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European Scrutiny Committee

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Documents considered by the Committee on 24 January 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/.

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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 Emissions Trading System (ETS)

- The Committee notes that a satisfactory compromise has been reached on how to protect the integrity of the EU Emissions Trading System in the event of an abrupt UK exit from the EU.

UK customs controls and the EU budget

- The Committee remains concerned about allegations by the European Commission that HM Revenue and Customs allowed undervalued Chinese imports into the EU, leading to a loss of customs duties of nearly €2 billion in the 2013–16 period, although the Government disputes the scale of the duty loss. As customs duties are used to fund the EU budget, the UK may have to pay the EU for the evaded tariff duties from the public purse. The dispute may also complicate UK-EU negotiations on a new customs partnership after Brexit.

VAT: e-commerce package

- The Committee has taken note of the final agreement on a package of new EU-wide VAT legislation intended to facilitate e-commerce, for example by allowing EU businesses to account for VAT due for distance sales to other EU countries via a platform operated by their national tax authority. The Government is yet to clarify whether it will have to implement the legislation as part of the post-Brexit transitional period, but the Committee expects this to be the case as the EU has only offered a transition on the condition that EU law continues to apply in the UK as if it were still a Member State.

Services Directive notification procedure

- The Committee asks how the Government, in retaining the Provision of Services Regulations 2009 (which transposes the EU Services Directive into UK law), intends to treat its cross-border, intra-EEA provisions.

The EU Civil Protection Mechanism: strengthening EU disaster management

- As the Government has highlighted civil protection as "an important area for future cooperation between the UK and the EU" post-exit, the Committee requests further information on the existing model for third country participation in the EU Civil Protection Mechanism and its suitability for the UK post-exit.

Managing EU migration and security databases

- The Government should explain whether the treaty it intends to seek on security, law enforcement and criminal justice cooperation with the EU post-exit could overcome the limitations on third country participation set out in the proposed Regulation.
- The Committee expects the Government to indicate whether eu-LISA and the information systems it manages will be a priority for the UK in negotiating a post-exit treaty on security, law enforcement and criminal justice cooperation with the EU, given that the European Council will agree a new set of guidelines in March on the framework for the UK's future relationship with the EU and expects the UK to "provide further clarity on its position on the framework" before then.

Exchanging information on criminal convictions

- The Government's Justice Impact Test and Impact Assessment on the proposed changes to the European Criminal Records Information System should set out the operational impact for the UK if it does not secure a post-exit agreement encompassing ECRIS and ECRIS-TCN.
- The Government should say whether it intends these measures to be included in a future agreement with the EU on security, law enforcement and criminal justice cooperation.
- The Government should explain how the longer deadline for implementing the changes to ECRIS (which will extend beyond the UK's exit from the EU in March 2019) would affect its preparations for implementing the legislation.

Summary

Commission Work Programme 2018

Each year the Commission sets out its legislative and policy priorities for the year ahead giving an indication of the proposals likely to emerge over the following year. The fourth annual work programme of President Juncker's Commission highlights 26 new key initiatives to complete the work of his ten strategic priorities. Unusually, the programme also includes eleven 'Future of Europe' initiatives launched with a 2025 perspective. The Commission Work Programme (CWP) remains important in setting out future legislation that might enter into effect after the UK has left the European Union, but during a transition period in which it may need to comply with and implement new EU law. Additionally, the forward-looking initiatives proposed will be an important indicator of the future priorities

of a key partner of the UK as a third country. We are not recommending the CWP 2018 for a separate debate, but it may be that we recommend individual proposals arising from the CWP for debate when we consider them in more detail in the future.

Cleared; drawn to the attention of the relevant Committees.

EU Emissions Trading System (ETS)

The outstanding issue on these documents about long-term reform to the EU ETS and about aviation emissions specifically was an amendment made to protect the integrity of the EU ETS in the event of an abrupt UK exit from the EU. The Committee reports a satisfactory resolution, which should not have the detrimental outcome on operators that had originally been feared following the EU's initial proposal.

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

2018 fishing quotas

The Committee reports that agreement to the 2018 fishing quotas was reached in December. The Fisheries Minister (George Eustice) is content with the outcome, considering it to be one which struck the right balance for the marine environment and coastal communities. He adds that no issues arose specific to the UK's withdrawal from the EU.

Cleared; drawn to the attention of the Environment, Food and Rural Affairs Committee.

UK customs controls and the EU budget

A report published by the European Commission in July last year on the protection of the EU budget against fraud highlighted allegations that HM Revenue and Customs had systematically undervalued Chinese textile imports over a period of four years, leading to a loss of nearly €2 billion in customs duties. Following the General Election, the Committee retained the report under scrutiny pending further information from the Government about the scale of the problem, and its political and financial implications. The Chief Secretary to the Treasury has now written to the Committee, effectively recognising there was a problem but rejecting the EU's estimate of the duty loss. The UK may still have to compensate the EU for the vast majority of any customs duties evaded, as such duties make up a significant component of each Member State's contribution to the EU budget.

Separately, the European Court of Auditors has also published a report on customs controls on imports into the EU, which included an audit of HMRC's practices to ensure the correct application of EU customs tariffs to imports. The auditors corroborated OLAF's findings in relation to undervaluation of Chinese imports, but do not independently estimate the total losses in customs duties. They found that, in some instances, the UK was allowing imports of clothing to be cleared by customs with declared prices lower than the price of raw cotton. The Committee remains concerned about the financial implications of the dispute, as well as its consequences for future negotiations on a new UK-EU customs partnership after Brexit and any transitional period.

Cleared from scrutiny; drawn to the attention of the International Trade Committee, the Public Accounts Committee and the Treasury Committee; further information requested.

VAT: e-commerce package

The Member States have supported new EU legislation reforming the system of VAT on cross-border supplies of goods and services to consumers. The changes had the support of the Government, which nevertheless admits it compromised on the VAT treatment of distance sales of goods (which must in the future be accounted for in the EU country of the consumer in a wider range of circumstances than is currently the case, increasing burdens on businesses) because a key ask—simplifying VAT accounting for suppliers of electronic services such as online games or music—was achieved.

The package of measures also aims to reduce the burden on businesses for cross-border VAT in the EU overall by allowing them to use the "Mini One Stop Shop" accounting mechanism, under which VAT due in another EU country for distance sales of goods or services would be paid domestically (after which the local tax authority remits it to their counterpart in another Member State). The new legislation will also abolish Low Value Consignment Relief, which allow EU consumers to import low-value goods from third countries without having to pay import VAT.

The Committee is of the view that important questions about the implications of the UK leaving the common VAT area after Brexit remain, and it is not yet clear whether the most fundamental reforms agreed as part of the e-commerce VAT package will apply to UK traders as any other third country business (which face additional barriers compared to EU businesses), or whether they will have a special status under any transitional arrangement or new UK-EU agreement on VAT.

Cleared from scrutiny; drawn to the attention of the Business, Energy and Industrial Strategy Committee and the Treasury Committee.

Services Directive notification procedure

The Government has responded to the Committee's questions about the General Approach that was agreed by the Member States. While the proposal will continue to benefit UK businesses post-exit, the text weakens the Commission's proposal: for example, insurance schemes have been excluded. Although the Government downplays these concerns, the weakening of the text may indicate that the EU27 have limited appetite for going further in areas covered by the Services Directive. Regarding the implications of EU exit for sectors covered by the Services Directive, the Government gives a mixed impression: market access to unregulated sectors (e.g. marketing) will be relatively unaffected, whereas there will be a greater impact on sectors for which more advanced frameworks exist at EU level (e.g. legal services). Although the Government provided extensive information regarding the proposal and its progress in Council, the Committee chose to retain it under scrutiny pending further information about how the Government proposes to treat the Provision of Services Regulation 2009, which implements the EU Services Directive.

Not cleared from scrutiny; further information requested.

Single Digital Gateway

A General Approach was agreed at the Competitiveness Council on 30 November which made the proposed Regulation significantly more flexible, in line with UK interests. On

Brexit, the Regulation does not contain third country provisions, and the Gateway and national webpages will be less useful to UK citizens and businesses where they concern EEA law/rights that no longer apply to them. Nonetheless, the Gateway and national webpages will continue to benefit UK stakeholders by providing them with much useful information online and in English, some of which will apply equally to citizens and businesses of third countries. Under the phased implementation of the Regulation its more significant provisions will only take effect 3 and 5 years after its publication in the OJ, meaning they are unlikely to apply to the UK before it has left the EU and the transition period has ended. The Committee cleared the document from scrutiny, and urged the Government to proactively ensure that arrangements are put in place to ensure that stakeholders are provided with accurate and up-to-date information about any applicable rules and administrative procedures which relate to their cross-border activities within the EU27 at the moment of exit.

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

The EU Civil Protection Mechanism: strengthening EU disaster management

The EU Civil Protection Mechanism enables Member States to coordinate their response to natural and man-made disasters within and beyond the EU. It is funded until the end of 2020. The Commission considers that changes need to be made before then—in 2017 alone, the Mechanism was unable to respond to 7 (out of 17) requests for assistance to fight forest fires. The proposal seeks to enhance the capacity of the EU and Member States to respond to disasters and address capacity gaps in two ways: by increasing the incentives for Member States to "pre-commit" their own disaster response capacities to a voluntary pool (to be renamed the European Civil Protection Pool) so that these assets are more readily available in an emergency and (more controversially) by establishing a dedicated reserve of EU-acquired response capacities (rescEU) which would provide "a last resort capacity" capable of being mobilised at short notice. The Government notes that the Commission has failed to publish an Impact Assessment and that there is "no evidence" that rescEU would "significantly reduce deaths, damage and economic losses". The Committee says it is unclear whether the Government considers that there are insufficient powers under the Treaties for the EU to develop its own disaster response capacities or that there would be no added value in the EU doing so. The Government is asked to clarify the basis of its objection (lack of competence or subsidiarity), to explain how the changes proposed by the Commission would affect the UK and to provide further information on the possible Brexit implications.

Not cleared from scrutiny; further information requested; drawn to the attention of the Public Administration and Constitutional Affairs Committee.

EU participation in Council of Europe Convention and Additional Protocol on the prevention of terrorism

The Government confirms that it has decided not to participate in Council Decisions authorising the EU to conclude (ratify) a Council of Europe Convention and Additional Protocol on the Prevention of Terrorism. It considers that there would be "no added value in doing so" as the UK is "fully compliant" with the Council of Europe instruments. The

Government intends the UK to "ratify at the earliest opportunity" but makes clear that its immediate priority is to review counter-terrorism powers and legislation following the terror attacks in the UK last year.

Cleared from scrutiny; drawn to the attention of the Home Affairs Committee.

Managing EU migration and security databases

A new EU Agency—eu-LISA—was established in 2012 to manage three EU information systems dealing with asylum, border management and law enforcement. The EU is developing a number of new EU information systems in these areas. The proposed Regulation would make eu-LISA responsible for managing these new systems. The Government has decided to participate in the proposal even though the UK does not take part in all of the systems that eu-LISA will manage. The Government sets out its aspiration for a post-exit treaty with the EU on security, law enforcement and criminal justice cooperation but says it would be "wrong" to speculate about continued UK participation in individual measures, such as eu-LISA and the information systems it manages. The Committee challenges the Government's reticence, noting that the European Council expects the UK to "provide further clarity on its position" before agreeing Guidelines in March on the framework for the future EU/UK relationship. We ask whether the new security treaty the Government intends to seek post-exit could overcome the limitations on third country participation set out in the proposed Regulation (only countries associated with the Schengen free movement area).

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.

Exchanging information on criminal convictions

The Council has agreed a general approach on two proposals which seek to improve the operation of the European Criminal Records Information System—ECRIS. The UK participates fully in ECRIS and has opted into the latest proposals. The texts agreed by the Council include some changes on third country access to information held in a new information system—ECRIS-TCN—which will contain information on third country nationals convicted in the EU. They also push the implementation deadline beyond the date on which the UK is expected to leave the EU. The Committee asks the Government to clarify the likely impact of the changes on the UK and to explain how they will affect the Government's preparations for implementing the legislation.

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.

Documents drawn to the attention of select committees:

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

Business, Energy and Industrial Strategy Committee: EU Emissions Trading System [(a) Proposed Directive (C), (b) Proposed Regulation (C)]; VAT: e-commerce package [Proposed Directive (C), (b) Proposed Implementing Regulation (C), (c) Proposed Regulation (C)], Single Digital Gateway [Proposed Regulation (C)]

Environment, Food and Rural Affairs Committee: 2018 Fishing catch quotas [Proposed Regulation (C)]; Fisheries Discard Plans [Delegated Regulations (C)]

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

Home Affairs Select Committee: EU Participation in Council of Europe Convention and Additional Protocol on the Prevention of Terrorism [Proposed Decisions (C)]; Managing EU migration and security databases [Proposed Regulation (NC)]; Exchanging information on criminal convictions[(a) Proposed Directive (NC), (b) Proposed Regulation (NC)]

International Trade Committee: UK Customs Controls and the EU Budget [(a) Report (C), (b) Special Report (C)]

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

Political and Constitutional Affairs Committee: The EU Civil Protection Mechanism: strengthening EU disaster management [(a) Communication (C), (b) Proposed Decision (NC)]

Public Accounts Committee: UK Customs Controls and the EU Budget [(a) Report (C), (b) Special Report (C)]

Treasury Committee: UK Customs Controls and the EU Budget [(a) Report (C), In addition, the Commission Work Programme 2018 has been brought to the attention of relevant Select Committees, (b) Special Report (C)]

1 Services Directive notification procedure

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested
Document details	Proposal for a Directive of the European Parliament and of the Council on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services, and amending Directive 2006/123/EC and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System
Legal base	Article 53(1), 62 and 114 TFEU, Ordinary legislative procedure, QMV
Department	Business, Energy and Industrial Strategy
Document Number	(38450), 5278/17 + ADDs 1–2, COM(16) 821

Summary and Committee's conclusions

1.1 The EU Services Directive (2006/123) aims to ensure that all new regulatory measures imposed by EU countries affecting a wide range of services are non-discriminatory, proportionate and justified by public interest objectives, with the aim of removing barriers to intra-EU services trade.[1] The notifications procedures the Directive contained were defective in a number of respects, meaning that Member States have been able to circumvent Commission scrutiny of new regulatory measures which may, in some cases, act as non-tariff barriers to trade and protect domestic businesses from competition.

1.2 On 13 January 2017 the Commission proposed, as part of a wider Services Package, a Directive which would widen the coverage of the existing notifications procedure and strengthen it in various ways (see Background for a detailed account of the proposed Directive).[2] In its Explanatory Memorandum,[3] the Government said that it was a strong supporter of a liberalised EU services market, had called for better enforcement of the notifications procedure, and that the proposal addressed many essential areas for improvement.

1 Directive (EC) 2006/123 of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

2 Proposal for a Directive of the European Parliament and of the Council on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services COM(16) 821 final.

3 Explanatory Memorandum from the Minister, BEIS, to the Chairman of the European Scrutiny Committee (30 January 2017).

1.3 A General Approach was agreed at the Competitiveness Council on 29–30 May 2017[4] which narrowed the scope of the proposal in a number of respects. In response, the Committee asked the Government to provide more information about these changes, as well as the implications of Brexit for affected sectors.[5]

1.4 The Parliamentary Under Secretary of State at the Department of Business, Energy and Industrial Strategy (Lord Henley) has now provided the Committee with a response.[6] The information that he provides mitigates the Committee's concerns about some aspects of the General Approach (e.g. late stage parliamentary amendments), but downplays the significance of others (e.g. weakening the legal effects of a breach of the notification procedure). More detailed information about these issues is provided in the section of this report concerning the Minister's letter of 12 December 2017. Despite these changes, the Minister considers that the General Approach preserves "most of the advantages of the Commission's original proposal".

1.5 The Minister does not provide a detailed analysis of the implications of EU exit across the affected sectors, instead directing the Committee to the Government's sectoral reports[7] and to the OECD Services Trade Restrictiveness Index.[8]

1.6 **We thank the Government for the exhaustive information provided in response to our questions about the General Approach that has been agreed. We are assured that the exclusion of late stage parliamentary amendments from the advance notification requirement is justified; however, we consider the exclusion of insurance schemes from the scope of the Directive regrettable, and regret the deletion of the clause which would have meant that a breach of one of the elements of the procedure would have rendered it unenforceable vis-à-vis individuals.**

1.7 **On balance, we accept the Government's view that the General Approach, which will continue the incremental liberalisation of the Single Market for Services, preserves most of the advantages of the original proposal, and is in line with UK interests. However, we note that the Member States' progressive weakening of the Commission's proposal may illustrate a dwindling impetus among the EU27 for further integration in the sectors covered by the Services Directive (excluding those service sectors for which harmonised frameworks exist), of which the UK has traditionally been the chief advocate.**

1.8 **On the implications of EU exit, we note that the UK will continue to benefit from the effects of the proposal, post-withdrawal, particularly where individual Member States' services regulation does not discriminate between EU and third country nationals. We conclude from the information provided by the Government that the impact on market access across the sectors covered by the Services Directive of a shift from EU membership to third country status will be highly uneven: UK access to the EU market in unregulated sectors (e.g. marketing, management consulting) is likely**

4 Letter from the Minister, BEIS, to the Chairman of the European Scrutiny Committee (20 April 2017).
5 Second Report HC 71—xxxi (2017–19) chapter 9 (22 November 2017).
6 Letter from the Minister, BEIS, to the Chairman of the European Scrutiny Committee (12 December 2017).
7 Department for Exiting the European Union, Sectoral Analyses inquiry—publications (21 December 2017).
8 OECD, Services Trade Restrictiveness Index Simulator

to be relatively[9] unaffected, whereas service sectors for which more developed EU-level frameworks exist (e.g. legal services, accountancy, audit) will be more adversely impacted. This is without reference to any future UK-EU trade agreement.

1.9 **Although the Government does not provide the detailed analysis the Committee requested as to how different sectors would be impacted, it directs the Committee to the OECD Services Trade Restrictiveness Index[10] (STRI) which provides a list of the restrictions affecting third county businesses seeking to operate in EU Member States. While this list does not in itself enable the Committee to make a comparison with the UK's terms of access to the EU market, we note the UK Trade Policy Observatory's statement that the STRI shows that outside the Single Market, "it is in professional services sectors … where access for foreign providers is restricted", and that UK lawyers and accountants looking to provide services in the EU would be up against "major restrictions".[11]**

1.10 **Post-withdrawal, we note the Government's stated intention to preserve the Provision of Services Regulations 2009, which implements the EU Services Directive. The reciprocal cross-border obligations created by the Services Directive and the EU Member States' implementation thereof will no longer apply vis à vis the UK. In practice, this means that, even if the UK retains in domestic law its regulations implementing the Services Directive,[12] the EU27 will no longer be required to reciprocate. As a consequence, EU Member States will be permitted to discriminate against UK service providers, within the scope of the EU's WTO GATS commitments.**

1.11 **We therefore request further clarification of how the Government proposes to use the powers created by the EU (Withdrawal) Bill to modify the Provision of Services Regulations 2009 following EU exit and the end of the Prime Minister's proposed implementation period. How does it intend to treat the EEA-specific provisions in the Regulations, which implement cross-border, intra-EU provisions of the Services Directive? We particularly ask the Government to clarify whether it considers that retaining the current implementation of the Services Directive vis-à-vis the EU27 is contingent on the EU27 reciprocating within the context of a wider trade agreement, or whether it intends to unilaterally extend these benefits to the EU27 post-withdrawal.**

1.12 **We ask the Government to provide this information by 22 February 2018. In the meantime, we retain the proposal under scrutiny, pending the provision of the information requested. We draw this report to the attention of the Committee for Business, Energy and Industrial Strategy and the Committee for Exiting the European Union.**

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9 This is in the narrow sense of market access (i.e. the absence of specific legal restrictions prohibiting service providers from offering their services in a territory). it is important to note that other non-tariff barriers might arise in certain exit scenarios, such as impediments to the movement of employees across borders, or the free flow of data, which could create separate barriers to trade, including for sectors which are otherwise permitted to operate in a territory.

10 OECD, Services Trade Restrictiveness Index Simulator.

11 Written evidence to the House of Lords EU Internal Market Sub-Committee from the UK Trade Policy Observatory (TAS0085).

12 Provisions of Services Regulations 2009, Provision 21 (Prohibited requirements).

Full details of the documents

Proposal for a Directive of the European Parliament and of the Council on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services, and amending Directive 2006/123/EC and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System: (38450), 5278/17 + ADDs 1–2, COM(17) 821.

Background

1.13 The Services Directive (2006/123/EC)[13] established that national rules restricting the right of establishment and the freedom to provide services falling under the Directive must be non-discriminatory, proportionate and justified by public interest objectives. To ensure that all new regulatory measures imposed by EU countries fulfilled these conditions, the Services Directive introduced two notification procedures whereby EU countries would notify the Commission of new or changed regulatory measures affecting services.

1.14 These procedures have proven ineffective for a variety of reasons. There is no binding requirement for Member States to notify draft regulations before they have been adopted. External stakeholders have no access to notifications, and failure to notify other parties of proposed measures does not have legal consequences. Member States are not required to demonstrate that proposed measures comply with the Services Directive. The Commission's power to issue Decisions that block non-compliant measures only applies to establishment, and not to cross border service provision.

1.15 These failings mean it is not currently possible to ensure that all new Member State regulation of services is non-discriminatory, justified and proportionate. To effectively enforce the Services Directive under the current rules the Commission would have to initiate legal infringement proceedings against Member States concerning already adopted measures, which is costly, politically difficult and less efficient than ensuring that non-compliant measures are not adopted in the first place. The Services Directive has, as a consequence, proven to be less effective than was originally envisaged.

The proposal

1.16 On 10 January 2017, as part of a package of legislative and non-legislative proposals on services, the European Commission published a proposal[14] for a Directive (hereafter 'the Directive') clarifying and reforming the services notification procedures laid out in the Services Directive 2006/123/EC, with the intention of addressing the limitations described above. It is intended to complement the existing notification proceeding applicable for goods and information society services.

1.17 The proposed Directive modified the existing notification procedure by:

- expanding the scope of the current notifications regime to include all authorisation schemes, professional liability insurance, and multidisciplinary activities for both cross-border service provision and secondary establishment;

13 Directive (EC) 2006/123 of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

14 Proposal for a Directive on the enforcement of the Directive 2006/123/EC on services in the internal market COM(2016) 821 final.

- creating an obligation to notify measures while they are in draft form and introducing a mandatory consultation period of three months, to allow comments by the Commission and other Member States to be made at an earlier stage;
- introducing an 'alert' system, which allows the Commission to notify a Member State of its concerns regarding a draft measure, with the effect that the Member State may then not adopt the measure for a further period of three months;
- extending the Commission's power to adopt a binding Decision preventing the Member State from implementing a measure, so that it applies to cross-border service provision as well as establishment;
- introducing an additional notice period of two weeks for Member States to notify the adoption of legislation;
- clarifying the means of notifying;
- requiring Member States to demonstrate that any measures proposed are necessary, proportionate and non-discriminatory, in line with the Services Directive;
- enabling the Commission to publish Member States' notifications on a public website to improve transparency and coherence; and
- clarifying the legal consequences that a breach of the notification procedure's requirements would carry, namely that they "should constitute a substantial procedural defect of a serious nature as requests effects vis-à-vis individuals".

Scrutiny to date

1.18 In the Government's Explanatory Memorandum,[15] the Parliamentary-Under Secretary of State, Department for Business, Energy and Industrial Strategy (Lord Prior) welcomed the proposal, and said that the Government had specifically called for reforms to be made to the notifications procedure. He said that the Government did not anticipate that the proposed reforms would entail a substantial increase in the administrative burden or cost of the notifications procedure. The departmental assessment of the proposal noted that the Directive would require transposition, which would entail new secondary legislation and some amendment of existing legislation that regulates the current notification procedure. Following agreement of the Directive, Member States would have one year to transpose its requirements into domestic law, after which time those provisions would apply.

1.19 In its report on the proposal on 22 February 2017,[16] the European Scrutiny Committee noted that the Government had advocated this reform, which would help to deepen the Single Market in services, and supported the Government's assessment that the proposal's policy objectives could only be effectively achieved through EU action,

15 Explanatory Memorandum from the Minister, BEIS, to the Chairman of the European Scrutiny Committee (30 January 2017).

16 Thirty-Third Report HC 71–xxxi (2016–17), chapter 2 (1 March 2017).

and that the proposal was therefore not in breach of the principle of subsidiarity. The Committee sought further information about the implications of exiting the European Union in relation to the proposal.

1.20 In the Minister's response on 28 March 2017,[17] he noted that regulatory cooperation of the kind envisaged by the Directive was achievable outside FTAs and not in breach of WTO rules, and that, EU subsidiaries of UK companies would continue to benefit from the removal of barriers to trade in the EU market, particularly where Member States' services regulation does not discriminate between EU and third country nationals.[18]

1.21 In a follow-up letter of 10 July 2017[19] the Minister updated the Committee that a General Approach was agreed at the Competitiveness Council on 29–30 May 2017. According to the Minister, a compromise position was reached that involved the removal of insurance schemes from the scope of the proposal and the exemption of late stage parliamentary amendments from the requirement to notify prior to adoption. The clause setting out that a breach of one of the elements of the notification procedure constitutes a 'substantial procedural defect of a serious nature as regards its effects vis-à-vis individuals' had also been removed from the compromise text.

1.22 In our subsequent report,[20] on 22 November 2017, after the appointment of the Committee following the 2017 General Election, we requested that the Government provide further information about the weakening of the text of the Directive in the General Approach, and further clarify the implications of EU exit across the affected sectors. We specifically sought clarification regarding:

- The exclusion of insurance schemes from the scope of the Directive;
- The removal of "late stage parliamentary amendments" from the Directive;
- The extent to which the deletion of the clause stating that a breach of any element of the notification procedure constitutes a 'substantial procedural defect of a serious nature as regards its effects vis-à-vis individuals' would weaken the effectiveness of the enforcement mechanism;
- Whether the remaining benefits of the Directive in the General Approach were sufficient to merit the burden of implementing it; and
- If the European Parliament advocated a more ambitious approach.

1.23 Regarding EU exit, we sought clarification of:

- How the Government intended to treat the Services Directive and associated legislation, including the notifications Directive, through the EU (Withdrawal) Bill;
- Whether the Government intended to implement the Directive even if it would only be effective for a short period of time before the UK left the EU; and

17 Letter from the Minister, BEIS, to the Chairman of the European Scrutiny Committee (28 March 2017).
18 Letter from the Minister, BEIS, to the Chairman of the European Scrutiny Committee (28 March 2017).
19 Letter from the Minister, BEIS, to the Chairman of the European Scrutiny Committee (20 April 2017).
20 Second Report HC 71—xxxi (2017–19) chapter 9 (22 November 2017).

- An assessment of the extent to which access to individual EU Member States' markets (in those sectors covered by the Services Directive) would be altered when the UK assumed third country status, in the absence of another agreement.

Letter from the Minister of 12 December 2017[21]

1.24 Lord Prior's successor as Parliamentary Under Secretary of State at the Department of Business, Energy and Industrial Strategy (Lord Henley) provides an update in response to the Committee's questions.

1.25 The Minister describes in greater detail the effects of the General Approach, which weakens the text in a number of respects—e.g. through the exclusion of insurance requirements from the scope of the Directive. However, the Minister states that he believes that the Council's General Approach preserves "most of the advantages of the Commission's original proposal" (by requiring Member States to notify draft laws in advance of adoption; by requiring Member States to justify why their measures are required and demonstrate proportionality; and by promoting dialogue between Member States and the Commission) and therefore continues to hold significant benefits for UK service providers, thus justifying the changes.

1.26 Furthermore, the European Parliament has voted on the proposal in Committee and is seeking to strengthen the proposal rather than to weaken it, suggesting that trilogue negotiations are likely to improve the proposal, from a UK perspective.

1.27 Key points from the Minister's letter are summarised below.

Exclusion of insurance schemes

1.28 The Committee asked how significant a barrier insurance schemes were to services trade in the internal market, and for the rationale for their exclusion from the scope of the initiative. The Minister states that the Government has heard from many stakeholders about the challenges they face accessing the correct insurance, differences between professional indemnity insurance in different Member States, and how these inhibit the cross-border provision of services. He cites a European Commission Staff Working Document[22] which summarises the situation. The Minister states that the Council excluded insurance requirements as some Member States argued that "they may change frequently and in minor ways".[23]

1.29 Given that the Commission had identified insurance schemes as one of the chief barriers that inhibited service providers seeking to operate on a cross-border basis, their exclusion from the proposal clearly weakens it.

Removal of late stage parliamentary amendments

1.30 Under the General Approach agreed by the Council, the Member States would not be required to amend their notification in advance if late stage parliamentary amendments were introduced. The Committee sought further clarification, as this would potentially

21 Letter from the Minister, BEIS, to the Chairman of the European Scrutiny Committee (12 December 2017).
22 Commission Staff Working Document, Access to insurance for services provided in another Member State SWD (14) 130.
23 Letter from the Minister, BEIS, to the Chairman of the European Scrutiny Committee (12 December 2017)

provide Member States with a loophole to escape the effects of the notification procedure. The Minister clarifies that, although late stage parliamentary amendments are excluded from the requirement for advance notification, "the original proposal would need to have been notified, and the amendments would need to be notified within two weeks after adoption".

1.31 The removal of late stage parliamentary amendments from scope therefore appears to be a sensible compromise, which will ensure that the ability of parliaments to make late stage amendments to domestic legislation is not unduly constrained, without completely undermining the objectives of the initiative.

Consequences of a breach of the notification procedure

1.32 The Minister explains, in detail, that the (now deleted) clause in the Directive had sought to codify CJEU case law which established that a breach of equivalent procedural obligations in the Technical Standards Directive (TSD) to notify resulted in a measure adopted in breach of these obligations being unenforceable against an individual in a national court. The Minister clarifies that the deletion of this clause does not necessarily mean that a breach would not be considered a serious procedural defect, but that a CJEU judgement would be required to consider it so.

1.33 The Minister concludes that, while retaining the clause would have strengthened the enforcement of the Services Directive, the possibility that a breach of the procedure could be considered a substantial procedural defect by the CJEU remains a powerful incentive for Member States to comply with the notifications procedures set out in the Directive.

1.34 The Minister appears to understate somewhat the significance of this deletion from the text. In effect, if the text of the General Approach were agreed, for a trader to show that a breach of the procedure was a substantial procedural defect, it would have to take a case to the CJEU which would have significant cost and time implications. So, in legal and practical terms, the incentive the General Approach creates for Member States to comply with the notifications procedures set out in the Directive is not commensurate with creating a procedural mechanism that would mean that a breach of procedure would automatically be considered a substantial procedural defect and have the effect of rendering the measure unenforceable against an individual.

The European Parliament

1.35 The Minister states that the European Parliament has now voted on amendments at committee stage, and that it supports a more ambitious approach than the Council's General Approach. Notable differences include retaining the requirement to notify changes in insurance requirements, a requirement to notify changes in rules around commercial communications, and retention of the language that breaches of the procedure should be considered a "substantial procedural defect". The Parliament's emerging position is therefore in line with UK interests—more so than the Council's General Approach.

Brexit implications

1.36 In response to the Committee's request for a summary of the Department's findings on the extent to which UK access to EU markets in sectors covered by the Services Directive will be affected by Brexit, the Minister states that:

> "Leaving the EU will not put a stop to UK businesses' ability to access EU markets and to set up in and invest in EU countries. In many of the sectors covered by the Services Directive, particularly those that are less regulated, foreign businesses are able to operate in the EU in much the same way as local businesses."

1.37 However, the Minister appears to somewhat contradict his point that leaving the EU will not put a stop to UK businesses' ability to access EU markets, when he observes that:

> "In certain sectors, particularly those that are very highly regulated such as the legal sector, there are more restrictions in different EU countries restricting the ability of non-EU firms to operate in the market."

1.38 The Government does not provide any detailed analysis of the extent to which access to the EU market is curtailed for third countries, by sector. However, he directs the Committee to:

- the OECD Services Trade Restrictiveness Index[24] which, the Minister states, provides a source of examples of restrictions affecting third county businesses seeking to trade in EU Member States, with the caveat that some of these restrictions may also affect domestic and EU businesses (however, the Index does not facilitate comparisons with the intra-EU trade regime on the basis of which the UK current trades with other EU Member States); and
- States that Committee members will be able to read the Government's sectoral analyses of market access in sectors covered by the Services Directive.

1.39 The Minister adds that the Services Directive is implemented in the UK through the Provision of Services Regulations 2009, which the EU (Withdrawal) Bill will preserve, and correct as necessary, and that this will also be the case for any secondary legislation implementing the notifications Directive.

1.40 The Minister undertakes to keep the Committee updated on any further progress.

Previous Committee Reports

Second Report HC 71—xxxi (2017–19) chapter 9 (22 November 2017); Thirty-Third Report HC 71–xxxi (2016–17), chapter 2 (1 March 2017).

24 OECD, Services Trade Restrictiveness Index Simulator.

2 The EU Civil Protection Mechanism: strengthening EU disaster management

Committee's assessment	Legally and politically important
Committee's decision	(a) Cleared from scrutiny (b) Not cleared from scrutiny; further information requested; (a)and (b) drawn to the attention of the Public Administration and Constitutional Affairs Committee
Document details	(a) Commission Communication: *Strengthening EU Disaster Management* (b) Proposed Decision amending Decision No 1313/2013/EU on a Union Civil Protection Mechanism
Legal base	(a)— (b) Article 196 TFEU, ordinary legislative procedure, QMV
Department	Cabinet Office
Document Numbers	(a) (39266), 14883/17, COM(17) 773; (b) (39265), 14884/17, COM(17) 772

Summary and Committee's conclusions

2.1 The EU Civil Protection Mechanism was established in 2001 to support Member States' efforts in preventing, preparing for and responding to natural or man-made disasters occurring within or outside the EU. It was overhauled in 2013 to strengthen the focus on disaster prevention, risk management and enhancing the collective operational capacity of the EU and Member States to plan for and respond to disasters through the creation of an Emergency Response Coordination Centre operating around the clock and a voluntary pool of response capacities (equipment and personnel) committed in advance by Member States.

2.2 Extreme weather events, earthquakes, health emergencies and large-scale terrorist attacks in recent years have increased the demands placed on the EU Civil Protection Mechanism. The Commission considers that additional capacity is needed to fill gaps in the assets made available to the Mechanism and ensure that it is able to respond at times when Member States' own capacities are stretched to their limits.

2.3 The Commission Communication—document (a)—provides an overview of the threats facing Member States and their human, environmental and economic impact. It calls for a restructuring of the existing voluntary pool of response capacities to increase the incentives for Member States to commit assets to a European Civil Protection Pool and make it harder for Member States to withhold these assets in the event of a disaster. The disaster response capacities provided by Member States would continue to remain under

their command and control. The Commission also calls for the creation of a dedicated "last resort" reserve of EU-funded assets—*rescEU*—to fill any gaps in the response capacities provided by Member States.[25] These assets would be available for immediate deployment by the Commission and (unlike assets provided by Member States) the Commission would have operational control.

2.4 As well as strengthening the capacities available to the EU Civil Protection Mechanism, the Commission envisages a more proactive role for itself in overseeing the risk assessments and disaster risk management plans developed by Member States to ensure that effective prevention measures are in place across the EU and that *rescEU* is not used as a substitute for national disaster response capacities. It intends to establish a Civil Protection Knowledge Network to share best practice, foster cooperation and develop "a common Union disaster preparedness culture".[26] It also says it will seek to strengthen coherence with other EU policies and funding instruments and streamline administrative procedures so that assistance can be deployed more rapidly.

2.5 The proposed Decision—document (b)—would make "targeted changes" to the EU Civil Protection Mechanism to fulfil the objectives set out in the Communication.

2.6 The Minister for Government Resilience and Efficiency (Caroline Nokes) explains that the current EU Civil Protection Mechanism is funded up until the end of 2020 and that the Commission's proposal has pre-empted negotiations (which were expected to begin this year) on a new legislative instrument to take effect from the beginning of 2021. She notes the absence of an Impact Assessment which makes it "difficult to assess the validity of some of the Commission's assertions" and considers that the Commission has "not provided evidence to support the current set of proposals". Whilst she welcomes the Commission's focus on enhancing prevention and preparedness-planning and supporting Member States in building their disaster response capabilities, she says there is "no evidence […] to support the conclusion that the Commission's ownership of assets would significantly reduce deaths, damage and economic losses from natural disasters".[27]

2.7 The Minister highlights civil protection as "an important area for future cooperation between the UK and the EU" post-exit. She says that the outcome of negotiations on the changes proposed by the Commission will affect the structures within which that cooperation will take place.

2.8 **The Minister's Explanatory Memorandum raises questions about the EU's competence to act under Article 196 of the Treaty on the Functioning of the European Union (TFEU) on civil protection, the need for and "added value" of a dedicated reserve of EU-acquired and funded disaster response capacities (*rescEU*), and the broader policy implications of the changes envisaged to the EU Civil Protection Mechanism.**

Competence to act

2.9 **The Minister says that the EU's role under Article 196 TFEU is limited to "supporting, coordinating and complementing the actions of Member States" and that establishing *rescEU* would erode "the principle set out in the Lisbon Treaty that**

25 See p.5 of the Commission Communication.
26 See p.6 of the Commission Communication.
27 See paras 16 and 19 of the Minister's Explanatory Memorandum.

Member States are primarily responsible for ensuring the safety and security of their citizens".[28] We note that this principle is not set out in the Lisbon Treaty, although it may be implicit in some of its provisions, and that the ability to take measures "supporting and complementing" Member States action gives the EU legislator considerable discretion.[29] With this in mind, we ask the Minister to clarify the Government's position on the limits of the EU's competence under Article 196 TFEU and to explain whether it gives sufficient powers to the EU to establish *rescEU*.

Subsidiarity—the setting up of rescEU

2.10 **The Minister says there is "no evidence" to support the Commission's view that *rescEU* would "significantly reduce deaths, damage and economic losses" and that the Commission has failed to consider more cost-effective options.[30] The Commission indicates that its analysis of the need for *rescEU* is based to a large extent on "operational experience", citing in particular the inability of the EU Civil Protection Mechanism to provide assistance to fight forest fires on seven out of a total of 17 occasions in 2017.**

2.11 **Whilst we share the Minister's concern that the Commission has failed to produce an Impact Assessment, we question whether it is fair to conclude that there is "no evidence" that the creation of *rescEU* would make some contribution to reducing loss of life and environmental and economic damage, even if the scale of the contribution may be open to question.[31] We ask the Minister:**

- **whether she accepts that there is a shortfall in the capacities available at a European level to respond to natural disasters, such as forest fires;**
- **where responsibility lies for any shortfall;**
- **whether she believes there are more cost-effective means to address any shortfall; and**
- **whether she sees any added value in *rescEU* as a dedicated "last resort" reserve of EU assets available for immediate deployment.**

2.12 **The Minister expresses concern that *rescEU* would "undermine national response capacity by substituting efforts which national and local authorities should take as part of their prevention strategy with a centralised response capacity owned by the Commission".[32] This contrasts with the Commission's position that *rescEU* "will not be a substitute for efforts at national, regional and local level" and that it should only operate as "a last resort capacity" in response to disasters "that are exceptional in scope or nature" and at times when "national capacities are insufficient or overwhelmed".[33] Other changes proposed by the Commission (which the Minister supports) would appear to reinforce its position that *rescEU* should not reduce capacity at national**

28 See paras 14 and 22 of the Minister's Explanatory Memorandum.
29 See also Article 6 TFEU which sets out the policy areas in which the EU has competence to "support, coordinate or supplement the actions of the Member States" and which includes civil protection.
30 See para 16 of the Minister's Explanatory Memorandum.
31 The Commission does not claim that *rescEU* would result in a "significant" reduction, but would bring "clear added value" and "benefits in terms of reducing the loss of human life, environmental, economic and material damage"—see p.3 of the Commission's explanatory memorandum accompanying the proposed Decision.
32 See para 22 of the Minister's Explanatory Memorandum.
33 See pp.5 and 10 of the Communication.

level—for example, greater oversight and monitoring of risk assessments and disaster risk management planning at national and sub-national level, more incentives for Member States to contribute assets to the voluntary European Civil Protection Pool, and the introduction of an element of conditionality in future EU funding for disaster prevention measures at national level. We ask the Minister whether her concerns could be allayed by amendments to the text of the proposed Decision which, for example, make clear that *rescEU* is intended to be a "last resort capacity" or give the Council rather than the Commission the power to decide on the future composition of *rescEU*.

The European Civil Protection Pool

2.13 **The Minister implies that there would be some loss of Member State control over assets made available to the European Civil Protection Pool as they would "need to consult the Commission before withdrawing the asset for national use". The changes proposed by the Commission do not alter the existing requirement that these assets "remain available for national purposes at all times" and, once deployed, "remain under the command and control of the Member States making them available".[34] The requirement to consult the Commission arises only when a Member State intends to withdraw assets after their deployment, during the lifetime of an operation. This does not seem unreasonable, given the Commission's coordinating role, provided it has no power to resist the withdrawal of assets. We ask the Minister to confirm whether this is the case and whether she is able to support these changes.**

2.14 **We ask the Minister to explain how changes to the co-financing rules for assets made available by Member States for ad hoc operations in the future, but which do not form part of the European Civil Protection Pool, are likely to affect the UK. How much funding for its own disaster response capacities might the UK stand to lose?**

Brexit implications

2.15 **The EU Civil Protection Mechanism is open to participation by non-EU members of the European Economic Area "and other European countries when agreements and procedures so provide" but, on current terms, the UK would have limited access to financial assistance after withdrawal from the EU.[35] The Minister highlights civil protection as "an important area for future cooperation between the UK and the EU" post-exit. We understand that six non-EU countries currently participate in the EU Civil Protection Mechanism.[36] We would welcome some general indication of the terms on which they are able to participate and the extent to which they provide a suitable model for the UK.**

2.16 **As well as providing the information we have requested, we ask the Minister to provide progress reports on the negotiations and to indicate how rapidly she expects the proposed Decision to proceed through the Council and the European Parliament. We are content to clear the Communication from scrutiny but retain the proposed Decision under scrutiny. We also draw this chapter to the attention of the Public Administration and Constitutional Affairs Committee.**

34 See Article 11(6) of Decision No 1313/2013/EU on a Union Civil Protection Mechanism and the amended Article 11(8) in the proposal.

35 See Article 28 of Decision No 1313/2013/EU on a Union Civil Protection Mechanism.

36 The former Yugoslav Republic of Macedonia, Iceland, Montenegro, Norway, Serbia and Turkey.

Full details of the documents

(a) Commission Communication: *Strengthening EU Disaster Management*: (39266), 14883/17, COM(17) 773; b) Proposed Decision amending Decision No 1313/2013/EU on a Union Civil Protection Mechanism: (39265), 14884/17, COM(17) 772.

Background

2.17 The Reports listed at the end of this chapter describe the substantial changes proposed by the Commission to the EU Civil Protection Mechanism in 2012. The revised Mechanism took effect in January 2014.[37]

The Commission Communication—document (a)

2.18 The Commission provides a brief overview of extreme weather events in Europe and beyond in recent years and the devastating human and economic impact. In 2017 alone, over 100 lives were lost to forest fires in Portugal and one million hectares of forest (an area four times the size of Luxembourg) destroyed. Forest fires are no longer confined to southern Member States but are spreading northwards. Other recent high impact events include earthquakes (in Italy and Greece) and hurricanes and flash flooding (affecting large parts of north-west Europe and European overseas territories in the Caribbean). Member States have also had to respond to a spate of terrorist attacks, health emergencies and epidemics (the Ebola and Zika viruses) and the humanitarian consequences of the refugee and migration crisis.

2.19 The Commission considers that the EU Civil Protection Mechanism has not always been able to "deliver the expected results" for a variety of reasons:

- Member States' reluctance to release assets committed to the voluntary pool at times when their own disaster response capacities are stretched;
- the limited scope of EU funding which only subsidises a proportion of the transport costs involved in moving assets, not the (far larger) operational costs; and
- slow response times compounded by the limited availability of appropriate equipment, such as fire-fighting planes.[38]

2.20 The lack of sufficient and appropriate response capacities meant that the EU was only able to respond to 10 of the 17 requests for assistance to tackle forest fires in 2017. The Commission concludes that "we have now clearly reached the limits of the Union's Civil Protection Mechanism, as it is structured and functions today" and that a further "leap forward" is necessary. It calls for additional capacity and "a functioning solidarity mechanism" with "a sufficiently robust incentive structure" to encourage sharing of disaster response assets across borders. The Commission also underlines the need for "a fully integrated approach to prevention, preparedness and response to disasters" across the EU and for the synergies between different EU funding instruments to be exploited

37 See Decision No 1313/2013/EU on a Union Civil Protection Mechanism.
38 See pp.2–3 of the Communication.

to greater effect.[39] Relevant instruments include the European Structural and Investment Funds, the European Agricultural Fund for Rural Development and the EU Solidarity Fund.

The proposed Decision—document (b)

2.21 The proposed Decision would make targeted changes to the EU Civil Protection Mechanism which are intended to:

- strengthen the collective capacity of the EU and Member States to respond to disasters and address capacity gaps;
- increase the focus on prevention and disaster risk management and reinforce coherence with other relevant EU policies (for example, on climate change adaptation); and
- ensure that administrative procedures are "agile and effective" in supporting emergency operations.[40]

Enhancing disaster response capacity

2.22 The Commission proposes a dual system based on "two complementary pillars":

- a voluntary pool of pre-committed response capacities made available by Member States—the European Civil Protection Pool; and
- a dedicated reserve of EU response capacities—*rescEU*—under the operational control of the Commission which would provide "a last resort capacity that can be mobilised immediately".[41]

2.23 The first pillar—the European Civil Protection Pool—would operate in a similar way to the existing voluntary pool, but with additional incentives to encourage Member States to make assets available to the Pool. They would be able to recover a higher proportion (75%) of the costs incurred in deploying assets through the EU Civil Protection Mechanism, including costs related to the adaptation and repair of equipment, transportation and operational costs. In return, these assets would have to be deployed in response to a request for assistance channelled through the EU Civil Protection Mechanism except where the Member State providing them is faced with "an exceptional situation substantially affecting the discharge of national tasks".[42] Throughout the disaster response operation, assets provided by Member States would remain under their command and control. To encourage a more predictable supply, the EU would only subsidise (co-finance) assets that are part of the European Civil Protection Pool, not those which are outside the Pool and made available on an ad hoc basis. The Commission describes these changes as "a significant shift compared to the situation today".[43]

2.24 The second pillar—*rescEU*—would consist of a range of assets purchased, rented or leased by the EU which could be immediately deployed by the Commission in response

39 See pp.3–4 of the Communication.
40 See p.2 of the Commission's explanatory memorandum accompanying the proposed Decision.
41 See p.5 of the Communication.
42 See the amended Article 11(7) and (8).
43 See p.5 of the Communication.

to a request for assistance and would remain under its command and control. The assets envisaged in the proposed Decision would endow the Commission with an autonomous capacity to respond to the most frequent emergencies—forest fires, floods, earthquakes and health emergencies.[44] The Commission would be given delegated powers to increase the response capacities available to *rescEU* as gaps emerge. It envisages that *rescEU* would be made available for disasters "that are exceptional in scope or nature" and "when national capacities are insufficient or overwhelmed", but makes clear that "it will not be a substitute for efforts at national, regional and local level: all levels need to strengthen preparedness in times of a changing risk landscape".[45]

Prevention and disaster risk management

2.25 The Commission considers that disaster prevention and the reduction of risks are "at the core" of disaster risk management efforts.[46] The proposed Decision would give it powers to request and review risk assessments and monitor the implementation of disaster risk management plans developed by Member States. It would also be able to require Member States to provide specific prevention and preparedness plans and take into account the progress made in implementing them as part of any future (post-2020) conditionality mechanism included in the European Structural and Investment Funds.

2.26 The proposal places greater emphasis on creating synergies with related EU policies and funding instruments supporting cohesion, rural development, research, health, migration and security (as well as humanitarian aid policies externally) which also have a role to play in preventing disasters and managing risks. It also seeks to consolidate existing efforts to develop training, disseminate information and share best practice through the creation of a Union Civil Protection Knowledge Network which would "help to build a common Union disaster preparedness culture".[47]

2.27 The changes proposed reinforce the Commission's view that risk prevention (and adaptation where prevention is impossible) "must be a duty, not a choice to be made" and that a substantial strengthening of disaster risk management capacities is required.[48]

Simplified procedures

2.28 The proposed Decision would simplify administrative procedures by clarifying the rules on co-financing and introducing a single rate (75%) for the adaptation, repair, transport and operational costs of assets made available to the European Civil Protection Pool. The proposal would underline the exceptional character of the Union Civil Protection Mechanism by specifying that requests for assistance would lapse after 90 days (and so do not entail an open-ended commitment of assets by Member States) unless there are new elements which would justify the provision of additional assistance.

44 The amended Article 12 establishing *rescEU* says that it will consist of aerial forest fire-fighting equipment, high capacity pumping equipment, urban search and rescue capacities and field hospital and emergency medical teams.

45 See pp.5 and 10 of the Communication.

46 See p.5 of the Communication.

47 See p.6 of the Communication.

48 See p.10 of the Communication.

Budget

2.29 The EU Civil Protection Mechanism currently has a budget of €368.4 million for the period 2014–20. This would be increased to €631.6 million. The Commission says that this represents an additional €280 million for the period 2018–20 if administrative and personnel costs (estimated at €16.8 million) are included.[49]

Legal base and subsidiarity

2.30 The proposal is based on Article 196 of the Treaty on the Functioning of the European Union (TFEU) which empowers the EU to:

- encourage cooperation between Member States in preventing and protecting against natural or man-made disasters;
- "support and complement" action taken at a national, regional and local level to prevent, prepare for and respond to natural or man-made disasters within the EU;
- promote swift operational cooperation within the EU between national civil protection services; and
- promote consistency in international civil protection work.

Article 196 TFEU is a "supporting" competence and excludes any harmonisation of national laws.

2.31 The Commission considers that further action at EU level is necessary because operational experience has demonstrated that "major disasters can overwhelm the response capacities of any Member State acting alone" or "paralyse mutual assistance amongst them" when dealing with simultaneous disasters. It says that the proposal would bring "clear added value" through a reduction in lives lost and in environmental, economic and material damage.[50]

2.32 The Commission has not prepared an Impact Assessment, citing the need for urgent action to fill gaps in critical disaster response capacities.

The Minister's Explanatory Memorandum of 11 December 2017

2.33 The Minister recognises the value of the current EU Civil Protection Mechanism in establishing a centralised framework (the Emergency Response Coordination Centre) for receiving and circulating requests for emergency assistance and coordinating an EU-wide response. The EU Civil Protection Mechanism also "provides influence, operational and financial benefits in terms of allowing the UK to act more quickly in some overseas emergencies", as well as a source of funding for research, training, exercises and other forms of cross-border cooperation, and is the principal means for developing the "resilience" of European partners.[51]

2.34 The Minister explains that the UK has not received assistance from the Civil Protection Mechanism but would be able to do so "should our own response capacities

49 See p.6 of the Commission's explanatory memorandum accompanying the proposed Decision.
50 See p.3 of the Commission's explanatory memorandum accompanying the proposed Decision.
51 See para 1 of the Minister's Explanatory Memorandum.

ever be overwhelmed".[52] She adds that the UK is "one of the biggest contributors to the Civil Protection Mechanism in terms of delivery of crisis expertise and humanitarian aid" and has played "a major role in the development of a successful and effective response mechanism".[53]

2.35 The Minister notes the Commission's view that urgent changes are needed to the EU Civil Protection Mechanism which are intended to take effect "as early as possible in 2018".[54] This is because "some requests for specific capabilities are not met in all emergencies" and the Commission considers that there are "gaps in critical capacities at the European level". She accepts that simplification of processes and incentives to enhance preparedness activities at national level may "add value", but considers that "the Commission has not provided evidence to support the current set of proposals".[55] She highlights the absence of an Impact Assessment accompanying the proposed changes which makes it "difficult to assess the validity of some of the Commission's assertions" and adds:

> "No evidence has been provided to support the conclusion that the Commission's ownership of assets would significantly reduce deaths, damage and economic losses from natural disasters, or whether other proposals (such as regional cooperation on response assets, or greater investment in prevention or preparedness) would achieve the same ends while representing significantly better value for money."[56]

2.36 The Minister makes clear that "Member States are responsible for ensuring the safety and security of their citizens" and that, under the EU Treaties:

> "The role of the Union is limited to supporting, coordinating and complementing the actions of Member States in preventing or protecting against natural or man-made disasters where there is a demonstrable need that cannot be effectively met in other ways."[57]

2.37 Turning to the substance of the changes proposed, the Minister highlights the creation of a Commission-led response capability—*rescEU*—as the most significant. She considers that there is insufficient evidence to support a change of this magnitude and "is not persuaded by the argument that the proposal will enhance the collective response of Member States". She continues:

> "Rather, the proposals appear to undermine national response capacity by substituting efforts which national and local authorities should take as part of their prevention strategy with a centralised response capacity owned by the Commission. It is not clear how the Commission could mitigate the erosion of the principle set out in the Lisbon Treaty, that Member States are primarily responsible for ensuring the safety and security of their citizens. Recent reports by the Court of Auditors and Interim Evaluation of the Civil Protection Mechanism do not in our view support the conclusion that the significant changes proposed, including acquisition of very expensive assets by the Commission, are necessary."[58]

52 See para 1 of the Minister's Explanatory Memorandum.
53 See para 24 of the Minister's Explanatory Memorandum.
54 See para 2 of the Minister's Explanatory Memorandum.
55 See paras 15 and 35 of the Minister's Explanatory Memorandum.
56 See paras 16 and 19 of the Minister's Explanatory Memorandum.
57 See para 14 of the Minister's Explanatory Memorandum.
58 See para 22 of the Minister's Explanatory Memorandum.

2.38 The Minister notes that the existing voluntary pool of response capacities provided by Member States would become the European Civil Protection Pool and that "co-financing of assets not in the voluntary pool will cease", thereby removing "all incentives for deployment of assets which are not in the voluntary pool" as there would be no reimbursement of costs incurred. This is likely to affect the UK as it "does not currently maintain assets in the voluntary pool" but does benefit from co-financing of transport assistance provided through the Civil Protection Mechanism.[59]

2.39 Under the Commission's changes, where assets are made available to the European Civil Protection Pool, the Minister indicates that Member States would "need to consult the Commission before withdrawing the asset for national use". The Minister makes clear that national authorities should maintain "full control and authorisation of their own assets".[60]

2.40 The Minister supports the changes proposed by the Commission to strengthen disaster prevention and preparedness, noting that the UK shared its 2015 UK National Risk Assessment with the Commission. She also supports proposals to:

- launch a disaster prevention communication and advocacy campaign which would raise awareness of preventative action, focused on forest fires, heat waves and other extreme weather events—the Minister notes that this aligns with the Government's emphasis on "raising public risk awareness and communication at the local level and in partnership with the private sector with regard to disaster prevention";[61]

- develop a dedicated European Civil Protection Knowledge Centre and establish new consultative mechanisms in which the Commission will bring Member States together to tackle a particular theme, such as forest fires; and

- enhance the exchange of information and best practice between Member States and build their capabilities—the Minister notes that the UK is an active participant in training courses which prepare experts for overseas deployment under the EU Civil Protection Mechanism and in the EU Exchange of Experts programme designed to increase the coherence of prevention and preparedness activities with other EU and Member State programmes.[62]

2.41 The Minister welcomes the Commission's proposal to consider using other EU funding instruments to support disaster risk reduction and response activities and underlines the importance of "increasing resilience of specific communities". She makes clear that the Government "would not welcome proposals that may request additional funds outside the existing processes to fund new response assets such as fire-fighting aircraft".[63]

2.42 The Minister considers that the budgetary implications of the changes proposed by the Commission are "substantial" and adds:

> "Where the proposed legislative innovations can be supported on policy grounds, then their implementation should be feasible within the constraints imposed by a real-terms payments freeze in the civil protection budget.

59 See paras 23–4 of the Minister's Explanatory Memorandum.
60 Ibid.
61 See para 26 of the Minister's Explanatory Memorandum.
62 See para 27 of the Minister's Explanatory Memorandum.
63 See para 28 of the Minister's Explanatory Memorandum.

> "The Government would in any event seek to ensure that final agreement on an amended Civil Protection Mechanism would fall within the constraints imposed by the agreement on the existing Multi-Annual Financial Framework, and that any funding should be identified by reallocation from lower value programmes rather than taken from margins."[64]

2.43 The Minister indicates that funding for the EU Civil Protection Mechanism will cease at the end of 2020 and that the Commission's proposal has "pre-empted" negotiations on a new legislative instrument for the period after 2020 which were expected to begin in 2018. She highlights civil protection as "an important area for future cooperation between the UK and the EU" post-exit, highlighting the following passages from two of the Government's future partnership papers published in September 2017. The first, on *Foreign Policy, Defence and Development*, states:

> "Responding to crises rapidly and effectively is crucial to the UK's security and prosperity. The UK and EU partners collaborate on disaster response, preparedness and prevention via the EU Civil Protection Mechanism which allows Member States to pool their resources and share technical expertise. The UK has a world class reputation in disaster management and, working with other Member States, helps other nations rapidly build their maturity. The UK also contributes specialist teams to an EU pool of experts that can be deployed to respond to disasters anywhere in the world."[65]

The second, on *Security, Law Enforcement and Criminal Justice*, states:

> "There are clear benefits for both the UK and the EU in coordinating efforts to protect citizens by making best use of resources and ensuring that complementary action is taken in areas with common objectives, such as… civil protection."[66]

2.44 The Minister adds:

> "The structure for the UK's future cooperation with the EU on civil protection will be influenced by the outcome of the current legislative proposals, given the significant changes which may be made to the Civil Protection Mechanism."[67]

Previous Committee Reports

None on these documents. Earlier Reports on the last set of changes to the EU Civil Protection Mechanism are relevant: Fifty-seventh Report HC 428–lii (2010–12), chapter 6 (29 February 2012), Fourth Report HC 86–iv (2012–13), chapter 6 (14 June 2012), Thirty-first Report HC 86–xxxi (2012–13), chapter 1 (6 February 2013), Thirty-third Report HC 86–xxxiii (2012–13), chapter 6 (27 February 2013) and Thirteenth Report HC 83–xiii (2013–14), chapter 27 (4 September 2013).

64 See paras 33–4 of the Minister's Explanatory Memorandum.
65 See para 34 of the future partnership paper, *Foreign Policy, Defence and Development*.
66 See para 6 of the future partnership paper, *Security, Law Enforcement and Criminal Justice*.
67 See para 30 of the Minister's Explanatory Memorandum.

3 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

3.1 These proposals are intended to improve the operation of the European Criminal Records Information System—ECRIS—which 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. The UK has participated fully in ECRIS since it became operational in April 2012 and is one of the most active users.

3.2 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 in the EU. 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 2017, 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 to obtain access to that information by submitting a request to the relevant Member State(s) through the decentralised ECRIS system.

3.3 Both proposals are 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. It opted into the proposed Regulation last October, stating that it 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".[68]

3.4 The Justice and Home Affairs Council agreed a general approach on the ECRIS package on 8 December. It includes changes to the provisions of the proposed Regulation on third country access to criminal records information. We asked the Minister for Policing and the Fire Service (Mr Nick Hurd) for his assessment of the changes, why they were included, and how they were likely to affect the UK once it leaves the EU. We noted also that the expected timeframe for implementing the changes to ECRIS and ECRIS-TCN had 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 (if agreed). We asked whether this delay was likely to affect the UK's preparations for implementing the proposed legislation and whether ECRIS and ECRIS-TCN were amongst the measures that the Government would seek to include in a future EU/UK agreement on security, law enforcement and criminal justice cooperation. We also asked whether the Government intended to fulfil its commitment to publish an Impact Assessment on the proposals.

3.5 In his latest update, the Minister apologises for the fact that we were unable to consider the terms of the general approach before it was agreed in early December, adding that the proposed Regulation was published "whilst Parliament was dissolved and therefore without the scrutiny committees in place". He considers that the provisions on third country access to criminal records information held in ECRIS-TCN "still offer a helpful route for third countries" to identify where information on third country offenders is held, but notes that requests for information could only be made for the purpose of criminal proceedings. He says that the Government is preparing a "Justice Impact Test" and will also complete an Impact Assessment which he expects to share with us in early 2018. Future cooperation with the EU on ECRIS and ECRIS-TCN once the UK becomes a third country post-exit "will need to be agreed in negotiations on the UK's future partnership with the EU".

3.6 **We remind the Minister that we are not responsible for the delay in setting up this Committee following the general election last June and do not see how it is relevant to his Department's handling of the ECRIS package in the run-up to the December Justice and Home Affairs Council. The Minister's explanation that "work moved far more quickly than anticipated" is difficult to reconcile with his recognition that the ECRIS package was "a priority" for the Estonian Presidency and that its term was soon to end. We trust that he will make greater efforts to communicate with us sooner in future so that we are able to perform our scrutiny function effectively.**

68 See the Home Secretary (Amber Rudd's) Written Ministerial Statement of 2 November 2017 on ECRIS and on the EU justice and home affairs IT Agency.

3.7 **We ask the Minister to confirm our understanding of the general approach texts agreed by the Council:**

- **there is (as now) no mechanism in ECRIS to enable a third (non-EU) country to obtain information on the previous convictions of EU citizens—this information would have to be obtained on a bilateral basis by sending formal letters of request;**
- **there is a mechanism in ECRIS-TCN to enable a third country to request information on the offending history of third country nationals convicted in the EU, but this information can only be requested for the purpose of criminal proceedings;**
- **a third country cannot, therefore, request information from ECRIS-TCN for wider public protection purposes, such as pre-employment checks on third country nationals seeking to work with children or vulnerable adults or to inform decisions on deportation and removal or inclusion on the sex offenders register; and**
- **requests for information from ECRIS-TCN would have to be routed through Eurojust (to ascertain whether Member States hold relevant criminal records information) and followed by a formal request to the relevant Member State(s).**

3.8 **Given these constraints on the ability of third countries to access information through ECRIS and ECRIS-TCN, we expect the Government's Justice Impact Test and Impact Assessment to set out the operational impact for the UK if it does not secure a post-exit agreement encompassing ECRIS and ECRIS-TCN.**

3.9 **The Minister does not confirm that the Government intends these measures to be included in a future agreement with the EU on security, law enforcement and criminal justice cooperation. We do not consider this reticence to be tenable, not least because the Government's future intentions are increasingly likely to affect its approach to the implementation of proposals currently under negotiation which are adopted before the UK leaves the EU but are only expected to take effect during or after a post-exit transitional/implementation period.**

3.10 **The Minister recognises that the deadline for implementing ECRIS-TCN and the changes to ECRIS "will indeed extend beyond the UK's exit from the EU in March 2019" but does not explain how this will affect the Government's preparations for implementing the legislation. It is important that he does so since there would be little point in committing expenditure unless there is a realistic prospect that the legislation will apply in the UK. To assist our scrutiny, we ask the Minister to explain:**

- **whether he expects the ECRIS package to be agreed and formally adopted before the UK leaves the EU;**
- **if he does, whether the UK would be under an obligation to implement the package, given current uncertainty as to the length of any transitional/ implementation period;**
- **whether the Government would, in any event, wish to implement the legislation to strengthen the prospects for securing a deal with the EU on ECRIS and ECRIS-TCN post-exit; and**

- **whether the UK would be at risk of being ejected from ECRIS during the transitional/implementation period or otherwise sanctioned if it failed to implement the new legislation.**

3.11 **Pending further information, the proposed Directive and Regulation remain under scrutiny. We look forward to receiving the information we have requested as well as regular reports on negotiations and a summary of the Government's position on any changes proposed by the European Parliament. We draw this chapter to the attention of the Home Affairs Committee, the Justice Committee 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

3.12 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 12 January 2018

3.13 The Minister's previous letter dated 1 December was sent shortly before the Justice and Home Affairs Council agreed a general approach on 8 December. We asked him to explain why he was unable to inform us sooner of the Presidency's intention to seek an agreement and made clear that we expect the Government to provide information in sufficient time for us to consider it before, not after, decisions are taken within the Council. We added that it was not good enough for the Government to abstain, safe in the knowledge that the proposals would pass through the Council unopposed. The Minister responds:

> "I apologise that the Committee were unable to take a view on the Presidency's intention to seek an agreement. The draft Regulation was published on 29 June 2017, whilst Parliament was dissolved and therefore without the scrutiny committees in place. The Estonian Presidency set out that during their term, reaching a General Approach on both the draft Directive and draft Regulation was a priority and the work moved far more quickly than anticipated. For example, officials attended working groups every two weeks with proposed changes to the text made in correspondence outside of those meetings."

3.14 We asked the Minister for his assessment of the changes to the provisions on third country access to criminal records information held in ECRIS-TCN, why they were

included, and how they were likely to affect the UK once it leaves the EU. He tells us that the general approach agreed by the Council "still offers a helpful route for third countries to identify where criminal records information is held in the EU on TCNs [third country nationals]", adding:

> "The text was revised to more explicitly reflect that when a request is made by a third country to Eurojust and a 'hit' or 'hits' are identified:
>
> (a) Eurojust will inform the Member State(s) that hold the information of the request; and
>
> (b) If the Member State(s) gives their consent, Eurojust will inform the third country which Member State(s) hold the information to allow the third country to make a targeted request for that information to the Member State(s).
>
> "In the event of 'no hit', Eurojust will only respond with this information where a signed cooperation agreement, Memorandum of Understanding, or letter of understanding exists with that third country.
>
> "The text now states that third countries may make requests for criminal proceedings only, using the standard form that will be set out at Annex A of the Regulation."

3.15 On future UK cooperation with ECRIS and ECRIS-TCN post-exit, the Minister tells us that this "will need to be addressed in the course of negotiations".

3.16 The Minister accepts that the longer deadline for implementing the ECRIS package (36 months in the Council general approach rather than the 24 months envisaged by the Commission) means that the UK will have left the EU before the changes take effect. He does not explain how the longer period will affect the Government's preparations for implementing the proposed legislation or confirm that the Government does intend ECRIS and ECRIS-TCN to be amongst the measures included in a future EU/UK agreement on security, law enforcement and criminal justice cooperation, observing only that:

> "The details of our future cooperation in relation to justice and home affairs measures, including ECRIS-TCN, will need be agreed in negotiations on the UK's future partnership with the EU."

3.17 Finally, the Minister says that the Government is completing a "Justice Impact Test" and "remains committed to completing an Impact Assessment, which we anticipate being able to share with the Committee in early 2018".

Previous Committee Reports

Seventh Report HC 301–vii (2017–19), chapter 7 (19 December 2017) and First Report HC 301–i (2017–19), chapter 22 (13 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).

4 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 Justice 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

4.1 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. 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).

4.2 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.

4.3 In his Explanatory Memorandum on the proposed Regulation submitted last July, 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 informed us in October that the Government had decided to participate in the proposal. A Written Ministerial Statement issued by the Home Secretary (Amber Rudd) in November set out the reasons:

> "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."[69]

4.4 The Minister wrote again in December. He accepted that full participation in eu-LISA would also depend on the Council adopting (by unanimity) a further Council Decision based on Article 4 of the Schengen Protocol and indicated that the Government would "keep under review the question of whether to seek a Council Decision".[70] We asked whether it would still be possible for the UK to participate in eu-LISA, albeit to a more limited extent, in the absence of a Council Decision, and whether partial participation in a Regulation would be legally possible.[71]

4.5 Turning to the UK's position as a third country post-exit, the Minister recognised that Article 38 of the proposed Regulation 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 told us:

> "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 [….] 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."[72]

4.6 He reminded us that the Government has proposed a treaty to govern the UK's relationship with the EU on security, law enforcement and criminal justice cooperation post-exit. We asked the Minister whether the Government intended 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.

4.7 We noted that the Justice and Home Affairs Council had agreed a general approach on the proposed Regulation on 7 December and that the text includes 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 asked the Minister to explain what sort of cooperation was envisaged under this provision and how useful it would be for the UK post-exit, particularly if the UK was unable to secure a separate treaty with the EU on security, law enforcement and criminal justice cooperation.

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

70 See the Minister's letter of 1 December 2017 to the Chair of the European Scrutiny Committee.

71 We drew the Minister's attention to the Court of Justice's reluctance to accept partial participation of the UK (and Denmark) in an EU measure (in that case EU participation in the Chicago Convention)—see Opinion 1/15 26 July 2017.

72 See the Minister's letter of 1 December 2017 to the Chair of the European Scrutiny Committee.

4.8 In his latest update, the Minister tells us that he considers the UK would still be able to participate in eu-LISA's management of the EU information systems in which the UK participates, even without a further Council Decision. He reiterates the Government's intention to establish a post-exit relationship with the EU "that provides for practical operational cooperation; facilitates data driven law enforcement; and allows multilateral cooperation through EU agencies" but says "it would be wrong to set out unilateral positions on particular measures now".

4.9 **In his Explanatory Memorandum on the proposed Regulation, the Minister indicated that "a new Council Decision under the Schengen Protocol would be necessary to ensure our full participation in this measure".[73] He nonetheless considers that it would be possible for the UK to participate without a further Council Decision, but participation would be limited to "eu-LISA's management of the systems that we take part in or have opted into". It would not extend to eu-LISA's management of new information systems in which the UK cannot take part—the EU Entry/Exit System and European Travel Information and Authorisation System.**

4.10 **We anticipate that securing political support for a Council Decision, which would require the unanimous approval of EU Schengen States, may be difficult given the UK's decision to leave the EU in March 2019. In the circumstances, partial participation on the basis set out by the Minister may be the best outcome that the UK can achieve in the limited time available. In our view, a further Council Decision would be preferable. It would (as the Minister suggests) make clear the basis on which the UK is participating in eu-LISA and enhance legal certainty. We therefore encourage him to pursue this option by seeking the views of other Member States and to report back to us on the outcome of these discussions. We ask him to explain what partial participation in eu-LISA would mean in practical terms, for example how it would affect the UK's role on the Agency's Management Board and in Advisory Groups.**

4.11 **We note that the general approach agreed by the Justice and Home Affairs Council in December amends Article 38 of the proposed Regulation. It now provides that participation in eu-LISA shall be open to "countries that have entered into agreements with the Union on their association with the implementation, application and development of the Schengen *acquis* and with Dublin and Eurodac-related measures". The Government has ruled out UK participation in the "Schengen border-free zone" post-exit.[74] We ask the Minister whether Article 38 is intended to limit participation in eu-LISA to the small number of third countries associated with Schengen, Dublin and Eurodac and exclude other third countries. If this is the intention, we ask the Minister whether the treaty the Government intends to seek on security, law enforcement and criminal justice cooperation with the EU post-exit could overcome this limitation on third country participation.**

4.12 **The Minister does not address the question we raised about the new Article 38a inserted in the general approach text which would enable eu-LISA to establish "cooperative relations" and "working arrangements" with relevant authorities in third countries. We ask him to explain what sort of cooperation is envisaged, whether it would extend to a wider range of third countries than is envisaged in Article 38, and**

73 See para 29 of his Explanatory Memorandum submitted on 20 July 2017.

74 See the Minister's letter of 20 July 2017 to the Chair of the European Scrutiny Committee.

how useful it would be for the UK post-exit, particularly if there is no deal on security, law enforcement and criminal justice cooperation post-exit or the deal does not extend to eu-LISA.

4.13 **We challenge the Minister's reticence in clarifying the importance the Government attaches to individual measures as part of the UK's post-exit relationship with the EU. The European Council is expected to agree a new set of guidelines in March on the framework for the UK's future relationship with the EU. Before then, it expects the UK to "provide further clarity on its position on the framework".[75] We accept that "the exact details of our future relationship will need to be agreed in the course of negotiations". Given that these negotiations are now imminent, and that the Government will have to set out its position on individual measures if it is to influence the European Council guidelines and make headway in negotiations with the EU, we do not agree with the Minister that it would be "wrong" to share this information with Parliament. We consider it would be wrong not to and will continue to press for greater transparency.**

4.14 **Pending further information, the proposed Regulation remains under scrutiny. We ask the Minister to provide progress reports on the negotiations. We draw this chapter to the attention of the Home Affairs Committee and Justice Committee and the Committee on Exiting the European Union.**

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

4.15 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.

4.16 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 also decided to participate in the Commission's proposed reform of SIS II in so far as it concerns police cooperation and in a recent proposal to establish a centralised EU information system—ECRIS-TCN—containing criminal records information on third country national offenders within the EU.

75 See the Guidelines agreed by the European Council on 15 December 2017.

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

4.17 To participate fully 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 letter of 11 January 2018

4.18 The Minister confirms that the December Justice and Home Affairs Council agreed a general approach and that the UK abstained as the proposal had not been cleared from scrutiny. He apologises that there was "insufficient time for the Committee to take a view on the Presidency's intention to seek a general approach prior to the December Council" but says that it was a priority for the Estonian Presidency and "work moved far more quickly than anticipated".

4.19 We asked the Minister whether a failure to secure a further Council Decision would affect the UK's ability to play a full part in eu-LISA and whether partial participation in a Regulation would be legally possible.[76] The Minister responds:

> "The Government considers that even without a Council Decision we would be able to participate in eu-LISA's management of the systems that we take part in or have opted in to. As I noted in my letter of 1 December, 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 a Member State. The Government has not yet sought the opinions of other Member States on a new Council Decision. We will do so in due course in order to find out if there would be any particular objections and to confirm what our options are. I am, of course, happy to keep the Committee updated on discussions on this matter, as requested."

4.20 Turning to the UK's future relationship with eu-LISA post-exit, the Minister observes:

> "The Government's future partnership paper on security, law enforcement and criminal justice published in September outlines how we are seeking a post-Brexit relationship with the EU that provides for practical operational cooperation; facilitates data driven law enforcement; and allows multilateral cooperation through EU agencies. We value the capability we currently have to share information with EU countries, a capability currently provided by tools like SIS II and Eurodac, which are managed by eu-LISA. The exact details of our future relationship will need to be agreed in the course of negotiations, however, and it would be wrong to set out unilateral positions on particular measures now."

4.21 The Minister expects trilogue negotiations to begin in January and undertakes to provide further updates as negotiations progress.

Previous Committee Reports

Seventh Report HC 301–vii (2017–19), chapter 8 (19 December 2017) and First Report HC 301–i (2017–19), chapter 26 (13 November 2017).

76 See the Court of Justice's ruling in Opinion 1/15 26 July 2017.

5 EU Emissions Trading System

Committee's assessment	Politically important
Committee's decision	(a) Cleared from scrutiny (by resolution of the House on 13/12/2016); (b) Cleared from scrutiny; drawn to the attention of the Business, Energy and Industrial Strategy Committee
Document details	(a) Proposal for a Directive amending Directive 2003/87/EC to enhance cost-effective emissions reductions and low-carbon investments; (b) Proposal for a Regulation of the European Parliament and of the Council amending Directive 2003/87/EC to continue current limitations of scope for aviation activities and to prepare to implement a global market-based measure from 2021.
Legal base	Article 192(1) TFEU; QMV; Ordinary Legislative Procedure
Department	Business, Energy and Industrial Strategy
Document Numbers	(a) (37003), 11065/15 + ADDs 1–3, COM(15) 337; (b) (38508), 5968/17 + ADDs 1–2, COM(17) 54

Summary and Committee's conclusions

5.1 The EU Emissions Trading System (ETS) is a central component of efforts to meet carbon dioxide reduction targets in a cost-effective and technologically neutral way. Companies can either buy allowances giving the right to emit carbon dioxide or they can act to reduce carbon dioxide and sell allowances to others. There is a fixed limit on the number of allowances available, reducing over time. Some allowances are auctioned and some allowances are available free.

5.2 When the Committee last considered these documents, we noted that substantive agreement had been reached on both of these proposals for various long-term and short-term changes but that a last-minute amendment had been submitted to the aviation emissions proposal (document (b)) to protect the integrity of the EU ETS in the event of an abrupt UK exit from the EU.

5.3 The Minister of State (Claire Perry) has written, explaining that the UK's proposed approach was accepted by the EU. It has been agreed that, from 1 January 2018, UK-issued allowances will be able to be used without any change, subject either to UK operators being legally required to surrender allowances by 15 March 2019 at the latest or to continued application of Union law until at least 30 April 2019.[77] The Minister describes this as a positive and pragmatic outcome which will avoid negative and detrimental impacts on the EU ETS carbon market, UK operators and exchequer revenue. On that basis, the UK decided to abstain—rather than oppose—in the Council vote.

5.4 **We are pleased that a satisfactory resolution has been reached to protect the integrity of the EU ETS in the event of an abrupt UK exit from the EU. Both proposals have been agreed and we have no outstanding questions. We now also clear the aviation**

77 The EU-wide compliance deadline is 30 April each year.

emissions proposal from scrutiny, further to earlier clearance of the proposal on the EU ETS 2021–2030. We draw this chapter to the attention of the Business, Energy and Industrial Strategy Committee.

Full details of the documents

(a) Proposal for a Directive amending Directive 2003/87/EC to enhance cost-effective emissions reductions and low-carbon investments: (37003), 11065/15 + ADDs 1–3, COM(15) 337; (b) Proposal for a Regulation of the European Parliament and of the Council amending Directive 2003/87/EC to continue current limitations of scope for aviation activities and to prepare to implement a global market-based measure from 2021: (38508), 5968/17 + ADDs 1–2, COM(17) 54.

Background

5.5 Two distinct pieces of legislation have been agreed. The first (document (a)) relates to long-term change to the EU ETS for the period 2021–2030. As explained in our Report of 6 December,[78] the Government was content with the agreement reached, noting that it meets the UK's key objectives of increasing the strength of the carbon price signal, while ensuring industrial sectors are given adequate protection from the risk of carbon leakage.[79]

5.6 The second (document (b)) relates specifically to aviation emissions under the EU ETS. It provides that, until 31 December 2023, only intra-EEA flights (flights between aerodromes within the European Economic Area) will be included within the EU ETS. Further information on the final agreement were set out in our Report of 6 December.[80]

5.7 In our Report of 6 December, we expressed concern about developments on future arrangements for the EU ETS post-Brexit. We asked for an update on the negotiations and the impact of any resolution, or lack of it, on UK operators. We also asked that the Government set out the final position taken on the aviation emissions proposal and the reasons for that position.

The Minister's letter of 20 December 2017

5.8 The Minister recalls that, in her letter of 14 November 2017, she explained that it was the UK's intention to vote against the Aviation EU ETS package when presented to the Council for formal adoption. The reason to vote against was because the text included the amendment to invalidate UK allowances; and a compromise provision on the use of auction revenues which, although judged to be a remote risk, could potentially compromise fiscal sovereignty.

5.9 The Minister explains that the UK responded to the amendment to invalidate EU Emissions Trading System (ETS) allowances issued by the UK, by proposing an alternative measure, which was to move forward the UK 2018 compliance deadlines (to report emissions and surrender allowances) to before the date of UK Exit from the EU in 2019.

78 Fourth Report HC 301–iv (2017–19), chapter 12 (6 December 2017).

79 Generally, energy-intensive industries, such as cement and steel, which might re-locate to countries which have a weaker (and therefore cheaper) regulation of emissions, thus simply transferring the emissions elsewhere rather than reducing them.

80 Fourth Report HC 301–iv (2017–19), chapter 1 (6 December 2017).

5.10 The amendment to the Aviation EU ETS proposal, says the Minister, has been implemented through amendments to the EU ETS Registries Regulation agreed by a technical-level body, the EU Climate Change Committee. The Minister comments:

> "I am delighted to be able to tell you that, on 30 November, Member State representatives at the Climate Change Committee meeting formally endorsed the UK alternative approach. It was agreed that from 1 January 2018 UK issued 2018 allowances will not be identified with a country code and will be able to be used for compliance, subject to UK operators being legally required to surrender allowances by the latest 15 March 2019, or if Union law continues to apply after the EU Treaties cease to apply (i.e. if an implementation period is agreed). The Commission confirmed this in a press statement published after the meeting.
>
> "This is a positive and pragmatic outcome which will avoid negative and detrimental impacts on the EU ETS carbon market, UK operators and exchequer revenue."

5.11 The Minister goes on to explain that the relevant domestic Statutory Instrument to bring forward the deadlines for operators to verify 2018 emissions and surrender allowances by 15 March 2019, was laid in Parliament on 6 December and was scheduled to come into force on 27 December. UK allowances will be issued as normal from the beginning of 2018 and will be able to be used for compliance.

5.12 Finally, the Minister says that the UK abstained in the final vote, rather than opposing as was the original intention. This position recognised that the amendment to the EU ETS Directive still stood, but there had been a positive outcome on the implementing legislation. The agreement was adopted on the basis of sufficient support from other Member States.

Previous Committee Reports

(a): Fourth Report HC 301–iv (2017–19), chapter 12 (6 December 2017), Fortieth Report HC 71–xxxvii (2016–17), chapter 21 (25 April 2017); Fourth Report HC 324–iv (2015–16), chapter 1 (16 September 2015).(b): Fourth Report HC 301–iv (2017–19), chapter 1 (6 December 2017), Fortieth Report HC 71–xxxvii (2016–17), chapter 8 (25 April 2017); Thirty-fourth Report HC 71–xxxii (2016–17), chapter 3 (8 March 2017).

6 Single Digital Gateway

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Business, Energy and Industrial Strategy Committee
Document details	Proposal for a Regulation of the European Parliament and of the Council on establishing a single digital gateway to provide information, procedures, assistance and problem solving services and amending Regulation (EU) No 1024/2012
Legal base	Articles 21(2), 48 and 114(1) of the Treaty on the Functioning of the European Union
Department	Business, Energy and Industrial Strategy
Document Number	(38699), 8838/17 + ADDs 1–7, COM(17) 256

Summary and Committee's conclusions

6.1 Businesses seeking to establish a commercial presence in other EU Member States, and individuals seeking to exercise their internal market rights in other EU Member States, must often commit time and resources to carry out multiple administrative procedures. Online information is often only available in the national language, increasing the cost of completing these procedures. These barriers combine to make it difficult for businesses, particularly SMEs, to expand into other Member States.

6.2 On 2 May 2017 the European Commission presented a proposal for a Regulation[81] which would require the Commission to develop a more comprehensive, user-friendly centralised portal for the provision of information and assistance to help citizens and businesses navigate the Single Market (the Single Digital Gateway). By creating a centralised digital access point, and ensuring that the relevant information and procedures are available in a single place online, businesses and citizens should be better able to understand requirements involved in setting up business or going to study or work in another Member State.

6.3 In a recent letter to the Committee on 6 November 2017[82] the Parliamentary Under-Secretary of State at the Department for Business, Energy and Industrial Strategy (Lord Henley) requested a scrutiny waiver to participate fully in the Competitiveness Council on 30 November. The Minister indicated that Member States were seeking a further watering down of the Commission's proposal. He stated that the changes would have to reduce costs and introduce more flexibility in the provision of services for the Government to support the text.

81 Proposal for a Regulation of the European Parliament and of the Council on establishing a single digital gateway to provide information, procedures, assistance and problem solving services and amending Regulation (EU) No 1024/2012 (8838/17).

82 Letter from the Minister, BEIS, to the Chairman of the European Scrutiny Committee (6 November 2017).

6.4 In its report on 22 November 2017 the Committee granted the Government a waiver.[83] It also requested a detailed update on the outcome of Council and further information about the implications of exiting the European Union for this proposal, as well as information about how the Government intended to handle this issue post-withdrawal.

6.5 On 14 December 2017 the Minister wrote to the Committee[84] to inform us that a General Approach had been agreed by the Member States at Competitiveness Council on 30 November. The Minister summarises the changes that were made in considerable detail (provided in the final section of this chapter), which sufficiently addressed the UK's concerns, meaning that the UK was able to support it.

6.6 On Brexit, as with other elements of the compliance package, the Minister states that co-operation with the Single Digital Gateway is a matter for the future relationship, and asserts that, regardless of the UK's future partnership with the EU, the Government "will continue to be supportive of reducing administrative burdens on citizens and businesses engaging in cross-border activity post-exit", but does not provide any further information about the Government's thinking on this issue.

6.7 **We thank the Minister for his detailed explanation[85] of the General Approach[86] that was agreed at Competitiveness Council. We note that the UK supported the proposal on the basis that the Council text made it less prescriptive and more flexible, notably with respect to the translation and information requirements, thereby addressing the Government's concerns. The extended phased implementation timetable means that the more demanding provisions will not apply for between three and five years after the publication of the proposal in the Official Journal, making it highly unlikely that they will apply to the UK.**

6.8 **In relation to EU exit, we note the Government's assessment that the Regulation will not apply to UK post-withdrawal, and that it does not create any obligation on the Member States with respect to third countries. We observe that some of the information provided through the Gateway and national webpages which concerns EEA-specific rights and procedures may no longer be relevant to UK stakeholders; however, much of the information provided will remain relevant, and we thus accept the Government's conclusion that the Regulation "has the potential to reduce the administrative burden for UK businesses and citizens engaging in cross-border activity in the Single Market following EU exit".**

6.9 **In terms of how the Government proposes to approach this policy issue post-withdrawal, the Government assures the Committee that, regardless of the UK's future partnership with the EU, it "will continue to be supportive of reducing administrative burdens on citizens and businesses engaging in cross-border activity post-exit"; as to how it intends to do so in practice, the Government states that it is not possible to anticipate what arrangements would be appropriate until the detail of the future partnership has been agreed.**

83 Second Report HC-301–ii (2017–19), chapter 10 (22 November 2017).
84 Letter from the Minister, BEIS, to the Chairman of the European Scrutiny Committee (14 December 2017).
85 Letter from the Minister, BEIS, to the Chairman of the European Scrutiny Committee (14 December 2017).
86 Council of the European Union, Proposal for a Regulation … establishing a single digital gateway to provide information, procedures, assistance and problem solving services and amending Regulation (EU) No 1024/2012—General Approach (14401/1/17).

6.10 **We regret the lack of any acknowledgement from the Government of the importance of this issue, the logistical challenge that it presents, or any evidence to show that the necessary preparations are being made. Leaving the EU will, even if a close future relationship is agreed, lead to major changes across a wide range of policy areas which will affect the legal basis of cross-border activity of UK businesses and citizens in the EU27, and vice-versa. Providing stakeholders with accurate and up-to-date information about these changes will provide legal certainty, smooth the process of exit, and enable businesses and individuals to make informed decisions; failure to do so will render exit more disruptive than it needs to be.**

6.11 **We therefore urge the Government to make a concerted effort to ensure that arrangements are put in place so that, at the moment of exit, businesses and citizens are able to easily access relevant up-to-date information about applicable rules and administrative procedures which relate to their cross-border activities within the EU27, and vice-versa. In order to make time for the necessary arrangements to be put in place, we suggest that this administrative matter, in which the UK and the EU have a mutual interest, should be concluded within the scope of Article 50 negotiations, not treated as an afterthought which can be settled following their conclusion.**

6.12 **We now clear this proposal from scrutiny. We draw this report to the attention of the Business, Energy and Industrial Strategy Committee.**

Full details of the documents

Proposal for a Regulation of the European Parliament and of the Council on establishing a single digital gateway to provide information, procedures, assistance and problem solving services and amending Regulation (EU) No 1024/2012: (38699), 8838/17 + ADDs 1–7, COM(17) 256.

Background

6.13 Citizens and businesses need to comply with national rules whenever they travel, work, live or do business across borders. It is therefore important that they are properly informed about applicable rules, that they can access the appropriate assistance services and that they do not encounter unnecessary obstacles when dealing with national administrations. Unfortunately obstacles continue to exist for both citizens and businesses interested in moving to another EU country, or selling products or providing services in that country.

6.14 Businesses must often dedicate significant resources to overcome these administrative barriers, which may act as a barrier to establishing a presence in another Member State. The Commission states that a business establishing a cross-border subsidiary and hiring employees spends approximately €9,700 on average finding out about and completing an average of eight common administrative procedures, which is 80% more than a domestic business would incur for the same procedures. Online information, when present, is not often available in languages other than the national one, considerably reducing accessibility for foreign users.

The proposal

6.15 On 2 May 2017 the European Commission presented a proposal for a Regulation which would require the Commission to develop a more comprehensive, user-friendly centralised portal for the provision of information and assistance to help citizens and businesses navigate the Single Market (the Single Digital Gateway).[87]

6.16 The objective of the proposal is to remove obstacles that exist for both citizens and businesses exercising their rights in the internal market. The proposal aims to achieve this by creating a centralised digital access point, and ensuring all the relevant information and procedures are available online and of a high quality. It also sets out quality requirements for the assistance and problem-solving services already provided by Member States.

6.17 The proposal comprises the following provisions:

a) **The establishment and operation of a single digital gateway:** the Regulation will require the European Commission to establish a common user interface integrated in a single portal;

b) **Provision of information online:** the Regulation will require Member States to ensure their national webpages provide citizens and businesses with easy access to high quality, comprehensive information relating to internal market rights;

c) **Provision of procedures online:** the Regulation requires Member States to have procedures related to internal market rights fully online and accessible by nationals from other Member States;

d) **Problem-solving and assistance tools:** the Regulation requires the Single Digital Gateway to bring all the existing problem solving/assistance tools in one place;

e) **Quality requirements on information:** the Regulation sets out quality requirements for the aforementioned provision of information, services and assistance tools and creates a user feedback tool to monitor quality;

f) **Quality monitoring:** the Regulation creates a mechanism to provide evidence of failures in the functioning of the Single Market;

g) **Governance of the gateway:** the Regulation creates a new technical exchange tool for exchanging evidence and establishes a coordination group composed of the national coordinators to support the implantation of the gateway;

h) **Amends the Internal Market Information System:** the Regulation amends the Internal Market Information System (EU/1024/2012) to allow Member States to share information collected from the gateway.

6.18 The Regulation does not change the rules and procedures that Single Market participants must comply with in order to operate in the Member States, which are set out in a wide range of EU and domestic law.

87 Proposal for a Regulation of the European Parliament and of the Council on establishing a single digital gateway to provide information, procedures, assistance and problem solving services and amending Regulation (EU) No 1024/2012 (8838/17).

Scrutiny to date

6.19 In his Explanatory Memorandum of 10 July 2017,[88] the Parliamentary Under-Secretary of State for the Department for Business, Energy and Industrial Strategy (Lord Prior) welcomed the proposal, which he said would benefit businesses, particularly SMEs, and would potentially continue to do so after the UK leaves the EU, although UK participation would be subject to the outcome of Article 50 negotiations.

6.20 The Minister considered that EU-level action was warranted. Nonetheless, the Minister indicated that the Government had a number of concerns about the technical details of the Regulation—particularly the obligation it would create to ensure that information is available in a second EU language, and the fact that the UK does not currently provide full online access to some of the thirteen procedures that are specified in the Regulation.

6.21 On 20 October 2017 the Minister provided the Committee with an update[89] in relation to this proposal. He clarified that the Government does not currently provide full online access, within the definition of the Regulation, to *any* of the procedures listed in Annex ll, and that it was seeking flexibility on this point. The Minister added that further analysis by the Government showed that the Commission had substantially underestimated the cost of the translation requirements that the Regulation would create, and that one way of addressing this issue would be to give the Member States greater flexibility over what they translated. He indicated the Presidency was expected to seek a General Approach at the Competitiveness Council on 30 November, and undertook to write again to seek scrutiny clearance in advance of the Council.

6.22 On 6 November 2017, Lord Henley—Lord Prior's successor—wrote[90] to the Committee to request a scrutiny waiver to participate fully in the Competitiveness Council on 30 November. The Minister stated that it was clear that there would have to be "a further watering down of the proposal" to secure a qualified majority in Council.

6.23 In its report on 22 November 2017,[91] the Committee granted the Government a scrutiny waiver, and asked it to (i) provide an update on any General Approach that was agreed at the Competitiveness Council on 30 November, and (ii) to answer a number of questions about the implications of EU exit for this policy area. These included:

- Whether the Government sought to incorporate future UK cooperation with the Single Digital Gateway into the exit negotiations; and
- Whether the Government intended to prioritise in negotiations the creation of similar reciprocal administrative arrangements for UK and EU businesses and citizens who encountered difficulties as a result of the legal changes resulting from UK withdrawal.

88 Explanatory Memorandum from the Minister, BEIS, to the Chairman of the European Scrutiny Committee (10 July 2017).
89 Letter from the Minister, BEIS, to the Chairman of the European Scrutiny Committee (20 October 2017).
90 Letter from the Minister, BEIS, to the Chairman of the European Scrutiny Committee (6 November 2017).
91 Second Report HC-301–ii (2017–19), chapter 10 (22 November 2017).

The Minister's letter of 14 December 2017

6.24 On 14 December the Parliamentary Under-Secretary of State at the Department for Business, Energy and Industrial Strategy (Lord Henley) wrote to the Committee to provide an update following Competitiveness Council on 30 November 2017, at which a General Approach was agreed. The General Approach is available online,[92] as is the Minister's letter.[93]

6.25 The Minister states that the final text put forward by the Presidency "sufficiently addressed the UK's concerns" and the UK was therefore able to support the General Approach. A summary of his account of the principal changes to the text is provided below.

Flexibility

6.26 The Minister states that the UK was satisfied that the Council text introduced additional flexibility for Member States in rolling out online capability. Illustrating this point, he states that:

- a number of the Annex II procedures (the procedures which the Member States would have to provide full online access) were scaled down in their scope or clarified;
- an amendment clarifies that where an online procedure does not already exist in a Member State, the Member State would not have to create one in order to digitalise it;
- the 'requesting/renewing ID card or passport' procedure has been deleted from the text;
- Member States can provide procedures partially offline if there are overriding reasons of public interest or where being present in person is necessary in order to complete the procedure, which creates an effective opt-out from providing a procedure "fully online" where appropriate; and
- Member States will be able to take additional steps to verify information in cases of doubt when evidence is submitted through the "once-only" technical system.

Implementation

6.27 The Minister states that a key issue for the UK was having sufficient time to implement the new digital capability required by the Regulation. He reports that the General Approach staggers the implementation period for different provisions, with the most basic obligations on the Commission coming into force shortly after the Regulation is published, and the substantive obligations on the Commission and Member States coming into force in a phased implementation of two, three and five years. A five year implementation period

92 Council of the European Union, Proposal for a Regulation … establishing a single digital gateway to provide information, procedures, assistance and problem solving services and amending Regulation (EU) No 1024/2012—General Approach (14401/1/17).

93 Letter from the Minister, BEIS, to the Chairman of the European Scrutiny Committee (14 December 2017).

applies to the most complex areas of the Regulation, such as making Annex II's list of procedures fully online, providing access to online procedures for other Member State users in a non-discriminatory way and the "once only" technical system.

6.28 This means that, even if the Government succeeds within the scope of Article 50 negotiations in negotiating a transition period until the end of 2020, the provisions in the Regulation will not apply to the UK before it leaves the EU. However there is a possibility that the following provisions of the General Approach (set out in Article 37), which apply two years after its publication in the Official Journal of the European Union, would apply to the UK before full exit took place: Articles 4 (Access to information on national webpages), 6 to 9 (Access to assistance and problem solving services; Quality of information on rights, obligations and rules; Quality of information on procedures; Quality of information on assistance and problem solving services), 13 (Quality requirements related to assistance and problem solving services), 14 (Quality monitoring), 15(1) to (3) (Common user interface), 16 (Repository for links), 17 (Common assistance service finder), 21(1) and (2) (User statistics), 22(1) to (4) (User feedback on the services of the gateway) and 23 (Reporting on the functioning of the internal market).

Translation requirements

6.29 The original proposal included the requirement to provide a wide range of information and instructions in at least one other official EU language. The Minister states that the wording in the General Approach requires Member States to make certain information, explanations and instructions "accessible in an official Union language broadly understood by the largest possible number of cross-border users". The Minister states that the UK may not be obliged to translate information into an additional language if English qualifies as a "language broadly understood by the largest possible number of cross-border users".

6.30 Further changes to the text mean that translation would only be required to enable users to understand the basic rules and requirements, as opposed to wholesale translation of all the information and instructions in scope, further reducing the volume of translation required.

Other changes

6.31 The Minister highlights a number of other changes the Council text effects to the proposal. These include:

- Greater flexibility regarding what information should be presented online and how it is presented;
- Delayed implementation of the "once only" principle, the detailed operation of which will be developed in implementing acts; and
- On the advice of the Council Legal Service, the removal of additional legal bases (Article 21(1) (free movement) and Article 48 TFEU (social security), with Article 114(1) remaining the sole legal base, clarifying that the aim of the Regulation is to facilitate the internal market.

Response to the Committee's questions

6.32 The Minister also provides responses to the questions contained in the Committee's report of 22 November 2017.[94]

6.33 Asked by the Committee whether Member States were likely to make the same information and some of the electronic procedures available to non-EU users (i.e., UK users, post-exit) through their national websites, the Minister does not rule this out, but states that the proposal does not include any obligation to provide information or access to procedures to users outside the EU.

6.34 In response to the Committee's question as to whether Member States were likely to make English the second language in which they made the necessary information available, the Minister states that, although no Member State has disclosed which language(s) they would be likely to choose for translation purposes, at present 26 EU Member States (not including the UK) plus Iceland and Norway translate information on their Point of Single Contact websites into English.

6.35 Asked whether Brexit created an incentive for the Government to seek a high level of ambition in relation to some aspects of the proposals (and, if so, which ones), the Minister does not directly answer the question, but suggests that the proposal has the potential to reduce the administrative burden for UK businesses and citizens engaging in cross-border activity in the Single Market following EU exit.

6.36 In response to the Committee's questions regarding post-withdrawal arrangements (i.e. whether the Government intends to negotiate continued cooperation/engagement with the Gateway, or to establish reciprocal arrangements designed to ensure that enhanced administrative support for UK and EU businesses who encounter difficulties) the Minister states:

- The UK's participation in the Single Digital Gateway is not considered a withdrawal issue and is therefore not within the scope of the withdrawal agreement;
- The arrangements that will govern the future partnership are subject to the future partnership negotiations;
- Continued participation in the Single Digital Gateway beyond the implementation period "would depend on whether this was appropriate for the future partnership"; and
- Regardless of the UK's future partnership with the EU, the Government "will continue to be supportive of reducing administrative burdens on citizens and businesses engaging in cross-border activity post-exit".

Previous Committee Reports

Second Report HC 301–ii (2017–19), chapter 10 (22 November 2017); First Report HC 301–i (2017–19), chapter 7 (13 November 2017).

94 Second Report HC-301–ii (2017–19), chapter 10 (22 November 2017).

7 EU Participation in a Council of Europe Convention on preventing and combatting violence against women

Committee's assessment	Legally and politically important
Committee's decision	Cleared from scrutiny
Document details	Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combatting violence against women and domestic violence
Legal base	Articles 82(2), 84 and 218(5) TFEU: QMV
Department	Business, Energy and Industrial Strategy and Home Office
Document Number	(37562), 6695/16 + ADD 1, COM(16) 111

Summary and Committee's conclusions

7.1 The original proposal would have authorised the EU to sign[95] the Istanbul Convention of the Council of Europe on preventing and combating violence against women and domestic violence. Details of the Istanbul Convention are set out in our predecessor's Report of 13 April 2016. All Member States have separately signed the Convention (the UK in 2012) and 14 have ratified it. The UK has not yet ratified as this would require primary legislation to meet the Convention's requirement that participants assume extra territorial jurisdiction for offences committed by their nationals.

7.2 The Convention, whilst important in its subject matter, does not otherwise raise controversial policy issues. However, it has given rise to legal issues as to:

- whether the UK has an opt-in in respect of the entire agreement, as the Government (with the support of the previous Committee) has claimed; or whether it automatically participates in part, as the Commission claims. The UK has announced that it was not opting into the proposal and will not opt-in after adoption;[96] and
- the extent to which the EU is exercising competence. The Commission originally claimed exclusive competence over the whole of the Convention but the Member States not only disputed this but wished to limit the EU participation to matters for which they recognised EU exclusive competence, leaving Member States to exercise shared competence.[97]

7.3 The original proposal has now been split into two parts and adopted in May 2017 as two separate Decisions: (a) Decision 2017/866 which all parties accept that the UK

95 It still needs conclusion (ratification by the EU). That is the subject of a separate proposal.

96 Letter of 13 June from the then Minister for Preventing Abuse, Exploitation and Crime (Karen Bradley) to Sir William Cash.

97 Exclusive EU competence must be exercised by the EU. Where competence is shared it can be exercised by either the EU or the Member States, the choice is political.

does not participate in, having not-opted in;[98] and (b) Decision 2017/865 which covers the rest of the Convention, which on its face follows the Commission 's assertion that the Commission regards the UK opt-in as not applicable with the consequence that the UK is an automatic participant.

7.4 When it last examined these Decisions, the Committee noted that they both made it clear that the EU was acting only to the extent that it had exclusive competence, leaving a residual fudge as to which provisions of the Convention this applied to. We expressed concern at the discrepancy between the UK position that Decision 2017/865 did not apply to the UK and the text of the Decision itself which indicates otherwise.

7.5 The Minister for Crime, Safeguarding and Vulnerability (Victoria Atkins) has written in response to these matters.

7.6 **We are grateful for the response from the Minister which includes the text of a minute statement laid at the time of the adoption of Decisions 2017/865 and 2017/866. This is reproduced at the annex to this chapter. It is helpful in clarifying the UK position on competence and the engagement of the UK opt-in under Protocol 21.**

7.7 **We also welcome the Minister's ongoing vigilence on the issue of competence which she will need to maintain in relation to the forthcoming proposal to authorise the EU to conclude the Istanbul Convention as well as the development of a Code of Conduct laying down the arrangements between the Council and the Commission regarding the exercise of rights and obligations of the European Union and Member States under the Convention.**

7.8 **We clear this matter from scrutiny whilst retaining under scrutiny the proposal authorising the EU to conclude the Convention.**

Full details of the documents

Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combatting violence against women and domestic violence: (37562), 6695/16 + ADD 1, COM(16) 111.

The Minister's letter of 3 January 2018

7.9 The Minister explains:

> "Your report notes that recital (10) of Decision 2017/865 states that the UK and Ireland are participating in this Decision, and asks whether we regard the UK as participating.
>
> "The UK laid a minute statement on adoption of the Council Decision 2017/865 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation

98 Covering Articles 60 of the Convention (Gender based asylum claims) and Article 61 (non-refoulement i.e. the practice of not forcing refugees or asylum seekers to return to a country in which they are liable to be subjected to persecution). These are areas where the UK does not participate in the internal EU rules giving rise to its competence to enter into an external agreement such as the Convention.

in criminal matters. This minute statement confirmed the UK's support for the Convention and our intention to ratify it. It also noted the UK's view that there is no exclusive external competence for the Union arising from the Convention with regard to matters related to judicial cooperation in criminal matters and that it should be for the Council to determine freely the matters in respect of which the European Union should sign the Convention. Finally, the minute statement confirms that we do not consider the UK to be automatically bound, as suggested by recital (10) of the Council Decision. I have attached a copy of the minute statement to this letter.

"As the UK has not indicated that it wishes to be bound by this Council Decision in line with Article 3 of Protocol (No. 21) to the Treaties, and as the Government does not consider the UK to be automatically bound as suggested by recital (10), the UK is not participating in the adoption and implementation of this Council Decision.

"I note your Committee's comments about the exercise of competence in relation to the Convention. Whilst the Government does not consider the UK to be bound by these Council Decisions authorising the EU to sign the Convention, the Government has fully engaged in negotiations on the extent of EU competence. I agree that clarification that the EU is only acting to the extent that it had exclusive competence is a helpful approach. The UK will be watchful in further negotiations on a Code of Conduct laying down the arrangements between the Council and the Commission regarding the exercise of rights and obligations of the European Union and Member States under the Istanbul Convention; and, as long as the UK remains a Member State, on the Council Decision on the conclusion of the Convention, to seek to ensure that this position on competence is not watered down."

Previous Committee Reports

Second Report HC 301–ii (2017–19), chapter 4 (22 November 2017); Thirty-seventh Report HC 71–xxxv (2016–17), chapter 4 (29 March 2017); Twenty-eighth Report HC 342–xxvii (2015–16), chapter 12 (13 April 2016).

Annex: The UK Minute Statement

Draft Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters

And

Draft Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to Asylum and Non-refoulement

The United Kingdom wishes to record its support for the Council of Europe Convention on preventing and combating violence against women and domestic violence (the

Istanbul Convention), and to place on record its intention to ratify the Convention. The UK is committed to working both nationally and internationally to tackle violence against women and girls in all its forms, ensuring that victims are supported, perpetrators are brought to justice, and that we do all we can to prevent these crimes happening in the first place.

The United Kingdom however wishes to record its view that there is no exclusive external competence for the Union arising from the Convention in respect of the subject matter referred to in the Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence with regard to matters related to judicial cooperation in criminal matters. Accordingly, it should be for the Council to determine freely the matters in respect of which the European Union should sign the Convention.

Further, the United Kingdom considers that the Council Decision, being a measure proposed pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union, is subject to Protocol (No. 21) to the Treaties on the position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice. Accordingly, the United Kingdom does not consider that it is automatically bound, as suggested by Recital (10), to participate in the Council Decision simply on account of its participation in Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and Directive 2011/93/EU on combating sexual exploitation of children, and child pornography.

8 Fisheries Discard Plans

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny (decision reported on 29/11/2017); drawn to the attention of the Environment, Food and Rural Affairs Committee
Document details	(a) Commission Delegated Regulation of 20 October 2017 establishing a discard plan for certain demersal and deep sea fisheries in North-Western waters for the year 2018; (b) Commission Delegated Regulation of 20 October 2017 establishing a discard plan for certain demersal and deep sea fisheries in the North Sea and in Union waters of ICES division IIa for the year 2018.
Legal base	Articles 15(6), 18(1) and (3) of Regulation (EU) 1380/2013
Department	Environment, Food and Rural Affairs
Document Numbers	(a) (39160), 13591/17 + ADD 1, C(17) 6990; (b) (39176), 13730/17 + ADD 1, C(17) 6997

Summary and Committee's conclusions

8.1 As part of the 2013 reform of the Common Fisheries Policy (CFP) it was agreed to phase in a landing obligation on stocks subject to quotas in order to end the practice of discarding fish. Implementation of the discard ban was foreseen through either regional multiannual plans or a series of regional discard plans drawn up by the Member States concerned as "joint recommendations". This is an example of the regionalised approach to decision-making under the reformed CFP, whereby rules are more tailored to the needs of the specific sea area than was previously the case.

8.2 These two documents concern the discard plans for the demersal[99] and deep sea fisheries of the North Sea (North Sea, Norwegian Sea and Kattegat and Skagerrak) and North Western Waters (West of Scotland, Irish Sea, English Channel and Celtic Sea) for 2018. The demersal landing obligation in both areas is subject to a phased introduction between 1 January 2016 and 1 January 2019.

8.3 At its meeting of 29 November 2017, the Committee welcomed the regional approach to decision-making being applied to implement the landing obligation. The Committee raised questions regarding: stakeholder engagement; involvement of the relevant Advisory Councils; appetite for post-Brexit UK engagement in the Advisory Councils; and the extent to which the discard plans address the phenomenon of "choke species".

8.4 The Minister for Agriculture, Fisheries and Food (George Eustice) has responded. The details of his response are set out below. In summary, he confirms close engagement with stakeholders and with the relevant Advisory Councils. He is committed to a close working relationship with the EU on the management of shared stocks post-Brexit. The Government will continue to work closely with stakeholders on the development of fishing policy. As regards choke species, the most challenging fisheries in that regard will be

99 The demersal species concerned are largely flatfish (such as sole, plaice and flounder) and whitefish (such as cod, hake, haddock and whiting). Norway lobster (scampi) are also included.

introduced into the landing obligation in 2019. The UK is committed to working within the regional groups and with the European Commission over the next year to develop solutions that address the risks faced in UK fisheries.

8.5 **Fisheries stakeholders currently have a number of different ways of influencing policy. As the Minister notes, they can work directly with the UK Government and the devolved administrations, but they also have the possibility of engaging with the relevant Advisory Councils, which bring the fishing industry and environmental NGOs together to come up with fisheries management proposals. While we do not take the matter of stakeholder involvement further at this stage, the only commitment made by the Minister is to continue to work closely with stakeholders. He does not suggest that the Government will also advocate continued UK stakeholder involvement in the Advisory Councils, or perhaps the development of similar fora post-Brexit. We highlight our interest in this matter and will monitor it both as negotiations progress and in the context of our scrutiny of other documents. We draw this chapter to the attention of the Environment, Food and Rural Affairs Committee.**

Full details of the documents

(a) Commission Delegated Regulation of 20 October 2017 establishing a discard plan for certain demersal and deep sea fisheries in North-Western waters for the year 2018: (39160), 13591/17 + ADD 1, C(17) 6990; (b) Commission Delegated Regulation of 20 October 2017 establishing a discard plan for certain demersal and deep sea fisheries in the North Sea and in Union waters of ICES division IIa for the year 2018: (39176), 13730/17 + ADD 1, C(17) 6997.

Background

8.6 The discard plans set out:

- the precise geographical areas covered, the species involved and the fishing gears that are employed;
- scientifically justified exemptions to the landing obligation based on high survival rates when fish that have been caught are returned to the sea post-capture; and
- a small number of scientifically justified *de minimis* exemptions to the landing obligation, where landing unwanted fish would have resulted in a disproportionate cost for the businesses affected or where further selectivity was not possible in the short term.

8.7 While presented as Commission Regulations, they are based on Joint Recommendations prepared by the concerned Member States. Further details were set out in our Report of 29 November 2017.[100]

8.8 At its meeting of 29 November 2017, the Committee raised the following issues with the Government:

- how a full range of stakeholders were engaged;
- whether engagement was through the Advisory Councils at all or largely through bilateral channels;

100 Third Report HC 301–iii (2017–19), chapter 28 (29 November 2017).

- how much input the respective Advisory Councils made into the process;
- the future of regional cooperation post-Brexit;
- how UK stakeholders' options for engagement will be maintained at current levels post-Brexit;
- any appetite for continued UK engagement in the Advisory Councils; and
- to what extent the phenomenon of "choke species" (whereby insufficient quota for one species in a mixed fishery prevents the fishing of species for which quota is held.) is addressed by the discard plans.

The Minister's letter of 18 December 2017

8.9 On stakeholder engagement, the Minister confirms that this was conducted both through regional group discussions with the Advisory Councils and through direct discussions with UK fishing industry representatives. Both regional groupings of Member States were rigorous, says the Minister, in formally requesting written advice from the Advisory Councils on what the scope and level of ambition of the 2018 discard plans should be. The Advisory Councils were also invited to attend most of the regional group meetings held throughout 2017. In parallel, UK Government officials held meetings with fishing industry representatives in London and York while the Devolved Administrations conducted their own engagement with their respective fishing industries. Environmental organisations also submitted their views which were carefully considered alongside the contributions they made to the Advisory Councils' advice. The Minister indicates that all of this engagement was "invaluable" in informing the UK's position within the regional groups and in ensuring that the 2018 discard plans made meaningful progress towards the full implementation of the landing obligation in 2019.

8.10 Concerning the future of regional cooperation after the UK's departure from the EU, the Minister re-affirms the Government's commitment to continuing a close working relationship with the EU on the management of shared stocks. The Government will also continue to work closely with UK industry and environmental organisations on the development of fishing policy.

8.11 Regarding the extent to which the agreed 2018 discard plans address the issue of "choke species", the Minister says:

> "[It] was clear from the regional group discussions that all Member States wanted to balance progression of the landing obligation with limiting the likelihood of choke occurring. With the additional fisheries introduced in 2018 there is some potential for choke, but the regional groups anticipate that quota trading between Member States will mitigate this risk. The most challenging fisheries will be introduced in 2019 and the UK is committed to working within the regional groups and with the European Commission over the next year to develop solutions that address the risks faced in UK fisheries."

Previous Committee Reports

Third Report HC 301–iii (2017–19), chapter 28 (29 November 2017).

9 Fisheries catch quotas for 2018

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 Regulation fixing for 2018 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters
Legal base	Article 43(3) TFEU; QMV
Department	Environment, Food and Rural Affairs
Document Number	(39201), 13780/17 + ADDs 1–2, COM(17) 645

Summary and Committee's conclusions

9.1 Catch limits for fishing in EU waters, and for EU vessels fishing in certain other waters, are set in December each year to take effect from 1 January. The 2018 catch limits were agreed at the 11–12 December 2017 Fisheries Council meeting.

9.2 The Committee first considered the draft fishing opportunities at its meeting of 29 November 2017. Noting that a general debate on fisheries had been scheduled to take place on 7 December 2017, the Committee waived the scrutiny reserve in advance of Council and highlighted a number of issues which might be addressed in the debate.

9.3 The Minister for Agriculture, Fisheries and Food (George Eustice) has now written to update the Committee following the Council. His response is set out in detail below. In summary, he is pleased with the outcome, considering it to be one which struck the right balance for the marine environment and coastal communities. He highlights a number of achievements in the negotiations, notable among which was the agreement on sea bass. The UK pressed for, and secured, the removal of a proposed ban on bass angling "catch and release" activity.

9.4 The Minister notes that no issues arose specific to the UK's withdrawal from the EU as the Council stuck to its remit to set 2018 fishing opportunities.

9.5 **We are grateful for the Minister's helpful summary of the Council agreement. We have no outstanding issues and now clear the document 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 Regulation fixing for 2018 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters: (39201), 13780/17 + ADDs 1–2, COM(17) 645 .

Background

9.6 Details of the Commission's proposals were set out in our Report of 29 November 2017[101] and in the Minister's Explanatory Memorandum (EM) of 22 November 2017.[102] The agreement is available on the Council's website.[103]

9.7 In his original EM, the Minister explained that the UK approach would be to obtain the best possible outcome for the UK consistent with following scientific advice, achieving maximum sustainable yield (MSY),[104] and minimising discards.

9.8 At its meeting of 29 November 2017—in advance of the general fisheries debate on 7 December 2017—the Committee identified a number of outstanding points, including:

- further development of the UK position;
- limits for the stocks subject to negotiations with third countries; and
- any emerging issues relating to EU Exit.

9.9 Particular points of detail in the UK's emerging position, to which the Committee drew the attention of the House, were:

- aligning quotas with the landing obligation ("discard ban");
- management of sea bass;
- resolving apparent misalignment between scientific advice and the Commission's proposals in some instances; and
- response to any issues that arise relating to EU Exit.

The Minister's letter of 9 January 2018

9.10 The Minister writes with information on the 11–12 December 2017 Fisheries Council at which fishing opportunities were set for 2018 for quota stocks in the North Sea, Atlantic, the English Channel, Irish and Celtic Seas.

9.11 The Minister says that he worked hard to secure an agreement that struck the right balance for both the marine environment and coastal communities:

> "As a result of the improving condition of many species the UK was able to agree to increase the total allowable catch (TAC) for stocks of importance to the UK whilst simultaneously adhering to fishery sustainability limits. I was for example able to secure additional quota for:
>
> - North Sea: cod +10%, haddock +23% and anglerfish +20%.
> - Irish Sea: cod +376% and haddock +23%.

101 Third Report HC 301–iii (2017–18), chapter 8 (29 November 2017).
102 http://europeanmemoranda.cabinetoffice.gov.uk/files/2017/11/EM_13780–17_22_November.pdf
103 15858/17.
104 The highest yield that can be taken from a stock under existing average environmental conditions without significantly affecting the reproduction process, and thus the overall sustainability of the stock.

- Eastern Channel: sole +25% and skates and rays +20%
- Bristol Channel: plaice +49% and sole +9%

> "Total fishing opportunities from this year's annual negotiations for 2018 are worth around £754 million, which is nearly £50 million more than for 2017. This includes the value of agreements reached in negotiations between the EU and certain third countries such as Norway for jointly managed stocks, which were endorsed at Council. The EU-Norway negotiations included agreement on TACs for cod, haddock, saithe, whiting, plaice and herring in the North Sea."

9.12 On the alignment of quotas with the landing obligation, the Minister explains that proportionate quota uplifts were agreed for demersal stocks subject to the landing obligation in 2018. These will be incorporated into the quota allocation of producer organisations and other groups when these are issued by the Marine Management Organisation early next year.

9.13 Concerning sea bass, further restrictions on commercial and recreational bass fishing were agreed. According to the Minister, the UK specifically pressed for and secured the removal of a proposed ban on bass angling "catch and release" activity. The UK also helped, he says, to ensure the agreement includes a specific undertaking for a review that would consider the scope to allow landings of bass in recreational fisheries in 2018, once the scientific evaluation method for the stock is updated by the end of March.

9.14 Commenting on those situations where the Commission's proposals were misaligned with scientific advice, the Minister says:

> "Where latest scientific evidence supports it, I argued against unnecessary quota cuts proposed by the European Commission, securing the same quota as in 2017 for many species, including anglerfish and pollack in the Celtic Sea and saithe in waters to the West of Scotland. In addition by deploying science backed arguments provided by CEFAS, I was also able to avoid the setting of a total allowable catch (TAC) to zero because it would not cut fishing mortality and would set an unworkable precedent for when such stocks come under the landing obligation. Instead I secured bycatch quotas for whiting in the Irish Sea and West of Scotland and plaice in the Celtic Sea."

9.15 Concerning Brexit, the Minister observes that the Council stuck to its remit of setting fishing opportunities for 2018. He says that there was no specific "spill-over to the EU exit negotiations".

9.16 The Minister acknowledges that there were other challenges "in areas like the Celtic Sea and on important species such as megrim in the South West, where action is necessary to cut fishing mortality in order to allow these stocks to recover." He successfully argued, he says, against the imposition of generic technical measures for the Celtic Sea and Irish Sea through the TAC and quota regulation. Instead, such measures will be scientifically developed and evaluated in the first half of 2018 through the Regional Groups and the Advisory Councils to ensure that they are both effective and protect the viability of fishing vessels.

9.17 The Minister was also able, he says, to persuade the Commission to withdraw its proposal for an 'of which no more than' quota for North Sea nephrops taken in functional units outside the Fladen (FU7). This would have caused UK vessels "serious economic loss".[105] The measures introduced by the UK in the Farn Deeps (FU6) demonstrate, says the Minister, that fishing mortality on nephrops can be controlled using technical measures which also protect the viability of fishing businesses. The Minister also supported the introduction of a package of measures to further protect European eels.

9.18 On the sustainability of the agreement, the Minister says:

> "In setting out our objectives for the negotiation, the UK Government strongly supported the overall objective of fishing sustainably, based on the principle of Maximum Sustainable Yield (MSY). We supported the aim to set exploitation rates consistent with MSY and to increase the number of stocks set at MSY compared to last year's result. The final agreement means that for 2018, 30 stocks of interest to the UK will be fished at or below their maximum sustainable yield rate (MSY), an increase on 2017, out of 44 such stocks for which MSY assessments have been made. At the EU level, that 39 of 66 assessed stocks were exploited within FMSY."

Previous Committee Reports

Third Report HC 301–iii (2017–18), chapter 8 (29 November 2017).

105 The Minister had argued in his original EM that the restriction on available quota outside FU7 would result in the displacement of vessels and cause significant safety implications, as vessels would be forced to fish in the most exposed area of the North Sea that FU7 covers.

10 Commission Work Programme 2018

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of relevant Select Committees
Document details	Communication from the Commission on the Commission Work Programme 2018—an agenda for a more united, stronger and more democratic Europe
Legal base	—
Department	Exiting the European Union
Document Number	(39181), 13837/17 + ADDs 1–5, COM(17) 650

Summary and Committee's conclusions

10.1 Each year the Commission sets out its policy and legislative priorities for the year ahead. This process means that interested parties both understand the political priorities of the Commission and have some idea of the detailed legislative proposals likely to emerge.

10.2 The annual Commission Work Programme (CWP) was published on 24 October 2017. This set out its priorities to be delivered by the end of 2018, building on the 'Roadmap for a More United, Stronger and More Democratic Union', which President Juncker presented alongside his State of the Union address on 13 September 2017.

10.3 This is the fourth annual work programme of President Juncker's Commission, highlighting 26 new key initiatives to complete the work on his ten strategic priorities, published in November 2014, and including eleven 'Future of Europe' of initiatives launched with a 2025 perspective. It compiles information on the necessary work for the three main EU institutions until the end of the mandate period.

10.4 The focus of the 2018 CWP is two-fold. First, there are a limited number of targeted legislative actions to complete work in the priority policy areas. Secondly, the work programme presents a number of initiatives with a forward-looking perspective, reflecting the debate kick-started by the Commission's White Paper on the future of Europe and the State of the Union Address, as the new Union of 27 shapes its future, towards 2025 and beyond.

10.5 The number of new priorities, 26, is the largest of the Juncker Commission (which had previously brought forward 23, 23 and 21 initiatives in the 2015, 2016 and 2017 CWPs respectively). This focused approach is still a considerable improvement on the average of 130 initiatives presented per year by its predecessor. It is welcome that the Commission continues to pursue its REFIT agenda (which assesses the adequacy of EU legislation in force), although the number of proposed withdrawals, repeals and measures to undergo the REFIT process has continued to decline.

10.6 On 14 December, the Presidents of the three main EU institutions signed a Joint Declaration of the EU's legislative priorities for 2018–19, the second such agreement. The

Declaration sets out 31 new legislative proposals tabled by the Commission which will be given priority treatment by the Parliament and the Council for adoption or substantial progress by the time of the European Parliament elections in 2019.

10.7 **This is the second CWP to be published following the EU referendum in June 2016 and the decision of the UK to leave the European Union. The UK formally notified the EU of its intention to withdraw on 29 March 2017. Under Article 50 TEU, the Treaties will therefore cease to apply to the UK on 29 March 2019. However, the Government and the European Commission reached provisional agreement on the 'phase 1' separation issues triggered by the UK's withdrawal from the EU on 8 December 2017, and following agreement by the European Council on the 15 December, it was agreed that negotiations on a 'transition period' could begin.**

10.8 **While negotiations on the transition period continue, the CWP remains important in setting out future legislation that might enter into effect after the UK has left the European Union, but during a transition period in which it may need to comply with and implement new EU law. Additionally, the initiatives presented that look further forward, towards 2025 and beyond, will be an important indicator of the future priorities of a key partner of the UK as a third country. The Committee notes the lack of information in the Government's EM relating to the implications of the CWP for a post-Brexit UK but welcomes the Government's commitment to "comment on the exit implications of specific proposals when they come forward".**

10.9 **The Commission Work Programme provides a comprehensive overview of the Commission's 26 new key initiatives for the year ahead within its priority areas. The subsidiarity implications of the CWP will depend on how the proposals are developed and the Government states that "more detail on adherence to the principle of subsidiarity will be provided in the EM on each legislative proposal as it is brought forward". The Committee awaits the detail of the proposals before making firm judgements on these issues while noting that the Government states that overall it believes "the CWP 2018 has broadly respected the principle of subsidiarity".**

10.10 **We welcome the Government's consultation with the Devolved Administrations in advance of the Explanatory Memorandum and note its commitment to continue to work with the Devolved Administrations to coordinate the UK's positions on specific initiatives outlined in the CWP as they develop.**

10.11 **Although the Commission Work Programme remains an important and comprehensive overview of the Commission's priorities for the year ahead, and beyond, we are not recommending the CWP 2018 for a specific debate. This decision reflects the changed parliamentary picture since the referendum decision, including the commitment of the Government to make time available for general debates on the UK's future relationship with the EU. It may be that we recommend individual proposals arising from the CWP for debate when we consider them in more detail in the future.**

10.12 **We are content to clear the Communication from scrutiny but draw it to the attention of relevant Departmental Select Committees.**

Full details of the documents

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions on the Commission Work Programme 2018—an agenda for a more united, stronger and more democratic Europe: (39181), 13837/17 + ADDs 1–5, COM(17) 650.

Background

10.13 The 2018 CWP—An agenda for a more united, stronger and more democratic Europe—consists of six documents:

- a Communication setting out principles of the Work Programme and the main proposals under the 10 political priorities;
- Annex 1: A list of the 26 new initiatives which the Commission plans to take forward in 2018;
- Annex 2: A list of the 12 legislative initiatives under REFIT foreseen for adoption in 2018;
- Annex 3: A list of the 66 priority pending proposals;
- Annex 4: A list of 15 proposals which the Commission intends to withdraw by April 2018; and
- Annex 5: A list of three repeals.

10.14 In introducing the CWP, the Commission states that Europe is visibly regaining its strength and has a window of opportunity that will not stay open forever. In outlining how the CWP will ensure the focus remains on the big things, where European action has a clear and demonstrable added value, it continues:

> "This Commission has already delivered over 80% of the proposals that are the essential for completing the Digital Single Market, the Energy Union, the Capital Markets Union, the Banking Union, the Security Union and a comprehensive European migration policy. The priority must now be on turning proposals into legislation, and legislation into implementation. The sooner the European Parliament and the Council complete the legislative process, the sooner citizens and business will feel the benefits of our joint work. The Commission will redouble its efforts to support the co-legislators every step of the way."

10.15 The Joint Declaration signed by the Presidents of the three main EU Institutions on 14 December 2017 set out 31 new legislative proposals tabled by the Commission which will be given priority treatment by the Parliament and Council for adoption or substantial progress by the time of the European Parliament elections in 2019.

10.16 The Joint Declaration set out seven priority areas:

- better protecting the security of EU citizens;
- reforming and developing the EU migration policy in a spirit of responsibility and solidarity;

- giving a new boost to jobs, growth and investment;
- addressing the social dimension of the European Union;
- delivering on the commitment to implement a connected Digital Single Market;
- delivering on the objective of an ambitious Energy Union and a forward-looking climate change policy; and
- further developing democratic legitimacy at EU level.

10.17 More detail on the ten political priorities outlined in the Communication is given below.

A new boost for jobs, growth and investment

10.18 The Commission sets out three initiatives in this priority area. The Commission will introduce a limited number of proposals to reinforce work to support innovation, jobs and growth through the **Circular Economy Strategy**, which was previously included in the CWP 2017. These will notably focus on the production and use of plastics, working towards plastic packaging being recyclable by 2030, and on the reuse of water and the management of drinking water. The Commission also proposes to move the European Skills Agenda forward with the support of the European Social Fund, paying particular attention to basic skills and to digital skills.

10.19 With a 2025 perspective, the Commission launches a comprehensive proposal for the future **Multi-annual Financial Framework** beyond 2020, on which it expects to complete negotiations in the mandate of this Commission, and a reflection paper on a **sustainable European future**, following up the UN Sustainable Development Goals, including the Paris agreement on Climate Change.

A connected Digital Single Market

10.20 The Commission has already tabled 24 legislative proposals in the area of the **Digital Single Market** (DSM) since May 2015, and prioritises implementation of the 18 outstanding proposals by the European Parliament and Council. These include the electronic communications Code, the proposed copyright reform and the Digital Content Directive. Additionally, the Commission will present proposals on fairness in platform-to-business relations, an initiative on countering fake news and revised guidelines on significant market power in the electronic communications sector.

A resilient energy Union with a forward-looking climate change policy

10.21 Continuing work to complete the **Energy Union** and to improve the security of energy supplies and the functioning of the internal market, the Commission will propose common rules for gas pipelines entering the European internal gas market.

10.22 As part of the future of Europe initiatives the Commission will present a Communication on the **future of EU energy and climate policy**, including the future of the Euratom Treaty.

A deeper and fairer Internal Market with a strengthened industrial base

10.23 The Commission proposes four key initiatives in this area, in addition to an initiative with a 2025 perspective to make **Single Market law-making more efficient** by further enhancing the use of qualified majority voting and of the ordinary legislative procedure in internal market measures.

10.24 In continuing efforts to protect national budgets against harmful tax practices, the Commission proposes to **simplify the rules for taxing the profits that multinationals generate through the Digital Economy**. A **social fairness package** will address labour mobility and social security coordination challenges by proposing a European Labour Authority and a multi-purpose European social security number aiming to simplify the interactions between citizens and administrations in a range of areas. The Commission will propose measures to improve the functioning of the **EU food supply chain** to help farmers strengthen their position in the market place and protect them from future shocks. Finally, to complete the **Capital Markets Union**, the Commission will propose a range of measures including rules on crowd and peer-to-peer funding, an initiative on sustainable finance and an enabling framework to facilitate the use of covered bonds.

A deeper and fairer Economic and Monetary Union

10.25 As part of continuing work to create a deeper and fairer **economic and monetary union**, the Commission will propose bringing the European Stability Mechanism into the European Union legal framework "to make it more democratically accountable, and, at the same time, strengthen its role and decision-making". Also under this key initiative the Commission will propose creating a dedicated euro area budget line within the EU budget in order to provide four functions: structural reform assistance; a stabilisation function; a backstop for the Banking Union; and a convergence instrument to give pre-membership assistance to Member States on their way to euro membership.

10.26 The second key initiative in this area are proposals to complete the **Banking Union** to achieve both risk reduction and risk sharing. These proposals, together with the Capital Markets Union, aim to help build a stable and integrated financial system for citizens and business.

10.27 Finally, launched with a 2025 perspective, the Commission will propose a Communication on the possible creation of a permanent **European Minister of Economy and Finance,** who is democratically accountable, to increase the efficiency of policy making.

A balanced and progressive trade policy to harness globalisation

10.28 The Commission will deliver on the **Trade for All Strategy**. EU trade deals will be pursued through negotiations with Mercosur and Mexico, and the Commission will work with the European Parliament and Member States to make sure that agreements, including with Japan, Singapore and Vietnam, are reached and properly implemented so that the benefits can be delivered.

An area of Justice and Fundamental rights based on mutual trust

10.29 Completion of the **Security Union** is a key priority for the Commission. This key initiative includes several individual proposals, particularly aimed at combatting terrorism. These include proposals to improve cross-border access by law enforcement authorities to electronic evidence and to financial data and to further strengthen the rules against explosives precursors that terrorists use for homemade weapons.

10.30 The Commission also proposes to strengthen the **European Union Civil Protection Mechanism** and to endow it with its own operational capacities to provide better crisis and emergency support with maximum efficiency and minimum bureaucracy.

10.31 Looking ahead to 2025, the Commission proposes two initiatives in this area. The first is a Communication on a possible extension of the tasks of the new **European Public Prosecutor's Office** to include the fight against terrorism ahead of a specific Leaders Summit in Vienna in September 2018, dedicated to security matters. The second is an initiative to strengthen the **Rule of Law** in the European Union.

Towards a new policy on migration

10.32 The Commission says that implementation of the **European Agenda on Migration** is on track, with priority to be given by the European Parliament and the Council to the proposals already on the table. The Commission will furthermore make the necessary proposals in 2018 to revise the Visa Code and upgrade the Visa Information System and in that context will withdraw its proposals for a Visa Code and the Touring Visa.

A stronger global actor

10.33 The longstanding partnership with countries from Africa, the Caribbean and the Pacific will be renewed, adapting it to the rapidly evolving global context and transforming it into a strong and modern political alliance. Links with Asia will also be enhanced. There will also be new frameworks for engagement with India, Iraq and Iran, following the historic nuclear deal with the latter.

10.34 There are two initiatives in this area launched with a 2025 perspective. The first is a **credible enlargement perspective**, with a strategy for the successful accession of Serbia and Montenegro as frontrunner candidates in the Western Balkans. Looking for more efficiency and consistency in implementing the **Common Foreign Policy**, the Commission proposes the possibility of further enhancing the use of qualified majority voting in Common Foreign Policy, making use of the so-called 'passerelle clauses' in the current treaties.

A Union of Democratic Change

10.35 **Communicating Europe**, is the key initiative in this area. The Commission will produce a Communication on how to make the Union more united, stronger and more democratic in communication terms, proposing a revision of the European Citizens Initiative to make it more accessible and easier to use.

10.36 Building on the work of the Task Force headed by First Vice-President Timmermans announced in the State of the Union address, the Commission will present its ideas on **further enhancing subsidiarity, proportionality and better regulation** to make sure the EU only acts where it can add value. Additionally, with a forward perspective, the Commission will propose options for enhancing efficiency at the helm of the European Union, reflecting on doing less more efficiently and giving back competences to Member States where it makes sense to do so.

The Government's view

10.37 In his Explanatory Memorandum of 14 November 2017, the Minister of State in the Department for Exiting the European Union (Lord Callanan) sets out the Government's initial view on the implications of the key policy initiatives announced in the CWP.

10.38 After stating, in familiar terms, that until the UK exits the EU the Government will continue to negotiate, implement and apply EU legislation, he says that the Government broadly welcomes the CWP 2018. Commenting on the broad range of the CWP the EM summarises that:

> "there are some areas where the Government welcomes Commission proposals, areas where we have some concerns and areas where we need more information before forming a complete view."

10.39 Commenting on the 26 new initiatives in the CWP 2018, the Government states that this "broadly aligns with the number brought forward throughout the Juncker Commission's CWP and these are consistently, substantially lower than the average figure for new initiatives under the previous Commission".

10.40 Considering the Commission's focus on the eleven initiatives to shape the new Union of 27 to 2025 and beyond, the Government notes that:

> "while it remains overwhelmingly and compellingly in Britain's national interest that the EU should succeed, for those proposals with a 2025 view, which fall after our departure, the UK Government believes these are a matter for the EU27 to decide on."

10.41 The Government will analyse the full implications of new initiatives when the Commission presents specific proposals and, with regard to financial implications, states that it "will press for costs to be met from within existing budget resources, respecting the agreed budget ceilings of the Multiannual Financial Framework".

10.42 The Government's initial view on the key policy areas are set out in the following paragraphs.

A new boost for jobs, growth and investment

10.43 The UK broadly welcomes the Commission's intent to deliver on the **Circular Economy Action Plan**, the proposals being progressed broadly aligning with UK policy interests. More specifically, the proposed regulation on minimum quality requirements for reused water is "expected to have limited implications for the UK", given our low level of planned reuse of treated wastewater. Secondly, noting the four improvement areas

identified by the REFIT evaluation, the Government says that the "UK welcomes any amendments to the Drinking Water Directive if it delivers benefits for citizens, business and society whilst identifying red tape and potential to lower costs".

10.44 The Government notes the Commission's plans to move the **European Skills Agenda** forward at Member States' and regional level, saying that the "proposed criteria are mostly in line with the aims and aspirations of our own apprenticeships programmes".

A connected Digital Single Market

10.45 The UK Government strongly supports the Commission's commitments to complete the **Digital Single Market** (DSM), which it believes "can play a critical part in ensuring future prosperity for all Member States" and has argued for an open, flexible market with a regulatory framework that reflects the dynamic nature of the digital economy, increases cross-border ecommerce and facilitates scale up of EU businesses. However, the Government notes concern at the proposal on fairness in platform-to-business relations as it believes that the existing competition framework is flexible and sufficiently capable.

A resilient Energy Union with a forward-looking climate change policy

10.46 Significant progress has been made in delivering the **Energy Union** and the Government welcomes the Commission's priority to adopt the **Clean Energy Package**, supporting "a robust and flexible governance framework which supports attainment of EU level objectives without constraining Member States' ability to set their most cost-effective pathway to decarbonisation or imposing unnecessary burdens". The Government is assessing the full implications of possible revision of the Euratom Treaty and the impact on association between the new UK regime and Euratom post-exit.

A deeper and fairer Internal Market with a strengthened industrial base

10.47 The Government will scrutinise the detail of company law proposals with a view to minimising burdens on business and tax authorities and seeking to ensure that the proposals provide Member States with a greater degree of flexibility to set VAT rates at a level that suits their domestic circumstances and needs. The UK Government agrees that the specific issue of **taxation of profits generated by multinationals through the digital market** is important and welcomes EU discussions, which it will work to ensure complement and reinforce the work of the OECD Task Force on the Digital Economy.

10.48 The Government has put forward its view to the Commission that **improving the EU food supply chain** will be "addressed most effectively if Member States have the flexibility to choose measures that best reflect the organisation of their domestic food supply chains, rather than follow a 'one size fits all' approach".

10.49 As the Commission aims to complete the **Capital Markets Union**, the UK will monitor the details of the specific proposals and actively engage as initiatives develop.

10.50 The UK has already responded to the Commission consultation on a **European Pillar of Social Rights**, welcoming the intent of the pillar, but stating a belief "that its

application should be primarily for the euro area, with opt-in for non-euro area states", with a preference for a non-legislative approach which gives flexibility for reforms to be driven by Member States.

A deeper and fairer Economic and Monetary Union

10.51 The Government makes no specific comment on the Commission's proposals aimed at completing the **Economic and Monetary Union**, but notes that "regardless of our relationship with the EU, it is in our interests that the euro area is a successful currency area".

10.52 While recognising that the Commission's work to complete the **Banking Union** is primarily a matter for participating Member States, the Government states that the interests of non-participants in the Banking Union, such as the UK, should also be respected.

A balanced and progressive trade policy to harness globalisation

10.53 The Government continues to support EU's ambitious and open trade policy and will continue to monitor the debate on the **Modernisation of Trade Defence Instruments**. The Commission is also calling for the adoption of proposals on the **Screening of Foreign Direct Investment**, about which the Government says the UK, and several other Member States, have concerns.

An area of Justice and Fundamental Rights based on mutual trust

10.54 The Government says that it is "committed to ensuring European security " and welcomes the Commission's work "to improve the internal Security of the European Union". The Government encourages European efforts that address the challenges posed by the increasing use of electronic means in cross-border crime, but would wish to ensure that proposals do not jeopardise some of the practical cooperation that is already happening. The UK is fully compliant with EU Regulation 98/2013 on the marketing and use of **explosives precursors** and strongly supports efforts by the Commission to reduce terrorist access to precursors.

10.55 The proposals to strengthen the **European Union Civil Protection Mechanism** are part of an ongoing debate, and the Government will comment as the proposal progresses.

Towards a new policy on migration

10.56 The Commission's desire to deliver on the **European Agenda on migration** is supported by the UK Government, which agrees with the Commission and European partners that a managed and coordinated EU approach to migration is still needed. The Government also see a need to reinforce work with transit and source countries as a key part of addressing the root causes of migration and reducing the dangers faced on transit routes, and is committed to working with European partners to address these challenges. The UK does not participate in the borders elements of Schengen, but will watch developments on the proposals to revise the **Visa Code and upgrade the Visa Information System** closely.

A stronger global actor

10.57 The Government welcomes the Commission's ambitions to pursue and strengthen its relations with key partners and **deliver on the Global Strategy. The UK will need to continue working with all the relevant global actors on foreign and defence policy.** The Government says it supports the Commission's prioritisation of rapidly implementing the **European Defence Fund and the European Defence Industry Development Programme**, saying:

> "Collaboration on European Defence research and capability development is in our mutual interests, helping Europe play a greater role in defence while ensuring it complements cooperation with NATO in this area".

A Union of Democratic Change

10.58 The Government supports the ongoing commitment of the Commission to deliver a Union of democratic change. On specific proposals to amend the Comitology regulation, the Government, whilst agreeing that procedures should be modernised, says it is essential that balance is retained regarding the role of expert committees.

Devolved administrations

10.59 The Explanatory Memorandum sets out the initial views of the Devolved Administrations.

10.60 The **Scottish Government** places particular importance on measures designed to strengthen an open and innovative European economy. Looking more closely at the 10 priorities, the Scottish Government:

> "recognises that a lack of digital skills in businesses is one of the main barriers to growth and wishes the retention of digital skills as a specific priority for a "New Boost for Jobs, Growth and Investment". This complements the Scottish Government's desire to continue work on creating "A Connected Digital Single Market". The Scottish Government has also identified "A Resilient Energy Union with a Forward-Looking Climate Change Policy" as a priority area. The Scottish Government has a key interest in "A Deeper and Fairer Internal Market with a Strengthened Industrial Base", particularly with relation to EU Better Regulation and Posted Workers Directive. The Scottish Government agrees that a "New Policy on Migration" is an appropriate priority for next year. Another work programme area of importance to the Scottish Government is "Justice and Fundamental rights based on Mutual Trust." They would also encourage further trade deals and would want to benefit from these in the future, including a balanced and progressive trade policy."

10.61 Noting the publication of CWP 2018 **Northern Ireland** has potential interest in:

> "the European Fund for Strategic Investment 2.0; revisions to the Financial Regulation/Omnibus; the proposals for the Multiannual Financial Framework post 2020; delivery of pending proposals on Digital Single

Market; the Internal Market Strategy; implementation of the Circular Economy Strategy, in particular, proposals to deliver on the Circular Economy Waste Package and the Plastics Strategy; Energy Union and the priority in updating policies on climate change; adoption of the Clean Energy Package; work to continue to improve security of energy supplies and functioning of the internal energy market; the proposal of common rules for gas pipelines entering the EU internal gas market; the focus of efforts on new CO^2 standards for cars, vans and heavy duty vehicles and work on batteries and alternative fuel infrastructure.

"Northern Ireland also have a potential interest in new initiatives to improve the functioning of the EU food supply chain; Completing the Security Union including a proposal to improve cross-border access of law enforcement authorities to electronic evidence; initiatives to facilitate cross-border access to and use of financial data by law enforcement authorities; Revision of the Regulation on service documents; Revision of the Regulation on taking of evidence; and the priority pending proposals for EU Cybersecurity Agency; European Criminal Records System (ECRIS); and Schengen Information System (SIS)."

10.62 The **Welsh Government** notes the "breadth and ambition of the Commission Work Programme" and say they will engage constructively in ongoing EU business in a spirit of co-operation and in a way that is consistent with the rights and obligations of EU membership.

Previous Committee Reports

None.

11 UK customs controls and the EU budget

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; further information requested; drawn to the attention of the International Trade, the Public Accounts and the Treasury Committees
Document details	(a) Report from the Commission: Protection of the European Union's financial interests—Fight against fraud 2016 Annual Report; (b) European Court of Auditors Special report No 19/2017: Import procedures
Legal base	(a)—; Report issued pursuant to Article 325(5) TFEU; (b)—; Report issued pursuant to Article 287(4) TFEU
Department	Revenue and Customs AND Treasury
Document Numbers	(a) (38939), 11503/17 + ADDs 1–6, COM(17) 383; (b) (39360),—

Summary and Committee's conclusions

11.1 Customs duties collected by EU Member States are used to finance the EU budget.[106] In a July 2017 report on fraud affecting the EU budget (the so-called PIF Report),[107] the European Commission repeated allegations by the EU's anti-fraud body OLAF that HM Revenue and Customs (HMRC) had enabled importers of Chinese textiles and footwear to evade customs duties totalling €1.98 billion (£1.76 billion)[108] between 2013 and 2016 by declaring fraudulently low values.[109]

11.2 The Commission argues that, as a consequence of this undervaluation fraud, the EU budget received €1.57 billion (£1.4 billion) less in customs duties than should have been the case over this period.[110] It has therefore called on the UK to compensate the EU for the customs duties that were allegedly evaded. The Government disputes the estimated amount of duty loss, and is currently engaged in talks with the Commission to settle the matter.

11.3 The Committee first considered the PIF Report in November 2017.[111] The Explanatory Memorandum submitted by the Chief Secretary to the Treasury (Elizabeth Truss) did not make clear whether the Government accepted OLAF's findings, or what steps had been taken to put a stop to undervaluation fraud at UK ports.[112] The European Commission, in

106 Customs duties are known in this context as "Traditional Own Resources" (TOR).
107 From the French, "*Protection des intérêts financiers*".
108 £1 = €0.87985 or €1 = £1.13655 as at 30 November.
109 The existence of widespread undervaluation of Chinese imports at UK ports was first uncovered by Operation Snake, a joint customs operation carried out by the European Commission, Member States and the Chinese Government.
110 Member States are allowed to retain 20 per cent of customs duties collected as an administration fee. The remainder is transferred to the EU.
111 See Report of 29 November 2017.
112 Explanatory Memorandum submitted by HM Treasury (10 October 2017).

a document dated 30 November 2017, stated that the fraud "has not been stopped to date".[113] Given the potential implications for the public purse and in the context of negotiations on the UK's cooperation with the EU on customs matters after it leaves the Customs Union, the Committee retained the report under scrutiny and asked the Minister to clarify the Government's position on OLAF's allegations.

11.4 Shortly after we considered the PIF Report, the European Court of Auditors produced a special report on import procedures at EU ports.[114] This corroborated the findings of the OLAF investigation in respect of widespread undervaluation of Chinese imports at UK ports, and questioned the effectiveness of the UK's import control procedures more generally (see paragraphs 11.18 to 11.22 below). In particular, the auditors expressed concern that HMRC does not apply risk thresholds to imports based on an independent calculation of the "fair price" of the good in question, or release goods which could have been undervalued with a request for a guarantee which would facilitate recovery of potential duty loss afterwards. The Court of Auditors concluded this "has led to traffic diversions", with "imports of significantly undervalued Chinese goods coming in transit from other Member States [to the UK for customs clearance] which (…) are [then] transported back to continental Europe".

11.5 The Chief Secretary to the Treasury (Elizabeth Truss) provided further information on the Government's position on the dispute concerning undervaluation fraud at UK ports by letter of 22 December.[115] In summary, while not disputing (widespread) undervaluation fraud at UK ports, the Government does not recognise OLAF's estimate of total customs duties evaded but is unable to provide a different estimate until "individual cases" have been pursued "to their conclusions based on their own facts". The Minister also argues that the dispute will not have an impact on any forthcoming negotiations with the EU on a post-Brexit customs partnership, as it relates to "historic transactions".

11.6 **We thank the Minister for her response to our questions on OLAF's allegations. It still leaves questions unanswered about the scale of undervaluation fraud on imported goods at the UK border. We are also concerned that the European Commission by November 2017 was still of the view that widespread undervaluation fraud at UK ports had not been addressed. The Court of Auditors also found that HMRC's approach to Chinese textiles imports had led to trade diversion, apparently to benefit from the opportunities to avoid duties when seeking customs clearance at UK ports.**

11.7 **As we have noted before, the dispute could give rise to a considerable payment from the UK public purse to the EU budget to compensate for the duty loss. In addition, after the UK leaves the EU Customs Union and ceases to make direct contributions to the EU budget, undervaluation of imports would present a direct loss to the Exchequer as customs duties collected by HMRC would be retained entirely by the Government. It is unclear to what extent undervaluation fraud at UK ports has been able to take root precisely because the fiscal losses accrue to the EU budget, and not the UK Exchequer.**

11.8 **We consider these findings of OLAF and the European Court of Auditors are more appropriately a matter for the Public Accounts Committee and the Treasury Committee given that they relate to the domestic activities of HM Revenue and**

113 Commission Impact Assessment SWD(2017) 428, p. 202.
114 European Court of Auditors, Special report No 19/2017.
115 Letter from Elizabeth Truss to Sir William Cash (22 December 2017).

Customs. We are therefore drawing this Report to their attention. We also consider the International Trade Committee may have an interested in the context of its inquiry into the Trade Bill.

11.9 **We now clear the PIF Report and the Court of Auditors report from scrutiny, but ask the Chief Secretary to keep us informed of progress in negotiations with the European Commission on resolving the matter of TOR losses to the EU budget as a result of undervaluation fraud at UK ports.**

Full details of the documents

(a) Report from the Commission: Protection of the European Union's financial interests—Fight against fraud 2016 Annual Report: (38939), 11503/17 + ADDs 1–6, COM(17) 383; (b) Special report No 19/2017: Import procedures: shortcomings in the legal framework and an ineffective implementation impact the financial interests of the EU: (39360),—.

Background

Report on protection of the EU's budget

11.10 The revenue which funds the EU budget consists primarily of its so-called Own Resources, including the Traditional Own Resources (TOR).[116] This refers to all customs duties and sugar levies collected by the Member States on imports from outside the EU; these are passed on to the European Commission, minus a 20 per cent collection cost which is retained by the collecting Member State. TOR are a substantial contribution to the EU budget: in 2016, the EU's revenue from customs duties was €20.1 billion (£17.9 billion), or 14 per cent of its total income.[117]

11.11 The European Commission checks annually whether the national authorities are correctly applying EU customs legislation, and collecting the right amount of customs duties. Failure to comply with these rules may require a Member State to make additional contributions to the budget, including a penalty in the form of interest. The Commission also publishes an annual report (the so-called PIF Report) on the steps it has taken, in cooperation with the Member States, to protect the EU budget from fraud and other irregularities.

11.12 The latest iteration of that Report, published in July 2017, described a two-year investigation into HM Revenue and Customs by the EU's anti-fraud body OLAF.[118] It concluded in March 2017 that HMRC had enabled importers of Chinese textiles and footwear to evade customs duties totalling €1.97 billion between 2013 and 2016. In response to these findings, it asked HMRC to take "all necessary actions" to stop the fraud from reoccurring, and to take "all appropriate measures to recover the customs duties evaded to the extent possible". Separately, the European Commission has asked the Government to compensate the EU for the net loss of these customs duties to its budget (estimated at €1.57 billion).

116 The other two elements of the Own Resources are a share of each EU country's VAT base, and a GNI-based contribution which is directly proportional to each Member State's economic size. The latter acts as a balancing mechanism, increasing if the TOR and VAT contributions shrink and vice versa.

117 The UK is the second-largest contributor with 17 per cent, after Germany.

118 See Commission document COM(2017) 383.

11.13 HMRC stated in its 2016–17 Annual Report that it "does not agree [with] the calculations or recognise the conclusions drawn". The Chief Secretary to the Treasury has also stated that the Government "[does] not recognise OLAF's estimate of alleged duty loss". The UK may face an infringement procedure before the European Court of Justice for its failure to apply EU customs law, and have to compensate the EU for the customs duties that were allegedly evaded.

11.14 When the Committee considered the Commission report in November 2017, it was unclear whether the Government accepted OLAF's factual findings in relation to how this particular type of customs fraud was perpetrated in the UK, or what steps had been taken to put a stop to it. In March 2017, OLAF had stated the "fraud hub" had "continued to grow".[119] Given the potential implications of these events for the public purse and in the context of negotiations on the UK's cooperation with the EU on customs matters after Brexit, the Committee retained the report under scrutiny and asked the Minister to clarify the Government's position on OLAF's allegations.[120]

The European Court of Auditors Special Report

11.15 The week after the Committee considered the Commission document, the European Court of Auditors produced a special report on import procedures, entitled "shortcomings in the legal framework and an ineffective implementation impact the financial interests of the EU".[121] It was deposited for scrutiny on 18 December 2017, and an Explanatory Memorandum was submitted by the Financial Secretary to the Treasury (Mel Stride) on 11 January.[122]

11.16 The UK was one of five EU countries audited for the purposes of the report. Overall, the auditors found that there is no harmonised and standardised application of customs controls by the Member States, meaning anti-competitive behaviour at the EU's various points of entry and exit cannot be effectively prevented. The Court of Auditors also argues that Member States' customs authorities may be disincentivised from properly applying customs controls, as any errors detected would result in that country being liable to make up the resulting loss to the EU budget from its public resources.[123]

11.17 Based on their findings, the Court of Auditors called on further support for EU customs authorities and exchange of information between them under the next Multiannual Financial Framework; recommended several targeted amendments to EU customs legislation, including a legal basis for financial corrections for Member States which are not adequately addressing the risks and possibly encouraging "import point shopping";[124] and called for additional efforts to tackle evasion of customs duties and

119 *The Guardian*, "UK faces €2bn fine over Chinese imports scam, say EU investigators" (8 March 2017).

120 See Report of 29 November 2017.

121 https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=44169.

122 Explanatory Memorandum submitted by HM Treasury on 11 January 2018.

123 The European Commission disagrees with that line of reasoning, stating: "The Commission is of the view that Member States do have sufficient financial incentives to perform custom controls. Member States that apply the EU customs legislative framework diligently do not face financial liability for TOR that become irrecoverable for reasons beyond their control".

124 For example, the Court has recommended that the Union Customs Code should make the indication of the consignor on the customs import declaration compulsory and the introduction of an EU-wide binding valuation decision.

VAT on goods bought online.[125] In response, the European Commission has rejected the need for any new legislation, except a change to make the indication of the consignor on customs import declaration compulsory in all Member States.

Court of Auditors' findings in the UK

11.18 The Court of Auditors includes in its report several findings on the operation of customs controls by HM Revenue and Customs specifically, which are relevant to the allegations of widespread evasion of customs duties at UK ports:

- nearly nine out of ten of all import declarations submitted to HMRC are cleared under a simplified procedure[126] without any documentary and physical inspections before release;[127]
- where documentary controls are applied by HMRC to verify the origin of a good during release controls,[128] original proofs of origin and the experimental "ConTraffic" database[129] are not checked. The auditors note this "calls into question the effectiveness of release controls in the UK";
- HMRC does not include insolvent traders when targeting post-release controls (as any error in the amount of customs duties could only be collected from these traders with difficulty or not at all, the resulting shortfall to the EU budget would have to be paid from the public purse);[130]
- the UK does not apply risk thresholds based on estimates for "fair prices" for imported goods;[131]
- HMRC does not request a guarantee for the release of goods declared with a potentially undervalued customs value, which would facilitate recovery of possible duty loss. The auditors concluded that lack of request for a guarantee "has led to traffic diversions", with "imports of significantly undervalued Chinese goods coming in transit from other Member States [to the UK for customs clearance] which (…) are [then] transported back to continental Europe"; and

125 See for more information the Committee's Report of 22 November 2017 on VAT and e-commerce, which deals with the pending abolition of Low Value Consignment Relief for consumer goods bought online.

126 The other 12 per cent of import declarations are subject to normal customs procedures, and therefore documentary and physical checks. In the UK, almost all (99.77 per cent) were cleared from customs within one hour.

127 ECA Report 19/2017, para. 118. The Court of Auditors noted that, EU-wide, only 0.2 per cent of import declarations are subject to release controls. The Court of Auditors added that the lack of any release controls "is particularly serious in the case of the UK because the vast majority of import declarations are submitted using simplified procedures". The EU average of simplified controls is 80 per cent of import declarations.

128 Rules of origin are applied to ensure differentiated tariff rates, as agreed through bilateral free trade agreements, are correctly applied and higher customs duties are not evaded by falsifying the origin of a good.

129 ConTraffic is the EU's research prototype for a Container Traffic Monitoring System. It allows customs officials to obtain information on the actual and past movement of shipping containers as well as various results of route-based risk analysis done by the system.

130 ECA Report 19/2017, para. 30.

131 For risk management purposes the risk threshold value can be determined on the basis of fair prices. To overcome the risk of undervaluation, the Commission has developed a methodology to estimate "fair prices" in order to produce robust estimates for the prices of the imported goods. OLAF disseminates these estimates among Member States' customs authorities.
In certain cases, importers submit supporting evidence (invoices, sales contracts, bank statements) which all match the declared (false) low values. Everything matches on the documents presented to customs and the undervaluation is difficult to detect. In such cases, there may be other payments either in cash or via third parties for the difference between the declared (undervalued) and real price.

- HMRC is not using the current version of TARIC 3, the EU's database of all tariff measures, because the earlier TARIC 1 is the only version that the HMRC's electronic release system is capable of applying.[132]

Undervaluation of Chinese textile imports by HMRC

11.19 The report also highlights the practical consequences of HMRC's practices, corroborating the alleged findings of undervaluation fraud perpetrated at UK ports detailed in the European Commission's July 2017 report (see paragraphs 11.10 to 11.14 above):

> "We also found that Member States which carry out fewer customs release controls attract more imports. This is particularly evident in the case of controls related to undervaluation of textiles and footwear from China, where Member States which do not carry out customs release controls attract traffic from other Member States."

11.20 In particular, the auditors concluded that improved release controls by national authorities for textiles and footwear from China were inversely correlated to decreases in such imports into those countries. Of the five Member States audited, the UK was the only one where the medium price per kilogramme of imported textiles and footwear from China was lower in 2016 than it was in 2007.[133] As a result, the report says, the volume of imports into the UK increased by 358,000 tonnes and it decreased in the other four Member States by 264,000 tonnes in total.[134]

11.21 The Court of Auditors concluded that the lack of request for a guarantee in the UK in respect of potentially undervalued goods has led to traffic diversions, with imports of "significantly undervalued" Chinese clothing being cleared for free circulation by HM Revenue and Customs. They also found evidence of abuse of customs procedure 42, which allows VAT to be suspended for imported goods which are immediately shipped from the EU point of entry to another Member State.[135] In many cases, the goods would disappear onto the black market after clearing UK customs control, thereby leading to evasion of VAT in addition to the duty loss linked to undervaluation.

11.22 The Court of Auditors report does not independently arrive at an estimate of the scale of duty loss, but refers to the €1.97 billion figure used by OLAF and the European Commission.

132 HMRC converts TARIC 3 data into TARIC 1 manually before uploading it.

133 ECA report, p. 43. In sampled imports of textiles from Asia, the auditors found that such goods were frequently released for free circulation into the EU after importers declared a value for the goods that was below the price of the raw cotton.

134 Imports of Chinese textiles into the UK have risen by approximately 30 per cent, from under 600,000 tonnes in 2007 to over 900,000 tonnes in 2016; over that same period, the medium price per kilogramme of such imports decreased from €10 (£9) to less than €8 (£7). The only other Member State audited which saw an increase (of a far smaller 20,000 tonnes) was Poland.

135 See ECA Report 24/2015, p. 33.

The Minister's letter of 22 December 2017 and Explanatory Memorandum of 11 January 2018

11.23 The Chief Secretary to the Treasury responded to the Committee's questions on OLAF's allegations against HM Revenue and Customs by letter of 22 December 2017.[136] In summary, her reply states:

- the Government does not recognise OLAF's estimate of alleged duty loss, as it believes OLAF's approach of aggregating duty losses across a variety of individual cases cannot accurately estimate the cumulative scale of the fraud;
- however, the Minister does not dispute that (widespread) evasion of customs duties did occur at UK ports in the 2013–16 period. Given the individual circumstances of each case, the Minister cannot provide a different or more precise estimate as "it is only possible to get an accurate figure of suspected duty loss by pursuing individual cases to their conclusions based on their own facts";
- nevertheless, the Minister argues that HM Revenue and Customs have taken "reasonable and appropriate steps to address suspected fraud", including "Operation Breach", which focused on post-clearance checks where there is suspected undervaluation or onward supply relief VAT fraud;[137]
- the Government remains in correspondence with the European Commission about the evasion of customs duties in the UK, and hopes to "resolve this matter as swiftly as reasonably possible". It is also ready to discuss "with the Commission where there may be genuine concerns";
- with respect to £357 million of customs debts which the European Commission alleges were wrongly cancelled by HMRC, a review by the latter is on-going but the Minister states that "the cases in question were withdrawn on the basis that, at the time, there was not enough evidence to maintain them under the Customs Code as replacement values could not be established to the requisite level of proof"; and
- in the context of the Brexit negotiations, the Minister is confident that the OLAF investigation will not have an impact on any forthcoming negotiations with the EU on a post-Brexit customs partnership as it relates to "historic transactions".

11.24 The Financial Secretary's subsequent Explanatory Memorandum on the Court of Auditors report reiterated the Government's position that it has taken "reasonable and appropriate steps" to address undervaluation fraud at UK ports. It also notes that HMRC will be able to use the latest TARIC system from July 2018 as part of the new Customs Declarations Service, but confirms that, at present, "HMRC ensures compliance with EU customs tariff information by manually keying the tariff measures, duty rates and data on to the system".

136 Letter from Elizabeth Truss to Sir William Cash (22 December 2017).

137 As noted however, the UK apparently does not any conduct clearance controls at the UK border on goods subject to simplified customs controls (88 per cent of import declarations).

11.25 With respect to the Court of Auditors' concerns about the effectiveness of HMRC's release controls of goods presented for inspection, the Minister argues that the UK's approach "strikes an appropriate balance between facilitating importations by genuine traders and targeting error and fraud by means of effective risk based checks":

> "Simplified declarations are scrutinised by the import declaration system, CHIEF, for matches against its risk parameters and consignments are selected for documentary or physical examinations as a result. Businesses that import high risk goods under simplified procedures are required to provide additional data to support CHIEF profiling."

Our assessment

11.26 The Committee remains concerned about the allegations of widespread undervaluation fraud on the calculation of customs duties at UK ports, which have now been highlighted in a series of documents issued by OLAF, the European Commission and the European Court of Auditors.

11.27 There appears to be a widespread view within the EU institutions that HMRC may still not be adequately assessing the risk related to potential undervaluation of imports, particularly for Chinese textiles and footwear. The Court of Auditors in its recent report made several observations relating to the apparent lack of use by HMRC of "fair price" risk assessments and guarantees to cover potentially duty losses for goods suspected of undervaluation, which appear to have contributed to the scale of the problem.[138] As a result, the auditors concluded that goods arriving elsewhere in the EU from China are sent onwards to the UK only for clearing customs at fraudulently low values, evading the correct level of customs duties before the goods are shipped back to the continent.

11.28 With respect to the total amount of customs duties evaded in recent years, the Minister says the Government does not recognise OLAF's estimate of €1.57 billion in net duty loss to the EU budget. However, she is unable to provide a different estimate for the total evaded customs duties, and also does not state the evasion was categorically of a smaller scale than alleged by OLAF and the Commission.

11.29 As we have noted in our previous Report on this matter,[139] this debate is not purely academic, as customs duties evaded represent a direct loss to the EU budget for which the UK may have to pay from the public purse (potentially including penalty interest). Moreover, after customs duties are no longer passed to the European Commission to finance the EU budget following the UK's withdrawal from the EU, any losses from incorrect or lax application of customs legislation by HM Revenue and Customs would result in a direct loss to the UK Exchequer.[140] It is therefore imperative that this matter is resolved as quickly as possible, and any shortcomings in the UK's customs operations

138 ECA Report, para. 97: "The UK does not apply the risk thresholds described in paragraph 92, nor does it request at release a guarantee for the release of goods declared with a potentially undervalued customs value in order to cover the potential duty loss". Para. 92 reads: "For risk management purposes the risk threshold value can be determined on the basis of fair prices".

139 See Report of 29 November 2017.

140 The same issue will not arise in relation to VAT evasion on imports if the UK leaves the single VAT area, as the tax will have to be collected on all imports and CP42 will no longer be available for onward transport to an EU country.

remedied without delay. It is unclear to what extent undervaluation fraud at UK ports has been able to take root precisely because the fiscal losses currently accrue to the EU budget, and not the Exchequer directly.

11.30 The Committee also remains to be convinced that the dispute over the evasion of customs duties will not complicate the Government's negotiations on a future UK-EU customs partnership, after the UK effectively leaves the Customs Union.[141] The Minister says that the OLAF investigation "relates to historic transactions" and will therefore will not have an impact on the negotiations about a future partnership. However, it is clear from the Minister's own letter that the matter has not yet been resolved with the European Commission. Moreover, in March 2017 OLAF stated publicly that, in its view, the scale of customs evasion in the UK was continuing to grow. A Commission document dated 30 November 2017 also states that "losses to the EU budget are still on-going since this fraud has not been stopped to date".[142]

11.31 We have asked the Minister to keep the Committee informed of progress in its discussions with the European Commission on resolving the matter of duty loss and the UK's contributions to the EU budget.

Previous Committee Reports

Third Report HC 301–iii (2017–19), chapter 13 (29 November 2017).

141 The UK may remain in the EU Customs Union for the duration of the post-Brexit transitional arrangement.

142 Commission Impact Assessment SWD(2017) 428, p. 202.

12 VAT: e-commerce package

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Business, Energy & Industrial Strategy Committee
Document details	(a) Proposal for a Council Directive on certain value added tax obligations for supplies of services and distance sales of goods; (b) Proposal for a Council Implementing Regulation laying down implementing measures for the common system of value added tax; (c) Proposal for a Council Regulation on administrative cooperation and combating fraud in the field of value added tax
Legal base	(a) and (c) Article 113 TFEU, special legislative procedure; unanimity; (b) Article 397 of Council Directive 2006/112/EC; unanimity
Department	Treasury
Document Numbers	(a) (38341), 14820/16 + ADDs 1–2, COM(16) 757; (b) (38342), 14821/16 + ADDs 1–2, COM(16) 756; (c) (38343), 14822/16 + ADDs 1–2, COM(16) 755

Summary and Committee's conclusions

12.1 Typically, within the EU, value added tax (VAT) on cross-border business-to-consumer (B2C) sales of goods and electronic services must be paid in the Member State of the customer. However, to reduce the administrative burden on traders of having to comply with the VAT legislation of another EU country, businesses benefit from an intra-EU threshold under which they can pay VAT on cross-border sales of goods as if it were a domestic transaction.[143]

12.2 The various complexities within this system,[144] for example the different national thresholds to determine in which Member State VAT would have to be paid on B2C transactions, led the European Commission to propose in December 2016 a legislative rationalisation of the way in which VAT must be paid on B2C sales within the EU.

12.3 In December 2017, EU Finance Ministers unanimously supported the proposals, which will take effect in two tranches in 2019 and 2021. The key elements of the reforms, which are set out in more detail in our Report of 22 November 2017, include:

- creating a new provision allowing small suppliers of electronic services to account for VAT in their home EU country as if it were a domestic transaction, but reducing the existing threshold for a similar provision on cross-border sales of goods;

143 For non-electronic services provided to consumers on a cross-border basis within the EU, VAT is typically (but not always) charged in the Member State of the supplier. See: European Commission, "Other services ordered online and provided in traditional format" for more information.

144 See our Report of 22 November 2017 for more information on the rationale behind the latest reforms of VAT on B2C sales within the EU.

- extending the Mini One Stop Shop (MOSS), which allows all of a trader's VAT on cross-border supplies within the EU to be paid in their home Member State, to *all* intra-EU distance sales of goods and services (in addition to the existing MOSS for electronic services).[145] Under this system, the VAT revenues are redistributed by the collecting tax authority to the Member State of the consumer; and
- the abolition of the VAT exemption for low-value goods (Low Value Consignment Relief or LVCR) imported by consumers from outside the EU.

12.4 The detailed rules necessary for the implementation of the reforms will be drafted by the Commission as a proposal for a Council Implementing Regulation, due to be presented for consideration—and amendment—by the Member States later this year.

12.5 The Financial Secretary to the Treasury (Mel Stride) informed the Committee in October 2017 that the Government was supportive of the proposals as amended by the Member States. The Minister confirmed this by letter of 11 January 2018, in which he added that the legislation as adopted "achieved an acceptable balance for the UK". Accordingly, it voted to support their adoption at the ECOFIN Council in December.

12.6 There are also particular VAT consequences for the UK in the context of its withdrawal from the EU. When it leaves the EU's common VAT area, the UK will be considered a "third country" for the purposes of EU VAT legislation. As such, VAT will become an import tax for goods exported from the UK to the EU and *vice versa* (which must, in principle, be collected by customs authorities at the border before the goods can be released).[146] Within the EU, such border controls are always absent as part of its internal market policies.

12.7 In the context of VAT on e-commerce sales by UK suppliers to EU-based consumers, the consequences of Brexit are significant. Once the UK is outside the common VAT area:

- British businesses will have to register for VAT in an EU country (and ensure compliance with its local VAT laws) to account for B2C sales of goods or electronic service there, as the intra-EU thresholds on accounting for the VAT in the country of the supplier will no longer apply; and
- traders will no longer be able to register for the MOSS simplification mechanism in the UK—either in its current or proposed expanded form—as HM Revenue and Customs will no longer be an EU tax administration. UK businesses could use the MOSS by accessing it through an EU country where they are registered for VAT purposes.

12.8 The reforms adopted by the Council last December do not fundamentally alter the impact of Brexit on the way in which UK businesses will have to account for VAT on B2C sales into the EU after the UK becomes a "third country". To some extent, the expansion of the MOSS to cover sales by non-EU businesses of all services and goods under €150 (£170)[147] will mitigate the administrative burden as all VAT on those sales to the EU can be accounted for in a single EU country. However, it still requires a UK company to register for VAT in another country. Moreover, the MOSS will not be of any use for

145 At present, the MOSS is only available to traders who sell electronic services to consumers in other Member States.

146 Although individual countries can adopt deferment procedures exist to allow the VAT to be collected after the goods clear the border, to reduce the administrative burden on traders importing goods.

147 £1 = €0.87985 or €1 = £1.13655 as at 30 November.

sales to EU-based businesses (which account for a much larger proportion of cross-border transactions).[148] UK traders will also not benefit from Low Value Consignment Relief once goods sent from the UK to the EU are classified as "third country" imports, as the exemption is set to be abolished.

12.9 However, when precisely these changes in the VAT treatment of UK sales into the EU would take effect (or, indeed, whether the Government will be able to secure a different VAT arrangement with the EU to reduce the impact of these changes on UK businesses) is unclear.

12.10 As set out in more detail in paragraph 0.27, the most fundamental reforms contained in this new legislation are due take effect on 1 January 2021. However, there are already indications this timetable may slip because of the complexities of the necessary changes that need to be made to national VAT systems.[149] Moreover, at present, it is unclear what the UK's position in relation to the EU's common system of VAT will be after March 2019. The European Commission has proposed that a post-Brexit transitional arrangement, during which the UK would in effect be classified as an EU country by the other Member States for VAT purposes, should end on 31 December 2020.[150] By contrast, the Prime Minister apparently envisages a transition that could potentially last longer, in which case UK businesses might still be treated as EU companies when the reforms take effect.[151]

12.11 With respect to the Government's position on the VAT implications of Brexit, the Minister in his letter of 10 January states that "ahead of the conclusion of negotiations, it is not possible to answer some of these questions in detail".

12.12 **We thank the Minister for the information he has provided on the final agreement on the VAT e-commerce package, and the Government's position thereon. As the new legislation has now been adopted and published in the Official Journal, we clear the proposals from scrutiny.**

12.13 **Important questions remain outstanding about the full implications of the UK leaving the EU and its common VAT area. The Minister has been unable to provide any indication of the Government's proposals to minimise disruption to UK-EU trade resulting from the UK establishing its own VAT regime, or indeed whether it is Government policy for the UK to remain in the common VAT area after Brexit. While the immediate impact looks set to be minimised by a post-Brexit transitional period (during which the UK would, presumably, be treated as an EU country by the other Member States for VAT purposes), the situation after this arrangement is much less clear.**

12.14 **When the UK eventually leaves the common VAT area, import VAT barriers could cause delays and cash flow issues for businesses in both the EU and the UK,**

148 A proposal to create a One Stop Shop for intra-EU business-to-business sales is under consideration, but as currently drafted this new legislation would not apply to sales into the EU by non-EU businesses. See our Report on the Single VAT Area of 6 December 2017 for more information.

149 See paragraphs 0.29 and 0.30 for more information on the timetable for implementation of the reforms.

150 European Commission, Supplementary Article 50 negotiating directives (20 December 2017).

151 On 20 December 2017, the Prime Minister told the Liaison Committee: " [The European Commission] have set that end December 2020 date because that covers their current budget plan period (…) but we will obviously have to discuss it, because this is a practical issue about how long certain changes would need to take to be put in place".

as fiscal border controls will need to be applied which are currently absent.[152] We understand that the impact of those "fiscal frontiers" could be mitigated by deferring the collection of VAT until after goods have cleared the border, but for goods exported from the UK to the EU the existence and requirements of such deferrals will vary country-by-country.

12.15 **With respect to this new legislation on the VAT treatment of supplies of goods and services sold to EU consumers via the internet, we do not know if the reforms—including the abolition of LVCR and the extension of the MOSS for both EU and non-EU suppliers—will apply to UK traders as "third country" businesses, or whether they will be treated differently under the terms of a transitional arrangement (or indeed a new UK-EU agreement on VAT altogether).**

12.16 **A key difference is that, as "third country" traders, UK businesses will have to register for VAT in an EU country to use the MOSS, as HM Revenue and Customs will no longer be subject to EU VAT legislation and will therefore sit outside the legal system that underpins the transfer of VAT revenues between Member States.[153] Similarly, VAT on sales of goods by UK businesses to EU-based consumers will *always* have to be accounted for in the Member State of the customer (within the EU, below a certain value threshold, VAT on such supplies can be accounted for in the supplier's own Member State).[154]**

12.17 **We will continue to press the Government on these matters, and we hope the issue of VAT on cross-border supplies between the UK and the EU will be addressed as soon as possible as part of the negotiations on the future bilateral relationship. The Committee will report to the House and the relevant Select Committees on VAT matters and Brexit as it continues its scrutiny of other recent proposals to modify the EU's VAT legislation.**

12.18 **We also draw these latest developments to the attention of the Business, Energy and Industrial Strategy Committee, in the context of its inquiry into "Brexit and the implications for UK business".**

Full details of the documents

(a) Proposal for a Council Directive on certain value added tax obligations for supplies of services and distance sales of goods: (38341), 14820/16 + ADDs 1–2, COM(16) 757; (b) Proposal for a Council Implementing Regulation laying down implementing measures for the common system of value added tax: (38342), 14821/16 + ADDs 1–2, COM(16) 756; (c) Proposal for a Council Regulation on administrative cooperation and combating fraud in the field of value added tax: (38343), 14822/16 + ADDs 1–2, COM(16) 755.

152 See for more information our Report on the Single EU VAT area (6 December 2017).

153 See paragraph 0.30 for more information on use of the MOSS by non-EU businesses.

154 Idem.

Background

12.19 In December 2016, the European Commission tabled a package of three legislative proposals to reform the EU's VAT legislation, with the aim of reducing the extent to which differences in VAT law hinder the EU's internal market for e-commerce, for both the supply of electronic services and the online sale of goods to consumers.

12.20 These proposals, which are due to come into effect in two tranches in 2019 and 2021 respectively, would reduce businesses' administrative burdens and simplify accounting for cross-border VAT. However, the draft legislation also sought to curtail firms' ability to treat cross-border sales of goods within the EU as domestic transactions. In addition, the existing VAT exemption for low-value parcels imported from non-EU countries would be abolished. We set out the substance of the Commission's package of measures in more detail in our Report of 22 November 2017.[155]

12.21 In the correspondence between the Committee and the Financial Secretary on the proposals, the Government persistently expressed concerns about some elements of the proposals. In particular, it thought the lower threshold for distance sales of goods could increase burdens for small businesses; the abolition of LVCR should be balanced against any additional burden on businesses and tax authorities; and non-EU businesses (e.g. UK firms after Brexit) would be put at a disadvantage by the proposed criteria for using the MOSS.[156]

12.22 Each Member State has a veto over EU taxation proposals, and the European Parliament has no binding say. In autumn 2017, the Estonian Presidency of the Council prepared a general approach on the proposed legislation; this compromise legislative text preserved most of the substance of the original Commission proposals but made some changes to meet the concerns of the Member States.

12.23 The Financial Secretary to the Treasury (Mel Stride) wrote to us on 24 October[157] and 6 November 2017[158] with his assessment of the compromise text, which he said offered "a reasonable compromise" which the Government—despite the apparent earlier misgivings—wanted to support. The Minister therefore requested a scrutiny waiver to enable him to support the Presidency's text at the November Council meeting. However, due to the delays in reconstituting the Committee following the general election, we were unable to consider this request in advance of the ECOFIN meeting on 7 November.

12.24 In the event, the Council did not adopt the tabled text. We understand Germany expressed concerns over the timing and substance of the further implementing legislation that will need to be adopted to make the new VAT rules function effectively, the principles for which were set out in a draft statement to be annexed to the legislation.[159] Accordingly, at its meeting on 22 November, the Committee retained the documents under scrutiny in anticipation of an update from the Minister on any additional changes made the Council statement on the necessary implementing regulation.

155 Report of 22 November 2017.
156 The concerns expressed by the Government are discussed in more detail in paragraph 19.25 of our Report of 22 November 2017.
157 Letter by Mel Stride to the Chair of the European Scrutiny Committee (24 October 2017).
158 Letter by Mel Stride to the Chair of the European Scrutiny Committee (6 November 2017).
159 See Council document 13841/17, p. 52, for the original draft statement.

Developments since November 2017

12.25 On 23 November, the Minister wrote to the Committee again about the proposals. He confirmed that Presidency was preparing a new statement ahead of the December ECOFIN meeting, but no further changes to the legislation itself.[160] The new statement was circulated on 30 November, and articulated in more detail the Commission and Council's intentions for the upcoming draft implementing regulation.[161] In particular, the statement now explicitly mentions the possibility that the introduction of the reforms may have to be delayed if the necessary IT systems to make the expanded Mini One Stop Shop function are not in place in time.

12.26 At the Minister's request, the Committee granted a scrutiny waiver allowing the Government to support adoption of the proposals at the ECOFIN meeting on 5 December.[162] EU Finance Ministers formally adopted the new legislation, and the amended statement, by unanimity at that meeting.[163]

The substance of the new VAT e-commerce legislation

12.27 The final legislative package mirrors the original European Commission proposals to a large extent. It includes the following short-term reforms, which will apply from January 2019:

- allowing cross-border suppliers of electronic services to non-business consumers to apply the VAT legislation of their home Member State provided the value of such services is less than €10,000 per year;
- enabling cross-border suppliers to apply the VAT invoicing rules of their home Member State, rather than having to apply the legislation of each Member State to which services are supplied;[164] and
- alleviating the administrative burden on smaller businesses by requiring only one piece of evidence for the location of customers when selling electronic services, rather than two pieces of evidence as is currently the case;

12.28 A second tranche of more fundamental reforms is planned to take effect from 1 January 2021. It includes:

The intra-EU threshold for distance sales of goods

- The legislation repeals article 34 of the VAT Directive, which established that VAT on distance sales of goods is payable in the country of the supplier, not that of the consumer, if the annual value of such supplies to any one Member State is below €35,000 (£31,000);[165]
- The reforms replace article 34 with a new, more restrictive system which allows cross-border suppliers of goods to consumers to apply the VAT legislation of

160 Letter from Mel Stride to Sir William Cash (23 November 2017).
161 The final statement is contained in Council document 14769/17/REV.
162 Letter from Sir William Cash to Mel Stride (29 November 2017).
163 http://data.consilium.europa.eu/doc/document/ST-15463–2017-INIT/en/pdf.
164 The Member States rejected the Commission proposal to allow MOSS users to follow the record retention rules of the Member State where they are registered for VAT rather than where the customer is based.
165 £1 = €0.87985 or €1 = £1.13655 as at 30 November.

their home Member State, provided the value of such services to all Member States other than the company's home country is less than €10,000 per year (thus mirroring the system for cross-border supplies of electronic services, for which this reform will take the place in 2019; see paragraph 12.29);

The Mini One Stop Shop accounting mechanism for cross-border VAT

- To assist businesses which will have to account for VAT in other EU countries as a result of the repeal of article 34, the legislation extends the Mini One-Stop Shop (MOSS) accounting mechanism to intra-EU distance sales of goods, and to services other than electronic services;
- The MOSS will also become available for non-EU businesses selling services, and goods valued below €150 (£134), to EU consumers. This will allow them to register in one EU country for VAT and pay all their liabilities there. In respect of VAT on goods, this option is available only if the non-EU business has appointed an intermediary in an EU country, or if it is established in a country with which the EU has an agreement on mutual assistance with respect to VAT;[166]
- However, where goods worth €150 or less are sold by third country businesses to EU consumers via an online platform such as Amazon or eBay, the latter will be legally considered the supplier and therefore held liable for the VAT;[167] and

Low Value Consignment Relief

- The abolition of the existing VAT exemption for the importation of low-value consignments (LVCR)[168] from suppliers based outside the EU.[169]

Further legislative proposals

12.29 The European Commission will in 2018 table a proposal for further amendments to the Council Implementing Regulation on VAT to provide the necessary technical detail for the 2021 tranche of reforms, in particular with respect to the new requirements for online marketplaces and the abolition of LVCR.

12.30 The Council and the Commission are also agreed on the need to "consult business further in the drafting of the necessary implementing regulations and the need to monitor progress to ensure that all the component elements of the second tranche of changes are in place ahead of implementation in 2021".[170]

166 See the Committee's Report of 6 December 2017 on the EU-Norway VAT Agreement.

167 Online marketplaces will also be accountable for VAT on sales of goods of *any* value from third country businesses to EU consumers, where the goods are already located within the EU at the point of purchase.

168 Goods imported from outside the EU which are priced at less than €22 (or €10 in some Member States) are exempt from VAT.

169 The Estonian Presidency noted in its report to the Council that one (unnamed) Member State had tabled a draft for an "alternative import scheme" in place of the proposals to abolish LVCR, but added that "pursuing this route would render it impossible to achieve the 2021 implementation date target". As such, it was not included in the Council's position. The Minister, in his letter of 11 January 2018, explains that "this proposal was put forward by another Member State and received little interest in Council as it would have delayed the proposed implementation date by 2–3 years as well as introducing a slightly more complex system than envisaged under the proposal".

170 Letter from Mel Stride to Sir William Cash (10 January 2017).

The Government's view

12.31 On 10 January 2018, the Minister wrote to us with information on Government's objectives for the legislative proposals, and to what extent they were reflected by the final package as agreed by the Council on 5 December:

- although the UK opposed the reduction in the thresholds for intra-EU supplies of goods (below which VAT can be accounted for in the Member State of the supplier, see paragraph 0.26), it compromised on this point to ensure that small UK suppliers of electronic services could account for VAT domestically if they sell less than €10,000 worth of such services to other EU countries per year. The Minister, in summary, explains that "the UK has obtained its goal of a threshold for digital services (previously rejected by other Member States) and avoided removal of a threshold for goods altogether";

- in respect of Low Value Consignment Relief (LVCR), the Minister states that the relief "has lost increasing revenue for the Member States, including the UK, and negatively affected EU businesses who find it increasingly difficult to compete". The Government could therefore support its abolition, especially in light of the proposed extension of the Mini One Stop Shop (MOSS) to facilitate the collection of VAT on low value goods imported from outside the EU; and

- the Government supported the removal of the possibility of third country businesses to register for the MOSS for distance sales of goods to EU consumers where they were " duly authorised" by an EU country, as "the bar to be passed was unclear and could have led to inequity of treatment".

Implications of Brexit

12.32 In its Report of 22 November 2017, the Committee raised a number of concerns about the implications of the UK leaving the EU's common VAT area for British businesses.

12.33 In his reply, the Minister says that "it is not possible to answer" many of the Committee's questions in the previous Report. Although he reiterates the Government's objective of a "deep and special partnership with the EU, based on free and frictionless trade in goods and services", the Minister is unable to provide any detail of a possible UK-EU VAT arrangement that would mitigate some of the consequences of the UK leaving the common VAT area.

12.34 The Minister does confirm that:

- UK businesses, if reliant only on the VAT Directive and absent a special UK-EU arrangement, could access the non-EU MOSS scheme for both services and goods from January 2021.[171] However, to access the MOSS they will need to register for VAT in an EU country; moreover, to use the scheme for sales of goods into the EU, they will have to appoint an EU-based intermediary until the UK has agreed a treaty on VAT cooperation with the EU;

171 For the supply of electronic services, UK firms could use the MOSS as soon as the UK becomes a third country vis-à-vis the EU. However, they will need to register for VAT in an EU country.

- the Government believes that the recent EU-Norway agreement on cooperation in VAT matters "could provide a useful precedent for a similar EU-UK agreement", although "any such agreement would of course be the subject of individual negotiations"; and
- UK consumers will no longer benefit from LVCR on goods coming into the UK. Conversely, UK exports to the EU would also not benefit from the VAT exemption when the UK becomes a "third country".

Previous Committee Reports

Twenty-Sixth Report HC 71–xxiv (2016–17), chapter 7 (18 January 2017); Fortieth Report HC 71–xxxvii (2016–17), chapter 17 (25 April 2017) and Second Report HC 301–ii (2017–19), chapter 19 (22 November 2017).

13 EU participation in Council of Europe Convention and Additional Protocol on the Prevention of Terrorism

Committee's assessment	Legally and politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Home Affairs Committee
Document details	(a) Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) (b) Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Additional Protocol supplementing the Council of Europe Convention on the Prevention of Terrorism (CETS No. 217)
Legal base	(a) and (b) Articles 83(1) and 218(6)(a) TFEU, QMV, EP consent
Department	Home Office
Document Numbers	(a) (39144), 13424/17 + ADD 1, COM(17) 606; (b) (39143), 13425/17 + ADD 1, COM(17) 607

Summary and Committee's conclusions

13.1 These proposed Council Decisions would authorise the EU to conclude (ratify):

- a Council of Europe Convention on the Prevention of Terrorism (adopted in the aftermath of the 9/11 terrorist attacks in the United States of America); and
- an Additional Protocol to the Convention which gives effect to the criminal law aspects of a UN Security Council Resolution concerning foreign terrorist fighters.[172]

13.2 The UK has signed but not yet ratified the Convention and Additional Protocol. The Council adopted Decisions authorising the EU to sign these instruments in 2015. The Decisions were subject to the UK's Title V (justice and home affairs) opt-in. The Government at the time decided *not* to opt in, meaning that the Decisions on signature do not apply to or bind the UK. The Minister for Security (Ben Wallace) told us in November that the Government was also "not minded" to opt into the latest proposals authorising the EU to conclude the Convention and Additional Protocol, adding:

> "The longstanding approach of the UK Government is that it would not be in the national interest to do anything which could bind us to an exercise of EU competence in relation to counter-terrorism which could limit our

172 UNSCR 2178 (2014) on *Threats to international peace and security caused by terrorist acts.*

> future ability to act independently on terrorism legislation; or which could grant the Court of Justice of the European Union jurisdiction over national security matters in relation to the UK."[173]

13.3 We suggested that there was no basis in the EU Treaties for the Court of Justice to assert jurisdiction over matters of national security and invited the Minister to elaborate on his concerns. As his Explanatory Memorandum lacked an analysis of the division of competences between the EU and Member States in relation to counter-terrorism measures, we asked him whether he considered that the Convention and Additional Protocol concerned areas of shared or exclusive competence—the distinction matters because it determines whether the Member States are free to act individually or only the EU can act—and to indicate how this should be reflected in the proposed Decisions. We also requested a more detailed insight into the position of other Member States, particularly those that had already ratified the Convention and (in much smaller numbers) the Additional Protocol. We asked the Minister to clear up any ambiguity about the possibility of the UK opting in to the Decisions following their adoption by the Council and to tell us how soon he expected the UK to ratify the Convention and Additional Protocol.

13.4 In his letter of 11 January, the Minister confirms that the Government has decided *not* opt in to the proposed Decisions as "there is no added value in doing so". Nor would the Government change its position (and seek to opt in post-adoption) if Member States succeeded in inserting additional wording to limit EU competence in relation to the Convention and Additional Protocol. He anticipates that Member States will wish to include "the same caveat" in the Decisions concluding these instruments as they secured in the earlier Decisions on signature, meaning that the EU could only participate in the Convention and Additional Protocol to the extent that it affects common EU rules or alters their scope. The Government does not accept that there are any areas of exclusive competence, reiterating its view that there is only shared competence as EU criminal law measures are based on "minimum rules", not fully harmonised common rules, meaning that there is no impediment to Member States implementing the provisions of the Convention and Additional Protocol.

13.5 The Minister agrees that "there is no basis in the Treaties for the Court of Justice to assert jurisdiction over matters of national security" but adds that "national security is not defined in the Treaties and the institutions often have a narrower interpretation than the Member States".

13.6 **As the Government has decided not to opt in to the proposed Council Decisions authorising the EU to conclude (ratify) the Convention and Additional Protocol, we accept that it will have little leverage to press for changes that would limit EU participation. We are grateful for the Minister's indication that other participating Member States are likely to seek the addition of a recital limiting EU participation to matters falling within the exclusive competence of the Union and making clear that Member States are free to act in areas of shared competence. We consider that a consistent approach in the Decisions authorising the EU to sign the Convention and Additional Protocol (adopted in 2015) and the Decisions authorising ratification is essential to ensure clarity and legal certainty.**

173 See para 11 of the Minister's Explanatory Memorandum of 27 November 2017.

13.7 **We are content to clear the proposed Decisions from scrutiny, since they will not apply to the UK, but ask the Minister to write to us once the Decisions have been adopted so that he can update us on the outcome of negotiations and explain whether Member States have succeeded in limiting EU participation in the Convention and Additional Protocol. We draw this chapter to the attention of the Home Affairs Committee.**

Full details of the documents

(a) Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196): (39144), 13424/17 + ADD 1, COM(17) 606. (b) Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Additional Protocol supplementing the Council of Europe Convention on the Prevention of Terrorism (CETS No. 217): (39143), 13425/17 + ADD 1, COM(17) 607.

Background

13.8 The Committee's previous Reports (listed at the end of this chapter) provide details of the earlier Council Decisions authorising the EU to sign the Convention and Additional Protocol. In reaching its decision not to opt in, the Government at the time accepted that the EU and Member States shared competence in relation to counter-terrorism measures and that the Council was entitled to authorise the EU to sign the Convention and Additional Protocol, but contested the Commission's view that the EU had *exclusive* competence for some of the provisions, meaning that the EU *had* to participate. The Government made clear that competence in this area should be exercised by Member States:

> "Security is a matter for national governments and national parliaments. Whilst cooperation across borders is important—indeed, often necessary—it is for the UK to judge what is best done in our national interest. Not opting into these proposals will ensure that the UK cannot be caught by any exercise of EU competence in this area […]."[174]

13.9 The final versions of the 2015 Council Decisions on signature (unlike the Commission's original proposals) include a recital which makes clear that the EU is only authorised to act "as regards matters falling within the competence of the Union in so far as the Convention/Additional Protocol may affect those common rules or alter their scope" and that Member States "retain their competence in so far as the Convention/Additional Protocol does not affect common rules or alter the scope thereof"—meaning that EU participation is limited to those (unspecified) provisions of the Convention and Additional Protocol for which the EU has acquired exclusive competence based on the adoption of internal EU rules.[175]

The Minister's letter of 11 January 2018

13.10 We drew the Minister's attention to an observation made by the then Immigration Minister (Brandon Lewis) in July 2017 that Article 4(2) of the Treaty on European Union expressly provides that "national security remains the sole responsibility of each Member

174 See the letter of 17 September 2015 from the then Security Minister (Mr John Hayes) to the Chair of the European Scrutiny Committee.

175 See recital (6) of Council Decision (EU) 2015/1913 and recital (5) of Council Decision (EU) 2015/1914.

State" and that "it is a Treaty provision which speaks for itself."[176] We asked whether he agreed that this Treaty provision "speaks for itself" in precluding any EU competence for matters of national security and, if so, whether he also agreed that there was no basis in the EU Treaties for the Court of Justice to assert jurisdiction over matters of national security. The Minister responds:

> "I agree with my colleague the Immigration Minister, and it has always been the UK position, that Article 4(2) TEU is clear when it states that 'in particular, National Security is the sole responsibility of each Member State'. As such I would agree that there is no basis in the treaties for the Court of Justice to assert jurisdiction over matters for national security. However, national security is not defined in the treaties and the institutions often have a narrower interpretation than the Member States."

13.11 We noted that the Minister's Explanatory Memorandum lacked any analysis of the division of competences between the EU and Member States in relation to terrorism, despite this being a major pre-occupation of the previous Government when examining the proposed Council Decisions on signature of the Convention and Additional Protocol in 2015. Unlike these earlier Decisions, the proposed Decisions authorising the EU to conclude (ratify) the Convention and Additional Protocol did not appear to constrain in any way the areas in which the EU would be competent to act. We asked whether the Government intended to press for the inclusion of a recital in each of the proposed Decisions (mirroring the recitals in the Decisions on signature) limiting the EU's participation in the Convention and Additional Protocol to matters for which the EU has exclusive competence. We also asked whether the adoption of a new EU Directive on combating terrorism in 2017—after the EU had signed the Convention and Additional Protocol—tipped the balance towards establishing that the EU had now acquired exclusive competence.

13.12 The Minister sets out the Government's position on the earlier Decisions on signature:

> "The UK opposed the EU signing on behalf of Member States on the grounds of subsidiarity and because the EU does not have the exclusive competence over criminal law, including as it relates to counter terrorism, required for the EU to be able to sign treaties (Article 3(2) TFEU). However, we accepted that as there was shared competence in the area it was for the Council to decide whether to authorise the Commission to sign on behalf of Member States. It is possible that the Council will approve ratification of the instruments with the same caveat over competence, although it is as yet unclear whether the adoption of Directive 2017/541 on combating terrorism will changes Member States' views on the extent of EU competence."

13.13 The Government remains of the view that competence for criminal law measures (including those relating to counter-terrorism) is shared as "these measures can only form minimum standards", not common rules, meaning that Member States can go further. He makes clear that the Council must authorise the Commission to sign and ratify international instruments but suggests that the UK "would be in a weak position" to press for the inclusion of recitals similar to those contained in the earlier Decisions on signature,

176 See the Minister's letter of 13 July 2017 to the Chair of the European Scrutiny Committee.

given that it did not opt in to the Decisions. He considers that Member States participating in the earlier Decisions on signature "are likely to insert the same caveat into the Council Decision to ratify as they did into the Council Decision to sign the instruments ", thereby "making it clear that the EU can only [conclude] the instruments insofar as they have competence under the Treaties to do so".

13.14 Finally, the Minister confirms that the Government has decided *not* to opt into the proposed Decisions authorising the EU to conclude the Convention and Additional Protocol, noting that:

> "All opt in decisions are taken in line with the national interest. The UK has signed the instruments in our own right and UK domestic law is fully compliant following the passage of the 2015 Counter Terrorism and Security Act."

13.15 He adds that the Government's assessment of the national interest would not change, even if Member States succeeded in inserting wording limiting EU competence for matters covered by the Convention and Additional Protocol. He reaffirms the Government's intention to "ratify at the earliest opportunity" but makes clear that "our priority is the ongoing review of CT [counter-terrorism] powers and legislation following the terror attacks in the UK last year", adding: "Once the review has been completed and its findings have been actioned, we will take forward the ratification of the instruments".

Previous Committee Reports

Fourth Report HC 301–iv (2017–19), chapter 10 (6 December 2017). See also the Committee's earlier Reports on proposed Council Decisions authorising the EU to sign the Convention and Additional Protocol: First Report HC 342–i (2015–16), chapter 39 (21 July 2015); Third Report HC 342–iii (2015–16), chapter 27 (9 September 2015); and Fifth Report HC 342–v (2015–16), chapter 31 (14 October 2015).

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

Department for Communities and Local Government

(39232) 14599/17 COM(17) 657 — Report from the Commission to the Council on the Urban Agenda for the EU.

Department for Environment, Food and Rural Affairs

(39323) 15540/17 COM(17) 742 — Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/66/EEC introducing Community measures for the control of Newcastle disease.

Department of Health

(39215) — — Report on the annual accounts of the European Monitoring Centre for Drugs and Drug Addiction for the financial year 2016 together with the Centre's reply.

Department for International Development

(39371) 15769/17 SWD(17) 464 — Commission Staff Working Document General Guidelines on Operational Priorities for Humanitarian Aid in 2018.

(39369) 8038/17 COM(17) 175 — Recommendation for a Council Decision authorising the opening of negotiations on an agreement between the European Union and the Global Green Growth Institute.

Department for Transport

(39386) 15926/17 COM(17) 775 — Report from the Commission to the Council and the European Parliament on the implementation of Regulation (EU) N° 70/2012 of the European Parliament and of the Council of 18 January 2012 on statistical returns in respect of the carriage of goods by road.

Foreign and Commonwealth Office

(39419) — —	Council Decision (CFSP) 2017/2426 of 21/12/2017 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

HM Treasury

(39243) 14812/17 COM(17) 674	Draft Joint Employment Report from the Commission and the Council accompanying the Communication from the Commission on the Annual Growth Survey 2018.
(39254) 14823/17 + ADD 1 COM(17) 770	Recommendation for a Council Recommendation on the economic policy of the euro area.
(39255) 14824/17 + ADD 1 COM(17) 771	Report from the Commission to the European Parliament, the Council, the European Central Bank and the European Economic and Social Committee Alert Mechanism Report 2018.
(39256) 14826/17 COM(17) 690	Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of The Regions and the European Investment Bank Annual Growth Survey 2018.
(39283) 15076/17 COM(17) 661	Report from the Commission to the European Parliament and the Council on the review of Articles 13, 18 and 45 as regards EBA's powers to conduct binding mediation to take account of future developments in financial services law.
(39307) 15351/17 COM(17) 721	Report from the Commission to the European Parliament and the Council on guarantees covered by the general budget—Situation at 31 December 2016.

Formal Minutes

Wednesday 24 January 2018

Members present:

Sir William Cash, in the Chair

Geraint Davies	Darren Jones
Richard Drax	David Jones
Marcus Fysh	Andrew Lewer
Kate Green	Michael Tomlinson
Kate Hoey	David Warburton
Kelvin Hopkins	

3. 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 14 read and agreed to.

Summary agreed to.

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

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

[Adjourned till Wednesday 31 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*)