching agreement with the EU; and

93 The Commission estimates that fewer than 5% of criminal convictions against third country nationals in 2014 were informed by a full criminal record history of previous offending.

94 See the Home Secretary's Written Ministerial Statement of 2 November 2017 on ECRIS and on the EU justice and home affairs IT Agency.

- whether British citizens would be third country nationals for the purposes of ECRIS and ECRIS-TCN once the UK leaves the EU and, if so, whether the proposed Directive and Regulation include adequate data protection safeguards and effective remedies to mitigate the risk of any adverse impact.

7.7 In his letter of 1 December, the Minister for Policing and the Fire Service (Mr Nick Hurd) tells us that negotiations have made "rapid progress" and that the Estonian Presidency intends to seek agreement to a general approach at the Justice and Home Affairs Council on 7/8 December. Although the Government does not yet have the final text, he anticipates that it will be "broadly acceptable" and expects "all other Member States" to support it. As the proposals remain under scrutiny in both Houses, the Government intends to abstain.

7.8 The Minister recognises that the ECRIS proposals are "unlikely" to be agreed and implemented before the UK leaves the EU but says that opting in underlines "the importance to the UK of EU tools in achieving a practical relationship with the EU on security cooperation after Brexit". He confirms that the Government is seeking "a strictly time-limited implementation period" during which the UK will continue to take part in existing security measures—the mechanisms for achieving this, as well as any post-exit participation in ECRIS, are still to be negotiated. The Minister acknowledges that, in the absence of an agreement with the EU, it would be harder to obtain criminal records information on EU and third country nationals from Member States on a bilateral basis.

7.9 **We understand that the Justice and Home Affairs Council agreed a general approach on both legislative proposals at its meeting on 8 December.[95] We ask the Minister to explain why he was unable to inform us sooner of the Presidency's intention to seek an agreement. It is not good enough for the Minister to tell us that the Government will abstain, safe in the knowledge that the proposals will pass through the Council unopposed. Effective scrutiny depends on the Government providing information in sufficient time for us to consider it before, not after, decisions are taken within the Council.**

7.10 **The Minister confirms that he is content with the outcome of negotiations on "the most important issues" for the Government—the treatment of EU citizens who are dual nationals and the criminal threshold that has to be met to include fingerprints in ECRIS-TCN. We note that the general approach also includes changes to the provisions of the proposed Regulation on third country access to criminal records information. We ask the Minister for his assessment of the changes, why they were included, and how they are likely to affect the UK once it leaves the EU.**

7.11 **We note that the expected timeframe for implementing the changes to ECRIS and ECRIS-TCN appears to have been pushed back to three (rather than two) years from the date on which the legislative proposals are adopted, taking it beyond the UK's exit from the EU in March 2019 and beyond the end of a two-year transitional/implementation period. Does the Minister expect this delay to affect the UK's preparations for implementing the proposed legislation? Can he confirm that the Government intends ECRIS and ECRIS-TCN to be amongst the measures included in a future EU/UK agreement on security, law enforcement and criminal justice cooperation?**

95 See the press release issued by the Council on 8 December 2017.

7.12 **We ask the Minister whether the Government has changed its position on producing an Impact Assessment on the proposed Regulation establishing ECRIS-TCN. His predecessor (Brandon Lewis) informed the Committee in November 2016:**

> **"The Home Office has already committed to working with the Ministry of Justice to provide a full impact assessment of the new system *once the legislation has been published*."**[96]

By contrast, the Minister now tells us:

> **"Home Office officials are working closely with the Ministry of Justice to establish the downstream impacts and so costs of the draft Regulation as it relates to the Criminal Justice System."**

Does the earlier commitment to provide "a full impact assessment" remain and, if so, when does the Government expect to publish it?

7.13 **The proposed Directive and Regulation remain under scrutiny. We look forward to receiving the information we have requested as well as regular progress reports on negotiations. We draw this chapter to the attention of the Home Affairs and Justice Committees and the Committee on Exiting the European Union.**

Full details of the documents

(a) Proposal for a Directive amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third country nationals and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA: (37463), 5438/16 + ADDs 1–2, COM(16) 7.

(b) Proposal for a Regulation establishing a centralised system for the identification of Member States holding conviction information on third country nationals and stateless persons (TCN) to supplement and support the European Criminal Records Information System (ECRIS-TCN) and amending Regulation No 1077/2011: (38886), 10940/17 + ADD 1, COM(17) 344.

Background

7.14 Our earlier Reports listed at the end of this chapter provide an overview of ECRIS, the changes put forward by the Commission in the proposed Directive and Regulation and the Government's position.

The Minister's letter of 1 December 2017

7.15 We asked the Minister to explain the Government's reasons for opting into the proposed Regulation and whether it would have been feasible *not* to do so, given the Government's earlier decision to opt into the related proposal for a Directive amending ECRIS. The Minister responds:

96 See the letter of 21 November 2016 from the then Minister for Policing and the Fire Services (Brandon Lewis) to the Chair of the European Scrutiny Committee.

> "Although ECRIS already allows for the exchange of criminal records information across the EU and establishes an EU-wide offending history for EU nationals, it does not lend itself to efficient exchange with regard to third country nationals (TCNs) because Member States must send requests to all Member States individually in order to capture EU-wide criminality. The draft Regulation addresses this by creating a centralised identification system, as detailed in my Explanatory Memorandum laid on 19 July 2017, which makes criminal records exchange for TCNs more efficient. Opting into the draft Regulation which provides for the efficient exchange ensures that our criminal justice and law enforcement agencies have more information available to them when they encounter TCNs than they do at present."

7.16 He confirms that it would not be possible for the UK to comply with the proposed Directive without also opting into the proposed Regulation, citing as an example Article 6(3)(a) of the proposed Directive. Under this provision, a third country national can request an extract of information held on his or her criminal record. To provide a complete extract, the requested Member State can only approach Member States holding relevant criminal records information. The Minister notes that "access to the centralised system is the only way to ensure the central authority can make a targeted request in this way".

7.17 The Minister recognises that the Government's opt-in decision has a wider significance in the context of Brexit:

> "Opting in also supports the Government's objectives as set out in the future partnership paper *Security, law enforcement and criminal justice* for an overarching agreement with the EU that supports future cooperation on security, law enforcement and criminal justice. By agreeing to participate in measures such as this, the Government is underlining the importance to the UK of EU tools in achieving a practical relationship with the EU on security cooperation after Brexit."

7.18 We asked the Minister to confirm that Article 4a of the UK's Title V opt-in Protocol would not have applied if the Government had decided not to opt into the proposed Regulation, meaning that there would have been be no mechanism for removing the UK from ECRIS while it remained a member of the EU.[97] The Minister confirms that this is the case, as Article 4a "only applies to measures which amend an existing measure by which the UK is bound" and the proposed Regulation "is not amending the existing draft Directive but instead is setting up the centralised system which is designed to complement the existing ECRIS system".

7.19 The Minister considers that the proposed Directive and Regulation are "unlikely" to be agreed and implemented before the UK leaves the EU as they will need "two years for development and implementation post-adoption". He confirms the Government's intention to seek "a strictly time-limited implementation period where we continue to take part in existing security measures" and which he expects to last "for a period of no more than two years", adding:

97 Article 4a provides a mechanism to eject the UK from an existing measure if the UK decides not to participate in a later amending measure and its non-participation would make the existing measure "inoperable" for other Member States or the EU. As the proposed Regulation (unlike the earlier proposal for a Directive) does not amend the existing ECRIS measures, it seems unlikely that the Article 4a mechanism would apply.

> "We will need to build a bridge from our exit to our future partnership, to allow business and people time to adjust, and to allow new systems to be put in place. It makes sense for there to be only one set of changes."

7.20 We invited the Minister to explain what mechanism the Government envisaged to enable the UK to participate in the new ECRIS-TCN system and to cooperate with eu-LISA, an EU Agency, during a transitional/implementation period, given that the UK will have left the EU and its institutions. He responds:

> "The mechanisms to enable our participation in existing security measures during the implementation period will need to be addressed in negotiations on the implementation period."

7.21 Post-exit, the Minister confirms the Government's intention to seek "an overarching agreement with the EU that supports future cooperation on security, law enforcement and criminal justice" but does not indicate whether ECRIS and ECRIS-TCN would be amongst the measures included in the agreement. He recognises, however, that in the absence of an agreement with the EU, it would be harder to obtain criminal records information on EU and third country nationals from Member States on a bilateral basis. The UK could fall back on the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters which includes provisions on the exchange of information between participating countries (including all EU Member States) but there are shortcomings:

> "Whilst the Convention does contain some very general provisions to exchange criminal records information, there are significant limitations. Criminal records requests would need to be made manually, compared with the current automated ECRIS system. Documents would not necessarily be translated or 'mapped' to recognisable offences here in the UK, as is the case currently via ECRIS. This makes processing slower and more costly. The information would not be received in a standard format which would make it difficult to process and would result in delays in passing criminality information to law enforcement and the courts. Critically, there is no requirement for Member States to respond to requests within any timescale, as there is with ECRIS, and so in some cases the UK may not receive a response at all."

7.22 Turning to Article 14 of the proposed Regulation which sets out restrictive conditions for exchanging information on criminal convictions with third countries via a contact point within Eurojust, the Minister comments:

> "The draft Regulation contains provisions in relation to indirect access for third countries to information held in the ECRIS-TCN system. The Government has not sought changes or amendments to these provisions, but notes the potential benefits for the UK post-Brexit."

7.23 We asked whether changes to Article 14 would be necessary to accommodate any agreement on UK participation in, or access to, ECRIS and ECRIS-TCN post-Brexit. The Minister observes only that "the mechanism by which the EU will cooperate with the UK as a third country will need to be addressed in the course of negotiations" and that the Government has proposed an agreement with the EU on security, law enforcement and criminal justice.

7.24 We asked the Minister whether he accepted that British citizens would be third country nationals for the purposes of ECRIS and ECRIS-TCN once the UK leaves the EU and sought an assurance that the proposed Directive and Regulation include adequate data protection safeguards and effective remedies to mitigate the risk of any adverse impact on British citizens post-Brexit. The Minister tells us that "the status of UK citizens in relation to measures such as ECRIS will need to be agreed during negotiations". He nonetheless considers that the data processing safeguards set out in the proposals and in general EU data protection law are sufficient.

7.25 We reminded the Minister that his predecessor had made a commitment to produce a full impact assessment on the Commission's ECRIS-TCN proposal once it had been published. We invited him to confirm that work on the impact assessment was underway and to share the findings with us at the earliest opportunity. He responds:

> "Home Office officials are working closely with the Ministry of Justice to establish the downstream impacts and so costs of the draft Regulation as it relates to the Criminal Justice System. Any future UK participation in ECRIS-TCN following the UK's exit from the EU, and any costs relating to that, will be agreed during EU Exit negotiations."

7.26 The Minister says that he expects the Estonian Presidency to seek agreement to a general approach at the Justice and Home Affairs Council on 7 December. Although the Government has not seen the final text, he describes developments on the main issues of concern to the Government:

> "Our objective was to ensure the threshold of criminality above which fingerprints should be taken is sufficiently low so as to capture as much criminality as possible. We are confident that the final text will offer a threshold which captures the types of criminality we care about whilst ensuring that UK police practice in collecting fingerprints is unaffected by this draft legislation.
>
> "The draft legislation also contains provisions for dual nationals to be treated as TCNs [third country nationals] in the centralised system, as we had intended, helping to ensure that individuals with two or more nationalities are not able to hide previous criminality."

7.27 The Minister expects negotiations with the European Parliament to progress quickly:

> "There is a good chance of Political Agreement being reached on the text in the first half of next year, under the Bulgarian Presidency."

Previous Committee Reports

First Report HC 301–i (2017–19), chapter 22 (1 November 2017). On document (a), see our Twenty-second Report HC 71–xx (2016–17), chapter 8 (7 December 2016), Fourteenth Report HC 71–xii (2016–17), chapter 4 (19 October 2016), Fourth Report HC 71–iii (2016–17), chapter 6 (8 June 2016) and Twenty-fourth Report HC 342–xxiii (2015–16), chapter 10 (24 February 2016).

8 Managing EU migration and security databases

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 and the Committee on Exiting the European Union
Document details	Proposal for a Regulation on the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice
Legal base	Articles 74, 77(2)(a) and (b), 78(2)(e), 79(2)(c), 82(1)(d), 85(1), 87(2)(a) and 88(2) TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Number	(38878), 10820/17, COM(17) 352

Summary and Committee's conclusions

8.1 A new EU Agency—"eu-LISA"—was established in 2012 to oversee the operational management of three EU information systems dealing with asylum, border management and law enforcement. The Regulation setting up eu-LISA provides that the Agency may be made responsible for the preparation, development and operational management of other large-scale EU information systems in the justice and home affairs field. Several new EU information systems are planned (see the Background section of this chapter for further details). Each envisages an important role for eu-LISA in ensuring overall operational management. The proposed Regulation would give eu-LISA responsibility for managing these new EU information systems. It would also repeal and replace the 2011 Regulation establishing eu-LISA, make some technical changes to implement the findings of a recent external evaluation, and empower the Agency to take the actions needed to make EU information systems for security, border and migration management fully interoperable by 2020 (this latter task being dependent on the adoption of a further legislative instrument).

8.2 UK participation in eu-LISA is legally complex, bringing into play the UK's Title V (justice and home affairs) opt-in and Schengen opt-out Protocols. This is because the proposed Regulation will give eu-LISA responsibility for an array of new EU information systems. Some build on parts of the Schengen rule book on border control and visa policy which do not apply to the UK and are not open to UK participation. Others are subject to the UK's Title V (justice and home affairs) opt-in or Schengen opt-out, meaning that the UK is able to decide whether or not to participate.

8.3 In his Explanatory Memorandum on the proposed Regulation, the Security Minister (Mr Nick Hurd) set out the steps that the Government would need to take if it were to decide that the UK should participate in the proposal (see the Background section). He indicated that the Government considers eu-LISA to be an effective Agency and supports most of the changes proposed by the Commission.

8.4 We noted that effective operational management of the EU's main asylum, border management and security information systems was particularly important in the context of the UK's decision to leave the EU since many of the systems will mainly contain data on third country (non-EU) nationals. A high level of data quality and accuracy was therefore in the UK's interests while it remains a member of the EU and when it leaves, given the potential impact on British citizens. We requested further information on the factors influencing the Government's opt-in and opt-out decisions and the prospects for securing some form of continued UK participation in eu-LISA, and the information systems it manages, post-exit.

8.5 In his letters dated 31 October and 1 December, the Minister confirms that the Government has decided to participate in the proposed Regulation for reasons set out in a Written Ministerial Statement issued by the Home Secretary (Amber Rudd):

> "The Government believe it is in the national interest to continue participating in eu-LISA, as this will maximise our influence over how it operates the IT systems that we take part in and for which it is responsible. We have therefore decided to opt in to the draft eu-LISA Regulation to the extent that it is not Schengen-building and not to opt out to the extent that it builds on the policing and judicial co-operation aspects of Schengen."[98]

8.6 The Minister accepts that full participation in eu-LISA will also depend on the Council adopting (by unanimity) a further Council Decision based on Article 4 of the Schengen Protocol. He recognises that "our impending departure from the EU is likely to make these discussions more difficult". He notes that Article 38 of the Commission proposal would limit participation in eu-LISA to non-EU Schengen countries (Iceland, Norway, Switzerland and Liechtenstein). Whilst the Government would have preferred Article 38 to provide for participation by any third countries taking part in some or all of the systems that eu-LISA manages, the Minister notes:

> "A third country agreement concluded by the EU may provide for an EU measure, or provisions within such a measure, to apply to that third country, with or without modifications or adaptations, even where the EU measure being applied does not itself expressly provide for participation by non-Member States."

He continues:

> "As such, ultimately the scope of a third country's participation in eu-LISA will be determined by the agreement that provides for that participation, and not by the eu-LISA Regulation itself. As the Committee will be aware, we have proposed a treaty with the EU on security, law enforcement and criminal justice."

8.7 The Minister provides an update on negotiations in Council which have proceeded swiftly. He expects the Estonian Presidency to seek agreement to a general approach at the Justice and Home Affairs Council on 7/8 December and adds:

> "Although there are some negotiating objectives that we have not achieved in full, the Government considers the text being submitted for General Approach to be broadly acceptable. However, as the text has not cleared Parliamentary Scrutiny in either House we will abstain in the vote on it. We expect all other Member States to support the text."

98 See the Written Ministerial Statement issued on 2 November 2017, Hansard 32WS.

8.8 **We are grateful to the Minister for clarifying the mechanism that would enable the UK to participate in the proposed eu-LISA Regulation and other EU police and criminal justice measures post-exit, even when the measures themselves appear either to preclude or restrict third country participation. We note that the example he gives—an agreement with Iceland and Norway providing for their participation in the Eurodac Regulation (and related EU asylum measures)—achieves this outcome by including these countries in the definition of "Member States" in the relevant EU legislation. The agreement also establishes a mechanism to keep pace with changes to relevant EU laws and to ensure "as uniform an application and interpretation as possible" of these laws.**[99]

8.9 **The Minister tells us that the Government is seeking to negotiate a treaty with the EU on security, law enforcement and criminal justice. We ask him to confirm that the Government intends eu-LISA to be amongst the measures included in this treaty and to indicate which EU information systems managed by eu-LISA should also be included.**

8.10 **We note that the Government "intends to keep under review the question of whether to seek a Council Decision to secure the full application of the measure to the UK". We ask the Minister whether this means that, in the absence of a Council Decision, the UK would still be able to participate in eu-LISA, but to a more limited extent. Does he consider that partial participation in a Regulation is legally possible, bearing in mind the Court of Justice's reluctance to accept partial participation of the UK (and Denmark) in a measure (in that case EU participation in the Chicago Convention)?**[100]

8.11 **The general approach agreed by the Council introduces a new provision—Article 38a—which would enable eu-LISA to establish "cooperative relations" and "working arrangements" with relevant authorities in third countries if authorised to do so by a Union act. We ask the Minister to explain what sort of cooperation is envisaged and how useful it would be for the UK post-exit, particularly if the UK is unable to secure a treaty with the EU on security, law enforcement and criminal justice cooperation.**

8.12 **We are disappointed that the Minister was unable to inform us sooner of the Presidency's intention to seek a general approach at the Justice and Home Affairs Council on 7/8 December. We remind him that effective scrutiny depends on the Government providing information in sufficient time for us to consider it before, not after, decisions are taken within the Council.**

8.13 **We ask the Minster to provide progress reports on the negotiations and to inform us of any developments in relation to the Council Decision required under Article 4 of the Schengen Protocol. Meanwhile, the proposed Regulation remains under scrutiny. We draw this chapter to the attention of the Home Affairs Committee and the Committee on Exiting the European Union.**

99 See the Agreement with Iceland and Norway on 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, OJ L 93, p.40, 03.04.2001.

100 Opinion 1/15 26 July 2017.

Full details of the documents

Proposed Regulation on the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, and amending Regulation (EC) 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) 1077/2011: (38878), 10820/17, COM(17) 352.

Background

8.14 The proposed Regulation covers an array of existing or planned EU information systems. Some build on parts of the Schengen rule book on border control and visa policy which do not apply to the UK and are not open to UK participation. Others are subject to the UK's Title V (justice and home affairs) opt-in or Schengen opt-out, meaning that the UK can decide whether to participate.

8.15 As the following table shows, the UK is not entitled to participate in the Visa Information System (VIS), the border control elements of the Schengen information System (SIS II), the EU Entry/Exit System (EES) and the European Travel Information and Authorisation System (ETIAS). The UK currently participates in the Dublin Regulation, Eurodac database, the European Criminal Records Information System (ECRIS) and the police cooperation aspects of SIS II. The Government has opted into new proposals to expand the Eurodac database but does not intend to take part in the new redistribution mechanism which is a key element of the Commission's Dublin reform proposals. The Government has decided to participate in the Commission's proposed reform of SIS II in so far as it concerns police cooperation. The Government has opted into a recent proposal to establish a centralised EU information system—ECRIS-TCN—containing criminal records information on third country national offenders within the EU.

Existing information systems managed by eu-LISA	Schengen or non-Schengen	UK position
Visa Information System—VIS	Schengen	UK excluded
Schengen Information System—SIS II (border control component)	Schengen	UK excluded
Schengen Information System—SIS II (police cooperation)	Schengen	UK participates in existing SIS II and is also participating in the Commission's proposal to strengthen the law enforcement component of SIS II
Eurodac	Non-Schengen	UK participates in the existing Eurodac database. The UK has opted into the Commission's proposal to expand its scope

New information systems to be managed by eu-LISA	Schengen or non-Schengen	UK position
EU Entry/Exit System—EES	Schengen	UK excluded
European Travel Information and Authorisation System—ETIAS	Schengen	UK excluded
Dublin Regulation	Non-Schengen	UK participates in the current (Dublin III) Regulation. The UK has not opted into the proposed Dublin IV Regulation containing a new automated redistribution mechanism for asylum seekers
European Criminal Records Information System—extension to third country nationals (ECRIS-TCN)	Non-Schengen	UK participates in ECRIS and has opted into a supplementary proposal extending ECRIS to third country national offenders

8.16 To participate in the proposed eu-LISA Regulation, the Government would need to:

- opt into those parts of the Regulation dealing with non-Schengen EU information systems—Eurodac, Dublin and ECRIS-TCN—on the basis of the UK's Title V opt-in Protocol;
- not opt out of those parts of the Regulation dealing with the police cooperation component of SIS II, as provided for in the Schengen Protocol; and
- seek a further Council Decision, based on Article 4 of the Schengen Protocol, authorising the UK to participate in the provisions of the Regulation concerning the operational management of new information systems in which the UK is not entitled not take part—the EES and ETIAS.

The Minister's letters of 31 October and 1 December 2017

8.17 In his first letter, the Minister informs us of the Government's decision to "opt into the new eu-LISA Regulation to the extent that it is not Schengen building, and not to opt out to the extent that it builds on those parts of the Schengen system in which the UK takes part". He says that the Presidency was notified on 23 October and adds:

> "The Government believes it is in the national interest to continue participating in eu-LISA while we are EU members and thus are bound by the legislation governing some of the IT systems it either manages or is likely to be commissioned to build."

8.18 In his second letter, the Minister addresses the questions raised in our earlier Report agreed on 13 November. First, we noted that the proposed Regulation would give eu-LISA

responsibility for the operational management of a new automated system for registering and monitoring asylum applicants and reallocating responsibility in the proposed Dublin IV Regulation. We asked whether the Government's decision *not* to participate in the proposed Dublin IV Regulation would have any legal or policy implications for its opt-in decision in relation to the proposed eu-LISA Regulation. The Minister says not:

> "Of course, eu-LISA already manages systems that the UK does not take part in, and will have responsibility for more of those systems if the draft Regulation is agreed. The concept of our being in eu-LISA without participating in all the systems it manages is well-established."

8.19 We questioned whether it would be legally or practically feasible for the UK to opt out of those parts of the proposed Regulation concerning the police cooperation aspects of SIS II, given that the Government has decided to participate in the Commission's recent proposal to strengthen the SIS II police cooperation Regulation. The Minister notes that this question no longer arises, in light of the Government's decision to participate in both Regulations.

8.20 The opt-in and opt-out decisions taken by the Government are not in themselves sufficient to secure UK participation in the proposed Regulation—a further Council Decision adopted by the EU26 (EU Schengen States, so excluding the UK and Ireland) will also be needed. We asked whether this was a realistic prospect, given the UK's decision to leave the EU in March 2019 and the possibility that negotiations may not be concluded in time. We also asked the Minister whether the Council Decision would need to be adopted before the Regulation. He responds:

> "The Government intends to keep under review the question of whether to seek a Council Decision to secure the full application of the measure to the UK. We will seek a Decision if it appears we would benefit from the legal certainty that it would give to our full participation in the Agency while we are still Members. Of course our impending departure from the EU is likely to make these discussions more difficult. We do not consider that the Council Decision would need to be adopted before the Regulation was."

8.21 We asked the Minister whether he expected the UK's Withdrawal Agreement to include arrangements for UK participation in, or access to, any of the information systems managed by eu-LISA, or whether would this be a matter for a future relations agreement between the EU and the UK or a separate "strategic agreement" establishing a framework for future security, law enforcement and criminal justice cooperation with the EU.[101] We asked how soon negotiations on these matters would begin and when we could expect the Government to provide further details of its negotiating objectives. The Minister says only:

> "The details of our future cooperation in relation to justice and home affairs measures will be agreed in negotiations. We will seek to ensure that any provisions in the withdrawal agreement and the overarching security cooperation treaty we aim to agree with the EU help operate the new relationship."

101 See the Government's future partnership paper, *Security, law enforcement and criminal justice* published in September.

8.22 We noted that, under Article 38 of the proposed Regulation, only non-EU Schengen Stats can participate in eu-LISA. We asked the Minister to explain:

- how he intended to approach this Article in negotiations;
- whether Article 8, as drafted, would preclude UK participation in eu-LISA following the UK's exit from the EU; and
- whether the UK's exclusion from eu-LISA would have wider implications for UK participation in the information systems managed by the Agency post-Brexit.

8.23 The Minister explains that Article 38 "currently provides that participation in the Agency will be open to third countries that have entered into agreements with the EU associating them with the Schengen *acquis* and with Dublin and Eurodac-related measures, and specifies that those agreements shall make arrangements for the detailed rules governing the participation of those countries, including their voting rights". The Council has introduced an additional provision—Article 38a—which would also allow eu-LISA to "establish and maintain cooperative relationships" with other (non-Schengen) third countries, "to the extent related to the fulfilment of its tasks".

8.24 The Minister continues:

> "The Government would have preferred Article 38 to provide for participation by third countries that take part in any of the systems that eu-LISA manages, as that would have made it clearer that a third country does not have to take part in the whole Schengen *acquis*, plus Dublin and Eurodac, in order to participate in eu-LISA.
>
> "However, we note that a third country agreement concluded by the EU may provide for an EU measure, or provisions within such a measure, to apply to that third country, with or without modifications or adaptations, even where the EU measure being applied does not itself expressly provide for participation by non-Member States. For example, the 2013 Eurodac Regulation does not on its face provide for or permit direct access by a third country to the Eurodac system. Nevertheless, Norway applies that Regulation and has access to the system it governs, under that country's agreement with the EU of 19 January 2001 [OJ L 093 , 03/04/2001 P. 40—47]. As such, ultimately the scope of a third country's participation in eu-LISA will be determined by the agreement that provides for that participation, and not by the eu-LISA Regulation itself. As the Committee will be aware, we have proposed a treaty with the EU on security, law enforcement and criminal justice."

8.25 The Minister says that negotiations have made rapid progress. He expects the Estonian Presidency to seek agreement to a general approach at the Justice and Home Affairs Council on 7/8 December. Although the Government does not yet have the final text to be agreed, he sets out the main issues on which it is likely to diverge from the Commission's original proposal:

- "The provisions on eu-Lisa's role in improving data quality (Article 8) have been amended to make it clear that they are without prejudice to Member States' responsibilities to ensure the data they enter is of sufficient quality.

- "As originally drafted, Article 12(2) would have allowed a group of at least six Member States to commission eu-LISA to develop (at their expense) centralised solutions to help them implement obligations of certain JHA legislation, such as those relating to the processing of Advance Passenger Information or Passenger Name Records. The text has been amended to reduce the minimum number of Member States to five, to make it clearer that the Member States concerned must meet all the costs of the work and to leave open the possibility of other Member States participating in the centralised system at a later date.

- "Article 13(4) still specifies the seat of eu-LISA and its technical and backup sites. As we indicated in the EM, the Government has concerns about this because of our view that the location of EU Agencies should be decided by 'common accord' of the Member States' Governments (Article 341 TFEU) rather than being specified in the legislation governing the Agency. We have not been able to make progress on this, largely because these are also specified in the existing Regulation governing eu-LISA.

- "The prohibition on eu-LISA establishing additional backup sites (Article 13(5)) has been removed. Instead, the current text requires the Commission to conduct a review, within 15 months of the date of the Regulation coming into force, of the capacity of the existing sites to keep the systems eu-LISA manages operating effectively on a 24/7 basis. The Government is not currently convinced of the benefits of any additional backup sites but is prepared to consider any arguments resulting from the Commission's review.

- "Article 21 sets out the provisions for appointing the Agency's Executive Director. He or she will be appointed by the Management Board from a shortlist drawn up by the Commission. The text now provides that the shortlist should contain at least three names, but does not allow the Management Board to reject the shortlist. The text does now allow the Management Board to initiate the process for dismissing the Executive Director by a two thirds majority. This is a welcome change from the original text, which would have allowed only the Commission to start this process."

- "The text now provides for the appointment of a Deputy Executive Director."

8.26 Commenting on these changes, the Minister acknowledges that "there are some negotiating objectives that we have not achieved in full" but describes the overall general approach text as "broadly acceptable". He notes that the proposed Regulation remains under scrutiny and says that the Government will abstain in the event of a vote. He expects all other Member States to support the general approach and adds:

> "Once the General Approach has been agreed, we expect negotiations between the Council and European Parliament to begin quickly. There is a good chance of Political Agreement being reached on the text in the first half of next year, under the Bulgarian Presidency."

Previous Committee Reports

First Report HC 301–i (2017–19), chapter 26 (1 November 2017).

9 Coordination of insolvency proceedings in the EU

Committee's assessment	Legally important
Committee's decision	Cleared from scrutiny; further information requested
Document details	Proposed Regulation replacing Annex A to Regulation (EU) 2015/848 on insolvency proceedings
Legal base	Article 81TFEU; ordinary legislative procedure; QMV
Department	Business, Energy and Industrial Strategy
Document Number	(38963), 11667/17 + ADD 1, COM(17) 422

Summary and Committee's conclusions

9.1 Regulation (EU) No 2015/848 on insolvency proceedings came into force in June 2017 to provide for the efficient administration of insolvencies where the debtor's centre of main interest ('COMI') is in the EU (the 2015 Regulation). The 2015 Regulation provides for exclusive jurisdiction for the "main" proceedings in the Member State where the debtor's COMI is situated, with the possibility of other "secondary" or "territorial" proceedings in any other Member States where the debtor has an establishment.

9.2 Annex A to the 2015 Regulation contains a list of insolvency procedures for each Member State which constitutes a definitive list of national proceedings which qualify as "insolvency proceedings" in the context of the Regulation.

9.3 In January of this year the Republic of Croatia asked the Commission to update the Regulation to reflect substantive reforms to their national insolvency laws. The proposed Regulation will make those changes to Annex A of the 2015 Regulation. The Government informs us that the proposal will now additionally reflect changes to the national insolvency laws of Belgium, Bulgaria, Latvia and Portugal. The Government agrees with the Commission's assessment that the changes to the national insolvency procedures concerned properly fall within the 2015 Regulation.

9.4 The UK's opt-in applies to the proposal which has a Title V JHA[102] legal basis. The Government had until 15 November to notify the UK's decision to the Council Presidency.[103] The eight-week deadline for this Parliament itself to consider the opt-in[104] expired on 10 October, before this Committee was formed.

9.5 The Government now informs us that the UK has notified the Presidency that it is opting into the proposal given the UK's existing participation in the underlying Regulation. Accordingly, the Government has now laid a Written Ministerial Statement in Parliament.[105]

102 Strictly speaking after the Lisbon Treaty, Justice and Home Affairs measures are known as measures falling within the Area of Freedom, Security and Justice.

103 Protocol No 21 to the EU Treaties require the opt-in decision to be notified within three months after a proposal has been presented to the Council pursuant to Title V of Part 3 of the TFEU.

104 See the Ashton undertakings on Parliamentary scrutiny of JHA opt-in decisions.

105 See HCWS315, 6 December 2017.

9.6 **We thank the Minister for her letter.**

9.7 **Now that the Government has told us that the UK is opting into what is only a technical Regulation, we are content to clear it from scrutiny. However, we expect a response from the Minister to the rest of the questions we raised in our Report of 13 November in due course. Broadly, those concerned jurisdictional and enforcement issues relating to insolvency proceedings taking place in the UK and the EU after Brexit.**

Full details of the documents

Proposal for a Regulation of the European Parliament and Council replacing Annex A to Regulation (EU) 2015/848 on insolvency proceedings: (38963), 11667/17 + ADD 1, COM (17) 422.

The Minister's letter

9.8 In a letter of 11 December 2017, the Minister for Small Business, Consumers and Corporate Responsibility at the Department for Business, Energy and Industrial Strategy (Margot James) says:

> "Further to Richard Harrington MP's Explanatory Memorandum dated 30 August 2017 the government has now considered the proposal and has concluded that it is in the UK's interests to opt-in to the amendments given the UK's existing participation in the underlying Regulation. The Foreign Secretary has now communicated the decision to the Presidency.
>
> "I would note that since the initial proposal, a number of other Member States (Belgium, Bulgaria, Latvia and Portugal) requested changes to the annexes to the EU Insolvency Regulation in addition to the original request from Croatia. As with the original request from Croatia, these changes reflect amendments to those Member States' national insolvency laws. The Commission therefore produced a revised proposal incorporating these additional changes.
>
> "I have laid a written statement in Parliament communicating this decision. I would like to take this opportunity to thank your Committee for its detailed consideration of the Commission's proposal and related documents."

Previous Committee Reports

First Report HC 301–i (2017–19), chapter 8 (13 November 2017).

10 European standardisation work programme 2018

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Business, Energy and Industrial Strategy Committee and the Committee for Exiting the European Union
Document details	Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The annual Union work programme for European standardisation for 2018
Legal base	--
Department	Business, Energy and Industrial Strategy
Document Number	(38999), 11785/17+ ADDs 1–2, COM(17) 453

Summary and Committee's conclusions

10.1 Each year the Commission must publish an annual work programme that identifies EU strategic priorities for European standardisation and the standards it will ask the European standardisation organisations (ESOs) to develop in support of new or existing legislation and policies. On 25 August 2017 the Commission published its standardisation work programme for 2018,[106] which highlights the role of standards in supporting the various overarching policies and strategies and recognises the strategic importance of international cooperation in order to achieve coherence between international and European standards.

10.2 On 21 September 2017 the Minister of State for Small Business, Consumers and Corporate Responsibility at the Department for Business, Energy and Industrial Strategy (Margot James) produced an explanatory memorandum which indicated the Government's broad support for European standardisation as well as the Commission's proposed action plan to address the stock of unpublished harmonised standards.[107] However, the Minister did not provide any information about the policy implications of the UK's impending withdrawal from the European Union for standards. In its report of 13 November, the Committee therefore sought extensive additional information on this point.[108]

10.3 The Minister's responses to the Committee's questions, taken together, appear to imply support for the status quo on standardisation both within Europe and internationally. The Minister states that engagement with industry stakeholders has shown that they value the current approach to standards-making and that UK business values British Standards Institution (BSI) participation in European and global standardisation processes. The Minister says that the EU (Withdrawal) Bill means that the UK will retain current EU

106 European Commission, Communication: The annual Union work programme for European standardisation for 2018 (11785/17) (1 September 2017).

107 Explanatory Memorandum 11785/17 from the Department of Business Energy and Industrial Strategy (21 September 2017).

108 First Report HC 301–i (2017–19), chapter 9 (13 November 2017).

laws and rules, including EU legislation that references standards, on exit day. Finally, she indicates that the Government does not currently have any plans to change how it approaches standards-making.

10.4 Regarding the statute changes that will be necessary to secure the BSI's membership of the CEN and CENELEC—the two principal European standardisation organisations—the Minister states that BSI's independence from the Government, and CEN and CENELEC's independence from the EU, mean that it is up to BSI to determine how and when it negotiates with its fellow members of CEN and CENELEC.

10.5 The Minister emphasises that standards are different from governmental regulation in that participation in standards is voluntary, they are mostly business-to-business arrangements, and that many European standards simply replicate international standards.

10.6 **We welcome the Government's responses to our questions about the implications of exiting the European Union for standards-making. The Government indicates that engagement with UK stakeholders shows that they value the current approach to standards-making, and that the Government does not currently have any plans to change its current approach. The EU (Withdrawal) Bill will retain current EU laws and rules, including EU legislation that references standards.**

10.7 **We also note the Government's finding that UK business seems to value BSI's participation in the European and global standardisation processes; and its assessment that, given the BSI's independence from the Government, and CEN and CENELEC's independence from the EU, it is up to BSI to negotiate to secure the necessary statute changes within these organisations to continue its membership of them.**

10.8 **Given that the Minister has answered our questions about the implications of exiting the EU for standards-making, and we have no concerns regarding the Annual Standardisation Work Programme 2018, we now clear this file from scrutiny. We draw this chapter to the attention of the Committees for Business, Energy and Industrial Strategy and Exiting the European Union.**

Full details of the documents

Communication to the European Parliament, the Council, the European Economic and social Committee and the Committee of the Regions: The annual Union work programme for European standardisation for 2018.: (38999), 11785/17+ ADDs 1–2 , COM(17) 453.

Background

10.9 Detailed background information on the operation of European standardisation organisations CEN, CENELEC and ETSI,[109] the relationship between standards and regulation, and the Annual Union Standardisation Work Programme for 2018, is provided in Chapter 9 of our report of 13 November 2017.[110]

10.10 In that report, we concluded that, although European standardisation organisations (ESOs) are not EU agencies:

109 The European Committee for Standardisation (CEN), the European Committee for Electrotechnical Standardisation (CENELEC), and the European Telecommunications Standards Institute (ETSI).

110 First Report HC 301–i (2017–19), chapter 9 (13 November 2017).

- the European Union has a significant degree of influence over the work undertaken by the ESOs, particularly through the EU regulatory framework for standardisation, EU legislation which references and in some cases defines elements of standards, and European Commission standardisation requests ('mandates'); we note that the UK's influence over these aspects of European standardisation processes will be reduced when it leaves the EU;

- despite this reduction of influence over certain aspects of European standardisation processes (primarily those which relate to EU legislation), the ESOs will potentially provide the UK with a valuable means to limit the extent to which regulatory divergences between the UK and the EU will create technical barriers to trade, by establishing common standards that accommodate both UK and EU rules, thereby limiting any increase in the administrative burden for UK businesses; and

- for the BSI to retain its membership of CEN and CENELEC, changes to the statutes of these organisations will be necessary: securing the support of the general assembly for this purpose is likely to require a clear commitment from the Government to supporting the single standard model, maintaining the rigour of the standards regime in the UK, and ensuring that the UK does not recognise national standards from other countries as a means of legal compliance in the UK.

10.11 In the Committee's first consideration of the Annual Union Standardisation Work Programme we asked the Government to clarify:

- to what extent might European standardisation processes be used, after the UK has left the single market, to limit technical barriers to trade which might otherwise arise due to regulatory divergences between the UK and the EU;

- whether continuing to participate in the single standard model post-withdrawal would significantly constrain UK sovereignty and/or trade policy;

- whether the Government, through its engagement with industry, has identified any strategic benefits or quick wins that can be achieved by deviating from the status quo on standardisation;

- whether UK industry supports the UK, through the British Standardisation Institution (BSI), continuing to participate fully in European standardisation processes;

- if the Government intends to modify its approach to standard setting in any way; and

- if the Government believes that it will be straightforward to persuade the other members of CEN and CENELEC to change the statutes of these organisations to create a category of membership that will allow the BSI to retain membership.

The Minister's letter of 4 December 2017[111]

10.12 The Minister for Small Business, Consumers and Corporate Responsibility at the Department for Business, Energy and Industrial Strategy (Margot James MP) provides the Committee with answers to each of our questions.

10.13 The Minister's response appears to be relatively supportive of the status quo on standardisation, noting that participation in standards is voluntary, they are mostly business-to-business arrangements, and that international standards have primacy and many European standards simply replicate them.

10.14 The key points the Minister makes in response to the Committee's questions are that:

- Government engagement with industry stakeholders shows that they "value the current approach to standards making";
- the Government does not have any plans at present to change how it approaches standards-making;
- when the UK leaves the EU, the EU Withdrawal Bill will retain current EU laws and rules, including EU legislation that references standards;
- UK business seems to value BSI's participation in the European and global standardisation processes; and
- given BSI's independence from the Government, and CEN and CENELEC's independence from the EU, it is up to BSI to determine how and when it negotiates with its fellow members of CEN and CENELEC, in order to secure the necessary statute changes within these organisations to continue its membership of them.

10.15 The Minister does not directly answer the Committee's question about the extent to which European standards could limit technical barriers to trade which might otherwise arise due to regulatory divergences between the UK and the EU, post-withdrawal. Instead, the Minister notes, variously, that: standards are a means of limiting technical barriers to trade; European standards have reduced the number of individual national standards that businesses need to comply with; only a fifth of European standards can be used to demonstrate conformity to EU policies and legislation; the remainder represent business-to-business agreements; 30% of the European Committee for Standardisation (CEN) and 70% of the European Committee for Electrotechnical Standardisation (CENELEC) standards are identical to international standards; and European standards are voluntary, and businesses are free to demonstrate conformity with European legislation in other ways.

Previous Committee Reports

First Report HC 301–i (2017–19), chapter 9 (13 November 2017).

111 Letter from the Minister (BEIS) to the Chairman of the European Scrutiny Committee (4 December 2017).

11 International Vine and Wine Organisation

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny, drawn to the attention of the Environment, Food and Rural Affairs Committee
Document details	Proposal for a Council Decision to be adopted on behalf of the EU with regard to certain resolutions to be voted in the framework of the International Organisation for Vine and Wine (OIV).
Legal base	Articles 43 and 218(9) TFEU
Department	Environment, Food and Rural Affairs
Document Number	(38705), 8554/17 + ADD 1, COM(17) 221

Summary and Committee's conclusions

11.1 The International Organisation for Vine and Wine (OIV) is an intergovernmental organisation which sets standards for viticulture, oenological practices, definitions, labelling and methods of analysis. Currently 46 States are members of the OIV, among which 20 are EU Member States. The UK and the EU itself are not members.

11.2 Resolutions adopted by the OIV (by consensus of its participating members) are not legally binding but they serve as a reference for members and, in particular, may be used as a relevant international standard according to the World Trade Organisation's Agreement on Technical Barriers to Trade.

11.3 The proposal under scrutiny sought to establish the voting position of the EU members of the OIV on certain draft resolutions (those affecting EU law) which were scheduled to be adopted in the context of the 15th General Assembly of the International Organisation for Vine and Wine (OIV) held in Sofia, Bulgaria on 2 June 2017.

11.4 Due to the timing of the General Election, it was not possible for the Committee to consider the document before its adoption. When we first considered this document, on 13 November, we noted that it had already been adopted and that the Government had abstained in order to avoid overriding the scrutiny reserve. We took the opportunity to raise the issue of UK membership of the OIV, increasingly relevant as the UK withdraws from the EU and thus loses its current indirect influence.

11.5 The Minister for Agriculture, Fisheries and Food (George Eustice) has responded, acknowledging that Brexit will impact on the UK's ability to engage in discussions that take place in the OIV and shape the rules that underpin domestic wine production and international wine trade. He states that UK membership of the OIV is one of the many areas being considered as part of the UK's future international engagement strategy. The Minister will keep the Committee informed of the Government's thinking and any decisions made in this regard.

11.6 **The Minister acknowledges that withdrawal from the EU will have an impact on the UK's influence in the OIV and that future UK membership of the OIV is therefore one of the areas under active consideration by the Government. We are pleased that the Government is considering the matter and we look forward to further information on those deliberations.**

11.7 **The document is cleared from scrutiny. We draw this chapter to the attention of the Environment, Food and Rural Affairs Committee.**

Full details of the documents

Proposal for a Council Decision to be adopted on behalf of the EU with regard to certain resolutions to be voted in the framework of the International Organisation for Vine and Wine (OIV): (38705), 8554/17 + ADD 1, COM(17) 221.

Background

11.8 The International Organisation of Vine and Wine (OIV) is an intergovernmental scientific and technical organisation active in the sector of vine, wine, wine-based drinks, table grapes, raisins and other vine products. The objectives of the OIV are: (i) to inform its members of measures whereby the concerns of producers, consumers and other players in the vine and wine products sector may be taken into consideration; (ii) to assist other international organisations involved in standardisation activities; and (iii) to contribute to international harmonisation of existing practices and standards. Further details on the background to, and content of, the proposal were set out in our Report of 13 November.

11.9 In his original Explanatory Memorandum, the Minister was content that the OIV resolutions represented positive developments for the wine sector and national and international wine trade.

11.10 At its meeting of 13 November, the Committee considered that the UK's decision to withdraw from the European Union added significance to the document as the UK was not a member of the OIV. The Committee asked for comment on the following matters:

- any consideration being given to future UK membership of the OIV and the timescale for making such a decision clear; and
- the implications for the UK wine industry of the UK not joining the OIV and thus having no direct or indirect influence on the development of international guidance on winemaking practices.

11.11 The Committee observed that, due to the timing of the General Election, it was not possible for the Committee to consider the document before its adoption. We noted that the UK abstained and therefore that the scrutiny reserve was not overridden.

The Minister's letter of 4 December 2017

11.12 The Minister recognises that the decision that the UK should leave the EU will have various implications, not least re-engagement at the international level where hitherto the UK has been represented through the EU.

In the case of the OIV specifically, he says:

> "I am aware that withdrawal from the EU will impact on our ability to engage in discussions that take place there and shape the rules that underpin our domestic wine production and international wine trade. UK membership of the OIV is one of the many areas being considered as part of our future international engagement strategy. A timetable in relation to such announcements has not been set but I will of course keep you and your Committee informed of our thinking and any decisions made in this regard."

Previous Committee Reports

First Report HC 301–i (2017–19), chapter 13 (13 November 2017).

12 Multilateral Court for the settlement of investment disputes

Committee's assessment	Legally and politically important
Committee's decision	Cleared from scrutiny; further information requested
Document details	Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral investment court for the settlement of investment disputes
Legal base	Articles 207(4) and 218(3) and (4) TFEU
Department	International Trade
Document Number	(39047), 12131/17 + ADDs 1–3, COM(17) 493

Summary and Committee's conclusions

12.1 The Commission's proposal for a new Multilateral Investment Court (MIC) is of clear interest to the UK in the context of its future trade policy. The Commission seeks the adoption by the Council of a negotiating mandate to take the proposal to the United Nations Commission of Trade Law (UNCITRAL)—the relevant multilateral body that the Commission hopes will agree to facilitate eventual negotiations.

12.2 We asked the Government whether it agreed with the Commission's assessment that neither the traditional investor-state dispute settlement system (ISDS) nor the revised investment court system (ICS) were viable long-term models. We also asked whether the Government believes that the proposal is capable of delivering fair dispute outcomes in a transparent manner, to ethical standards, and in a cost-effective manner.

12.3 We further enquired whether the Government agreed with the Commission's costings of the proposal, notably that annual costs would come to around €2.7 million (£2.48 million) for each Member State and the Commission. Related to this, we asked the Government's views on the Commission's suggestion that the court's running costs should be apportioned based on the level of development of third country members.

12.4 Finally, we wanted to know whether the Government would consider joining eventual international negotiations on the establishment of the multilateral investment court.

12.5 **The Minister of State for Trade Policy (Greg Hands MP) has responded to our questions and indicates that the UK intends, in due course, to "actively participate" in the negotiations as a member of UNCITRAL.**

12.6 **We agree with the Minister's assessment that it is not possible, at this early stage, to assess the likely establishment and running costs of the court with a high degree of accuracy, since the final model adopted will depend on agreement on a combination of possible options. We are reassured, however, that the Government appears to agree with the empirical basis of the Commission's impact assessment.**

12.7 **We note that the Minister has not responded directly to our request for the Government's view on the Commission's assertions that the ISDS and ICS systems are fundamentally deficient. However, the Minister has reiterated the Government's expectations of the principles that any new system must adhere to, and states that since the multilateral negotiations have not yet begun (and there is as yet no timetable for their commencement), there is likely to be significant development of the detail in the Commission's proposal.**

12.8 **We are content to release this proposal from scrutiny, but request the Minister to keep us updated on its progress, both through the Council and eventually in negotiations with third countries. In particular, we wish to be briefed on the options chosen for the format, remit and funding of the court, and the Government's views on their merits.**

Full details of the documents

Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral investment court for the settlement of investment disputes: (39047), 12131/17 + ADDs 1–3, COM(17) 493.

Background

12.9 Full details of the Commission's proposal can be found in the Committee's previous report, listed below.

The Minister's letter of 29 November 2017

12.10 The Minister of State for Trade Policy and Minister for London (Greg Hands MP) writes with responses to the Committee's questions.

12.11 The Minister observes that negotiations on the MIC are likely to take several years, during which time there will likely be significant development of the detail in the Commission's proposal. He states:

> "We would not want to prejudge those negotiations at this stage. Rather, the Government shall want to see how those negotiations progress so as to allow an understanding of how any resulting MIC might improve the existing ISDS framework."

12.12 On the question of the Commission's calculation of the possible running costs of the court, the Minister agrees with the Commission's impact assessment that the precise cost of the court is hard to predict with a high level of accuracy because of the different possible variables, which would all be the focus of future negotiations. He notes also that the Commission's assumptions of the salary costs for adjudicators and supporting staff are based on a comparison with existing international courts and tribunals.

12.13 Regarding the distribution of costs among the members of the Court, the Minister notes that the Commission's cost estimates are based on an indicative number of contracting parties, and that:

> "As negotiations progress it is likely that a range of indicators will be considered by UNCITRAL as to how costs could be apportioned and I will provide an update to the Committee on this in due course."

12.14 On the UK's intentions regarding possible future membership of the court, the Minister states:

> "The Government will actively participate in those negotiations as a member of UNCITRAL. We will assess the detail of this proposal as it develops, and will consider the compatibility of any outcome with the UK's interests."

Procedural issues

12.15 The Minister also provides a clarification from the Council Legal Service on the voting procedure for this file. In addition to the previously notified Council Decision to be adopted by qualified majority voting, a decision of the Representatives of the Governments of the Member States meeting within the Council will be required. This is necessary to authorise the Commission to negotiate on behalf of Member States in an area of shared competence (investor-state dispute settlement). The legal basis for the proposal has consequently been updated to include Article 207(4) TFEU in addition to Article 218(3) and (4) TFEU.

Previous Committee Reports

Second Report HC 301–ii (2017–19), chapter 16 (22 November 2017).

13 Strategic Agreements with Australia and New Zealand

Committee's assessment	Legally important
Committee's decision	Cleared from scrutiny
Document details	(a) Joint proposal for a Council Decision on the conclusion of the Framework Agreement between the European Union and its Member States of the one part, and Australia of the other part; (b) Joint Proposal for a Council Decision on the conclusion of the Partnership Agreement on Relations and Cooperation between the European Union and its Member States of the one part, and New Zealand, of the other part
Legal base	Article 37 TEU and Articles 207, 212(1), 218(6)(a) and the second paragraph of 218(8) TFEU (both) unanimity, EP consent
Department	Foreign and Commonwealth Office
Document Numbers	(a) (38325), 14996/16, JOIN(16) 51; (b) (38326), 14997/16, JOIN(16) 54

Summary and Committee's conclusions

13.1 The proposals would enable the EU to conclude (ratify) high level strategic agreements with Australia and New Zealand. They are designed to strengthen cooperation across a wide spectrum of policy fields including human rights, non-proliferation of weapons of mass destruction and the fight against terrorism; cooperation on economic and trade matters, health, the environment, climate change, education, culture, labour, disaster management, fisheries and maritime affairs, transport, legal cooperation, and combatting money laundering and terrorist financing, organised crime and corruption. They are a precursor to future trade agreements.

13.2 The New Zealand Agreement received the necessary consent of the European Parliament in mid-November. The Australia Agreement has been referred to the European Parliament for its consent, but no decision by that body is expected until April next year.

13.3 The agreements raise no policy issue. However the previous Committee raised the issue that the proposals did not distinguish the extent to which the EU was exercising competence in concluding these agreements and thus undermined the Government's own policy that the EU should only exercise competence in relation to external agreements such as these to the extent that its competence is exclusive, leaving Member States to exercise shared competence.[112] We therefore repeated a question, first asked by the previous Committee, as to what steps the Minister intended to take to ensure clarity in respect of the exercise of competence. We also asked for an update on progress in ratification by the UK of the agreements.

112 Under the Treaties shared competence may be exercised by either the EU or the Member States.

13.4 **The response by the Minster (Sir Alan Duncan) does not directly answer the question asked but asserts that the division of competences between the EU and the Member States is protected by limiting the ability of the EU to trigger provisional application of the agreement. In doing so he does not acknowledge that these proposals are concerned only with the conclusion of the agreements and not their provisional application and that we have already indicated that we consider that the competence to trigger provisional application is different and distinct from the competence to conclude an agreement.**

13.5 **Furthermore Article 2 of each Decision on the signing and provisional application of these Agreements,[113] which provide a limited list of the Articles of each agreement being provisionally applied, states that provisional application of these Agreements is being triggered "only to the extent that they cover matters falling within the Union's competence"; not its exclusive competence.**

13.6 **Furthermore the list of Articles provisionally applied cannot be taken as a guide to those for which the EU has exclusive competence because it does not include matters (such as those on trade and customs) which are clearly of exclusive EU competence.**

13.7 **We therefore draw these proposals to the attention of the House as further examples of the Government undermining its own policy that shared competence should normally be exercised by Member States. We now clear the proposals.**

Full details of the documents

(a) Joint proposal for a Council Decision on the conclusion of the Framework Agreement between the European Union and its Member States of the one part, and Australia of the other part: (38325), 14996/16, JOIN(16) 51; (b) Joint Proposal for a Council Decision on the conclusion of the Partnership Agreement on Relations and Cooperation between the European Union and its Member States of the one part, and New Zealand, of the other part: (38326), 14997/16, JOIN(16) 54.

The Minister's letter of 27 November 2017

13.8 The Minister deals with the outstanding requests from the Committee as follows:

> "You asked for further information on the issue of competence. I reassure you of my previous letters of 23 September 2016 and 1 February 2017 that the division of competence is protected and the Government has been successful in securing a short list of Articles for provisional application and the division of competences is protected.
>
> "The European Parliament voted consent to the New Zealand Agreement on 16 November. The Australian Agreement is at an earlier stage and we do not expect consent until April 2018.
>
> "On UK ratification of these agreements, activity was paused due to the election. We will shortly seek cross Whitehall Ministerial agreement to proceed with the ratification of the named agreements along with a number of other strategic agreements at a similar stage."

113 Decisions 2016/1546 and 2016/1970.

13.9 He added further information on the override in respect of Australia:

> "The override for the EU-Australia Framework Agreement was issued to ensure the UK was not delaying signature as the only member state with an outstanding scrutiny reserve. At the time the Commons Scrutiny Committee had not been reconstituted and an override was the only way to move forward. Similarly with the New Zealand Agreement it was necessary to override when the Council Decision on the Conclusion of the Agreement was brought forward."

Previous Committee Reports

First Report HC 301–i (2017–19), chapter 17 (13 November 2017); Twenty-sixth Report HC 71–xxiv (2016–17), chapter 6 (18 January 2017).

14 Military mobility in the EU

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Defence Committee
Document details	Joint Communication on Improving Military Mobility in the European Union
Legal base	—
Department	Foreign and Commonwealth Office
Document Number	(39202), 14237/17, JOIN(17) 41

Summary and Committee's conclusions

14.1 As part of the 2016 European Defence Action Plan, the Commission had committed to "increase coherence and synergies between defence issues and other Union policies where an EU added-value exists".[114] In November 2017 it published a Communication setting out its initial assessment of EU-level initiatives that could facilitate the movement of both military personnel and equipment within the EU.

14.2 The Communication enumerates several obstacles that inhibit the smooth movements of military transports across Member State borders, including EU customs legislation on dangerous goods and gaps in the necessary transport infrastructure, in particular for military flights. The Commission will publish an Action Plan in March 2018 with a list of concrete policy initiatives to address the problems identified. These will also be linked to the newly-launched Permanent Structured Cooperation (PESCO) between 23 Member States (not including the UK), as part of which they undertake to make their national approaches for troop movements and the development of military technology more coherent.[115] The Foreign Affairs Council welcomed the Commission's intentions at its meeting on 13 November 2017.[116]

14.3 The Minister for Europe and the Americas (Sir Alan Duncan) submitted an Explanatory Memorandum on the document on 4 December 2017.[117] In it, he recognises "the need to improve military mobility within Europe and to resolve common impediments across the areas outlined [by the Commission]". He adds that "EU exit issues do not play a critical role" in the scope of the work outlined by the Commission, but he then goes on to say that "the UK will be keen to ensure that the proposed work-plan is taken forward with key stakeholders outside of the EU, particularly NATO", as otherwise "there is considerable risk of duplication and for any proposed action plan to be substantially less valuable".

14.4 **We consider this Commission Communication to be of political importance. While no concrete announcements are made for policy initiatives, the document makes a number of intriguing suggestions as to how the EU could use its existing competences to facilitate mobility of personnel and materiel between Member States.**

114 For more information on the European Defence Action Plan, see our predecessors' Report of 22 March 2017.
115 We have considered the launch and implications of PESCO separately elsewhere in this Report.
116 http://data.consilium.europa.eu/doc/document/ST-14190–2017-INIT/en/pdf.
117 Explanatory Memorandum submitted by the Foreign & Commonwealth Office (4 December 2017).

Some, including the possible use of EU budget funding to invest in dual-use civilian-military transport infrastructure, are likely to be controversial. We will examine the impact of any concrete proposals more closely when the Action Plan is deposited for scrutiny next year.

14.5 **This policy paper should be seen in the broader context of recent developments at EU-level to facilitate closer cooperation on defence matters, in particular the creation of the Military Planning and Conduct Capability (MPCC) unit for non-executive CSDP missions and the launch of Permanent Structured Cooperation (PESCO), which we have considered separately and which we have recommended for debate on the floor of the House.**[118]

14.6 **We accept the Minister's assertion that the EU exit implications of this particular Commission document are minimal. However, given the current uncertainty about the parameters of the post-Brexit partnership between the UK and the EU on defence policy, it is unclear what the overall implications of further long-term EU action to facilitate military mobility might be in the UK. Although the Commission refers to the need to expedite military mobility "both within [EU] borders as well as with a view to rapidly deploying military operations abroad", we cannot judge at this junction how the Action Plan might affect transport of British troops and materiel to or through the EU after Brexit.**

14.7 **It is clear, however, that the UK's withdrawal from the EU means that any initiatives of a regulatory or legislative nature, which are meant purely to facilitate intra-EU movements, are unlikely to be of benefit as the UK will no longer be bound by EU law or a full member of its regulatory systems on customs or transport. Of course, the Government may seek to negotiate UK participation in specific initiatives where it believes this to be in the country's interest. The extent to which that is politically and legally possible (and desirable) will depend on the specific policy measures the Commission outlines in its upcoming Action Plan. We will expect more detail from the Minister about these implications when we assess that document in due course.**

14.8 **We are also conscious of the fact that it remains possible that any legislative proposals relating to the Military Mobility Action Plan might still apply in the UK, if they become applicable during the Government's post-Brexit "implementation period".**

14.9 **We now clear this document from scrutiny, but ask the Minister to write to us by 12 January 2018 setting out which specific initiatives on military mobility the UK would like to see included in the Commission Action Plan. We also draw these developments to the attention of the Defence Committee.**

Full details of the documents

Joint Communication on Improving Military Mobility in the European Union: (39202), 14237/17, JOIN(17) 41.

118 See chapter 1 of this Report.

Background

14.10 In its 2016 European Defence Action Plan, the European Commission said it would work to "increase coherence and synergies between defence issues and other Union policies where an EU added-value exists".[119] In November 2017 the Commission published a policy paper on one of the areas where it has identified such added value exists: military mobility. It uses this phrase to refer to the "movement of military equipment and personnel across the EU with the aim of facilitating and expediting their mobility to react in a fast and effective way to internal and external crises".[120]

14.11 According to the Commission, obstacles remain to the hassle-free movement of personnel and materiel which should be addressed at EU-level, "both within our borders as well as with a view to rapidly deploying military operations abroad". Although it acknowledges that it remains the sovereign decision of each Member State whether to allow foreign troops to enter their territory, the Commission argues that certain obstacles could be removed to allow EU countries to move troops and equipment "swiftly and smoothly" where they have decided to deploy them.

14.12 The Commission's initial analysis is that military mobility is affected by a wide range of obstacles—of a physical, legal and regulatory nature—in a number of fields, including transport, customs, environment and health. The purpose of this latest policy paper is to set out how the EU, including with its existing policies, will work to "facilitate and help to expedite military mobility ranging from day-to-day needs to strategic pre-deployment of military forces and resources, in synergy with non-military activities and without disrupting civilian use of infrastructure [and] avoiding unnecessary inconveniences".

14.13 The European Commission, with the Member States and the European Defence Agency, will examine the existing bottlenecks and barriers further to "develop a shared understanding of the needs and requirements". In March 2018, it will present the results of that exercise to the Council in the form of a Military Mobility Action Plan, covering:

- Coordination mechanisms between national and EU military and civilian authorities, including systematic exchange of information and data;
- Gaps in physical infrastructure which comply with the necessary technical requirements for all military transport, including the way in which military transports can be prioritised over civilian traffic;
- The legal and regulatory framework governing transport of both personnel and equipment, including export and import formalities for dangerous goods; and
- Protection for, and liability of, military personnel, equipment and restricted data in transit.

14.14 The Commission clearly envisages that EU legislation or non-legislative initiatives would contribute to resolving barriers to military transports, noting that these areas are "subject to legislation, procedures and investment instruments which would need to be

119 For more information on the European Defence Action Plan, see our predecessors' Report of 22 March 2017.

120 European Commission, "The European Union is stepping up efforts to improve military mobility" (10 November 2017).

adapted, including at EU level, to make them suitable for military uses". The Commission adds, rather ambiguously, that "EU legislation in other areas could also be looked at for possible relevance to military mobility".

14.15 The Commission has already made some initial suggestions for EU interventions to tackle known obstacles, including:

- Using the EU budget to invest in transport infrastructure that benefits both civilian and military traffic;
- Introducing streamlined customs procedures for cross-border transports of military goods under the Union Customs Code;
- Extending the applicability of the Dangerous Goods Directive[121] to military transports; and
- Harmonising procedures for movements of troops.

14.16 The Commission paper acknowledges the need for any EU-level initiatives in this area to be compatible and coherent with existing projects to facilitate the movement of troops and equipment, both EU and NATO-led.[122]

The Government's view

14.17 The Minister for Europe (Sir Alan Duncan) submitted an Explanatory Memorandum on the document on 4 December 2017.[123] In it, he states:

> "The UK recognises the need to improve military mobility within Europe and to resolve common impediments across the areas outlined in the [Commission document]. To this end, the UK will continue to engage in the Ad Hoc Working Group which will shape the action plan to be delivered by March 2018, offering expertise by consulting relevant stakeholders across Defence and across other Whitehall departments as required."

14.18 The Minister states that "EU exit issues do not play a critical role" in the scope of the work outlined by the Commission, as the Action Plan is due well before the UK's withdrawal in March 2019. However, he then goes on to say that "the UK will be keen to ensure that the proposed work-plan is taken forward with key stakeholders outside of the EU, particularly NATO", as otherwise "there is considerable risk of duplication and for any proposed action plan to be substantially less valuable". The Memorandum also reiterates that the UK is leaving the EU but "remains committed to European defence and security, and protecting the interests of UK industry".

14.19 In addition, on 13 November 2017, the Foreign Secretary supported the adoption of a set of Foreign Affairs Council conclusions on security and defence, which included a section on military mobility.[124] The Ministers welcomed the "timely presentation" of the

121 Directive 2008/68/EC.

122 Including, for example, the existing EDA-led initiatives on standards for dual-use equipment, the Multimodal Transport Hub on troop movements and the Diplomatic Clearances Agreement for military flights.

123 Explanatory Memorandum submitted by the Foreign & Commonwealth Office (4 December 2017).

124 http://data.consilium.europa.eu/doc/document/ST-14190–2017-INIT/en/pdf.

Commission Communication, and called on 2018 Action Plan to "consider comprehensively the infrastructural, procedural and regulatory issues in light of the military requirements defined by Member States to facilitate mobility of personnel and assets across the EU".

14.20 The Council also recognised the link between this initiative and recent launch Permanent Structured Cooperation (PESCO) between 23 EU Member States on development and acquisition of military equipment,[125] stating that the PESCO participating Member States' commitment to simplifying and standardising cross-border military transport "should be coherent with the respective NATO initiatives in this area".

Previous Committee Reports

None.

125 We have considered the launch of PESCO in a separate Chapter in this Report.

15 Tobacco product traceability and security

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Treasury Committee and the Health Committee
Document details	(a) Commission Implementing Regulation on technical standards for the establishment and operation of a traceability system for tobacco products; (b) Commission Delegated Regulation on key elements of data storage contracts to be concluded as part of a traceability system for tobacco products; (c) Commission Implementing Decision on technical standards for security features applied to tobacco product
Legal base	Directive 2014/40/EU
Department	Revenue and Customs
Document Numbers	(a) (39064),—; (b) (39064),—; (c) (39064),—

Summary and Committee's conclusions

15.1 In an effort to tackle the illicit trade in tobacco products, the EU is introducing a "track and trace" system for tobacco products throughout the supply chain.

15.2 These documents set out detailed rules to put in place such a system alongside new rules mandating security markings on such products. Both sets of rules should be in place by May 2019 for cigarettes and hand-rolling tobacco and by May 2024 for other tobacco products (OTPs), such as cigars, cigarillos, pipe tobacco and snuff.

15.3 The proposed new rules are complex in nature, reflecting the detailed mandate from the 2014 Tobacco Products Directive. All products should be marked with an irremovable and indelible unique identifier which should allow a wide range of specific information to be determined.

15.4 We were unable to consider the documents until 22 November, by which time they were close to agreement. At our meeting that day, we noted their complexity and sought assurances from the Exchequer Secretary to the Treasury (Andrew Jones) about the consultation process. We asked for an update on the agreed texts.

15.5 The Minister has responded, explaining that the documents have been adopted—with "important changes"—and that they were supported by the UK. He says that the Government has had ongoing dialogue on implementation of these measures with the Commission, other Member States and both large and small businesses and their trade bodies since the Tobacco Products Directive was agreed in 2014. Dialogue will continue throughout the implementation period to ensure that burdens on business are kept to a minimum.

15.6 The Minister points to a number of changes which have been made in the course of the drafting process, including:

- an easing of the process for generating ID codes for aggregated packs of products;
- a transitional period for smaller businesses; and
- more use of agreed international standards.

15.7 On the UK's withdrawal from the EU, the Minister notes that the UK—as a signatory to the World Health Organisation's Framework Convention on Tobacco Control (FCTC) Illicit Trade Protocol—is obliged to introduce a track and trace system in any case. The EU and international provisions reflect the need for access to data held by, and co-operation between, all parties. The measures support continuing efforts to tackle smuggling, including across the Irish border.

15.8 We have received a number of submissions from third parties who are concerned about the impact of the proposed new rules on OTPs.[126] The submissions have been published on our website. In summary, they argue that there is very little, if any, illicit trade in such products and that the requirements are prohibitively burdensome for many of the small businesses involved in OTPs.

15.9 **We note that these detailed measures have now been adopted and that a number of changes were made to the original texts published by the Commission.**

15.10 **We are very grateful to all those third parties who made representations to us about the specific implications for the OTP (Other Tobacco Products) sector. We received no representations from other affected sectors or interests. It is regrettable that the delay in establishing the Committee means that the concerns of the OTP sector could not be taken into account in our scrutiny of these measures before their adoption. We nevertheless draw the submissions to the attention of the Minister and his officials and trust that the Government will take on board these concerns during the implementation process, working with the Commission, other Member States and the sector. We note from the submissions that similar representations have been made to the European Commission and to the Government.**

15.11 **On the OTP sector specifically, we observe that the rules will not apply until 2024, by which time the UK will be outside the EU. While the rules will become EU retained law under the EU (Withdrawal) Bill, there may clearly be scope to amend the detail of the rules, so as to respect the UK's international obligations, meet wider revenue and public health objectives and avoid undue burdens on small and micro businesses in particular. We further note that the FCTC Illicit Trade Protocol is yet to come into effect and has not yet been ratified by the United Kingdom, although ratification is imminent. Under the terms of the Protocol, each Party need only apply track and trace to cigarettes within five years of the Protocol entering into force on**

126 Collation of correspondence received from Association of Independent Tobacco Specialists (AITS); Gawith Hoggarth; Imported Tobacco Products Advisory Council (ITPAC); McChrystals (Leicester) Limited; Oettinger Davidoff AG/Davidoff Distribution (UK) Limited; and Tor Imports Ltd (December 2017).

each Party, and to OTPs within ten years. The 2024 deadline is thus an EU deadline and the UK would—subject to the terms of the UK's withdrawal—be able to extend it domestically until 2028 at least.[127]

15.12 **As the legislation has now been adopted and the focus turns to implementation, we consider it appropriate to draw these documents to the attention of the Treasury Committee and the Health Committee so that those Committees are aware and are able to scrutinise both implementation and potential future changes post-Brexit. We clear the documents from scrutiny.**

15.13 **We would encourage all sectors and interests affected by these measures to make representation to the Government during the course of implementation should they consider that their concerns are not being duly taken into account.**

Full details of the documents

(a) Commission Implementing Regulation on technical standards for the establishment and operation of a traceability system for tobacco products: (39064),—; (b) Commission Delegated Regulation on key elements of data storage contracts to be concluded as part of a traceability system for tobacco products: (39064),—; (c) Commission Implementing Decision on technical standards for security features applied to tobacco products: (39064),—.

Background

15.14 These documents constitute EU implementing legislation for Articles 15 and 16 of the Tobacco Products Directive 2014/40/EU (TPD), a Directive aimed at further tackling the health issues which arise from smoking. Article 15 mandates a track and trace system for tobacco products, taking effect from May 2019 for cigarettes and hand-rolling tobacco, and May 2024 for other tobacco products. Article 16 mandates security markings on tobacco products to the same timetable.

15.15 On track and trace, the rules cover Unique Identifiers and identifying codes, data repositories and the recording of product movements. The security markings rules require every unit pack of tobacco products to be marked with a security feature. Further background to, and details of, these documents were set out in our Report of 22 November 2017.[128]

15.16 In his original Explanatory Memorandum (EM), the Minister believed that the provisions were likely to change "significantly and rapidly" before any final agreement was reached. While the Government supported the principle of track and trace, it was concerned to ensure that the solution adopted was proportionate, efficient and effective, could be implemented in the timescale set and kept burdens on legitimate business to a minimum while delivering the required objectives.

15.17 The Department of Health consulted in July 2015 on implementation of the Tobacco Products Directive and issued a response in January 2016. On the matter of track

127 Entry into force requires ratification by 40 Parties. At the time of writing, 34 Parties had ratified and we understand that there is a hope that the threshold of 40 will be reached in 2018.

128 Second Report HC 301–ii (2017–19), chapter 17 (22 November 2017).

and trace, the Department of Health noted that the Government was "fully considering the information provided" and would "continue to listen to all businesses involved in the supply of tobacco products in the development of EU proposals in this area".

15.18 At its meeting of 22 November, the Committee agreed that rules were required in order to address the illicit trade in tobacco products but it also appeared that the Government had some concerns that the proposed methodology was potentially onerous, at least on the proposed timescale. The Committee also agreed that the approach should be proportionate, efficient, effective, and able to be implemented in the timescale set and that burdens on legitimate business should be kept to a minimum while delivering the required objectives

15.19 The Committee asked the Minister to:

- set out the Government's consultation process and preparatory work;
- provide the Government's analysis as to the extent to which the agreed approach aligns with the Government's objectives as set out in the Explanatory Memorandum; and to
- assure us that there has been adequate opportunity to assess the impact of the agreed approach and to consult with affected stakeholders.

15.20 On the UK's withdrawal from the European Union, the Committee asked:

- whether it was envisaged that the new rules (as applicable from May 2019 to cigarettes and hand-rolling tobacco) would apply during any post-Brexit implementation period; and
- what the implications would be of not replicating the rules post-Brexit, with particular reference to illicit tobacco trade across the Irish border and on access to data.

The Minister's letter of 12 December 2017

15.21 The Minister notes that the regulations have now been voted on and approved by the written procedure, and the UK voted in favour of their introduction.

15.22 He says that the Government has had ongoing dialogue on implementation of these measures with the Commission, other Member States and both large and small businesses and their trade bodies since the Tobacco Products Directive was agreed in 2014. Officials have listened to the concerns of the industry about implementation and have visited a number of tobacco product distribution sites to see how these measures will have an impact in practice. This dialogue, he says, will continue throughout the implementation period to ensure burdens on business are kept to a minimum and a system is delivered which is, as far as possible, effective, efficient and proportionate. The Minister adds that, when the draft legislation was published in September 2017, HMRC took steps to draw the draft texts to the attention of industry stakeholders and encourage them to raise any concerns with the Commission during the consultation exercise.

15.23 On the timing of agreement, the Minister acknowledges that discussion and adoption have been swift, but that the Commission has made a number of important

changes in response to issues raised by the industry and Member States. These have included: an easing of the process for generating ID codes for aggregated packs of products; a transitional period for smaller businesses for some requirements; and more use of agreed international standards.

15.24 The Minister expresses the position on Brexit-related matters in the following terms:

> "With regard to the impact of EU Exit on these requirements, the nature and detail of any UK obligations under EU law after March 2019 are still to be determined through negotiation. The UK and the EU are signatories to the World Health Organisation Framework Convention on Tobacco Control (FCTC) Illicit Trade Protocol, a global rather than an EU treaty. This includes the requirement to introduce a track and trace system for tobacco. Regardless of application of the Directive and membership of the EU, the UK will need to implement a system of this nature. The provisions of the Directive and Protocol also reflect the need for access to data held by, and co-operation between, all parties. Both support our continuing efforts to tackle smuggling, including across the Irish border, a concern which the government shares with the Committee."

Previous Committee Reports

Second Report HC 301–ii (2017–19), chapter 17 (22 November 2017).

16 Double taxation: dispute resolution

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny
Document details	Proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union
Legal base	Article 115 TFEU; special legislative procedure; unanimity
Department	Treasury
Document Number	(38214), 13732/16 + ADDs 1–3, COM(16) 686

Summary and Committee's conclusions

16.1 The previous Committee held a proposed Council Directive about double taxation dispute resolution between EU Member States under scrutiny from December 2016. Most recently, in March 2017, it asked, before considering again a request for scrutiny clearance, for news of developments on two outstanding issues—the scope of the proposal and the composition of a body to resolve disputes.[129]

16.2 We have now been told that, prior to adoption of a general approach by the Council in May 2017, which the Government supported, an acceptable compromise on the two outstanding points was secured. The European Parliament subsequently delivered its non-binding opinion on 6 July, and the Council formally adopted the Directive on 10 October 2017. The new legislation was published in the Official Journal on 14 October.

16.3 **We note the Government's account of where matters stood on the two outstanding issues, when the Member States reached agreement on the legal text. On the basis of that account, and the formal adoption of the Directive in October, we now clear the document from scrutiny.**

16.4 **We have also considered the new Directive in view of the UK's withdrawal from the EU. As the legislation will apply from June 2019, it will not in principle govern any double taxation disputes between the UK and one of the EU-27 countries, unless the Prime Minister's "implementation period", should one be agreed, extends the applicability of the *acquis* to the UK for its duration. The Directive makes no provision for participation by non-EU countries in the dispute settlement mechanism it creates.**

16.5 **In view of the fact that the dispute resolution system created by the Directive is entirely new, it is not possible to judge what consequences Brexit will have for UK cooperation with the remaining Member States in this area. We look forward to further announcements by the Government in due course about its proposals for cooperation on tax matters with the EU post-Brexit.**

129 The detail of the proposal is set out in more detail in the previous Committee's Report of 7 December 2016.

Full details of the documents

Proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union: (38214), 13732/16 + ADDs 1–3, COM(16) 686.

Background

16.6 The previous Committee held under a scrutiny a proposed Council Directive about resolving disputes between Member States on how double taxation should be eliminated in a business context from December 2016.

16.7 In March 2017, when they last considered the proposal, the Government told our predecessors that although there had been progress in negotiating the matter, two issues remained outstanding. These were the exact scope of the double taxation to which the Directive should apply and the composition of the "Advisory Commission" which would settle disputes. Nevertheless, the Government asked the previous Committee to clear the document from scrutiny against the possibility that the Presidency might wish to achieve a political agreement at the May 2017 ECOFIN Council.

16.8 While our predecessors noted the progress that had been made on this proposal, they wished to have news of developments on the two outstanding issues before considering clearance from scrutiny. Meanwhile the document remained under scrutiny.

The Minister's letter of 19 June 2017

16.9 The Financial Secretary to the Treasury (Mel Stride) has now told us that on 23 May 2017, the Economic and Financial Affairs Council (ECOFIN) agreed the proposed Council Directive. He said that due to the unexpected dissolution of Parliament before the general election, the Government had not received scrutiny clearance from the previous Scrutiny Committee when this proposal went for a general approach at ECOFIN. He explained that the Government decided to override the scrutiny reserve resolution and support the proposal on the following grounds:

- its support for this file was well-established, as is its support in general for the availability of effective mechanisms for resolving double tax disputes, which were already in many of the UK's double tax treaties;
- the implementation date, July 2019, was after the expected Brexit date; and
- as unanimity was required, a failure by the UK to agree would have prevented the proposal from going ahead.

16.10 Turning to the two points that had remained unresolved, the Minister said that:

- the Government had supported the scope remaining as wide as possible, and for membership of Advisory Commissions to be open to a range of practitioners, including those providing commercial tax advice;
- compromise positions were reached on both issues in the run-up to ECOFIN, which the Government accepted;

- the Council opted for a broad scope but with the possibility, on a case-by-case basis, of excluding disputes that did not involve double taxation—without such a concession, agreement remained uncertain;
- the Council agreed that Member States could object to arbitrators on a number of grounds where independence was in question, for instance where an arbitrator was an employee with an enterprise that provided tax advice on a professional basis (or was in such a situation at any time during a period of at least three years prior to the date of the appointment);
- a general approach was agreed on this basis;
- it should be noted that following a statement in the Council minutes at ECOFIN, further work might now also be undertaken by Member States to explore the possibility of establishing a permanent committee to resolve disputes; and
- the UK would, however, in no way be bound to agree to any subsequent proposals.

16.11 The Minister added that:

- whilst it would clearly have been preferable for the usual parliamentary scrutiny process to be completed ahead of agreement at ECOFIN, the Government believed it was in the national interest to override the scrutiny reserve;
- he wished to reiterate the Government's commitment to the parliamentary scrutiny process; and
- he asked us to take into account the exceptional circumstances in this instance.

Previous Committee Reports

Thirty-seventh Report HC 71–xxxv (2016–17), chapter 2 (29 March 2017); Thirty-second Report HC 71–xxx (2016–17), chapter 5 (22 February 2017) and Twenty-second Report HC 71–xx (2016–17), chapter 7 (7 December 2016).

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

Department for Environment, Food and Rural Affairs

(39262)
14929/17
COM(17) 692

Proposal for a Council Regulation amending Regulation (EU) No 1370/2013 determining measures on fixing certain aids and refunds related to the common organisation of the markets in agricultural products, as regards the quantitative limitation for buying-in skimmed milk powder.

Department for Exiting the European Union

(39059)

Unnumbered doc Court of Auditors Report 14/2017 on Performance review of case management at the Court of Justice of the European Union.

Department for International Development

(39235)
14642/17
COM(17) 662

Annual Report on the European Union's humanitarian aid policies and their implementation in 2016.

(39179)
13579/17
COM(17) 622

Communication from the Commission to the Council European Development Fund (EDF): forecasts of commitments, payments and contributions from Member States for 2017, 2018, 2019 and non-binding forecast for the years 2020–2021.

Department for International Trade

(38907)
11243/17
COM(17) 373

Report from the Commission to the European Parliament and the Council Initial Review of the scope of the Enforcement Regulation.

(39141) 13377/17 ADD 1 COM(17) 598	Report from the Commission to the Council to the European Parliament 35th Annual Report from the Commission to the Council and the European Parliament on the EU's Anti-Dumping, Anti-Subsidy and Safeguard activities (2016).
(39149) 13598/17 ADD 1 COM (17) 614	Report from the Commission to the European Parliament and the Council Annual Report on the Implementation of the EU Korea Free Trade Agreement.

Foreign and Commonwealth Office

(39319) —	Proposal of the High Representative of the Union for Foreign Affairs and Security Policy to the Council for a Council Decision amending Decision 2014/486/CFSP on the European Union Advisory Mission for Civilian Security Sector Reform Ukraine (EUAM Ukraine)

HM Treasury

(38997) 11845/17 COM(17) 459	Report from the Commission to the Council Report on the Union's facility providing medium-term financial assistance for Member States' balances of payments pursuant to Article 10 of Council Regulation (EC) No 332/2002.
(39110)	Report on the annual accounts of the European Insurance and Occupational Pensions Authority for the financial year 2016 together with the Authority's reply.
(39128)	Report on the annual accounts of the European Banking Authority for the financial year 2016 together with the Authority's reply.
(39217)	Report on the annual accounts of the European Securities and Markets Authority for the financial year 2016 together with the Authority's reply.
(39263) 14887/17 COM(17) 683	Report from the Commission to the European Parliament and the Council on the application of Regulation EU n°260/2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation.

Formal Minutes

Tuesday 19 December 2017

Members present:

Sir William Cash, in the Chair

Marcus Fysh	Andrew Lewer
Kate Green	Michael Tomlinson

2. 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 17 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Seventh Report of the Committee to the House.

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

[Adjourned till Wednesday 10 January at 1.45pm.

Standing Order and membership

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

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

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

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

The expression "European Union document" covers—

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

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

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

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

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

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

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

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

Current membership

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

Douglas Chapman MP (*Scottish National Party, Dunfermline and West Fife*)

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

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*)