House of Commons

European Scrutiny Committee

Fourteenth Report of Session 2017–19

Documents considered by the Committee on 21 February 2018

Report, together with formal minutes

Ordered by the House of Commons
to be printed 21 February 2018

HC 301-xiv
Published on 27 February 2018
by authority of the House of Commons

Notes

Numbering of documents

Three separate numbering systems are used in this Report for European Union documents:

Numbers in brackets are the Committee's own reference numbers.

Numbers in the form "5467/05" are Council of Ministers reference numbers. This system is also used by UK Government Departments, by the House of Commons Vote Office and for proceedings in the House.

Numbers preceded by the letters COM or SEC or JOIN are Commission reference numbers.

Where only a Committee number is given, this usually indicates that no official text is available and the Government has submitted an "unnumbered Explanatory Memorandum" discussing what is likely to be included in the document or covering an unofficial text.

Abbreviations used in the headnotes and footnotes

AFSJ	Area of Freedom Security and Justice
CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy
ECA	European Court of Auditors
ECB	European Central Bank
EEAS	European External Action Service
EM	Explanatory Memorandum (submitted by the Government to the Committee)*
EP	European Parliament
EU	European Union
JHA	Justice and Home Affairs
OJ	Official Journal of the European Communities
QMV	Qualified majority voting
SEM	Supplementary Explanatory Memorandum
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

Euros

Where figures in euros have been converted to pounds sterling, this is normally at the market rate for the last working day of the previous month.

Further information

Documents recommended by the Committee for debate, together with the times of forthcoming debates (where known), are listed in the European Union Documents list, which is published in the House of Commons Vote Bundle each Monday, and is also available on the parliamentary website. Documents awaiting consideration by the Committee are listed in "Remaining Business": www.parliament.uk/escom. The website also contains the Committee's Reports.

*Explanatory Memoranda (EMs) and letters issued by the Ministers can be downloaded from the Cabinet Office website: http://europeanmemoranda.cabinetoffice.gov.uk/.

Staff

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

Contacts

All correspondence should be addressed to the Clerk of the European Scrutiny Committee, House of Commons, London SW1A 0AA. The telephone number for general enquiries is (020) 7219 3292/5465. The Committee's email address is escom@parliament.uk.

Contents

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:

Brexit implications

Digital Single Market: Free Flow of Data

- Given the mixed (personal and non-personal) nature of many data sets, to what extent, post-withdrawal, will the ability of UK businesses to fully benefit from the liberalisation of non-personal data flows be dependent on securing an ongoing basis for UK-EU personal data transfers?

EU Aviation Safety Agency (EASA)

- Is the Government willing, as the price of continued UK participation in EASA, to adopt and apply EU law and EASA rules in this policy area, to accept the indirect jurisdiction of the CJEU, and to accept lack of voting rights and ongoing financial contributions to the agency?

Emergency oil stocks

- The security of supply of the UK's emergency oil stocks, 40% of which are currently held in other EU Member States.

Nuclear energy

- The UK's relationship with Euratom, including agreements with third countries, post-Brexit.

Nuclear fusion project

- Risks to UK jobs and investment if the UK does not find a way to participate in ITER (international nuclear fusion project) post-Brexit.

Summary

Digital Single Market: Free Flow of Data

The European Commission has proposed a draft Regulation which would prohibit "data localisation requirements"—rules introduced by Member States which require data processors to conduct data processing, and locate associated infrastructure, on national territory—because these requirements impede intra-EU trade and fragment the Single Market, increasing business costs and acting as a barrier to growth. In its previous report, because of a lack of information from the Minister (Matt Hancock MP), the Committee opposed it participating in the agreement of an informal mandate in the Committee of Permanent Representatives (COREPER) and asked the Minister to instruct the UK Permanent Representation to defer the decision, and to press for a general approach to be agreed in Ministerial Council instead. The Minister did not do so, meaning that the Permanent Representation supported the mandate, which does, however, appear to be in line with the UK position. The Bulgarian Presidency hopes to conclude negotiations with the EP in the coming months, and the Regulation will apply six months after its publication, meaning that it is likely to enter into force before the conclusion of Article 50 negotiations, or during the transition period. UK stakeholders will benefit from the proposed Regulation after the UK withdraws from the EU.

Not cleared from scrutiny; further information requested.

Digital Single Market: EU Cybersecurity Agency / European Network and Information Security Agency (ENISA)

The Government has provided a detailed response to our questions about the proposed ENISA Regulation, which would make ENISA's mandate permanent and grant it the power to develop cybersecurity certification schemes. The Minister (Margot James MP) addresses our concerns about a possible "operational" role for ENISA, concluding that the role that is proposed does not impinge on national competences, but assuring the Committee that the Government will continue to monitor this during negotiations. The Minister also notes that participation of competent authorities of third countries in ENISA is permitted, and that the NIS Directive permits associate membership of the NIS Cooperation Group by third countries, but that there is no equivalent provision for the Computer Security Incident Response Teams (CSIRT) Network. Regarding EU exit, the proposal is likely to become applicable to the UK either before or during any transition period, depending on when negotiations conclude.

Not cleared from scrutiny; further information requested; drawn to the attention of the Digital, Culture, Media and Sport Committee.

EU Aviation Safety Agency (EASA)

The Minister (Baroness Sugg) states that industry values having a single regulatory system for aviation safety in the EU and believes that it would be beneficial to remain part of the EASA system after the UK has left the EU. She states that remaining part of the EASA system will be considered as an option for the exit negotiations with the EU. Industry regards the prospect of an exit from EASA as negative because manufacturers and carriers

would incur increased compliance costs, through having to comply with two regimes. The Chief Executive of the UK Civil Aviation Authority has said that the CAA is not preparing for this eventuality as it regards taking over EASA activities as unviable. The UK could continue to participate in EASA under the EASA Basic Regulation, but it would have to negotiate an agreement with the EU under which it undertook to apply Union law in the areas covered by the Regulation and accept the indirect jurisdiction of the CJEU. Precedent suggests that it would also forfeit its voting rights. Although not ideal, industry representatives do not appear to regard these concerns as overly significant: EASA is a technical agency and operates on the basis of consensus, so voting rights are less important than being able to provide input, and the CJEU has never made a ruling in relation to EASA.

Not cleared from scrutiny; further information requested; drawn to the attention of the Exiting the EU and the Transport Committee.

European System of Financial Supervision

The Committee considered a letter from the Treasury about EU proposals for reform of financial supervision of the banking, insurance and securities markets, which include greater centralised supervisory powers at EU-level and a new industry levy for the financial sector. While the Government is seeking substantial changes to the proposals, the Committee remains concerned about the UK's influence over the process given its EU exit, and the much-reduced level of representation of the Bank of England and the Financial Conduct Authority, as the EU's most sophisticated financial regulators, within the European Supervisory Authorities during the transitional period.

In autumn 2017 the European Commission proposed to substantially alter the current EU-wide system of supervision of the financial sector, and in particular the powers and responsibilities of the European Supervisory Authorities (ESAs) for the banking, insurance and securities sectors. Although likely to be watered down by the Member States, the regulations as proposed would significantly increase the powers of the European Securities & Markets Authority at the expense of national supervisors; create an industry levy to wean the ESAs off direct support from the EU budget; and make the ESAs more assertive vis-à-vis domestic regulators.

The Committee first considered the proposals back in December, and expressed concern about the scope of the changes proposed; in particular the centralisation of supervisory powers at EU-level. Moreover, it asked the Government how it would ensure that the Bank of England and the Financial Conduct Authority—which currently play a major role in the decision-making structures of the ESAs as the competent authorities of the EU's largest financial sector—could continue to exercise influence within the Authorities' governance structures during the post-Brexit transition. The EU has said, repeatedly and categorically, that UK public bodies will have no formal representation in EU organisations during the transitional period, much less a vote. A letter from the Economic Secretary to the Treasury to the Committee offered no reassurance on this point, noting only that UK representation during the transition remained a matter for negotiation. As such, the Committee retained the proposals under scrutiny.

Not cleared from scrutiny; further information requested; drawn to the attention of the Treasury Committee.

Economic and Monetary Union

The European Commission's recent package of measures for the 'completion of the Economic and Monetary Union' within the Eurozone includes the transformation of the European Stability Mechanism into a European Monetary Fund, and the incorporation of the intergovernmental Fiscal Compact—which former Prime Minister David Cameron unsuccessfully tried to block in December 2011—into the EU legal framework. None of the proposals impacts directly on the UK, given its opt-out from the single currency and decision to leave the EU. Nevertheless, given the importance of a stable Eurozone to the UK economy, we consider the package politically important.

Proposal for a Regulation establishing a European Monetary Fund not cleared from scrutiny; further information requested.

EU-US commercial data transfers: Annual Review of Privacy Shield

This Commission report is the first annual review of the EU-US Privacy Shield. Privacy Shield is a Commission adequacy decision: in other words, a Commission implementing act (EU tertiary legislation) which approves the transfer of personal data for commercial purposes between the EU and the US. Privacy Shield replaced the "Safe Harbor" adequacy decision after it was invalidated by the CJEU in Schrems.

The Commission is satisfied overall with Privacy Shield but has recommended improvements. Privacy Shield is important for UK companies trading with the US so in our last Report we asked the Government how the UK will continue to exchange personal data after Brexit and during an implementation period with third countries who have EU adequacy decisions. We also asked for an update on legal challenges to Privacy Shield.

The Government now responds, rehearsing statements about the importance of the unhindered flow of data post Brexit and referring to its Future Partnership paper on data. It mentions an implementation period without indicating how data-sharing will continue during that time when the UK is a third country. It does, at least, confirm that the Digital Rights Ireland challenge against Privacy Shield has been struck out by the CJEU.

Given that this document is non-legislative and the Government has provided answers to most of our specific questions on the document itself, we now clear it from scrutiny. We will continue to press the Government on how data-sharing will work generally during transition as part of our ongoing scrutiny of the Commission's Communication on "Exchanging and Protecting Data in a Globalised World".

Cleared from scrutiny; further information requested; drawn to the attention of Exiting the EU Committee, the Science and Technology Committee, and the Digital, Culture, Media and Sport Committee.

Access to EU Environmental Justice at EU and Member State Level: (a) Proposed Council Decision (b) Commission Guidance

These two documents concern obligations in the Aarhus Convention on signatories to provide access to environmental justice. Both the EU and Member States (in their own right) have ratified the Convention. Document (a) concerns adopting a collective EU position in relation to a finding by the Aarhus Compliance Committee that the EU is in

breach of its obligations. Document (b) is a Commission summary of CJEU and national court case law on access to environmental justice, aimed at improving compliance with the Convention at Member State level.

When we considered these documents in November, we asked with respect to document (a) whether the UK's support for the EU to reject the Compliance Committee's findings was rooted in the UK's own difficulties in complying with the Convention. Specifically, relating to the obligation to provide access to environmental justice which is not "prohibitively expensive" (Article 9(2) paragraph 4 of the Convention). On document (b) we asked about Brexit implications: whether the UK will need to take additional steps to comply with the Convention in the absence of EU enforcement mechanisms, including any plans for a national environmental enforcement body.

Based on the Government's responses now received, we clear both documents from scrutiny. This is because document (a) was adopted in July 2017 and the question of the compliance complaint against the EU has now been deferred to 2021 and document (b) is simply non-legislative guidance. The Government has also made a reasonable effort to address our specific questions on how the UK will take forward its own compliance with the Convention post Brexit/transition. For instance, it confirms that there are no current plans to use delegated powers under the European Union (Withdrawal) Bill once enacted to change "EU retained law" relating to the Convention; and it is consulting on a new independent statutory body to challenge government and other public bodies on environmental legislation and enforce standards.

However, we ask the Government for one further response about recent developments concerning a Complaint to the Aarhus Compliance Committee against the UK alleging a lack of public consultation on the EU (Withdrawal Bill); and a partially successful Judicial Review last September affecting UK law on the capping of the costs of legal challenges relevant to the environment.

Cleared from scrutiny; further information requested; drawn to the attention of the Environmental Audit Committee and the Environment, Food and Rural Affairs Committee.

Mandatory Transparency Register for EU Lobbying: A proposed Inter-Institutional Agreement (IIA) and a Council Decision

These two proposals concern the creation of a new mandatory register for lobbyists of the EU institutions to replace the existing voluntary system of registration. Historically, both we and our predecessors have been interested in the transparency of decision-making in the EU in respect of the Council and COREPER and during trilogues.

We have already told the Government that transparency in relation to lobbying will be important during a possible transition/implementation period, assuming a loss of UK influence and voting rights in the institutions during that time. We have also questioned how the register might operate for UK lobbyists after Brexit and transition and whether it could assist transparency during the Brexit negotiations, if adopted in time.

We now report on the Government's responses to those questions and its update on progress. Both the Council and EP have adopted their positions on the proposed IIA. The Council has also proposed a Council Decision to narrow the condition of pre-registration

of lobbyists in relation to Council and COREPER activities. The Government apologises for some scrutiny oversights but has responded promptly to our request, at officials' level, to deposit the proposed Decision and has made a good effort to answer questions. We therefore simply ask the Government to keep us updated.

Not cleared from scrutiny; further information requested.

Rule of Law in the EU and Poland: Proposed Article 7(1) TEU Council Decision

This proposed Council Decision means that for the first time in the EU's history the Article 7(1) TEU "preventive mechanism" has been launched. It follows a long-running dispute between the EU and the Polish Government since 2015 concerning whether reforms of the Polish judiciary, Constitutional Court and the press/media breach the rule of law. If adopted, the Council Decision would amount to an assessment that there is a clear risk of a serious breach of the rule of law in Poland.

However, further steps would need to be taken for Poland to be sanctioned, for instance by losing voting rights in the Council. This would involve a separate triggering of the two stage sanctions mechanism set out in Articles 7(2) and (3) TEU. Also, the current proposal may not be progressed to a vote in Council if the Commission considers that Poland has complied with a 3-month deadline with the Fourth Rule of Law Recommendation which it issued at the same time. Voting thresholds in both the Council/EP and political sensitivities mean that it is far from certain that there will be a negative outcome for Poland as result of the current proposal under scrutiny.

The Government provides us with a neutral view of the proposal. It considers that Member States should respect the rule of law, but that constitutional arrangements are a matter for national governments. It also notes the positive relationship the UK enjoys with Poland and asserts the UK's own "rule of law" credentials. Not unreasonably, the Government also says that it does not want to pre-empt the Article 7(1) process which affords Poland the right to make representations to the other Member States before the matter is put to a vote in Council.

We understand that there might be a discussion on the situation in the Foreign Affairs Council on 27 February. There is no vote currently planned and it is more likely that any vote would take place in March or April. This would make sense as Poland has until 20 March to comply with the latest Rule of Law Recommendation. So we ask the Government to give us sufficient notice of any imminent votes and to indicate their voting intentions, together with underlying reasoning. We also flag wider issues which arise from the assessment of EU institutions and Member States that another Member State or third country is in breach of the rule of law or human rights.

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

Emergency oil stocks

The Commission's paper proposes some minor changes to the EU's system of guaranteeing security of supply of crude oil and petroleum products. As just under half of the UK's

emergency oil reserves are held in other EU Member States and this arrangement is covered by EU legislation, the Committee presses the Government about post-Brexit arrangements for the UK's security of supply.

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

Euratom: nuclear research programme

The proposed extension of the Euratom nuclear research programme for both fusion and fission energy until the end of 2020 is important for the UK as it will form the legal basis for any European funding to the Joint European Torus (JET) fusion energy project in Oxfordshire after 2018. The JET, a leading fusion energy project, is owned by the EU and the European Commission has cast doubt over continued EU funding for the site as a consequence of Brexit. There are also broader implications of the UK's EU exit for its participation in European nuclear energy research projects, including ITER.

In parallel to its general research funding programme (Horizon 2020), the EU also operates a supplementary research programme for fusion and fission energy under the auspices of Euratom. Under the Treaties, that nuclear programme can only run for a maximum of five years at a time; as the last cycle began in 2014, the European Commission has proposed a two-year extension so that funding will remain available until the end of 2020.

The Euratom research programme is strongly supported by the Government, among other things because it is the main source of funding for the Joint European Torus (JET), an EU-owned, Oxfordshire-based fusion energy project that was located in the UK by decision of the then-EEC Member States in the 1970s. The UK's exit from the EU and Euratom has put this funding stream at risk, with the European Commission—which makes financial decisions—having refused to confirm whether it will extend the current grant agreement for the JET (which expires this year) until the end of 2020. A final decision will be taken when the formal proposal to extend the Euratom research programme is endorsed by the Council, which is likely to happen in mid-March.

Separately, as we noted in our recent report on Euratom, the UK's exit from the EU also throws into doubt its participation in ITER. This is an international fusion energy research project established by the EU, US, India, China, Japan, South Korea and Russia. The UK's involvement—which the Government strongly supports and wants to maintain after Brexit—is currently legally dependent on membership of Euratom. Following Brexit, the Government will either have to seek 'association' as a non-voting country within Euratom (as Switzerland has done), or negotiate independent membership of the ITER agreement (requiring national ratification of an international treaty by all 7 current signatories).

Cleared from scrutiny; further information requested; drawn to the attention of the Business, Energy and Industrial Strategy and Science and Technology Committees.

Nuclear energy

The Commission had set out in its original document the investment needs of the EU's nuclear industry until 2050. Responding to the Committee's queries about continued UK engagement in the European Atomic Energy Community (Euratom), the Minister

confirms the Government's desire to maintain close and effective cooperation with Euratom and that any post-Brexit transition arrangement would cover Euratom. We note that outstanding issues remain in relation to: the nature of the future relationship with Euratom; access to relevant networks; applicability to the UK, during transition, of Euratom Nuclear Cooperation Agreements with third countries; and access during transition to the Council's Working Parties. These will be pursued through our wider work on transition and future relationship.

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

ITER (Nuclear fusion project)

The Government has responded to our queries about future UK engagement in ITER (an international nuclear fusion project). Explaining the benefits of UK participation in ITER, the Minister points to substantial construction contracts that have already been won and notes that further contracts are being targeted. ITER also supports UK science excellence, encouraging investment from industry and the creation of high-skill jobs. Non-participation, says the Minister, would place those benefits at risk and undermine the UK's "world leading" nuclear fusion research capability. We take forward outstanding issues in our related chapter on the Euratom Research and Training Programme.

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

Documents drawn to the attention of select committees:

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

Business, Energy and Industrial Strategy Committee: Euratom Research and Training Programme [(a) Commission Report (C), (b) Proposed Regulation (C)]; Status and outlook for investment in nuclear energy in the EU [Commission Communication (C)]; EU Contribution to a reformed ITER project [Commission Communication (C)]; Linkage of EU and Swiss Emissions Trading Systems [(a) and (b) Proposed Decisions (C)]

Digital, Culture, Media and Sport Committee: Digital Single Market: ENISA/EU Cybersecurity Agency Regulation [(a) Proposed Regulation (NC), (b) Commission Communication (C), (c) Commission Report (C), (d) Joint Report (C)]; EU-US commercial data transfers: review of Privacy Shield [Commission Report (C)]

Environmental Audit Committee: Linkage of EU and Swiss Emissions Trading Systems [(a) and (b) Proposed Decisions (C)]; Access to EU environmental justice at EU and Member State level [(a) Proposed Decision (C), (b) Commission Notice (C)]

Environment, Food and Rural Affairs Committee: Access to EU environmental justice at EU and Member State level [(a) Proposed Decision (C), (b) Commission Notice (C)]

Committee on Exiting the European Union: EU-US commercial data transfers: review of Privacy Shield [Commission Report (C)]; EU Aviation Safety Agency (EASA) [Proposed Regulation (C)]

Foreign Affairs Committee: Rule of law in the EU and Poland [Proposed Decision (NC)]

Home Affairs Committee: EU-US commercial data transfers: review of Privacy Shield [Commission Report (C)]

Joint Committee on Human Rights: Rule of law in the EU and Poland [Proposed Decision (NC)]

Justice Committee: Rule of law in the EU and Poland [Proposed Decision (NC)]

Science and Technology Committee: Euratom Research and Training Programme [(a) Commission Report (C), (b) Proposed Regulation (C)]; EU-US commercial data transfers: review of Privacy Shield [Commission Report (C)]

Transport Committee: EU Aviation Safety Agency (EASA) [Proposed Regulation (C)]

Treasury Committee: European System of Financial Supervision [(a) Proposed Regulation (NC), (b) Proposed Directive (NC), (c) Proposed Regulation (C), (d) Amendment to Proposed Regulation (NC)]

1 Emergency oil stocks

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Business, Energy and Industrial Strategy Committee
Document details	Commission Staff Working Document—mid-term evaluation of Council Directive 2009/119/EC imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products
Legal base	—
Department	Business, Energy and Industrial Strategy
Document Number	(39302), 15130/17, SWD(17) 438

Summary and Committee's conclusions

1.1 In case of supply disruptions, EU Member States are obliged to maintain minimum stocks of crude oil and/or petroleum products, some of which may be held in other Member States. According to Eurostat, the UK currently holds around five million tonnes in other EU Member States (40% of its obligation) and holds around 500,000 tonnes belonging to other EU Member States. The overall cost of stockholding can be reduced if use is made of excess storage capacity abroad instead of building additional storage facilities domestically.

1.2 The EU Directive exists in addition to similar obligations applied by the International Energy Agency (IEA), of which all but eight EU Member States are members. In 2009, the Directive was revised in order to ensure better alignment between the EU and IEA requirements and to add value.

1.3 The Commission's review of the Directive finds it to be effective and relevant. The revised Directive is considered to be much better aligned with the IEA rules, and it is considered to add value to those rules. This is because: not all Member States are IEA members; the EU system allows the EU to react to smaller, regional incidents rather than global supply crises that might be better managed by the IEA; the enforceability of the IEA system is lower than the EU system overseen by the Court of Justice; and the EU system requires one third of stockholding to be held in the form of finished products (such as petrol and kerosene).

1.4 A number of suggestions are made for changes to the annexes so as to improve the Directive's efficiency. These include possible harmonisation of the conditions for holding oil stocks in another Member State ("cross-border stocks") as there can be discrepancies in reporting, leading to a lack of clarity as to the volume and quality of stocks.

1.5 The Minister for Energy and Industry (Richard Harrington) says that none of the proposed changes is likely to be substantial. Of those, the suggestion regarding cross-border stocks is potentially the most significant. The details are not yet available, but the

result might be a light touch register to improve the reporting of cross border stocks. He concludes that any changes are largely technical and will not fundamentally impact on the UK's ability to meet its international oil stocking obligations in the future.

1.6 **We note that the Directive allows for some stocks to be held in other Member States and, as such, the UK both holds stocks for other Member States and has stocks elsewhere. Given this reciprocity, the UK's exit from the EU is relevant to future oil stocking arrangements. We would welcome responses to the following queries:**

- **how important the Government considers the EU Directive to be as a way of safeguarding the security of UK supply of crude oil and/or petroleum products;**
- **whether the Government agrees with the assessment that the EU Directive adds value to the IEA system, due not least to the Directive's requirement that a proportion of the stocks should be in the form of finished products;**
- **whether or not the UK will therefore seek, post-Brexit, to continue its cooperation with the EU (as well as the IEA) in this area;**
- **how the UK would do so as the Directive includes no third country provision;**
- **whether the UK would like to continue to participate in the EU's Coordination Group for oil and petroleum products, and what the implications of non-participation would be (noting the Department's confirmation that it has inputted throughout the review process by virtue of the UK's attendance at meetings of this Group);**
- **whether responsibility for oil stocks held in the UK and EU-27 respectively, but belonging to the other, has been discussed within the exit negotiations;**
- **whether resolution of the matter is likely to form part of the Withdrawal Agreement or is seen as part of the agreement on the future relationship between the EU and UK; and**
- **what the approximate additional cost would be of storing all UK stocks in the UK, rather than making use of excess capacity elsewhere.**

1.7 **Pending a response to the above queries, the document remains under scrutiny. We draw this chapter to the attention of the Business, Energy and Industrial Strategy Committee.**

Full details of the documents

Commission Staff Working Document—mid-term evaluation of Council Directive 2009/119/EC imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products: (39302), 15130/17, SWD(17) 438.

Background

1.8 Council Directive 2009/119 imposes an obligation on Member States to maintain minimum emergency stocks of crude oil and/or petroleum products. The Commission's

document presents the findings of the mid-term evaluation to assess the actual effectiveness, efficiency, relevance, coherence and EU-added value of the Directive in the period 2009–16.

1.9 The findings are as follows:

- regarding effectiveness, the Directive has effectively contributed to achieving its objectives, those being: improved availability of the oil stocks, better harmonisation with the mechanism existing under the International Energy Agency (IEA), reduced administrative burden for those Member States that are parties to the IEA, and improved transparency on the actual levels of stocks held in the EU;
- regarding efficiency, no firm conclusions were drawn due to the difficulties to quantify the costs and the benefits linked to the security of oil supply;
- regarding relevance, the energy security needs that led to the establishment of reliable emergency stocks fully remain (while oil consumption in power generation and heating has fallen, transport still relies on oil for 94 % of its energy needs and oil is projected to remain a vital source of energy in the short term); and
- regarding coherence, the Directive is coherent with the objectives of the Energy Union, contributing to the objectives of security of energy supply and completing the parallel mechanisms existing in other energy sectors, and coherent with the objective of decarbonisation (as the share of clean energy increases the levels of oil consumption and corresponding stocks needed, calculated on the basis of consumption, will fall accordingly).

1.10 Regarding the added value of the Directive above and beyond Member States' individual measures and the IEA framework, the Directive is found to enhance the energy security of the eight Member States that are not member countries of IEA, and reinforces the legal certainty regarding the obligations and rights of those EU Member States that are IEA members.

1.11 According to the study[1] underpinning the evaluation, the Directive also adds value because:

- the EU is an integrated economy and an integrated and joint response is therefore more appropriate in order to minimise the impact of an oil supply disruption on the EU economy as a whole;
- the IEA system is primarily designed to address large (global) supply disruptions, whereas the EU Directive also includes the possibility of acting to address smaller, regional disruptions affecting one or more of the Member States;
- the EU (Court of Justice) has the power to impose fines or other sanctions on Member States who do not comply with the Directive, whereas the enforceability of the IEA obligation is low (i.e. the IEA cannot impose sanctions); and

1 Study in support of the mid-term evaluation of the functioning and the implementation of Council Directive 2009/119/EC on Oil Stocks.

- the EU Directive introduced the obligation of holding one third of the stockholding obligation in the form of finished products (or 30 days of inland consumption in the form of specific (product) stocks) reflecting consumption patterns. Compared to the IEA system, in which there is no requirement to hold finished products, this improves the availability of relevant oil products in case of a supply disruption.

1.12 A number of proposals for changes are made:

- change the methodology for calculating the crude oil equivalent of imports of petroleum products;
- change the 10% reduction applicable when calculating the level of oil stocks held (to take account of the potential unavailability of stocks at a particular time);
- change the date of the start of the yearly stockholding obligation; and
- harmonisation of the conditions for holding oil stocks in another Member State ("cross border stocks")—concerns have been expressed about the reduced ability to monitor the volume and quality of stocks held elsewhere, about the potential for double-counting (i.e. duplicate claims on the same stock) and discrepancies in reporting, and about the absence of a regulatory framework to govern cross-border stocks in the EU.

These potential changes will be the subject of further assessment.

Explanatory Memorandum of 18 December 2017

1.13 The Government indicates that the Department has inputted into the review throughout as an attendee at the Oil Coordination Group and also having responded to the consultation conducted during the review.

1.14 The Minister notes that none of the changes is likely to be substantial. He describes the suggestions regarding cross-border stocks as potentially the most significant change. It is likely, he says, to result in a proposal for a "light touch register to improve reporting of such stocks". The other three suggestions are technical in nature "with minimal impact on the UK and the operation of our domestic oil stocking system."

1.15 He concludes:

> "These suggestions and the potential proposals and (if implemented) changes to the Directive are largely technical changes that will not fundamentally impact on the UK's ability to meet its international oil stocking obligations in future."

Previous Committee Reports

None.

2 Digital Single Market: ENISA / EU Cybersecurity Agency Regulation

Committee's assessment	Politically important
Committee's decision	(a) Not cleared from scrutiny; further information requested; (b) (c) and (d) cleared from scrutiny; drawn to the attention of the Digital, Culture, Media and Sport Committee
Document details	(a) Proposal for a Regulation of the European Parliament and of the Council on ENISA, the "EU Cybersecurity Agency", and repealing Regulation (EU) 526/2013, and on Information and Communication Technology cybersecurity certification ("Cybersecurity Act"); (b) Communication from the Commission to the European Parliament and the Council: Making the most of NIS—towards the effective implementation of Directive (EU) 2016/1148 concerning measures for a high common level of security of network and information systems across the Union; (c) Report from the Commission to the European Parliament and the Council on the evaluation of the European Union Agency for Network and Information Security (ENISA); (d) External Action Service Joint Communication to the European Parliament and to the Council: Resilience, Deterrence and Defence: Building strong cybersecurity for the EU.
Legal base	Article 114 TFEU; ordinary legislative procedure; QMV
Department	Digital, Culture, Media and Sport
Document Numbers	(a) (39045), 12183/17, COM(2017) 477; (b) (39021), 12205/17 + ADD 1; (c) (39022), 12208/17, COM(17) 478; (d) (39050), 12211/17, COM(17) 450

Summary and Committee's conclusions

2.1 In September 2017, as part of its Digital Single Market Strategy, the European Commission presented a 'Cybersecurity package' which proposed, to make the European Union Agency for Network and Information Security (ENISA) permanent and to update its mandate to reflect current and future needs in the field of cybersecurity.[2] The modified mandate for ENISA, contained in a draft Regulation, would also create a new Cybersecurity Certification Framework, which would minimise market fragmentation in this policy area.

2.2 The Government did not raise any serious concerns about the proposal in its Explanatory Memorandum on the Regulation,[3] noting that a certain degree of EU

2 Proposal for a Regulation of the European Parliament and of the Council on ENISA, the "EU Cybersecurity Agency", and repealing Regulation (EU) 526/2013, and on Information and Communication Technology cybersecurity certification (''Cybersecurity Act'') COM(2017) 477 final.

3 Explanatory Memorandum 12183/17 submitted to Parliament (18 October 2017).

coordination is beneficial to manage cross-border cyber risks, and that "the current flexibility in the text means that the Government is content that the proposed measures remain proportionate to the need".

2.3 In our report on 6 December 2017,[4] the Committee noted Foreign and Commonwealth Office concerns (expressed in relation to a separate cybersecurity-related document, concerning external policy) at the Commission's use of the word "operational" to describe the role envisaged for ENISA in cybersecurity crisis management, and sought further information on this point. We also asked whether the Government considered the Justice and Home Affairs Opt-In Protocol applied to the proposal, and requested further information on the implications of EU exit for this proposal and the wider policy area of cybersecurity.

2.4 Matt Hancock's successor as Minister of State at the Department of Digital, Culture, Media and Sport (Margot James MP) replied to the Committee's questions on 16 January 2018.[5] In brief, the Minister addresses our concerns about a possible "operational" role for ENISA that would impinge on Member State competences, and provides a helpful account of the third country provisions in ENISA and the NIS Directive. The detail of the Minister's responses to the our individual questions is summarised at the end of this chapter.

2.5 **We thank the Minister for this detailed update which addresses the various concerns that we raised. We note the Government's assessment that concerns about a possible "operational" role for ENISA impinging on national competences are not borne out by the text of the draft Regulation, and that the Government will continue to police the boundaries of national competence during negotiations to ensure that this does not change. The Government also notes that the cybersecurity certification framework seeks to align with international standards, to avoid creating barriers to global trade. As long as this is the case, the introduction of an EU-level cybersecurity certification framework should decrease, not increase, barriers to trade and compliance costs incurred by businesses seeking to operate in multiple EU Member States.**

2.6 **One additional point the Committee wishes to raise is that the advisory comitology procedure is proposed for the European Cybersecurity Certification Group. Under this procedure, even if the Group of national cybersecurity experts opposed a proposal for a particular cybersecurity certification scheme, the Commission would still be allowed to adopt it. We ask the Government to clarify whether it intends to press for the more stringent examination procedure to be used instead, and, if not, to provide its reasons.**

Cybersecurity and Brexit

2.7 **Regarding the UK's withdrawal from the EU and the possibility of future UK-EU cooperation in cybersecurity, we note that:**

- **the existing and proposed mandates for ENISA provide for participation of competent authorities of third countries in the Agency, subject to approval by the Commission, and agreements regarding, inter alia, financial**

4 Fourth Report HC 301–iv (2017–18), chapter 3 (6 December 2017).

5 Letter from the Minister, DCMS, to the Chairman of the European Scrutiny Committee (16 January 2018).

contributions and staff. Norway is the only third country to participate in the ENISA Management Board, on which it has an observer role and no voting rights;

- **the Network and Information Security (NIS) Directive permits associate membership of the NIS Cooperation Group by third countries through a third country agreement. Norway and Switzerland have participated in NIS Cooperation Group Meetings. However, there is no equivalent provision for the Computer Security Incident Response Teams (CSIRT) Network that is established by the NIS Directive;[6] and**
- **after the UK leaves the EU, under the NIS Directive, all UK-established Digital Service Providers will have to designate a representative in an EU Member State if they want to offer services within the EU. They would then have to comply with that Member State's security and incident reporting requirements, along with the UK's requirements.**

2.8 **The Government states that it will seek solutions to these issues through its negotiations with the EU on the future EU/UK relationship.**

2.9 **We retain the proposal under scrutiny. We request an update regarding progress of the proposal in due course, including further information regarding future UK-EU co-operation in the area of cybersecurity, a fuller account of the implications of non-participation in ENISA and the CSIRT Network, and a response to our query about the type of comitology procedure that is proposed, as well as a request for clearance/a scrutiny waiver as appropriate. We draw this report to the attention of the Digital, Media, Culture and Sport Committee.**

Full details of the documents

(a) Proposal for a Regulation of the European Parliament and of the Council on ENISA, the "EU Cybersecurity Agency", and repealing Regulation (EU) 526/2013, and on Information and Communication Technology cybersecurity certification (''Cybersecurity Act'') : (39045), 12183/17, COM(17) 477; (b) Communication from the Commission to the European Parliament and the Council: Making the most of NIS—towards the effective implementation of Directive (EU) 2016/1148 concerning measures for a high common level of security of network and information systems across the Union: (39201), 12205/17 + ADD 1, COM(17) 476; (c) Report from the Commission to the European Parliament and the Council on the evaluation of the European Union Agency for Network and Information Security (ENISA): (39022), 12208/17 + ADD 1, COM(17) 478; (d) External Action Service Joint Communication to the European Parliament and to the Council: Resilience, Deterrence and Defence: Building strong cybersecurity for the EU : (39050), 12211/17, COM(17) 450.

6 For further information about the precise role of the NIS Cooperation Group and the CSIRT Network see this press release by the European Commission (6 July 2016).

Background

2.10 The European Union Agency for Network and Information Security (ENISA) was established by Regulation (EC) No 460/2004[7] to contribute to the overall goal of ensuring a high level of network and information security within the EU. The Agency has its administrative seat in Heraklion (Crete) and its core operations in Athens. ENISA is a small agency with a low budget (€11.25m) and number of staff (84) compared to all EU agencies. It is headed by an Executive Director and governed by a Management Board and Executive Board made up of EU Member States and Permanent Stakeholders. An informal Network of National Liaison Officers facilitates outreach with EU Member States.

2.11 The ENISA Regulation sets out the ENISA's current mandate, which is due to expire on 19 June 2020. ENISA's main task is to enhance capability to prevent and respond to network and information security problems within the EU by building on national and Union efforts.

ENISA Regulation

2.12 The Commission's proposed Regulation (12183/17),[8] which provides a new mandate for ENISA, proposes to grant ENISA a permanent mandate. The proposed Regulation also modifies the scope of ENISA's mandate in a number of respects, to align it with experience of what has demonstrated clear added value (as reflected in the Report) as well as recent additions to its role, including those which are proposed in this Regulation.

2.13 The following are the main changes that are proposed to ENISA's mandate:

- EU cybersecurity policy development—The proposal tasks ENISA with a role in the development and implementation of EU policy and for it to play a specific advisory role. This would primarily be in the area of network and information security, but would also apply to policy initiatives with cybersecurity elements in other sectors (e.g. energy, transport, finance). ENISA would undertake this work by providing independent opinions and providing preparatory work;

- EU cybersecurity policy implementation—ENISA would assist the Member States in achieving a consistent implementation of the NIS Directive, particularly supporting the work of the NIS Cooperation Group. More generally, ENISA would provide regular reporting on the implementation of the EU Cybersecurity regulatory framework;

- Capacity building, knowledge and information, awareness raising—ENISA would be tasked with contributing to the improvement of EU and Member State authorities' capability and expertise and to contribute to the establishment of information-sharing and analysis centres. The proposal outlines a vision for ENISA to act as a knowledge and information sharing hub through the pooling

7 Regulation (EC) 460/2004 was subsequently amended in 2008 and 2011 to extend the duration of its mandate. It was later superseded by Regulation (EU) 526/2013 (the ENISA Regulation).

8 Proposal for a Regulation of the European Parliament and of the Council on ENISA, the "EU Cybersecurity Agency", and repealing Regulation (EU) 526/2013, and on Information and Communication Technology cybersecurity certification (''Cybersecurity Act'') COM(2017) 477 final.

of best practice from across the Union. Alongside this it is stated that ENISA should act as a point of guidance in the aftermath of cross border cyber incidents through the compilation of reports and guidance;

- Research and innovation—ENISA would advise EU and national authorities on research and development priorities and the implementation of research and innovation EU funding programmes;

- Operational cooperation and crisis management—The proposal identifies a role for ENISA in the context of crisis management, which would involve strengthening the existing preventive operational capabilities, in particular upgrading the pan-European cybersecurity exercises (Cyber Europe) by having them on a yearly basis, and a supporting role in operational cooperation as secretariat of the CSIRTs Network (as per NIS Directive provisions);

- EU cybersecurity blueprint—Also related to cybersecurity crisis management, an 'EU cybersecurity blueprint' is presented as part of this package and sets out the Commission's recommendation to Member States for a coordinated response to large-scale cross-border cybersecurity incidents and crises at the EU level. ENISA would facilitate cooperation between individual Member States in dealing with a large-scale cross-border emergency by analysing and aggregating national situational reports based on information made available to the Agency on a voluntary basis by Member States and other entities;

- Market-related tasks, including cybersecurity certification of ICT—ENISA would perform a number of cybersecurity market-related functions. It would operate a cybersecurity 'market observatory', which would analyse relevant trends in the cybersecurity market and support EU policy development. In relation to standardisation, it would facilitate the establishment and uptake of cybersecurity standards, including through the proposed EU framework for cybersecurity certification. More information on this framework is provided below.

EU cybersecurity certification framework

2.14 The Commission argues that cybersecurity certification frameworks are important for developing trust in ICT products and services, but that the current certification framework landscape is patchy and as a result companies are often required to undergo multiple processes in order to offer products across EU Member States. This fragmentation increases costs for businesses. The Commission adduces various examples to illustrate this point—for example, the cost of smart meter cybersecurity certification in the UK is almost €150,000, and costs a similar amount in France. Ultimately, consumers incur a proportion of these increased costs.

2.15 In response, the Commission proposes to introduce a framework which will govern the introduction of EU-wide cybersecurity certification schemes. The Regulation itself does not introduce certification schemes, but seeks to create a system which will allow such schemes to be established and recognised across the EU. The proposal outlines the

minimal content of what would be required under such schemes. Specific cybersecurity certification schemes would be adopted by the Commission in the form of implementing acts, with ENISA playing a central role in their development.

2.16 Where the Commission adopts a specific certification scheme, national schemes or procedures will immediately cease to apply. Manufacturers of ICT products or providers of ICT services would then be able to submit an application for certification to an accredited conformity assessment body of their choice.

2.17 The proposal establishes the European Cybersecurity Certification Group (the 'Group'), consisting of national certification supervisory authorities of all Member States, with ENISA and Commission officials providing the secretariat of the group. The main task of the Group is to advise the Commission on issues concerning cybersecurity certification policy and to work with ENISA on the development of draft European cybersecurity certification schemes. ENISA would also liaise with standardisation bodies to ensure the appropriateness of standards used in approved schemes and to identify areas in need of cybersecurity standards.

2.18 Member States will be responsible for monitoring, supervisory and enforcement tasks, and to this end they will appoint a certification supervisory authority.

2.19 Important limitations to the scope of the proposed framework include that:

- EU cybersecurity certification schemes would make use of existing standards in relation to the technical requirements and evaluation procedures that the products need to comply with and would not develop the technical standards themselves, with international standards being used instead;
- participation in European certification schemes will remain voluntary (unless, as with all certification schemes and standards, legislation laying down security requirements for ICT products were to require otherwise).

2.20 In our first report[9] on the proposal, we asked the Government:

- to what extent the proposed Regulation realised Government concerns about the creation of EU-only standards;
- what scrutiny there will be by Member States and the European Parliament of any Commission-developed implementing regulations which would create individual cybersecurity certification schemes;
- to clarify whether the FCO's concerns about prospective EU interference with national operational activities in the field of cybersecurity were warranted; and
- to expand on the implications of EU exit for future UK-EU co-operation regarding cybersecurity, in a number of different respects.

9 Fourth Report HC 301–iv (2017–18), chapter 3 (6 December 2017).

Letter from the Minister of 16 January 2018[10]

2.21 The Parliamentary Under Secretary of State at the Department of Digital, Culture, Media and Sport (Margot James MP) has responded to the Committee's report. The Minister states that Council negotiations have re-commenced under the new Bulgarian Presidency, and that the EU's Action Plan for cybersecurity cites December 2018 as the date at which it intends the negotiations to conclude.

2.22 The Minister also provides detailed responses to the Committee's questions, which are summarised below.

Cybersecurity standards

2.23 In response to the Committee's question whether the proposal would create EU-only cybersecurity certification standards, the Minister provides a detailed response which includes the points that:

- the Commission specifies in the regulation that ENISA would facilitate the establishment and take-up of European and international standards. This has provided some reassurance that it is not their intention to create EU-only standards;
- in relation to the certification proposals, the Commission has again provided some reassurance by specifying in the text that the cyber security requirements of schemes within the framework are intended to be evaluated using international standards; and
- the conformity assessment bodies who would certify products and services are also required to meet standards set by the International Organization for Standardization (ISO) and the national supervisory authorities would monitor and enforce this.

2.24 The Minister undertakes to ensure during negotiations that any proposals are in line with global standards which are applied in an open and transparent way.

Potential impact of the certification framework on trade

2.25 The Minister indicates that the Government does not think that the proposal to create an EU cybersecurity certification framework will create barriers to international trade. She states that it aims to build flexibility into the approach by setting out a framework under which schemes would operate, rather than setting out directly operational schemes. Furthermore, where the certification framework sets out minimum content of schemes, it makes reference to international standards. The Government takes assurance from this that ENISA will seek to align with existing internationally recognised standards, which will protect against unnecessary barriers to trade and investment.

10 Letter from the Minister, DCMS, to the Chairman of the European Scrutiny Committee (16 January 2018).

Scrutiny of new cybersecurity standards (advisory procedure)

2.26 The Minister summarises the scrutiny that would take place of proposed cybersecurity certification schemes. She states that, when preparing certification schemes, ENISA would consult all relevant stakeholders and closely cooperate with the European Cybersecurity Certification Group, which is composed of Member State national supervisory authority representatives. The Group's role in advising ENISA would include ensuring a consistent application of the framework and reviewing existing European certification schemes. The Regulation also provides for an evaluation and review of the certification provisions within five years, to assess the impact, effectiveness and efficiency. The results of this would be reviewed by the European Parliament, Council, Management Board and would be made public.

2.27 The Minister does not mention that the comitology procedure that is proposed for the Group is the advisory procedure (this is specified in Article 55 of the Regulation).[11] This means that, even if the Group of national cybersecurity experts objects to a proposed cybersecurity certification scheme, the Commission will still be able to adopt it in the form of an Implementing Regulation.

ENISA's "operational" role

2.28 The Minister acknowledges concerns about the Regulation's description of some of its tasks as 'operational', a term which is normally used in the context of national intelligence activities, which are the preserve of Member States. The Minister states that some of the tasks, such as preparing technical situation reports and providing technical assistance, could be viewed as representing an extension of powers towards a more technical role, and that a number of large Member States were likely to object to these provisions. However, the Minister concludes from the detailed text of the Regulation and the Commission's own explanation, that the proposals do not envision any incursion into national competences, but to increase ENISA's role in enhancing cooperation and information sharing. The Government undertakes to cooperate with like-minded Member States so to ensure that any 'operational' role for ENISA remains a supporting but not a leading one.

JHA opt-in

2.29 The Government is of the view that the JHA opt-in does not apply in relation to the ENISA Regulation, as it does not cite a Title V TFEU legal base and does not appear to contain JHA content. The Regulation does not seek to impose any requirements on the police or any other law enforcement agency. The purpose of the Regulation is to maintain optimal cyber-security generally, rather than in areas of JHA specifically, and the Government therefore considers that the JHA opt-in does not apply.

11 http://europeanmemoranda.cabinetoffice.gov.uk/files/2017/09/12183–17.pdf.
See Article 4 of the … http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011R0182&from=EN for detail of advisory procedure.

Brexit implications: the Government's assessment

Third country participation in ENISA

2.30 The Minister states that the proposed new mandate for ENISA provides for continued participation between the Agency and competent authorities of third countries. It sets out that it may, subject to approval by the Commission, establish working arrangements with the authorities of third countries. Article 30[12] of the current legislation which underpins ENISA (EU No 526/2013 of the European Parliament and of the Council of 21 May 2013) also allows for the participation of third countries.

2.31 The Minister states that arrangements are made under the relevant provisions of these agreements, specifying the nature, extent and manner in which those countries will participate in the Agency's work, including provisions relating to participation in the initiatives undertaken by the Agency, financial contributions and staff. The only third country to play an active role in the ENISA management board is Norway, which plays an observer role at Management Board meetings attending and has no voting rights.

Third country participation in NIS Cooperation Group and CSIRT

2.32 Regarding the NIS Directive, the Minister states that it contains a provision (Article 13)[13] which allows associate membership of the NIS Cooperation Group by third countries through a third country agreement. Norway and Switzerland have participated in NIS Cooperation Group Meetings. If the UK is considered a third country after the UK exits the EU then the Government would need to seek associate membership of the NIS Cooperation Group if it wanted to continue to participate in this group.

2.33 The Minister notes that there is no equivalent provision for the Computer Security Incident Response Teams (CSIRT) network established by the NIS Directive. If the UK wanted to continue to participate in the CSIRT network as a third country it would therefore need to seek an alternative or bespoke solution to maintain access.

2.34 Additionally, the Minister notes that the NIS Directive states that any Digital Service Provider (DSP) established outside the EU, which offers services within the EU must designate a representative in one of the Member States where they provide services and comply with the oversight of that Member State's competent authority. For the UK this means that post-EU Exit, if the UK is considered a third country, all UK-established DSPs must designate a representative in another Member State if they want to offer services within the EU. They would then have to comply with that other Member State's security and incident reporting requirements, along with the UK's requirements (through the UK's national implementation of the NIS Directive).

2.35 The Government states that it will seek solutions to these issues through its negotiations with the EU on the future EU/UK relationship.

12 Article 30 states that "The Agency shall be open to the participation of third countries which have concluded agreements with the European Union by virtue of which they have adopted and applied Union legal acts in the field covered by this Regulation."

13 Article 13 states that "The Union may conclude international agreements, in accordance with Article 218 TFEU, with third countries or international organisations, allowing and organising their participation in some activities of the Cooperation Group. Such agreements shall take into account the need to ensure adequate protection of data."

Letter from the Minister of 25 January 2018[14]

2.36 As part of a forward look at the Bulgarian Presidency of the Council of the European Union, the Secretary of State at DCMS (Matt Hancock MP) states that the Presidency have indicated its aim to reach a General Approach within its Presidency.

Previous Committee Reports

Fourth Report HC 301–iv (2017–18), chapter 3 (6 December 2017).

14 Letter from the Minister, DCMS, to the Chairman of the European Scrutiny Committee (25 January 2018).

3 Digital Single Market: Free flow of data

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested
Document details	Proposal for a Regulation of the European Parliament and of the Council on a framework for the free flow of non-personal data in the European Union.
Legal base	Article 114 TFEU; ordinary legislative procedure; QMV
Department	Digital, Culture, Media and Sport
Document Number	(39028), 12244/17 + ADDs 1–3, COM(17) 495

Summary and Committee's conclusions

3.1 The European Commission has proposed a draft Regulation[15] which would prohibit "data localisation requirements"—rules introduced by Member States which require data processors to conduct data processing, and locate associated infrastructure, on national territory—because these requirements impede intra-EU trade and fragment the Single Market, increasing business costs and acting as a barrier to growth.

3.2 In the Government's Explanatory Memorandum[16] the (then) Minister of State at the Department of Digital, Culture, Media and Sport (Matt Hancock MP) said that the Government had specifically asked the Commission to bring forward a proposal to tackle data localisation measures, and was therefore supportive of EU action in this area, but also noted that further clarification was needed regarding various aspects of the proposal. In our first report on the proposal,[17] the Committee expressed regret at the lack of substantive analysis from the Government of the implications of EU exit for the proposal, and asked the Government to provide a wide range of clarifications about the implications of the text.

3.3 On 13 December 2017 the Minister informed the Committee[18] that the Estonian Presidency intended to seek an informal negotiating mandate from COREPER (the Committee of Permanent Representatives to the European Union) on 20 December 2017. The Minister did not provide the Committee with the clarifications that it had requested. In our subsequent report,[19] the Committee indicated that we would regard the agreement of a mandate at this stage, in the absence of the requested clarifications, as a deprecation of Parliamentary scrutiny. The Committee therefore requested that the Government instruct the Permanent Representation to request in COREPER that the decision be deferred until sufficient scrutiny of the proposed mandate had taken place, and that a general approach should be agreed in Ministerial Council in due course, rather than an informal mandate.

15 Proposal for a Regulation of the European Parliament and of the Council on a framework for the free flow of non-personal data in the European Union COM(17) 495.
16 EM from the Minister, DCMS, to the Chair of the European Scrutiny Committee (12 October 2017).
17 Second Report HC 301–iii (2017–18), chapter 4 (29 November 2017).
18 Letter from the Minister, DCMS, to the Chairman of the European Scrutiny Committee (13 December 2017).
19 Seventh Report HC 301–vii (2017–19), chapter 6 (19 December 2017).

3.4 An informal mandate[20] was agreed by COREPER on 20 December, meaning that the Council's position is now established in advance of negotiations with the European Parliament. The Minister's successor as Parliamentary Under Secretary of State (Margot James MP) informs[21] the Committee the final text of the mandate was in line with the UK position, with no new exemptions from the principle of the free movement of non-personal data being added to the text. The Minister states that the Government supported the adoption of the informal mandate as it did not want to obstruct the business of the Council. The Minister also provides detailed answers to the Committee's previous questions, including various clarifications regarding the draft Regulation.

3.5 **We regret the Government's failure to communicate to the UK's Permanent Representation our request that the agreement of an informal mandate in COREPER be deferred until we were provided with the necessary clarifications, and that a General Approach be agreed at a later date instead. In effect, the key stage of the legislative process for the purposes of parliamentary scrutiny has now concluded without Parliament being able to meaningfully exercise its scrutiny function. That a vote will eventually take place in the Ministerial Council at the end of the legislative process in no way mitigates this situation as there will be negligible scope at that late stage to influence the legal text, which will have been agreed by the Parliament and the Council in trilogue negotiations. The Department's handling of this proposal falls short of our expectations and deprecates parliamentary scrutiny. We note that this is not the first instance of such difficulties arising.[22]**

3.6 **The Committee notes the Government's assurance that the final text agreed in COREPER broadly retained the scope and ambition of the Commission text and that no further exemptions were added, as well as the Government's view that, post-withdrawal, the proposal will benefit many UK businesses with an EU presence, as it will remove artificial barriers to data flows and reduce the cost of providing data processing services. However, further clarification is needed regarding the new text on public sector data processing, as well as the effects of the Regulation on third country operators (see below). We note that if the Bulgarian Presidency succeeds in concluding negotiations with the European Parliament, the Regulation will apply to the UK before and during the envisaged Article 50 transition period, given that the Regulation will apply six months after its publication.**

3.7 **We seek further clarification regarding the following aspects of the informal mandate:**

- **the scope and effects of the provisions regarding public sector insourcing, as well as any other effects of Article 2(2)(b) as referenced in recital 7b; particularly whether these provisions constitute the retention of some form of exemption for public sector data processing;**
- **the extent to which the provisions in the draft Regulation apply to third country providers (the Minister states that "the Regulation would apply to businesses headquartered outside the EU without a secondary establishment**

20 General Secretariat of the Council to Permanent Representatives Committee, Proposal for a Regulation of the European Parliament and of the Council (19 December 2017).

21 Letter from the Minister, DCMS, to the Chair of the European Scrutiny Committee (18 January 2018) including an annex of responses to the Committee's questions.

22 Twenty-seventh report HC 71–xxix (2016–17), chapter 3 (18 January 2017).

within the EU, which are processing the non-personal data of a user residing or having an establishment in the EU"; however, Recital 8 of the mandate states that the draft Regulation "should therefore not apply to data processing taking place outside the Union and to data localisation requirements relating to such data");

- **although the draft Regulation will liberalise non-personal data flows both within the EU and with respect to third countries, we note that under the General Data Protection Regulation an adequacy decision from the European Commission (or other arrangement provided for in the GDPR) is necessary for businesses to transfer and process the personal data of EU citizens outside the EU. Given the mixed (personal and non-personal) nature of many data sets, it appears that, post-withdrawal, the ability of UK-based businesses to fully benefit from the draft Free Flow of Data Regulation will remain dependent on securing an ongoing basis for UK-EU *personal* data transfers. What is the Government's assessment of this point? and**

- **we ask for an update on the code of conduct on data porting that is under development. Please provide a summary of its key provisions and how it applies the principles of interoperability and open standards.**

3.8 **We retain the proposal under scrutiny. We ask the Government to respond to our queries by 28 March 2018. We also request an update in due course when the anticipated outcome of trilogue negotiations becomes clear, including an account of any changes that will negatively impact the UK when it leaves the EU, and, if appropriate, a request for a scrutiny waiver/clearance.**

Full details of the documents

Proposal for a Regulation of the European Parliament and of the Council on a framework for the free flow of non-personal data in the European Union: (39028), 12244/17 + ADDs 1–3, COM(17) 495.

Background

3.9 On 13 September 2017 the Commission adopted a proposal for a Regulation governing the free flow of non-personal data (hereafter 'the Regulation').[23] The draft Regulation proposed to:

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

- require Member States to repeal existing data localisation requirements which do not comply with the Regulation as adopted, and to notify the Commission of any draft data localisation requirements that are proposed in future;

- ensure that public bodies can access data on a cross-border basis for regulatory control purposes; and

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

- facilitate data portability in a business-to-business context, with a view to making it easier for data service users to switch data service provider, by requiring industry to develop a self-regulatory code of conduct for data porting.

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

3.11 In its Explanatory Memorandum,[24] the Government indicated its support for the proposal, but said that it would seek further clarification in relation to aspects of Article 4 (Free movement of data within the Union),[25] the scope of Article 5 (Data availability for competent authorities),[26] and aspects of Article 6 (Data porting).[27]

3.12 The Committee subsequently asked the Government for updates in relation to each of these points of clarification.[28] We also asked the Government whether it was confident that the proposed Regulation's provisions were sufficient to require Member States to repeal existing data localisation requirements other than where genuine public security grounds existed, or whether countries would be free to obstruct proper implementation of the Regulation once adopted on the basis of tenuous and weakly justified public security grounds.

3.13 On 13 December 2017 the (then) Minister of State for Digital at the Department of Digital, Culture, Media and Sport (Matt Hancock MP) wrote to the Committee[29] to indicate that the Estonian Presidency intended to seek an "informal [negotiating] mandate" from COREPER (the Committee of Permanent Representatives to the European Union) at its meeting on 20 December. The Minister did not provide the Committee with the requested clarifications, or answer the Committee's other questions. He indicated that there had been a push among some Member States to increase exemptions from the principle of the free movement of non-personal data, raising concerns that the proposal's liberalising effect might be diminished. He indicated that the Government would continue to support the Commission's proposal and to resist changes that could weaken its scope and impact. Clarification was sought from officials but these did not address any of the Committee's previous requests.

3.14 In our report on 19 December 2017[30] we stated that we could not support the Government instructing the UK's permanent representation to back the agreement of an informal mandate on the proposed regulation in COREPER, as none of the areas

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

25 Aspects of Article 4 on which clarification was sought include: the treatment of datasets that contain personal and non-personal data, and exempted and non-exempted data, including where these are difficult to separate out; the mechanism for assessing notified exemptions: the criteria, including any proportionality test, and the process in the event of a Member State challenging a negative decision; how the proposed notification system would capture localisation that occurs as a result of practices, guidance and procurement; and how the proposed transparency model will work in relation to sensitive data that is exempted.

26 Aspects of the scope of Article 5 where the Government sought further clarification included examples of the information that would apply, as well as the degree to which it would support public authorities seeking to access data held in non-public organisations.

27 Aspects of Article 6 on which further clarification was sought included the evidence in the impact assessment to support action on data porting; how the proposed code of conduct would have the desired impact on facilitating switching and increased market competition; and what appeared to be an ambitious 12-month deadline.

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

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

30 Seventh Report HC 301–vii (2017–19), chapter 6 (19 December 2017).

where further clarification was required had been addressed by the Government, little information had been provided to the Committee about the proposed mandate, and the Government had not made it clear on what basis it would instruct the permanent representation to vote.

3.15 For these reasons, the Committee said that agreeing a mandate for the proposed regulation in COREPER "would seriously deprecate parliamentary scrutiny of the proposal" and asked the Government instruct the Permanent Representation "to request in COREPER that the decision be deferred until sufficient scrutiny of the proposed mandate has taken place, and that, instead of an informal mandate, a general approach be agreed in Ministerial Council in due course".

Letter from the Minister on 18 January 2018[31]

3.16 On 18 January 2018 the Parliamentary Under Secretary of State at the Department of Digital, Culture, Media and Sport (Margot James MP) wrote to inform the Committee that the Estonian Presidency achieved its ambition to obtain an informal mandate for trilogue discussions at the 20 December meeting of COREPER. The Minister does not explicitly acknowledge the Committee's request that the Government instruct the UK's permanent representation to seek to defer a decision and to push for a general approach to be agreed in Ministerial Council. Instead, the Minister explains that:

> "The decision to accelerate the adoption of an informal mandate was made by the Presidency on the basis of support expressed by the majority of ministers during a debate at a meeting of the Telecommunications Council on the 5 December. The UK has been a consistent supporter of action on the free flow of non-personal data and to tackle data localisation in the EU and consider this file to be of significant importance to driving future trade and the development of the digital economy. Whilst we recognise that it would have been preferable to have more time to work through the file, the Government supported its speedy adoption, as we did not want to obstruct the business of the Council on what is an important regulation."

3.17 The Minister stated that the UK supported the informal mandate for trilogue as the Government believed the final tabled document did not include any new text that went against the UK's position on this file, and because the final text broadly retained the scope and ambition of the Commission text and resolved many of the points of clarification set out in the explanatory memorandum of 12 October.

3.18 The Minister also enclosed a copy of the text of the mandate, and an annex which systematically answers the Committee's previous questions. Key clarifications provided in the annex cover the following aspects of the Regulation:

Article 4 (Free movement of data within the Union)

- *Mixed data sets*—It is explained in Recital 10 of the informal mandate that, in the case of mixed (personal and non-personal) data sets, personal data falls

31 Letter from the Minister, DCMS, to the Chair of the European Scrutiny Committee (18 January 2018) including an annex of responses to the Committee's questions.

under the GDPR, whilst non-personal falls under this proposed Regulation. The two Regulations are intended to provide a coherent set of rules to cater for the free movement of different types of data.

- *Notifications of data localisation measures*—The mechanism for assessing notifications is via the process set out in Articles 5 and 7 of the Transparency Directive (2015/1535). The key requirements are that: Member States inform the Commission of any proposed new law/regulation or administrative practice where they intend to mandate data localisation; once notified, the measure enters a period that usually lasts for three months, during which the measure cannot be enacted, allowing the Commission and other Member States to ask questions and raise concerns. The Government states that it is not clear whether or how the Commission might be able to stop a Member State from acting against that decision, other than by pursuing the legal ramifications of breach of obligations under the regulation. The Government commits to pursue further clarification on this point.

- *The exception for public security*—Any notification would need to demonstrate proportionality against the public security exemption, now defined in text at Recital 12 and 12a. This states that public security "covers both the internal and external security of a Member State, as well as issues of public safety, in particular to allow for the investigation, detection and prosecution of criminal offences. It presupposes the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society, such as a threat to the functioning of institutions and essential public services and the survival of the population, as well as by the risk of a serious disturbance to foreign relations or the peaceful coexistence of nations, or a risk to military interests". This sets a high threshold for such exceptions, which may reassure the Committee that it does not represent a route for Member States to continue to apply data localisation measures.

Article 5 (Data availability for competent authorities)

- The Government clarifies that this Article gives competent authorities the ability to request from another Member States access to data where they have exhausted all other mechanisms to access. Access may not be refused on the basis that the data is stored in another Member State, but may be refused for other reasons such as cost. The Government explains that this Article does not extend existing powers of access, but gives Member States a further route to seek access. It only obliges the Member State in receipt of a request to provide a response to the request.

Article 6 (Porting of Data)

- Following Member State feedback, the code of conduct requirements have been reduced to a principle based approach. The Code of Conduct will now be developed on the principles of interoperability and open standards. It now aims to give users minimum information requirements in contracts, best practice and certification standards across industry. In the informal mandate, the code of conduct review timeline has been extended to two years from the date of

application of the regulation. The Minister states that the Government believes that the proposed industry-led code of conduct is a proportionate approach to the identified issues.

Third country and EU exit implications

- The Minister clarifies that "the Regulation applies to businesses headquartered outside the EU without a secondary establishment within the EU, which are processing the non-personal data of a user residing in the EU". However, the text of the mandate states that the Regulation does not apply to data processing taking place outside the EU, and the Minister also states that " the proposed Regulation is a piece of Single Market legislation, so its provisions only apply to EU Member States", and that the UK's relationship with the EU on this issue is a matter for negotiations. Although the drafting of the Regulation is not particularly clear in this respect, it appears likely that the intention is that the Regulation only applies where data processing organisations conduct the data processing within the Union. Given the contradictions in the Minister's letter, further clarification from the Government is necessary on this point.

- The Minister also states that the regulation aims to remove barriers to trade and that UK businesses will benefit from additional and more flexible access to the EU market, even once the UK assumes third country status. Through the prohibition of data localisation measures, the Government expects that costs will be driven down for business, but particularly for SMEs, through new access to EU markets and seamless data mobility.

3.19 On 25 January 2018, as part of a letter on the DCMS-related priorities of the Bulgarian Presidency, the Secretary of State (Matt Hancock MP) informed the Committee that the Free Flow of Non-Personal Data regulation would be a high profile file during the Bulgarian Presidency, and that the Bulgarians have stated their expectation that the file would be brought to a conclusion during their Presidency.

Previous reports

Seventh Report HC 301–vii (2017–19), chapter 6 (19 December 2017); Second Report HC 301–ii (2017–19), chapter 4 (29 November 2017).

4 Mandatory transparency register for EU Lobbying

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested
Document details	(a) Proposed Interinstitutional Agreement on a Mandatory Transparency Register; (b) Proposed Council Decision on the regulation of interactions between officials of the General Secretariat of the Council and interest representatives.
Legal base	(a)Article 295 TFEU and Article 106(a) EURATOM;—(b) Article 240 TFEU;—; simple majority
Department	Exiting the European Union
Document Numbers	(a) (38141), 12882/16 + ADD 1, COM(16) 627; (b) (39459), 15336/17,—

Summary and Committee's conclusions

4.1 Document (a) is a proposal for an Interinstitutional Agreement (IIA). It aims to require lobbyists ("interest representatives"[32]) to register before lobbying all of the main EU institutions. The current register is only voluntary and does not extend to interactions with the Council. A full account of the proposal and the Government's views of the proposal are set out in our first Report chapter of 16 November 2016.[33]

4.2 Document (b) is a proposed Council Decision which sets out the condition of prior registration to the Commission's proposal for an institutional transparency register for interest representatives wishing to interact with the Council.

4.3 The draft Decision sets out that the Council's position that prior registration of interest representatives to the transparency register should apply to the Council in the following areas: meetings with the Secretary-General and Director Generals of the General Secretariat; participation in thematic briefings (meetings organised by the Council Secretariat to update third parties on progress of various initiatives); participation by interest representatives acting as speakers in public events organised by the General Secretariat; and, lastly, access to Council premises.

4.4 A previous draft of the Inter-Institutional Agreement (IIA) had made meetings between interest representatives and the Ambassador of the current or forthcoming Presidency of the Council of the EU, as well as their deputies in the Committee of Permanent Representatives (COREPER), conditional upon registration. This has not been carried forward into the Council Decision, and the Council has amended the IIA so that Member States are merely encouraged to make interactions with their Permanent Representatives and Deputy Permanent Representatives conditional upon registration.

32 Natural or legal persons engaging interacting with the Council, Commission or Parliament with the intention of influencing the development of policy or legislation, or the decision-making processes within the relevant institution

33 Eighteenth Report, HC 71–xvi (2016–17), chapter 6, (16 November 2016)

4.5 The Government reports, in correspondence we have already considered and in a letter of 5 February from the Minister of State for Exiting the European Union (Lord Callanan), that both the Council and EP have agreed their own positions on the IIA and that preparations are being made for tripartite negotiations on the IIA. In addition, that the Council has proposed to narrow how pre-registration of lobbyists would apply to Council and COREPER activities. As a result, the newly proposed Council Decision (document (b)) has also been deposited for scrutiny by the Government at our request and we now report the Government's views on that document too.

4.6 **We thank the Minister for his helpful response and note his apologies for any scrutiny lapses. We look forward to the Minister updating us in due course and ask that when he does, he should bear in mind the previous concerns we have expressed, namely:**

i) **the scope of impact of the register on the Council and COREPER; and**

ii) **the operation of the register during a transition/implementation period and after Brexit.**

4.7 **We retain both documents under scrutiny pending the Minister's further updates.**

Full details of the documents

(a) Proposal for an Interinstitutional Agreement on a Mandatory Transparency Register: (38141), 12882/16 + ADD 1, COM (16) 627; (b) Proposed Council Decision on the regulation of interactions between officials of the General Secretariat of the Council and interest representatives: (39459), 15336/17,—.

Previous scrutiny

4.8 When the previous Committee first reported on this document in November 2016, it asked the Government:

- Whether it was likely that the register would take effect before Brexit;
- If so, whether it might "assist the transparency of the negotiations and possibly make it easier for Parliament to assess the extent to which influence is being sought on behalf of various sectoral interests" based either in the UK or across the EU.

4.9 Subsequent Ministerial letters have been considered by us by way of correspondence. We summarise that correspondence here before turning to the current letter from the Minister of 5 February.

The Minister's letter of 7 December 2016

4.10 The Minister at the time (Mr David Jones)[34] wrote in response in December 2016. He thought it likely that the register could come into force at some point during the Brexit negotiations, but would keep us updated on this issue. He noted our comments about the impact of the register on the transparency of the negotiations.

The Minister's letter of 21 December 2017

4.11 The current Minister of State for Exiting the European Union (Lord Callanan) wrote to us over a year later, apologising for the delay in updating us.

4.12 He added that:

- The proposed IIA had been revised following Working Group sessions.
- As a result of the Council producing its own text on 30 June, the scope of the proposal in relation to the Council had now narrowed to:

— meetings with the Secretary General and Director Generals of the General Secretariat (GS);

— participation in thematic briefings (meetings organised by the GS to update third parties on progress of initiatives);

— participation in events organised by the GS with interest representatives as speakers; and

— access to Council premises.

- Unlike the original proposal, the current text did not cover third party interventions with Member State ambassadors and COREPER deputies.

4.13 He added that the EP's negotiating mandate, adopted in June, was based on three principles:

— The widest possible scope of application for EU institutions and bodies, including meaningful participation by the Council;

— A comprehensive, clear framework for regulation of "interest representation" activities; and

— Structures and resources guaranteeing effective implementation.

4.14 The Minister further indicated that the UK agreed with the EP's principles.

4.15 He then updated us on progress on the proposal at Council and COREPER level. He said that following working group discussions and a November update to the Council during the Estonian Presidency, COREPER approved a mandate for informal trilogue discussions on 6 December.

4.16 Finally, he explained that he had enclosed a copy of the mandate which was marked "limité" and so shared in confidence. He expects the proposal to be voted on in the General Affairs Council "in the New Year".

Our letter of 17 January 2018

4.17 When we responded to the Minister we noted the Minister's apology for the delay in updating us.

4.18 However, we find other aspects of the Government's scrutiny handling of this document to be unsatisfactory:

- It would have been better to have written to us in advance of the agreement of the mandate in COREPER so that any views of the Committee could have been taken into account. In any case, it is unclear why a letter dated 21 December encloses a "LIMITÉ" version of the COREPER mandate when the "LIMITÉ" marking had been lifted and the documents made public on 6 December.
- Given the now public nature of the mandate, we would like a much fuller explanation of the substance of that mandate and of any text going to the Council for adoption so that we could report further to the House in advance of final adoption.
- Transparency of any lobbying by third parties of the Council or COREPER could be important during a post-Brexit transition period when the UK itself is expected to have no formal influence on Council decision-making. We asked the Minister to address this issue when next updating us.

4.19 The formal deposit of the proposed Council Decision annexed to the proposed IIA text was subsequently requested.

The Minister's letter of 5 February 2018

4.20 The Minister now responds, thanking us for our letter of 17 January. As he is responding to our criticism of the handling of the scrutiny of these documents, we reproduce the rest of the letter in full:

> "I would like to reassure you that we remain committed to keeping Parliament updated on ongoing EU business. I apologise that the limité marking on the Coreper negotiating mandate had not been removed due to an administrative oversight.
>
> "As the Committee is aware, on 6 December 2017, Coreper agreed to the draft Council Decision on proposals for a mandatory transparency register. This draft Decision sets out where the Council has agreed to apply the condition of prior registration for interest representatives wishing to interact with the Council. I will be laying an EM in Parliament on the draft Decision shortly. The Council has decided that interest representatives will be required to sign up to the transparency register should they wish to, interact with the Secretary-General and Director Generals of the General Secretariat of the Council; participate in thematic briefings organised by the General Secretariat of the Council; participate, as speakers, in public events organised by the General Secretariat of the Council; and have access to Council premises. Article 7 of the draft Council Decision sets out that interest representatives' access to Council documents will continue to be regulated by Regulation (EC) No 1049/2001.
>
> "The Council's amendments to Article 5 of the proposed Inter-Institutional Agreement explains that it is for each of the institutions to set out which actions it deems conditional upon prior registration to the transparency

register. A Code of Conduct which outlines the rules and principles to which registrants must comply is attached to the draft Decision as an annex. The Bulgarian Presidency held an informal meeting on 29th January with the European Parliament and the Commission to agree a way forward for tripartite discussions. We will update your Committee again once tripartite discussions progress.

"In response to your questions about the implementation period, you are correct that once the UK becomes a third country, the UK will not participate or vote in the Council. However, separate from the time LIMITÉ implementation period and the UK's decision to leave the EU, UK business that wish to interact with the EU institutions will continue to be subject to the terms of the transparency register. As set out in Article 4 of the Commission proposals, public authorities of Member States (including their permanent representations) are not required to register prior to interactions with the Council—nor are the public authorities of third countries (including their diplomatic missions and embassies).

"On the Commission proposals more broadly, the register's purpose is to make the work of the EU more transparent to the people it serves—this is something which the Government supports and, in working group discussions, no Member State has raised a serious objection to the proposed IIA. As set out in Article 5 of the proposed IIA, as amended by the Council, it is for each of the three institutions to inform the Secretariat to the Register which activities it wants to make conditional on prior registration. The proposal also explains that it is for each institution to lay down a Code of Conduct to which registrants must comply.

"The Council has also amended the IIA so that it invites Member States holding the Presidency of the Council, to make certain interactions, with their Permanent and Deputy Permanent Representatives and interest representatives conditional upon prior registration of such representatives in the register (Article 13(1)). Given the UK will not hold the Presidency before our exit from the EU, this Article will not apply to the UK. Annexes I, II and III to the proposal set out the; classification of registrants; information to be provided by registrants and finally; investigative proceedings, respectively".

The Government's view of document (b)

4.21 In an Explanatory Memorandum dated 6 February 2018, the Minister of State at the Department for Exiting the European Union (Lord Callanan) comments on the policy implications of the proposed Council Decision as follows:

"In practice, the draft Decision means that UK interest representatives will, in order to engage with the Council in those circumstances set out in articles 3–6 of the draft Decision, be obliged to meet the condition of prior registration to the transparency register.

"While the draft Decision requires prior registration for a less extensive range of interactions with the Council than the original IIA proposed,

> the Government is of the view that the revised proposal still constitutes meaningful Council participation. The Council, by removing the application to Permanent and Deputy Permanent Representatives, does not strictly, limit the application of the register itself, rather it prevents the register from applying to Member States without their express opt-in.
>
> "As we set out in our EM of 25 October 2016 on the original Commission proposal, the Government is also conscious that the register should not impose unnecessary restrictions on the everyday conduct of business or result in excessive regulatory burdens for businesses.
>
> "While it is unclear when precisely the Inter-Institutional Agreement will come into force, the UK's exit from the EU and the Government's proposed implementation period will not affect the requirement for UK organisations' to comply with the terms of the IIA. The classification of registrants is set out in Annex I to the Commission's proposals and largely, covers lobbyists".

4.22 On the progress of the proposal, the Minister says that in advance of tripartite discussions, there was an informal meeting on 29th January between the Presidency, the EP and Commission to agree how best to take this proposal forward.

Previous Committee Reports

(a) Eighteenth Report, HC 71–xvi (2016–17), chapter 6, (16 November 2016); (b) None.

5 Rule of Law in the EU and Poland

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Foreign Affairs Committee, the Joint Committee on Human Rights and the Justice Committee
Document details	Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law.
Legal base	Article 7(1) TEU; majority (four fifths); EP consent
Department	Exiting the European Union
Document Number	(39401), 16007/17, COM(17) 835

Summary and Committee's conclusions

5.1 On 20 December, the European Commission announced that it was initiating the Article 7(1) TEU process against Poland for breach of the rule of law. This followed an ongoing dispute between the governing Law and Justice party (PiS) in Poland and the Commission over judicial reforms which the Polish Government began in 2015. The long history of those reforms and the dispute between the EU and Poland is set out in "Background" section of this Report chapter. At the same time as publishing a proposed Article 7(1) Council Decision which, if adopted, would result in a determination of a clear risk of serious breach of the rule of law by Poland, the Commission published its Fourth Rule of Law Recommendation. If Poland complies with that Recommendation to the satisfaction of the Commission within three months, the proposed Council Decision will not progress further.

5.2 The Commission decided to initiate the Article 7(1) TEU process for the first time in the EU's history, partly because it had exhausted a preliminary process called the "Rule of Law" Framework[35] which it had in turn initiated in January 2016. The history of the adoption by the Commission of "Rule of Law" Framework and its scrutiny by our predecessors is set out in the "Previous Scrutiny" section of this Report chapter.

5.3 According to Article 7(1) TEU, on a reasoned proposal by one third of Member States,[36] by the European Parliament (EP) or by the Commission, the Council, acting by four-fifths majority[37] and after obtaining the consent of the EP,[38] may determine that there is a clear

35 Communication from the Commission to the Council and European Parliament: A new EU Framework to strengthen the Rule of Law, COM 14 (158).

36 Poland, as the Member State to whom the proposed Decision is addressed, will not participate in any votes under the Article 7 TEU procedures.

37 The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of Article 7 are laid down in Article 354 TFEU.

38 Parliament's consent requires a two-thirds majority of the votes cast, representing an absolute majority of all MEPs (Article 354(4) TFEU).

risk of a serious breach by a Member State of the EU values referred to in Article 2 TEU.[39] Those values include respect for the rule of law. Before making such a determination, the Council must hear from the Member State in question and may make recommendations.

5.4 There is no automatic escalation from such a determination under the so-called preventive mechanism of Article 7(1) TEU to the imposition of sanctions on a Member State, such as losing its right to vote in the Council (the sanctions mechanism).[40] For that to happen:

— The European Council,[41] after obtaining the consent of the EP,[42] would have to unanimously determine a serious and persistent breach by a Member State of the Article 2 values (Article 7(2) TEU);[43] and

— The Council would then have to decide,[44] by QMV to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including voting rights in the Council (Article 7(3) TEU).

5.5 The Prime Minister visited Poland on 21 December, following the Commission's publication of its fourth Rule of Law Recommendation and the proposed Article 7(1) TEU Council Decision. When asked to comment, she said: "These constitutional issues are normally, and should principally be a matter for the individual country concerned". She added "Across Europe we have collective belief in the rule of law". She welcomed "… the fact that Prime Minister Morawiecki has indicated that he will be speaking with the European Commission" and hoped " that will lead to a satisfactory resolution".[45]

5.6 The Minister of State for Exiting the European Union (Lord Callanan) now says that the Government places great importance on the rule of law. He notes that all Member States have a responsibility to uphold "a set of common values" and should respect the rule of law. However, the Government believes that constitutional arrangements are primarily a matter for national governments. As Poland now has three months to consider the Commission Reasoned Proposal and its fourth Rule of Law Recommendation, the Government does not want to prejudge the process and wishes to consider the Polish Government's response to the Commission's proposal.

5.7 **We thank the Minister for his Explanatory Memorandum which is particularly helpful in setting out the background to the dispute between the European Commission and Poland.**

39 The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

40 Nor is the Article 7(2) and (3) TEU two-stage sanctions mechanism dependent on an Article 7(1) TEU determination. The two mechanisms are independent of each other.

41 Acting on a proposal from one third of Member States or the Commission, but not by the EP.

42 By a two-thirds majority of the votes cast and absolute majority of MEPs.

43 The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations"

44 Without any involvement of the EP.

45 See Reuters, 21 December 2017.

5.8 **The resort to the Article 7(1) TEU process is a highly significant development in the history of the EU. However, we consider that there is time yet for the position to be resolved between Poland and the Commission because:**

- **it does not seem likely that the matter will be pressed immediately to a vote in either the Council or the EP as there is a three-month grace period for Poland to respond to the recommended corrective action outlined in the Commission's Fourth Rule of Law Recommendation published on 20 December, at the same time as this document; and**
- **the Article 7(2) and (3) TEU procedures which can result in a decision to suspend the Council voting rights of the Member State in question have not been activated, nor it is automatic that this would follow a determination of a "clear risk of a serious breach" of the rule of law by Poland under the Article 7(1) TEU process.**

5.9 **We will, of course, require the Minister to indicate to us well in advance of any vote in Council how the UK intends to vote, should the process progress to that stage in due course. Whilst we do not think it is for us to express any views about the Polish Government reforms and Poland's compliance with Article 2 TEU values, we would be interested to learn the reasons for the UK's voting intention and consider that they would also be of wider interest to the House.**

5.10 **However, in the meantime, we ask the Government to register our interest in the wider questions posed by the EU institutions and individual Member States having to make judgments about the compliance of other Member States and third countries with values such as the rule of law or human rights. This may be a feature of the UK post-Brexit relationships. For example, we will be interested to see whether the UK will be either open or averse to including any human rights conditionality in either its future trading and cooperation relationships with the EU and with other countries. We acknowledge the potential wider interest of the House in these questions, as evidenced by a report of the previous Joint Committee on Human Rights on the "Human Rights implications of Brexit".[46] This touched on human rights clauses in EU-third country Free Trade Agreements (FTAs) and latterly, in Strategic Partnership Agreements (SPAS).**

5.11 **Pending further developments, we retain the document under scrutiny. We draw it and the chapter to the attention of the Foreign Affairs Committee, the Joint Committee on Human Rights and the Justice Committee.**

Full details of the documents

Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law: (39401), 16007/17, COM (17) 835.

46 Sixth Report, HC 695 HL88 (2016–17), 19 December 2016.

Background

5.12 The Government has provided a comprehensive history to the Polish Government's reforms affecting the Polish Judiciary, the Polish Constitutional Court and freedom of the press. It is reproduced here, but summarised where possible.

5.13 Following the 2015 General Election, PiS introduced legislation regarding the composition and procedures of Poland's Constitutional Tribunal. The Tribunal is responsible for judging whether statutory legislation complies with the Polish Constitution. It is composed of 15 judges, each chosen by parliament for a nine-year term. Its key terms of reference are set out in the Constitution, while the details of its operation are determined by legislation. The Tribunal ruled these changes to its composition and procedures were unconstitutional. This led to an impasse after the Polish Government refused to publish the rulings so preventing those judgments from taking legal effect. Both internal and international criticism of the Polish Government followed.

5.14 The Commission initiated a dialogue under the Rule of Law Framework (see "Previous Scrutiny" below) in January 2016. Under the Framework the Commission and Polish Government exchanged opinions and the Council was regularly updated. The Venice Commission, a Council of Europe body consisting of Constitutional law experts, also issued an opinion in October 2016 on the Constitutional Tribunal reforms. This concluded that despite some Commission recommendations being reflected, the reforms would 'considerably delay and obstruct the work of the tribunal' as well as 'undermine its independence by exercising excessive legislative and executive control over its functioning'.

5.15 In Spring 2017 the Polish Government proposed further legislation aimed at judicial reform:

- to change the selection process for membership of the Polish judicial appointments body, the National Judicial Council;
- to give the Justice Minister the ability to dismiss Court Presidents who have the task of supervising judges' work, allocating cases and organising courts; and
- to terminate the tenure of all Supreme Court judges, unless decided by the Justice Minister that they could stay in office.

5.16 The Polish Government argued these reforms were necessary to address corruption and inefficiency in the Polish Judicial System, a legacy from communism. They considered the reforms to be in line with valuing the rule of law and the independence of the judiciary and judicial reform process to be a matter for Member States. The Commission believed that these reforms, in addition to the changes to the Constitutional Court, had serious implications for the rule of law in Poland and issued recommendations on how they could be amended to address their concerns.

5.17 The bills relating to the National Judicial Council, Court President and Supreme Court reform all passed through the Lower and Upper Houses of the Sejm (Polish Parliament). On 24 July 2017 President Duda announced he would veto the reforms to the National Judicial Council and Supreme Court, saying "these would not strengthen a sense of justice", but signed into law the third Bill reforming the role of Court Presidents. President Duda agreed that the judiciary needed "wise" reforms, and said that he would personally draw up new legislation to put to Parliament. On 27 September 2017, the President presented his proposals. The changes he proposed included:

- that instead of being retired immediately (though at the Justice Minister's discretion), judges should retire at 65, subject to extension by the President;
- the 15 members of the National Judicial Council, currently elected by their peers, would be decided by a three-fifths majority in parliament, rather than the originally proposed simple majority; and
- further, candidates for these positions must be nominated by either a group of at least 25 judges or a group of at least 2000 citizens.

5.18 President Duda also proposed the addition of lay judges, chosen by the Senate to sit on two additional chambers of the Supreme Court:

- The 'Chamber of Extraordinary Control and Public Affairs' which would, among other things, deal with a new type of complaint called an 'extraordinary appeal'. The 'extraordinary appeal' allows a complaint against any court ruling from any level within five years. This would be available to the Prosecutor General, Chairman of Financial Supervisory Authority, Financial Ombudsman, Commissioner for Patient's Rights, Commissioner for Human Rights or children's rights as well as a group of 20 senators or 30 MPs. This Chamber would also decide on issues such as validity of elections.
- A 'Disciplinary Chamber', which would hear complaints against judges.

5.19 On 8 December 2017, reflecting a compromise that had been reached, the Lower House of the Sejm adopted the revised National Judicial Council and Supreme Court bills, although with some Government amendments. Both bills have been signed into law by President Duda and accepted amendments include:

- each party sitting in Parliament is entitled to at least one candidate for a member of the National Judicial Council; and
- 15 out of 25 members of the National Judicial Council would be decided on by three-fifths majority in parliament, and in the case of a stalemate, a simple majority would decide. The party with the voting majority could appoint at most 9 members, while the opposition parties could appoint a maximum of 6 members.

5.20 On the 8 December 2017, the Venice Commission of Constitutional Law adopted a legal opinion, which the European Commission had asked them to conduct, on the reforms to the Supreme Court, National Judicial Council and Court Presidents. They concluded that the Bills put the independence of the Polish judiciary at serious risk. Other international authorities such as the Organization for Security and Co-operation in Europe voiced similar concerns.

5.21 The European Commission announced on 20 December 2017 that they had concluded that there was a clear risk of a serious breach of the rule of law in Poland. The Commission therefore:

- proposed the current Article 7(1) Council Decision; and
- issued a fourth Rule of Law Recommendation.

5.22 The Recommendation invites the Polish Government to respond within three months to the following individual recommendations to:

- amend the Supreme Court law, not apply a lowered retirement age to current judges, remove the discretionary power of the President to prolong the mandate of Supreme Court judges, and remove the extraordinary appeal procedure, which includes a power to reopen final judgments taken years earlier;
- amend the law on the National Judicial Council, not terminate the mandate of judicial members of the Council, and ensure that the new appointment regime continues to guarantee the election of judicial members of the Council by their peers;
- amend or withdraw the law on Ordinary Courts Organisation, to remove the new retirement regime for judges including the discretionary powers of the Minister of Justice to prolong the mandate of judges and to appoint and dismiss Presidents of Courts;
- restore the independence and legitimacy of the Constitutional Tribunal, by ensuring that its judges, President and Vice-President are lawfully elected and by ensuring that all its judgements are published and fully implemented; and
- refrain from actions and public statements which could further undermine the legitimacy of the judiciary.

5.23 Polish Prime Minister Morawiecki and President Juncker met in Brussels on 9 January 2018 and discussed the issue in what were described as constructive discussions. Both sides made a public commitment to dialogue and agreed to meet again before the end of February.

Previous scrutiny

5.24 In March 2017, the previous Committee cleared from scrutiny the Commission's Rule of Law Framework[47] after holding it under scrutiny since 2014. The Framework was produced in response to the concern of the European Parliament and some Member States about various developments in Hungary, Romania[48] and even France.[49] It seeks to resolve such future threats to the rule of law before conditions are met for activating the procedures in Article 7 TEU in a three-stage process involving:

- an initial Commission assessment of whether there is a systematic threat to the rule of law, and after dialogue with the Member State, the issuing of a "rule of law" opinion substantiating its concerns;
- a Commission Recommendation addressed to the Member State if the situation remains unresolved, requesting that the Member State remedies the problems identified within a fixed period; and
- a follow-up to the Commission Recommendation and in the absence of a satisfactory outcome, possible resort to the Article 7 TEU procedure.

47 (35878), 7632/14 + ADD 1, COM (14) 158. Cleared in Thirty-fifth Report, HC 71–xxxiii (2016–17), chapter 13 (15 March 2017).

48 In 2011 the Hungarian Government's mandatory early retirement policy for the judiciary and in 2012 Romanian Government's non-compliance with key judgments of its Constitutional Court.

49 In summer 2010, the French authorities' policy of collective deportations of EU citizens of Roma ethnicity.

5.25 When the Framework document was first scrutinised by a previous Committee, it referred the document for debate on 7 May 2014. In so doing, it highlighted the potentially wide scope of the concept of the rule of law envisaged, the lack of oversight of the Commission when applying the process and the possibility of the Framework's extension in future to wider Article 2 TEU values. It thought that altering the threshold in Article 7, should be a matter for Treaty change and the collective political will of the Member States. The Framework has not been formally adopted by the Member States, who instead agreed to participate in an annual Rule of Law Dialogue. In addition, a Council Legal Service opinion was made public on the Council's website, expressing the view that the Commission never had legal competence to adopt the Framework.

5.26 In the light of the Referendum, the debate recommendation was rescinded by the preceding Committee. However, it was kept under scrutiny because of the use of the Framework to address developments in Poland concerning the constitutional court and judiciary and freedom of the press.

5.27 The document was only cleared in March 2017 once the Government produced a long-overdue response on what progress had been achieved under the Framework.

The Government's view

5.28 In an Explanatory Memorandum of 19 January 2018, the Minister of State at the Department for Exiting the European Union (Lord Callanan), says:

> "The Government places great importance on respect for the rule of law. The UK has a proud history in encouraging, respecting and promoting the rule of law and our independent judiciary is universally respected. The rule of law and an independent judiciary are cornerstone values of the United Kingdom. They are essential principles for economic prosperity and the protection of individuals. The UK is a strong voice on the global stage with respect to importance of the rule of law and an independent judiciary.
>
> "Relations between the United Kingdom and Poland are strong and broad, covering security issues such as defence, foreign policy and law enforcement cooperation as well as economic cooperation through trade and investment. London hosted the Polish Defence and Foreign Ministers in October 2017 whilst in December 2017 the Prime Minister and a number of Cabinet Ministers represented the UK at the Inter-Governmental Consultations between the UK and Polish Governments in Warsaw. Both the Prime Minister and Foreign Secretary discussed the rule of law with their Polish counterparts during the IGC.
>
> "The Government notes, and is considering, the Commission's Reasoned Proposal and Venice Commission Legal Opinion on the issue of the rule of law in Poland. All Member States have a responsibility to uphold a set of common values and should respect the rule of law and cultivate a society where it thrives. However, the Government believes that constitutional arrangements are primarily a matter for national governments.

> "Article 7 of the TEU provides for the Polish Government to present its views and the Commission has given the Government three months to respond to its most recent Rule of Law recommendations. The Government does not want to prejudge this process and wishes to consider the Polish Government's response to the Commission's proposal.
>
> "The Government maintains its belief that the best resolution is one that is mutually agreed by both Poland and the Commission. We urge both parties to fully engage with one another within the three-month window, given by the Commission, in substantive, sustained and constructive dialogue with the aim of reaching a common understanding on how to resolve the issue".

Previous Committee Reports

None, but see (35878), 7632/14: Thirty-fifth Report, HC 71–xxxiii (2016–17), chapter 13 (15 March 2017); Thirty-ninth Report HC 219–xxxvii (2014–15), chapter 3 (24 March 2015); Thirty-sixth Report HC 219–xxxv (2014–15), chapter 1 (11 March 2015); Forty-eighth Report HC 83–xliii (2014–15), chapter 1 (7 May 2014).

6 Economic and Monetary Union: reform

Committee's assessment	Politically important
Committee's decision	(a), (b), (d), (e), (f) and (g) Cleared from scrutiny; (c) Not cleared from scrutiny; further information requested
Document details	(a) Reflection Paper on the Deepening of the Economic and Monetary Union; (b) Communication from the Commission: Further Steps Towards Completing Europe's Economic and Monetary Union—a Roadmap; (c) Proposal for a Council Regulation on the establishment of the European Monetary Fund; (d) Proposal for a Regulation amending Regulation (EU) 2017/825 to increase the financial envelope of the Structural Reform Support Programme and adapt its general objective; (e) Communication from the Commission: A European Minister Of Economy and Finance; (f) Proposal for a Council Directive laying down provisions for strengthening fiscal responsibility and the medium-term budgetary orientation in the Member States; (g) Communication from the Commission: new budgetary instruments for a stable Euro Area within the Union framework
Legal base	(a), (b), (e), (g):—; (c) Article 352 TFEU; special legislative procedure; unanimity; (d) Articles 175 and Article 197(2) TFEU; ordinary legislative procedure; QMV; (f) Article 126(14) TFEU; special legislative procedure; unanimity
Department	Treasury
Document Numbers	(a) (38795), 9940/17, COM(2017) 291; (b) (39353), 15653/17, COM(2017) 821; (c) (39348), 15664/17, COM(2017) 827; (d) (39349), 15663/17, COM(2017) 825; (e) (39351), 15655/17, COM(2017) 823; (f) (39350), 15660/17, COM(2017) 824; (g) (39352), 15654/17, COM(2017) 822

Summary and Committee's conclusions

6.1 The EU's "Five Presidents Report" of June 2015 called for further steps to strengthen the institutional governance and economic resilience of the Eurozone. It included recommendations to improve the single currency area's financial stability, fiscal prudence, economic convergence and institutional governance. Based on these objectives, the European Commission published a White Paper on "completing Europe's Economic and Monetary Union", accompanied by several concrete legislative proposals, in December 2017.[50]

50 See https://ec.europa.eu/commission/publications/completing-europes-economic-and-monetary-union-factsheets_en.

6.2 As we have set out in more detail in "Background" below, the most notable features of the Commission's proposals are the transformation of the existing European Stability Mechanism for Eurozone countries in financial difficulty into a European Monetary Fund (EMF); the integration of the 2011 "Fiscal Compact" on budgetary stability into EU law; and a discussion on the possible creation of a "European Minister of Economy and Finance". The Commission also announced that it will table further proposals in the coming months for Eurozone-specific budgetary instruments, including a stabilisation fund to address macro-economic shocks and a reform delivery tool to support structural reforms in Euro area countries. These will be part of the broader negotiations on the post-2020 Multiannual Financial Framework (MFF), which are due to begin this summer.

6.3 The Commission's EMU package is unlikely to face smooth sailing through the EU institutions, given the political sensitivity around Eurozone reform. It has already been reported that the Eurozone Governments in the Council want to ditch the EMF proposal, because it would grant new powers to the European Commission and give the European Parliament an oversight role. Instead, the Council is apparently exploring the possibility of creating the European Monetary Fund via a new intergovernmental agreement, by-passing the EU institutions altogether.[51]

6.4 The Chief Secretary to the Treasury (Elizabeth Truss) submitted Explanatory Memoranda on the various documents published by the Commission in late January 2018. The Government will keep the various initiatives put forward by the Commission under review, although it is of the view that they will have very little direct impact on the UK as a non-Eurozone country and given its withdrawal from the EU. The Minister also adds that the forthcoming proposals on the next MFF are "not relevant to the UK" as the Government "is envisaged to play no part" in that long-term budget due to Brexit.

6.5 **The Commission's proposals for the completion of the EU's Economic and Monetary Union are far-reaching, but will only have a limited direct impact on the UK given its withdrawal from the EU and its opt-out from the single currency. We nonetheless consider them of political importance, given the UK's interest in an economically cohesive and resilient Eurozone. The drive towards reducing risks to financial stability could also affect the terms under which the British financial services industry operate in the EU after the UK effectively leaves the Single Market,[52] if it leads to a further regulatory reform affecting the banking sector and capital markets within the Eurozone.[53]**

6.6 **Given that the proposals have no direct impact on the UK, we are content to clear all the Commission documents from scrutiny, with the exception of the proposed European Monetary Fund (whether it is established by EU Regulation or via an intergovernmental agreement). We would like to be kept informed of progress in the**

51 *Politico*, "Capitals' power grab for eurozone enforcer" (14 February 2018).

52 The UK is expected to stay within the Single Market until the end of 2020 under the transitional period sought by the Government. However, during this time it will have no political representation or voting rights over new EU legislation. The Committee is pursuing the far-reaching political and legal implications of this arrangement with the Government separately.

53 The Eurozone has already established specific mechanisms for the oversight, recovery and resolution of credit institutions in the single currency area as part of the Banking Union. Separate proposals on the prudential requirements for banks and investment firms remain under discussion.

negotiations on the EMF, and how it would affect the functions of the International Monetary Fund in Eurozone countries. We also note that, even though it is an Article 352 proposal, the Commission has not included an impact assessment.

6.7 **However, we are concerned by the Minister's characterisation of the upcoming proposals for Eurozone budgetary instruments under the post-2020 Multiannual Financial Framework as "not relevant to the UK", because the Government "is envisaged to play no part" in that long-term budget. The Government and the European Commission have begun negotiations on a post-Brexit transitional period, during which the EU has stipulated that the UK should remain subject to the EU's regulatory and budgetary instruments and structures.**[54]

6.8 **Conversely, the Secretary of State for Exiting the EU has told Parliament that the Government is seeking a transitional arrangement lasting "between 21 and 27 months".**[55] **Should the transition lasts beyond December 2020, it would overlap with the entry into force of the next MFF in January 2021. If the EU's "budgetary instruments" continue to apply to the UK during any part of the transition after December 2020, that would imply the UK would have to make contributions to the EU budget for expenditure plans over which it will have had no vote. We have written to the Chief Secretary to the Treasury separately about this matter.**

Full details of the documents

(a) Reflection Paper on the Deepening of the Economic and Monetary Union: (38795), 9940/17, COM(2017) 291; (b) Communication from the Commission: Further Steps Towards Completing Europe's Economic and Monetary Union—a Roadmap: (39353), 15653/17, COM(2017) 821; (c) Proposal for a Council Regulation on the establishment of the European Monetary Fund: (39348), 15664/17, COM(2017) 827; (d) Proposal for a Regulation amending Regulation (EU) 2017/825 to increase the financial envelope of the Structural Reform Support Programme and adapt its general objective: (39349), 15663/17, COM(2017) 825; (e) Communication from the Commission: A European Minister of Economy and Finance: (39351), 15655/17, COM(2017) 823; (f) Proposal for a Council Directive laying down provisions for strengthening fiscal responsibility and the medium-term budgetary orientation in the Member States: (39350), 15660/17, COM(2017) 824; (g) Communication from the Commission: new budgetary instruments for a stable Euro Area within the Union framework: (39352), 15654/17, COM(2017) 822.

Background

6.9 The institutional set-up of the euro centralised monetary policy within the European Central Bank and the Eurosystem,[56] but left responsibility for economic and fiscal policies firmly in the hands of the Eurozone's national governments. When the financial crisis erupted in 2008, this decentralised structure allowed financial and sovereign debt crisis in one Eurozone country to spread to others, while the EU lacked the necessary structures to mount a unified response.

54 European Council guidelines on Article 50 (15 December 2017).

55 Exiting the European Union Committee Oral evidence: The Progress of the UK's Negotiati ons on EU Withdrawal, HC 372, Q743.

56 The Eurosystem consists of the ECB and the Central Banks of Eurozone countries.

6.10 To stabilise the Eurozone economy, and to put in place the structures necessary to prevent a recurrence of the crisis, the EU has engaged in a far-reaching process of economic, legal and institutional reform. Initiatives to that end have included:

- The annual cycle of economic and budgetary coordination, known as the **European Semester**;
- Reinforced budgetary surveillance of all EU Member States including **reforms of the Stability and Growth Pact** (SGP), including the Excessive Deficit Procedure, and the creation of the Macroeconomic Imbalances Procedure. These changes were legislated for via the so-called "Six-Pack" Regulations;[57]
- The 2012 **Fiscal Stability Treaty**,[58] to which all EU Member States are party except the UK, the Czech Republic and Croatia.[59] It creates a legally-binding obligation on Eurozone countries,[60] known as the Fiscal Compact, to maintain a legislative requirement for a balanced budget in their domestic legal order;
- The 2013 **"Two-Pack" Regulations**, which reinforces the application of the SGP and the Excessive Deficit Procedure[61] to Eurozone countries;[62]
- The 2010 **European Financial Stability Facility** (EFSF) and the **European Financial Stability Mechanism** (EFSM), since subsumed into the **European Stability Mechanism** (ESM), which provide financial assistance to Eurozone countries experiencing or threatened by severe financing problems, primarily through macro-financial loans;[63] and
- An improved **Single Rulebook** to reduce risks in the EU banking sector. For the Eurozone, the EU has also pursued efforts to create a **Banking Union**,[64] where enforcement of the Single Rulebook is centralised and risks are shared, through a Single Supervisory Mechanism, a Single Resolution Fund and a European Deposit Insurance Scheme.[65]

57 See European Commission Memo 11–898 of 12 December 2011 for more information.

58 Formally known as the "Treaty on Stability, Coordination and Governance in the Economic and Monetary Union".

59 The Fiscal Stability Treaty was originally envisaged to be brought within the EU framework through a change to the EU Treaties. However, this was vetoed by then-Prime Minister David Cameron. See for more information the House of Lords EU Select Committee Report on the Euro area crisis (February 2012).

60 Non-Eurozone countries party to the Treaty can voluntarily opt-in to this requirement. Denmark, Romania and Bulgaria have done so. See for more information the European Commission's 2017 review of the Fiscal Compact.

61 The Stability and Growth Pact (SGP) applies to all EU Member States, as per Articles 121 and 126 TFEU. It consists of set of rules designed to ensure that EU countries maintain sound public finances and coordinate their budgetary policies. The main requirements are that Member States must keep their public deficit below 3 per cent of GDP, and their public debt below 60 per cent.

62 The "Two-Pack" Regulations (Regulations 472/2013 and 473/2013) impose more frequent scrutiny on the budgetary plans of Eurozone countries under the SGP, and impose additional requirements on Eurozone countries who are in the Excessive Deficit Procedure. See the previous Committee's Report of 12 February 2012 for more information.

63 The EFSF, with a volume of €440 billion, and the ESM, with a volume of €700 billion, were agreed between the Eurozone countries outside of the framework of the EU Treaties, because of legal concerns that they would violate the Treaties' "no bail-out clause" (Article 125.1 TFEU) if established by secondary legislation. A much smaller facility, the European Financial Stability Mechanism, was established under EU law with a volume of €60 billion. It is backed by the EU budget, and provided financial assistance to Ireland and Portugal between 2011 and 2014, and to Greece in July 2015. It no longer provides new assistance, since the creation of the ESM.

64 The Banking Union centralises responsibility for oversight of the Eurozone's largest banks to the European Central Bank, rather than being left to domestic regulators.

65 The state of play on the creation of the European Deposit Insurance Scheme is covered in a separate chapter in this Report.

6.11 In October 2014 the Finance Ministers of the Eurozone underlined the fact that "closer coordination of economic policies is essential to ensure the smooth functioning of the Economic and Monetary Union".[66] It called for work to continue to "develop concrete mechanisms for stronger economic policy coordination, convergence and solidarity" and "to prepare next steps on better economic governance in the euro area".

The Five Presidents' Report

6.12 In response to the Eurogroup's request, the EU institutions prepared the "Five Presidents' Report" (FPR),[67] published in June 2015. This identified four areas where further reform was needed to complete the Eurozone's Economic and Monetary Union, and made concrete proposals to achieve these:

- the **Financial Union**, which envisages increased sharing of risks in the financial system between Eurozone countries, and reducing overall risk to financial stability. The FPR therefore recommended completion of the Banking Union,[68] including the Single Supervisory Mechanism and a mutualised European Deposit Insurance Scheme, and further work on the Capital Markets Union;[69]
- the **Fiscal Union**, ensuring that all Eurozone countries adopt budgetary policies which keep public debt sustainable and operate automatic stabilisers to cushion country-specific economic shocks. Proposed measures to achieve this include a review of the existing Stability and Growth Pact; the establishment of an advisory European Fiscal Board; and the establishment of a common macroeconomic stabilisation function (i.e. a European Monetary Fund);
- the **Economic Union**, i.e. policies to foster convergence at a high level of the economic and social welfare of the Eurozone's Member States. This would include stronger (and, eventually, legally-binding) standards on economic and taxation policies; the creation of national Competitiveness Boards; and higher minimum requirements for social and employment rights;[70] and
- horizontally, a **Political Union** that guarantees the "democratic accountability and governance" of the Eurozone. The FPR recommends more systematic communication of the Commission's European Semester recommendations to the European Parliament and the Eurozone's national parliaments; the creation of a mechanism to allow the Eurozone to speak "with one voice" internationally; and the integration of inter-governmental crisis responses—such as the European Stability Mechanism and the Fiscal Compact—into the framework of the EU treaties.

66 Euro Area Summit, 24 October 2014.

67 The five presidents in question are those of the European Commission (Jean-Claude Juncker), the European Council (Donald Tusk), the Eurogroup (Jeroen Dijsselbloem), the European Central Bank (Mario Draghi), and the European Parliament (Martin Schulz).

68 The Banking Union centralises responsibility for oversight of the Eurozone's largest banks to the European Central Bank, rather than being left to domestic regulators.

69 The Capital Markets Union integrates the EU's 28 national capital markets, for example by having more centralised oversight of such markets at EU-level, introducing EU-wide prudential requirements for investment firms and considering ways of facilitating SMEs' shares on public markets. Its primary purpose is to give EU businesses more diversified sources of non-bank finance. However, in the context of the EMU it also serves to strengthen cross-border risk-sharing through deepening integration of equity markets, which is a key economic shock absorber, and to provide a buffer against a liquidity crisis in the banking sector.

70 The EU's social policy objectives for the coming years are set out in the "European Pillar of Social Rights", adopted by the Commission, Parliament and the Council in November 2017. See for more information our Report of 29 November 2017.

6.13 In spring 2017, the European Commission presented a "reflection paper" on the EMU which took stock of progress made since the publication of the FPR in 2015, and the additional work needed to complete the EMU (document A).[71] It noted that several short-term measures were being taken to meet the FPR's recommendations, including a stronger focus on social issues within the European Semester and continued negotiations on Risk Reduction Measures in the banking sector.[72]

6.14 In his September 2017 "State of the Union" speech, European Commission President Juncker announced that the Commission would be bringing forward further proposals to make the structural changes identified as necessary by the Five Presidents Report.[73] In particular, he announced that preparations were underway for:

- the transformation of the European Stability Mechanism, which provides assistance to Eurozone countries in financial difficulties, into a **European Monetary Fund** governed by the EU Treaties;
- the creation of a **dedicated euro area budget line within the EU budget**, which would fund structural reform assistance; perform a stabilisation function in the event of an economic shock; provide a fiscal backstop for the Banking Union, and finance the economic and social convergence of countries seeking to join the Euro; and
- the legal **integration of the Fiscal Compact into EU law**.

The Commission proposals for reform of the EMU

6.15 On 6 December 2017 the Commission presented the package of initiatives announced by the Commission President three months earlier. The main objectives of the package are set out in a Communication on the "further steps towards completing the Economic and Monetary Union" (document B). It sets out a "roadmap" for the completion of the EMU by 2025, noting that progress is required in the four areas identified in the Five Presidents' Report (Financial, Fiscal, Economic and Political Union).

Specific initiatives to reform the EMU

6.16 Concretely, the Commission has published three specific legislative proposals and two detailed policy papers to put flesh on the bones of its vision for the completion of the EMU:

- a proposal to bring the European Stability Mechanism (ESM) into the EU legal framework, transforming it into a European Monetary Fund (document C);
- a Communication setting out plans for new budgetary instruments to support the Eurozone, including an initial proposal on dedicated structural support for countries seeking to join the single currency (documents D and G);

71 See Commission document COM(2017) 291.
72 We have covered the state of play on the Risk Reduction Measures package in a separate chapter in this Report.
73 Jean-Claude Juncker, State of the Union Speech, September 2017.

- a Communication on establishing a European Minister of Economy and Finance, to increase the democratic accountability and the efficiency of Eurozone policy-making (document E); and
- a proposal for a Directive on fiscal stability, which would integrate the substance of the Fiscal Compact into the framework of EU law without the need for Treaty change (document F).

6.17 We received Explanatory Memoranda from the Chief Secretary to the Treasury (Elizabeth Truss) on these documents in late January. We discuss the substance of the Commission initiatives in more detail below, along with the Minister's assessment of their implications.

Establishing a European Monetary Fund

6.18 The European Stability Mechanism (ESM) was set up in October 2012 at the height of the Eurozone's sovereign debt crisis. It provides additional support to Eurozone countries in financial difficulties through a "toolkit" of measures, including conditional loans; bank recapitalisation; and purchasing Eurozone sovereign bonds. The ESM currently oversees conditional macro-financial loans to Cyprus, Greece, Portugal and Ireland (granted by the EMS's predecessor, the European Financial Stability Facility or EFSF) and a loan to Spain for indirect bank recapitalisation.[74]

6.19 The "pressure of events" of the debt crisis in 2012 led to an intergovernmental solution to establish the ESM by separate Treaty.[75] The Mechanism's highest decision-making body is the Board of Governors, composed of the Finance Ministers of the Eurozone. An assistance operation to a Member State can only be agreed by unanimity among Eurozone countries, except in emergency situations (when a qualified majority rule applies).[76]

6.20 Even as the intergovernmental solution was pursued, the European Commission argued that the same result could also be achieved within the framework of the EU Treaties.[77] The Commission has now tabled a proposed Regulation to bring the Mechanism within the framework of EU law, with the aim of improving its functioning in terms of "transparency, legal review and efficiency of the EU's financial resources", and increase its accountability to the European Parliament. The proposal is complemented by a draft Treaty for the Eurozone countries to agree on the transfer of funds from the European Stability Mechanism to the European Monetary Fund. The EMF's budget would not be part of the general EU budget.

6.21 However, the Commission wants to go beyond merely transferring the ESM's legal framework from an intergovernmental agreement to secondary legislation under the EU Treaties. It wants to transform the Mechanism into a "European Monetary Fund", which in addition to maintaining the support functions of the ESM would also:

74 See https://www.esm.europa.eu/assistance/lending-toolkit.
75 Treaty Establishing the European Stability Mechanism.
76 Articles 4 and 5(6)(f) of the ESM Treaty.
77 See for example the Blueprint for a Deep and Genuine Economic and Monetary Union (28 November 2012). Nevertheless, the Member States agreed an amendment to Article 136 TFEU in 2011 which allowed the Eurozone countries to "establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole". This was in response to a legal claim that the ESM would otherwise be incompatible with EU law.

- alter the objective of the instrument, from safeguarding the stability "of the Euro Area as a whole *and* of its Member States" under the ESM[78] to the stability "of the Euro Area *or* of its Members". The legal implications of this, and its consistency with the EU Treaties, are unclear;[79]

- allow the EMF to act as the fiscal backstop to the Single Resolution Fund (SRF), which—as part of the Banking Union—is responsible for the resolution of important banks in the Eurozone under the Single Resolution Mechanism.[80] Member States have agreed on the need for such a backstop, which would be activated as a last resort to if the SRF's available resources were to be insufficient for capital or liquidity purposes.[81] Non-Eurozone countries in the Banking Union would also contribute to the backstop;[82]

- streamline the decision-making process by the Board of Governors, for example by allowing decisions on providing assistance to a Eurozone country to be made by qualified majority in all circumstances (and not just in emergency situations, as is currently the case);

- make decisions by the Governing Board subject to approval by the Council, as the EMF would become a formal EU body.[83] In practice this is likely to be a formality only, as only Member States who use the euro would have an in-built qualified majority in Council;[84] and

- enable the EMF to develop new financial instruments to supplement or support other EU financial instruments and programmes. The Commission notes that this could prove "particularly useful if the European Monetary Fund were to play a role in support to a possible stabilisation function in the future" (see paragraph 6.31).

6.22 The initiative takes the form of a proposal for a Council Regulation, under Article 352 of the Treaty on the Functioning of the EU—the fall-back option if there is no specific legal basis for EU legislation elsewhere in the Treaties.[85] As a result, the proposal is subject to a unanimity requirement in the Council (including non-Eurozone Member States), and a vote of consent in the European Parliament. To be validly adopted under Article 352,

78 Article 3 of the European Stability Mechanism Treaty.

79 See for more information the EU Law Analysis website, http://eulawanalysis.blogspot.co.uk/2018/01/towards-european-monetary-fund-comments.html (accessed 6 February 2018).

80 The SRF is financed by contributions for the Eurozone's banking sector.

81 The Commission says: "Such a backstop would instil confidence in the banking system by underpinning the credibility of actions taken by the Single Resolution Board. In turn, this would actually reduce the likelihood of a situation in which a backstop would need to be called on". In addition, Member States also agreed that the backstop should be fiscally neutral over the medium term so that any potential deployment would be recovered from the banking sector in the euro area.

82 At present, there are no non-Eurozone countries in the Banking Union. However, Sweden and Denmark are considering joining.

83 This change is to ensure compliance with the *Meroni* case law of the European Court of Justice (cases C-9/56 and C-10/56), relating to the extent to which EU Institutions can delegate their tasks to regulatory https://curia.europa.eu/agencies.

84 See article 3 of the Commission proposal.

85 The Commission notes that, historically, several significant decisions relating to the establishment of the Economic and Monetary Union have been based on the equivalent of Article 352 TFEU, i.e. in absence of a clear legal base in the Treaties. For instance, decisions on the European Monetary Cooperation Fund, the European Currency Unit and the first balance of payment mechanisms were taken under Article 235 of the Treaty on the European Economic Community, the predecessor to Article 352 TFEU.

the proposal will have to be shown to be "necessary to obtain one of the objectives set out in the Treaties". It has been reported that the proposal has not been well-received by Eurozone Governments, who are apparently pushing for changes to the ESM to be made by a new inter-governmental treaty rather than ceding any more powers to the European Commission.[86]

6.23 In her Explanatory Memorandum,[87] the Chief Secretary to the Treasury states that "the Government will monitor the EU negotiations on the European Monetary Fund, including any potential implications for its relationship with the International Monetary Fund". The UK would not be liable for any part of the financing of the EMF, as its capital will be subscribed only by Eurozone Member States, with no contribution from, or liability for, the general EU budget.

6.24 The Minister also notes that the Government may not vote in favour of or allow the adoption of an Article 352 measure without an Act of Parliament to that effect, subject to certain exceptions (which do not apply to the EMF proposal).[88] However, if the proposal is voted on in the Council after the UK ceases to be a Member State, as the Commission envisages, the Government will of course no longer have a veto.

Fiscal discipline: integrating the Fiscal Compact into EU law

6.25 The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), including the Fiscal Compact, came into force in January 2013. It was agreed outside the framework of the EU Treaties after the UK vetoed a proposed Franco-German amendment[89] to the Treaty on the Functioning of the European Union in December 2011. Article 16 of the resulting intergovernmental agreement, which was signed by all then-Member States except the UK and the Czech Republic, stipulated that its substance should be brought into EU law by 2018.[90]

6.26 The Commission argues that many of the Treaty's elements were already incorporated into EU law via the so-called "Two Pack" Regulations in 2013 (see paragraph 6.10 above). It has now made a formal legislative proposal to incorporate the substance of the TSCG into EU law. This includes in particular Title III, the so-called Fiscal Compact, which requires the signatory countries to apply a balanced budget rule, along with an automatic correction mechanism in case of significant deviation.[91] The Commission argues that integrating the Fiscal Compact into Union law will "simplify the legal framework and allow for continuous and improved monitoring as part of the overall EU economic governance framework" under the European Semester.

6.27 Its proposal takes the form of a Directive on Fiscal Discipline, based on Article 126(14) TFEU.[92] The Directive, which must be agreed unanimously by all Member States,[93] would

86 *Politico*, "Capitals' power grab for eurozone enforcer" (14 February 2018).
87 Explanatory Memorandum submitted by HM Treasury (23 January 2018).
88 European Union Act 2011, section 8.
89 See https://uk.ambafrance.org/President-Sarkozy-s-press,20171.
90 Technically, under the terms of the TSCG, the deadline for its incorporation into EU law was 1 January 2018. The European Parliament and the Commission insisted on its incorporation under EU law within a defined timeframe, which the Member States accepted.
91 Title III requires participating countries to have budgetary position in balance or in surplus, with a lower limit for the structural deficit of 0.5% of GDP, which can become 1.0% of GDP for Member States with a debt level significantly below 60% of GDP and with low risks for the long-term sustainability of public finances. They must also legislate for a correction mechanism automatically triggered in case of significant deviation.
92 See Article 126 TFEU for more information.
93 The European Parliament will be consulted, but will not have a vote.

apply automatically to Eurozone countries, with "opt-in" provisions for non-euro Member States. The Commission notes that some elements of the TSCG cannot be incorporated into EU law without a Treaty amendment, and as such have not been included in its proposal.[94]

6.28 In her Explanatory Memorandum,[95] the Minister underlines that the UK is "not a signatory to the TSCG", but adds that "a strong and successful EU, as well as a resilient euro area remain in the UK's interests" irrespective of Brexit.

Eurozone budgetary instruments

6.29 The EU already provides financial support for the Eurozone, in terms of both structural economic reforms and to assist Member States with financial difficulties, through the Structural Reform Support Programme,[96] the European Structural & Investment Funds,[97] and the European Financial Stability Mechanism.[98]

6.30 The Commission has now proposed to build on these measures, by creating several new budgetary instruments to support the cohesion and stability of the Eurozone, including a separate budget line within the general EU budget dedicated to addressing the specific economic and fiscal needs of the single currency area.[99] Some of the proposed initiatives can be taken forward as part of the current Multiannual Financial Framework (MFF), which runs until the end of 2020. Others, which require legislative change, will be incorporated into the Commission's proposals for the next MFF, which will be presented in May 2018 and take effect in January 2021.

6.31 The Commission proposes to create four dedicated budgetary Eurozone functions:

- an **automatic fiscal stabiliser**, to respond to macro-economic shocks affecting the single currency area that could not be addressed by national fiscal buffers. The Commission proposes that this Eurozone "stabilisation function" should consist of both loans and budget support, funded by the EU budget, the European Monetary Fund (see above) and a new insurance mechanism, such as an Investment Protection Scheme[100] or an Unemployment Reinsurance Scheme;[101]

94 In its proposal, the Commission says: "Other provisions of the TSCG have either been already integrated into EU law (in particular via the 'Two-pack', for the euro area), or would require changes to the Treaties, or do not lend themselves to incorporation for various reasons (e.g. some replicate existing EU law)".

95 Explanatory Memorandum submitted by HM Treasury (23 January 2018).

96 The Structural Reform Support Programme is intended to help EU countries to design and implement institutional, administrative and structural reforms, and to use EU funds that are available for such purposes more efficiently and effectively. The SRSP is complementary to existing EU programmes and resources available for capacity-building and technical assistance. Its added value is the provision of assistance, advice and expertise on the ground, i.e. to the national authorities of the requesting member states. See Regulation 2017/825.

97 The ESIFs include the European regional development fund (ERDF); the European social fund (ESF); the Cohesion fund (CF); the European agricultural fund for rural development (EAFRD); and the European maritime and fisheries fund (EMFF)

98 See the section on the proposed European Monetary Fund for more information on the EFSM.

99 For more information on the general EU budget for 2018, see our Reports of [date] and [date].

100 In its reflection paper on the EMU, the Commission suggests that an Investment Protection Scheme could safeguard domestic investment in "well-identified priorities and already planned projects or activities at national level, such as infrastructure or skills development".

101 According to the Commission, a Eurozone Unemployment Scheme would act as a "reinsurance fund" for national unemployment schemes, ensuring that increased uptake of unemployment benefit during an economic downturn would not lead to an excessively high fiscal deficit.

- providing **financial support for domestic economic reforms** through a "reform delivery tool" funded by the ESIFs, and via a Eurozone-specific work-stream under the Structural Reform Support Programme;

- a **financial support facility for Member States seeking to adopt the euro** as their currency under the Structural Reform Support Programme, which would be fully funded from the EU budget (i.e. without any co-financing from the recipient Member State);[102] and

- a **fiscal backstop for the Single Resolution Fund** for failing banks within the Eurozone,[103] through the proposed European Monetary Fund. This would be funded by the participating states in the Banking Union (which the UK is not), and be legally separate from the EU budget (see paragraphs 6.18 to 6.24 above).

6.32 Under the existing legal framework, only the proposals related to structural support and reform, in particular for euro accession countries, can be accommodated relatively easily. To that end, the Commission proposed two Regulations in December 2017 to:

- use the performance reserve built into the existing European Structural and Investment Funds to fund a pilot project for a "reform delivery tool" under the post-2020 MFF, which would provide extra grants to support national efforts in implementing economic and fiscal reforms identified as priorities in the European Semester;[104] and

- amend the Structural Reform Support Programme (SRSP), to boost technical support for economic reforms available for all Member States and to create a dedicated work stream to support Member States seeking to adopt the euro. To reflect the fact that requests for support from the Programme have "significantly exceeded funding available", this proposal increases the financial envelope for the SRSP until the end of 2020 by €80 million to €223 million, and invites the Member States to transfer some of the funding from the ESIFs to the SRSP to increase it further to €300 million (document C).[105]

6.33 The provisions for the fiscal backstop for the SRF is contained in the separate legislative proposal to transform the European Stability Mechanism into the European Monetary Fund (see paragraphs 6.18 to 6.24). The other proposals will follow in the context of the post-2020 Multiannual Financial Framework, for which the Commission will present detailed proposals in May 2018. This will also include a more comprehensive reform delivery tool and a convergence facility for euro accession countries, building on the pilot projects already proposed by the Commission (see above).

102 All EU Member States except the UK and Denmark are under a legal obligation to join the euro when they meet the relevant convergence criteria.

103 The Single Resolution Fund is open to non-Eurozone EU Member States, but none have so far joined. Sweden and Denmark are currently considering participating.

104 The reform delivery tool pilot would allow Member States to use some of their European Structural and Investment funds (ESIFs) performance reserve (a maximum of 6% of their respective ESIF allocation) to support structural reforms, such as changes to tax and public administration systems. The proposal is budget-neutral as funding would be allocated by Member States from their existing 2014–20 ESIFs. The Committee cleared this proposal from scrutiny separately.

105 The budgetary increase for the SRSP is to be funded from the Flexibility Instrument, i.e. it will not be funded by cuts to the EU budget elsewhere.

6.34 The Chief Secretary to the Treasury submitted an Explanatory Memorandum on the Commission's suggestions for Eurozone budgetary instruments on 29 January 2018.[106] She notes that the Government supports the proposed changes to the SRSP, as participation by Member States would remain voluntary. With respect to the more far-reaching propositions, including the full reform delivery tool and the stabilisation tool, the Minister notes that there are no concrete proposals at this stage, and that they will be part of the "next MFF, post 2020, when the UK is envisaged to play no part, so are not relevant to the UK".

A European Minister of Economy and Finance

6.35 The European Commission also published a policy paper on the creation of a European Minister of Economy and Finance. This position, it says, would be "instrumental in strengthening the coherence, efficiency, transparency and democratic accountability of EU economic governance".

6.36 As a first step, the Commission proposes the merger of the office Vice-President of the European Commission in charge of the Economic and Monetary Union with that of the President of the Eurogroup (currently a Finance Minister of a Eurozone country), which it says "is already possible under the current EU Treaties".[107] It argues this could be done when the next European Commission is appointed by the Member States and the European Parliament in November 2019.

6.37 As a second step, the Commission wants Eurozone countries to reflect on the "key functions" of this new position in addition to the existing responsibilities vis-à-vis the Commission and the Eurogroup. Its policy paper outlines some possibilities, including:

- Representing the Eurozone in international settings, such as the International Monetary Fund;[108]
- Oversee the work of the proposed European Monetary Fund (see paragraphs 6.18 to 6.24), the Eurozone's fiscal stabilisation function under the EU budget (see paragraph 6.31) and the Structural Reform Support Programme for Eurozone countries (see paragraph 6.32); and
- Acting as the coordinator for the EU's economic and fiscal policy as part of the European Semester, and acting as the Commission's observer at the European Central Bank.

6.38 Given that this proposed new position would primarily affect the political leadership of the Eurozone, the Chief Secretary has not commented in detail on this aspect of the EMU package. She notes that the role would become operational "after the UK's exit from the European Union".

106 Explanatory Memorandum submitted by HM Treasury (29 January 2018).

107 It would require the Eurogroup to change its working methods, for example by agreeing to elect the relevant Vice-President of the Commission as its President.

108 In October 2015, the European Commission proposed measures to establish a "unified representation of the euro area" in the IMF. That proposal has not been adopted by the Council.

Proposed timetable for the adoption of EMU reforms

6.39 Given the far-reaching nature of some of the reforms proposed by the Commission, the timetable for adoption by the Eurozone Member States is long-term: the aim is to have all the different elements for the "completion" of the EMU in place by 2025.

6.40 Before May 2019, when the next European Parliament elections will take place, the Commission hopes to secure Council adoption of it the pending proposals for:

- the European Monetary Fund, including its use as a fiscal backstop for the Single Resolution Fund;
- the European Deposit Insurance Scheme for the Banking Union;
- the Fiscal Responsibility Directive; and
- Unified external representation of the Eurozone at international organisations, in particular the IMF.

6.41 Ambitiously, by mid-2019 the Commission also wants to have brokered agreement with Eurozone countries and the European Parliament on the EMU-elements of its proposals for the next Multiannual Financial Framework, the details of which are due to be published in May 2018. These will include the support facilitate for euro accession states and the outline of the fiscal stabilisation function. However, it expects only a "common understanding" of the role of a European Minister for Economy and Finance among Eurozone states.

6.42 We have retained the proposal for a European Monetary Fund under scrutiny, and will assess the detail of the proposed Eurozone budgetary instruments when the relevant proposals are tabled by the Commission later this year.

Previous Committee Reports

None.

7 European System of Financial Supervision

Committee's assessment	Politically important
Committee's decision	(a), (b) and (d) Not cleared from scrutiny; drawn to the attention of the Treasury Committee; (c) Cleared from scrutiny
Document details	(a) Proposal for a Regulation on the European Supervisory Authorities; (b) Proposal for a Directive amending Directive 2014/65/EU on markets in financial instruments and Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II); (c) Proposal for a Regulation on the European Systemic Risk Board; (d) Amendment of pending proposal for a Regulation as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs
Legal base	(a)—(d): Article 114 TFEU, ordinary legislative procedure; QMV
Department	Treasury
Document Numbers	(a) (39052), 12420/17 + ADDs 1–2, COM(17) 536; (b) (39053), 12422/17, COM(17) 537; (c) (39055), 12430/17 + ADD 1, COM(17) 538; (d) (39056), 12431/17, COM(17) 539

Summary and Committee's conclusions

7.1 The European Commission in September 2017 proposed substantial reforms for the functioning of the EU's financial supervisory authorities (the ESAs) for the banking, insurance and investment industries, as well as proposing changes to the European Systemic Risk Board (ESRB), which monitors the build-up of macroprudential risks in the EU's economy.

7.2 As we set out in more detail in "Background" below, these reforms would expand the powers of the ESAs, in particular for the European Securities & Markets Authority (ESMA); alter their governance structures to make the ESAs more assertive vis-à-vis the Member States' national financial regulators; and impose a new industry levy to fund their work. The European Commission has made clear that its proposals are driven, in part, by the UK's withdrawal from the EU. This has led to a perceived need to strengthen the ESAs to enable them to tackle any UK financial services firms which try to establish "letter box" entities in the EU, servicing EU-based clients from the UK without substantially moving their operations to an organisation within the Single Market as required by EU law.

7.3 When we first considered the proposals in December 2017, we expressed our concern about the proposal to allow the ESAs to set supervisory priorities for domestic regulators; the increased direct supervisory responsibilities of ESMA for certain financial products;

the consequences of the post-Brexit "implementation period" for the formal representation of the UK's domestic financial regulators at EU-level; and the implications of new powers for the ESAs in relation to firms established outside the EU (which will become relevant once the UK becomes a "third country" vis-à-vis the Single Market). We asked the Minister for further information about the Government's position on the proposed changes to the ESAs and the ESRB, and retained both documents under scrutiny in the meantime.

7.4 The new Economic Secretary to the Treasury (John Glen) wrote to us on 31 January 2018 with further information on the Government's position on both sets of proposals. With respect to the proposed changes to the European Systemic Risk Board, which are uncontroversial and technical in nature, he explained that the Government is broadly supportive of the suggested reforms. The Minister also reiterated the ambition to establish a post-Brexit partnership on financial services that includes "regulatory and supervisory cooperation", and the aim of continued cooperation between the ESRB and the Bank of England.

7.5 However, the Minister's letter on the European Supervisory Authorities made clear the Government's opposition to many elements of the Commission proposals affecting their powers and governance.[109] He expresses particular concern about the increased direct supervisory responsibilities of ESMA for various investment products and services, and the proposed ability for the ESAs to set supervisory priorities for national regulators. We have set out the substance of the Government's position in more detail in paragraph 6.23 below.[110]

7.6 The Economic Secretary also sought to reassure us about the implications of Brexit for the UK financial services industry becoming a "third country" vis-à-vis the Single Market. In particular, he writes that the representation of the Bank of England and the Financial Conduct Authority within the ESAs during the transition remains a matter for negotiation. He also reiterates that the EU's third country "equivalence regime" for cross-border access for non-EU financial services providers to EU-based clients may not necessarily apply to the UK firms after Brexit, as the Government is seeking to negotiate a bespoke UK-EU regulatory arrangement under which there would be a "new process for conducting cross-border business".

7.7 **We thank the Minister for the additional information he has provided on the Government's approach to the ESFS proposals. It is clear that it does not support many parts of the ESA reform package, and we will closely follow the negotiations on the relevant legislative proposals within the Council and the European Parliament in the coming months. We note that the Bulgarian Presidency has provisionally scheduled a debate on the ESFS package at the meeting of EU Finance Ministers on 22 June 2018. We ask the Minister to write to us after that meeting with further information on the state of play (or earlier, in the unlikely event that negotiations within the Council working party proceed at a faster pace).**[111]

7.8 **We remain concerned about the UK's representation within the ESAs and the ESRB under the post-Brexit transitional arrangement. The EU has repeatedly stated**

109 Letter from John Glen to Sir William Cash (31 January 2018).

110 Letter from John Glen to Sir William Cash (31 January 2018).

111 The European Parliament's Economic & Monetary Affairs Committee has provisionally scheduled a vote on the proposals for September 2018. It therefore appears unlikely that trilogue negotiations on the final legislative texts will be concluded before the end of the year at the earliest.

that the Government and its regulators will no longer be represented within the governance structures of any EU bodies or agencies during this period, although EU financial services legislation and the ESAs' powers would continue to apply in the UK.[112] The European Commission has explicitly said that the UK could "attend meetings of [the] ESAs only exceptionally and on a case-by-case basis".[113] The Minister has not been able to offer any reassurance in this regard, saying only that the issue of representation is subject to negotiations with the EU. We ask him to write to us again when the negotiations on the transitional period are concluded, with his assessment of the implications for the ability of the UK's NCAs to be represented within the ESAs during this period.

7.9 **With respect to the future UK-EU relationship after the transition, we remain supportive of the Government's intention to negotiate "a new process for conducting cross-border business" which would go "beyond the third country equivalence regimes in the EU *acquis*" to take effect after the transitional arrangement ends.**

7.10 **However, we remain unsatisfied with the Government's refusal to provide any concrete detail of its proposals in this regard, particularly with respect to the "process for establishing regulatory requirements for cross-border business between the UK and EU", to which the Chancellor referred in his 2017 Mansion House speech.[114] The EU would make any preferential cross-border access to its market for financial services depend, primarily, on continued alignment of UK and EU financial services regulation.[115] We will therefore pay particular attention to the balance the Government seeks to strike between UK's post-Brexit regulatory autonomy and any overarching legal obligations vis-à-vis the EU to secure preferential access to the Single Market for financial services.**

7.11 **In view of our concerns, we retain the ESA proposals under scrutiny and draw the Minister's letters to the attention of the Treasury Committee. We are content to now clear the ESRB Regulation from scrutiny, given the nature of the changes proposed.**

Full details of the documents

(a) Proposal for a Regulation amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority); Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority); Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority); Regulation (EU) No 345/2013 on European venture capital funds; Regulation (EU) No 346/2013 on European social entrepreneurship funds; Regulation (EU) No 600/2014 on markets in financial instruments; Regulation (EU) 2015/760 on European long-term investment funds;

112 European Council guidelines of 15 December 2017: "The European Council notes the proposal put forward by the United Kingdom for a transition period of around two years, and agrees to negotiate a transition period covering the whole of the EU acquis, while the United Kingdom, as a third country, will no longer participate in or nominate or elect members of the EU institutions, nor participate in the decision-making of the Union bodies, offices and agencies".

113 European Commission presentation on Brexit and services, p. 51 (accessed 6 February 2018).

114 https://www.gov.uk/government/speeches/mansion-house-2017-speech-by-the-chancellor-of-the-exchequer.

115 For example, the European Commission has reiterated that "free trade agreements offer very limited market access mostly via establishment but not comparable to the Single Market" because they "do not ensure convergence of regulatory frameworks".

Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds; and Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market: (39052), 12420/17 ADDs 1–2, COM(17) 536; (b) Proposal for a Directive amending Directive 2014/65/EU on markets in financial instruments and Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II): (39053), 12422/17, COM(17) 537; (c) Proposal for a Regulation amending Regulation (EU) No 1092/2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board: (39055), 12430/17 + ADD 1, COM(17) 538; (d) Amendment of pending proposal for a Regulation amending Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority) and amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs (EMIR II Commission's proposal): (39056), 12431/17, COM(17) 539.

Background

7.12 The EU made major changes to the supervision of the financial markets of its Member States in response to the 2008 financial crisis. Notably, it created the European System of Financial Supervision (ESFS), built on a two-pillar system of macro-prudential and micro-prudential supervision. Such supervision is conducted at EU-level by the European Systemic Risk Board (ESRB) and the European Supervisory Authorities (ESAs) respectively, and at Member State level by the relevant domestic financial authorities.

7.13 The ESAs draft tertiary EU legislation to give effect to the Directives and Regulations that govern financial services within the Union, and also have powers to foster regulatory and supervisory convergence through dispute settlement powers in cases of disputes between NCAs and by investigating potential breaches of EU law by domestic regulators.[116] Thee decision-making powers of the ESAs rests with their respective Board of Supervisors (BoS), on which only the Member States' national competent authorities—including for the UK the Bank of England, the Prudential Regulation Authority and the Financial Conduct Authority—have a vote.

7.14 In parallel, the European Systemic Risk Board (ESRB) is responsible for macro-prudential oversight of the financial system in the EU. Its primary task is to monitor and assess the build-up of risks in the financial system and issue warnings and recommendations accordingly.

The ESFS package

7.15 In September 2017 the European Commission proposed substantial reforms of the functioning of the ESAs and the ESRB. As set out in more detail in our Report of December 2017,[117] these reforms would expand the powers of the ESAs, in particular for

116 Under the "breach of Union law" procedure, the ESAs can identify and address inadequate application of the EU legislation within their remit as applied by the NCAs, which can culminate in the imposition of requirements on specific financial institutions to alter their practice if the relevant national authority fails to act

117 See Report of 13 December 2017.

the European Securities & Markets Authority (ESMA); alter their governance structures to make the ESAs more assertive vis-à-vis the Member States' national financial regulators; and impose a new industry levy to fund their work.

7.16 The Commission also proposed some technical changes to the composition and functioning of the ESRB to reflect the creation of a new Single Supervisory Mechanism within the European Central Bank and a Single Resolution Fund for the Eurozone. Primarily, this means that the President of the European Central Bank will be the *ex officio* Chairman of the European Systemic Risk Board, and representatives of the Single Supervisory and Resolution Mechanisms will become voting members of the Board.

7.17 It is clear from the Commission's explanatory notes that the proposals to reform the European Supervisory Authorities are driven, at least in part, by the UK's withdrawal from the EU. There are concerns that UK financial services firms might try to establish "letter-box" entities in the EU, servicing EU-based clients from the UK without substantially moving their operations to an organisation within the Single Market as required by EU law. This, the Commission argues, increases the need for stronger ESAs which can ensure that all Member State regulators apply the EU's regulatory requirements for "third country" firms in the same way.

7.18 The then-Economic Secretary to the Treasury (Stephen Barclay) submitted an Explanatory Memorandum on the proposals in October 2017.[118] This did not reflect on the implications of the proposals for the UK financial services industry after Brexit, or during the "implementation period" after March 2019 during which the UK would remain subject to EU law but without formal political representation within the EU institutions and bodies, including the ESAs.

7.19 The Committee concluded that the proposed legislation was of major political importance, as it would substantially alter the European System of Financial Supervision as it was created seven years ago and expand the powers of the Supervisory Authorities. There would also be a financial impact on the UK sector, as the Commission proposes to replace the current part-funding of the ESAs' by contributions from national regulators by an industry levy.

7.20 The package also had a specific impact on the UK in the context of Brexit, which is likely to lead to its designation as a "third country" for the purposes of the provision of financial services into the EU (unless a more comprehensive financial services agreement is negotiated).

7.21 As described in our previous Report, we are most concerned about:

- allowing the ESAs to become more independent from national regulators through the creation of new "Executive Boards";
- setting EU-wide supervisory priorities for domestic financial regulators through Strategic Supervisory Plans;
- the financial implications for the UK sector of the new industry levy to fund the ESAs' operations;

118 Explanatory Memorandum submitted by HM Treasury (16 October 2017).

- increasing the responsibilities of ESMA, in particular the expansion of its direct supervisory powers to certain alternative investment funds;
- the EU's stipulation that the UK will have no representation on the governance structures of the ESAs during the post-Brexit "implementation period",[119] while the ESAs would retain their powers in relation to the UK's financial regulators and industry during this period; and
- the implications of new powers for the ESAs in relation to certain financial products—including prospectuses and benchmarks—offered by non-EU firms to EU-based customers (which will become relevant once the UK becomes a "third country" vis-à-vis the Single Market).

7.22 We asked the Minister to provide further information on the Government's position on the proposals in light of these concerns.

The Minister's letter of 31 January 2018

7.23 The new Economic Secretary (John Glen) provided further information on the Government's position on the elements of concern within the ESFS proposals at the end of January.[120]

The substance of the Commission proposals

7.24 In summary, with respect to the new powers and governance structures for the ESAs, the Government is of the view that:

- there is no need for Strategic Supervisory Plans at EU-level which constrain national financial regulators, as these would interfere with domestic priorities and dilute accountability to national parliaments;
- representatives of the national competent authorities (such as the Bank of England) should remain on the ESAs' new Executive Boards if they can act autonomously;
- the potential for the ESAs to restrict delegation of portfolio management or risk transfer to non-EU countries "conflicts with the principle of subsidiarity and with a business model that is designed to support open, global capital markets", and could risk "significant disruption to delegation from fund domicile jurisdictions to third countries";
- there is no justification for the centralisation of direct supervisory powers for certain financial benchmarks and investment prospectuses in ESMA, as such responsibilities can be discharged more efficiently at national level; and
- further information is needed from the Commission on the proposed industry levy, including with respect to the calculation of firms' contributions and to which firms the levy would apply.

119 European Council guidelines on Article 50 of 15 December 2017: "The United Kingdom, as a third country, will no longer participate in or nominate or elect members of the EU institutions, nor participate in the decision-making of the Union bodies, offices and agencies".

120 Letter from John Glen to Sir William Cash (31 January 2018).

The implications of Brexit

7.25 With respect to the implications of the ESFS proposals for the UK once it ceases to be a Member State, the Minister says:

- the UK's representation on the governance structures of the ESAs' during the post-Brexit transitional period, when EU financial services legislation would continue to apply in the UK, is subject to discussion with the EU and the Minister will inform the Committee "as negotiations progress"; and
- following the transitional period, UK firms may not be considered "third country" undertakings for the purposes of accessing the Single Market, because the conditions for cross-border access using the EU's existing equivalence regimes—"would not support the scale and complexity of trade in financial services that exists between the UK and the EU". The Minister reiterates the Government's intention to negotiate "a new process for conducting cross-border business" which would go "beyond the third country equivalence regimes in the EU acquis".[121]

Previous Committee Reports

For the ESA proposals, see (39052), 12420/17 + ADD 1–2, COM(17) 536: Fifth Report HC 301–v (2017–19), chapter 9 (13 December 2017). For the ESRB proposal, see (39055), 12430/17 + ADD 1, COM(17) 538: Fifth Report HC 301–v (2017–19), chapter 11 (13 December 2017).

121 The Committee is awaiting a reply from the Minister to an earlier letter requesting further information on the Government's concrete proposals for these new regulatory decision-making processes; whether they would produce legal effects in the UK and the EU; and how they would facilitate cross-border flows of financial services.

8 Status and outlook for investment in nuclear energy in the EU

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	Commission Communication—Nuclear Illustrative Programme presented under Article 40 of the Euratom Treaty
Legal base	—
Department	Business, Energy and Industrial Strategy
Document Number	(38718), 9186/17 + ADD 1, COM(17) 237

Summary and Committee's conclusions

8.1 Nuclear energy is part of the energy mix of half of the EU Member States. The Commission's Communication provided an overview of investments in the EU for all steps of the nuclear lifecycle. EU Member States collaborate on nuclear energy through the linked European Atomic Energy Community (Euratom). When the UK signalled its intention to withdraw from the EU under Article 50 TFEU, it also signalled withdrawal from Euratom.

8.2 At its meeting of 10 January 2018, the Committee raised a number of issues relating to the UK's withdrawal from Euratom. The Minister for Business and Industry (Richard Harrington) has responded to the Committee, confirming the Government's desire to maintain close and effective cooperation with Euratom and to participate in advisory organisations such as the European Nuclear Safety Regulators Group (ENSREG). On transition, he confirms that it would (subject to the outcome of negotiations) cover Euratom. The Minister reports that significant progress has been made on maintaining continuity of co-operation with third countries through Nuclear Co-operation Agreements with the US, Canada, Japan and Australia. The Government will be discussing the approach to Euratom Nuclear Co-operation Agreements during transition with the EU and the respective third countries.

8.3 **We welcome the Minister's confirmation that transition will extend to Euratom and that the Government is actively working to ensure continuity of co-operation with third countries during transition and beyond. On transition specifically, we note that the terms of the Commission's draft legal text[122] would bind the UK to obligations stemming from EU agreements with third countries. This would not, however, have reciprocal effect on the third countries and so we are pleased to note that the UK will be engaging with both the EU and respective third countries on Euratom Nuclear Co-operation Agreements during transition.**

122 https://ec.europa.eu/commission/sites/beta-political/files/transition.pdf.

8.4 **We note that the Minister does not comment on continued UK participation in relevant decision-making or deliberations on the orientation of future policy, including the Council's Atomic Questions Working Party, and the implications of non-participation. The draft legal text is unclear whether exceptional UK attendance at various meetings would extend to meetings of Council Working Parties.**

8.5 **We clear this document from scrutiny and will pursue the outstanding matters in our wider work on transition and the future relationship as the issues apply beyond this policy area. We draw this chapter to the attention of the Business, Energy and Industrial Strategy Committee.**

Full details of the documents

Commission Communication—Nuclear Illustrative Programme presented under Article 40 of the Euratom Treaty: (38718), 9186/17 + ADD 1, COM(17) 237.

Background

8.6 The Commission concluded in its Communication that nuclear energy will remain an important component of the EU's energy mix over the period until 2050. The total estimated investments in the nuclear fuel cycle between 2015 and 2050 are projected to be between €660 billion (£607 billion) and €770 billion (£708 billion).[123] Full details of, and background to, the Communication were set out in our report of 10 January 2018.[124]

8.7 In his original Explanatory Memorandum, the Minister (Richard Harrington) noted that no policy implications result from the document. The UK, he said, remains committed to new nuclear and will continue to operate a robust and effective regulatory regime across the whole fuel cycle.

8.8 At its meeting of 10 January, the Committee sought information on:

- the Government's approach to regulatory cooperation and framework arrangements post-Brexit;
- continued application of the framework of Euratom rules and regulations during any transition period;
- whether transition should include Nuclear Cooperation Agreements with third countries; and
- future UK participation in any relevant decision-making or deliberations on the orientation of future policy, including the meetings of the Council's Atomic Questions Working Party, and the implications of non-participation.

The Minister's letter of 2 February 2018

8.9 The Minister is clear that the Government considers continuity of the "mutually successful civil nuclear co-operation with Euratom and international partners" to be a high priority matter following the UK's withdrawal from the EU.

123 €1 = £0.88723

124 Eighth Report HC 301–viii (2017–19), chapter 2 (10 January 2018).

8.10 On the Government's approach to regulatory cooperation/framework arrangements post-Brexit, the Minister says:

> "The Government recognises the importance of continuing our long-standing and mutually beneficial engagement with relevant regulatory organisations and advisory bodies set up under Euratom auspices as well as non-Euratom organisations, to further common understanding, exchanges of information and cooperation in areas such as nuclear safety.
>
> "This intention is set out in the Government's Written Ministerial Statement of 11 January 2018 on Euratom where it is stated that the UK wishes, through negotiation with the European Commission, to maintain close and effective cooperation with Euratom on nuclear safety among other things. The Government is exploring potential ways of continuing such engagement through appropriate mechanisms, noting that there are precedents for non-EU countries like Norway and Switzerland to participate in advisory organisations like ENSREG, the European Nuclear Safety Regulators Group."

8.11 On arrangements for the implementation period, the Minister adds:

> "Both the UK and the rest of the EU recognise that we will need time and preparations to implement smoothly many of the detailed arrangements that will underpin our new partnership. The Prime Minister in September 2017 proposed a time-limited period for implementation which would cover the EU and Euratom. The exact nature of the period will be subject to forthcoming negotiations. We want our departure from the EU to be as smooth as possible, including on nuclear issues.
>
> "Government also intends to maintain continuity of cooperation with its international partners and is working to ensure arrangements are in place to deliver this. As such, UK officials have been engaging with four key international partners, the US, Canada, Japan, and Australia, to ensure we have the essential Nuclear Cooperation Agreements in place to ensure uninterrupted cooperation and trade in the civil nuclear sector. These discussions are progressing well and significant progress has been made.
>
> "Currently, the UK's arrangements with these and other international partners on civil nuclear matters are mainly reliant on Euratom Nuclear Co-operation Agreements, in some cases alongside existing bilateral UK ones. The UK Government will be discussing the approach to these agreements during the implementation period with the EU and with third country partners. Our priority is to ensure all the necessary arrangements and agreements are in place to guarantee continuity for the nuclear sector, whatever the outcome of negotiations and whatever the length and nature of any implementation period."

Previous Committee Reports

Eighth Report HC 301–viii (2017–19), chapter 2 (10 January 2018).

9 EU Contribution to a reformed ITER project

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	Commission Communication—EU contribution to a reformed ITER project
Legal base	—
Department	Business, Energy and Industrial Strategy
Document Number	(38849), 10434/17 + ADD 1, COM(17) 319

Summary and Committee's conclusions

9.1 ITER (International Thermonuclear Experimental Reactor) is a project to build and operate an experimental facility to demonstrate the scientific viability of nuclear fusion as a future sustainable energy source. It was launched in 2005 and now involves seven global partners (Euratom,[125] USA, Russia, Japan, China, South Korea and India). The Commission's Communication sought *ad referendum* approval (i.e. non-binding and subject to finalisation at a later date) to agree with other partners a new baseline budget for the project post-2020.

9.2 The Minister of State for Universities, Science, Research and Innovation (Sam Gyimah) has now responded to queries raised by the Committee at its meeting of 10 January 2018. He is clear that the UK intends to seek a "close association" with the Euratom Research and Training Programme post-Brexit. The Minister notes that the Council is due to vote in March 2018 on the legal instrument that will extend the Programme to the end of 2020, also allowing for the two-year extension of the JET (Joint European Torus) project. Following the Council vote, the specific arrangements for the JET extension will not be affected by the Austrian Presidency.

9.3 Explaining the benefits of UK participation in ITER, the Minister points to substantial construction contracts that have already been won and notes that further contracts are being targeted. It also supports UK science excellence, encouraging investment from industry and the creation of high-skill jobs. Non-participation, he says, would place those benefits at risk and undermine the UK's "world leading" nuclear fusion research capability.

9.4 **We consider the extension of the Euratom Research and Training Programme, including JET, in a separate chapter of this Report. A number of further issues are raised in that chapter. We now clear this Communication from scrutiny and require no further information. The chapter is drawn to the attention of the Business, Energy and Industrial Strategy Committee.**

125 The European Atomic Energy Community, comprising all members of the EU as well as Switzerland which participates in some of the research activities, including ITER.

Full details of the documents

Commission Communication—EU contribution to a reformed ITER project: (38849), 10434/17 + ADD 1, COM(17) 319.

Background

9.5 ITER is being built at the Cadarache research centre in southern France and originally aimed to complete construction with so-called "First Plasma" in 2020.[126] That stage is now expected to be reached only by December 2025. Progress to full performance operation is foreseen by 2035. The total EU contribution to ITER between 2021 and 2035 is estimated at €7.1 billion (£6.3 billion).[127] No change is foreseen to the EU's contribution of €6.6 billion (£5.86 billion) by 2020. Full details and background were set out in our Report of 10 January 2018.[128]

9.6 In his Explanatory Memorandum of 11 July 2017, the then Minister (Jo Johnson) re-iterated past Government statements to the effect that the UK would like to find a way to continue to participate in ITER once it has withdrawn from the EU, but this would be dependent on negotiations. The Government would also like to continue involvement in ITER's predecessor, JET (Joint European Torus). JET is based in the UK and is largely funded by Euratom.

9.7 At its meeting of 10 January, the Committee asked for further information on:

- the Government's satisfaction that previous management and governance challenges had been resolved and that further delays were unlikely;
- whether the UK would prefer to participate in ITER post-Brexit as a global partner or in association with Euratom;
- the impact on the UK of non-participation in the future; and
- the likelihood of securing agreement to the JET contract extension before the launch of the Austrian Presidency.

The Minister's letter of 30 January 2018

9.8 On the question of whether ITER had overcome its management and governance challenges, the Minister says:

> "Following an independent review in 2013 the ITER organisation appointed a new Director, created a new governance structure and developed an Action Plan focused on cost control and implementing a more realistic schedule. An Independent Review Board found that these actions have significantly improved ITER processes.

126 First Plasma represents the stage in the construction of the fusion machine that will allow testing the essential components of the machine; under the terms of the ITER Agreement, it is the point where the construction phase is formally completed and the operation phase starts.

127 €1 = £0.88723 as at 29 December 2017.

128 Eighth Report HC 341–viii (2017–19), chapter 3 (10 January 2018).

> "The EU's Joint Undertaking, Fusion4Energy, has also carried out parallel reforms to improve the delivery of the EU's contribution to ITER.
>
> "ITER is arguably the world's most complex, ambitious, and technically challenging international scientific collaboration and as such some level of risk is unavoidable. However, the Government is satisfied that the steps taken by both the ITER organisation and Fusion4Energy will minimise the risk of further budget and schedule overruns."

9.9 Regarding the impact of the UK's non-participation in ITER, the Minister says:

> "The UK has already won €500m (£444m) worth of construction contracts for ITER, and is targeting further high-value contracts before construction completes. ITER participation supports UK science excellence, encouraging investment from industry and the creation of high-skill jobs. Non-participation would place those benefits at risk and undermine the UK's world leading nuclear fusion research capability.
>
> "As set out in a Written Ministerial Statement published on 11th January 2018, the UK intends to seek a close association with the Euratom Research and Training Programme, including JET and ITER."

9.10 On the extension of the JET contract, the Minister reports that the Council is due to vote in March 2018 on the legal instrument that will extend the Euratom Research and Training Programme to the end of 2020. It is the agreement of this legal instrument, he says, that will allow for the JET contract to be similarly extended. He adds:

> "The specific arrangements for the extension will be decided as part of discussions on the Euratom Research & Training work programme following the Council vote. These discussions are conducted at working level within the Commission and will be unaffected by the Austrian presidency."

9.11 Regarding the UK's financial contribution, the Minister confirms the Committee's understanding that the UK will continue to pay its net financial contribution to the EU until 31 December 2020 and UK organisations will continue to benefit from participation in EU programmes—including the Euratom Research & Training Programme. Longer term participation will be subject to further negotiations.

Previous Committee Reports

Eighth Report HC 341–viii (2017–19), chapter 3 (10 January 2018).

10 Linkage of EU and Swiss Emissions Trading Systems

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Business, Energy and Industrial Strategy Committee and the Environmental Audit Committee
Document details	(a) Proposal for a Council Decision on the conclusion, on behalf of the EU, of an Agreement between the EU and the Swiss Confederation on the Linking of their Greenhouse Gas Emissions Trading Systems; (b) Proposal for a Council Decision on the signing, on behalf of the EU, of an Agreement between the EU and the Swiss Confederation on the Linking of their Greenhouse Gas Emissions Trading Systems
Legal base	(a) Articles 192(1) and 218(6)(a), TFEU; EP consent; QMV (b) Articles 192(1) and 218(5) TFEU;—; QMV.
Department	Business, Energy and Industrial Strategy
Document Numbers	(a) (38987), 11699/17 + ADD 1, COM(17) 427; (b) (38988), 11700/17 + ADD 1, COM(17) 428

Summary and Committee's conclusions

10.1 The EU and Switzerland have decided to link their respective emissions trading systems (ETSs) with each other, with the aim of expanding the carbon market as to allow more cost-effective reduction of carbon emissions. The Government has now provided analysis as to why the agreement took seven years to conclude and comments on whether the EU-Swiss model could prove a useful one for the UK.

10.2 In response to queries put by the Committee, the Minister for Climate Change and Energy (Claire Perry) says that the EU-Swiss agreement is "clearly" of interest in relation to a future scenario were the UK to develop a national emissions trading system linked to other systems.

10.3 The Minister offers three significant reasons to explain the lengthy negotiation period:

- initial divergence between the EU and Swiss systems;
- Swiss reluctance to include aviation within the linked scheme; and
- the time needed for the EU to agree its common negotiating position.

10.4 On lessons learned for the UK in determining its future relationship with the EU ETS, the Minister says that the first two reasons should not be problematic for the UK as the respective schemes are already aligned, including aviation. As to the third, the Minister considers it is too early to tell whether the EU would have difficulties in coming to a common position. She notes that another factor influencing EU-UK negotiations

would be the comparatively larger size of the UK market compared to the Swiss market. The Minister confirms that the Government is considering a range of post-Brexit carbon pricing scenarios.

10.5 **The Minister has provided helpful analysis in response to our queries. We remain interested in future policy design in this area and in the specific arrangements for any post-Brexit transition period, during which the position regarding bilateral agreements between the EU and third countries is under active consideration. This EU-Switzerland agreement is one such example.**

10.6 **We will monitor developments with interest, but require no further information on these proposals. The proposals were agreed before we were able to meet following the General Election. We now clear them from scrutiny. The chapter is drawn to the attention of the Business, Energy and Industrial Strategy Committee and of the Environmental Audit Committee.**

Full details of the documents

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

Background

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

10.8 In December 2016 the Commission proposed the conclusion (document (a)) and the signature (document (b)) of an agreement linking the EU and Swiss ETSs. Negotiations had been lengthy due, in part, to the Swiss referendum in 2014 on the introduction of quotas for EU workers in Switzerland. Full details of, and background to, the proposal were set out in our report of 19 December 2017.

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

10.10 The Minister subsequently wrote to explain that the Decisions were adopted on 10 November 2017, which was before the Committee was able to consider the document. Acknowledging that the Committee had not granted scrutiny clearance, the Minister reported that she nevertheless voted in favour of the proposals. Given the UK support for the proposals, and its efforts to negotiate them, the Minister did not wish to be isolated in either abstaining or opposing the agreement.

10.11 At its meeting of 19 December 2017, the Committee was pleased to note the UK's engagement in the negotiation of this agreement. Of greatest interest was the Brexit context. We sought information on:

- the extent to which the EU ETS-Swiss ETS linkage agreement might prove a helpful model to the UK post-Brexit;
- why—other than the Swiss referendum on free movement—it took seven years from authorising the start of negotiations to reaching the final stage; and
- what lessons could be learned from the process with a view to establishing the relationship between the UK and the EU ETS.

10.12 We recognised the Minister's reasons for supporting the proposals before scrutiny clearance had been secured and we took no issue with the Government's approach.

The Minister's letter of 18 January 2018

10.13 On whether this could be a helpful model for future EU-UK relations, the Minister says:

> "[The] Government is considering the UK's future participation in the EU ETS after our exit from the EU. As set out in the Clean Growth Strategy, we remain committed to continuing to lead the world in tackling climate change. This includes carbon pricing as an emissions reduction tool for tackling climate change whilst ensuring energy and trade intensive businesses are appropriately protected from any detrimental impacts on competitiveness. In this context, the Government is looking at a range of possible scenarios and the EU-Swiss agreement is clearly of interest in relation to a future scenario were the UK to establish a national emissions trading system linked to other systems."

10.14 As to why it took seven years to negotiate the agreement, the Minister explains that there were three significant reasons for the delay.

10.15 First, there was initial divergence between the EU ETS and the Swiss ETS. Time was therefore needed during the bilateral discussion to find common ground. Consequently, Swiss policy-makers revised their CO^2 Act in 2011[129] to harmonise some design features.

10.16 Second, the inclusion of aviation in the linked scheme was a contentious topic, reports the Minister, with Switzerland initially reluctant to include the sector. As a result of negotiations, domestic and intra-European aviation were brought under scope through further revisions to the CO Act for 2021–2030.

10.17 Third, some delay was due to internal discussions and agreement within the EU. The negotiating mandate went through the standard procedures—the European Commission required the agreement of Council so it could have a mandate for the negotiations and it then renewed its mandate by updating the Council working party as needed by agreeing on common lines.

129 Federal Act (641.71) on the Reduction of CO2 emissions, 23 December 2011.

10.18 On possible lessons learned with a view to the EU-UK relationship, the Minister says:

> "[The] first two reasons for delay in the EU-Swiss link should not be so problematic as we are already aligned (given we are currently a member) and the aviation issue is resolved. On the third, it is too early to tell whether this would apply. As a participating Member State of the EU ETS, the UK's starting position will be different from Switzerland (whose ETS was not fully aligned with the EU ETS). Another factor that would influence any future negotiations relating to the UK's relationship with the EU in this area is the relative size of the UK market, which is much larger than that of the Swiss."

10.19 The Minister concludes:

> "After EU exit, the UK will be free to decide the shape and form of future policy approaches to reduce emissions. We are considering a range of carbon pricing scenarios and we welcome the interest of your Committee in how the experience of the EU-Swiss negotiations can inform our deliberations."

Previous Committee Reports

Sixth Report HC 301–vii (2017–19), chapter 3 (19 December 2017).

11 Euratom Research and Training Programme

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; further information requested; drawn to the attention of the Business, Energy and Industrial Strategy Committee and the Science and Technology Committee
Document details	(a) Report from the Commission: Interim evaluation of the Euratom Research and Training Programme 2014–2018; (b) Proposal for a Council Regulation on the Research and Training Programme of the European Atomic Energy Community (2019–2020)
Legal base	(b) Article 7 of the Treaty establishing the European Atomic Energy Community; (a)—
Department	Business, Energy and Industrial Strategy
Document Numbers	(a) (39314), 15388/17 + ADDs 1–4, COM(17) 697; (b) (39315), 15387/17 + ADD 1, COM(17) 698

Summary and Committee's conclusions

11.1 The EU's nuclear energy body, Euratom, funds a research programme into nuclear energy, both fission and fusion. The UK is a major beneficiary of the programme, because it is the host of the EU-owned Joint European Torus (JET) fusion energy project in Oxfordshire. Euratom also funds the EU's contribution to ITER, an international research project to develop a commercially-viable source of fusion energy, via its Fusion for Energy Agency of which the UK is currently a member by virtue of its EU membership.[130]

11.2 The current Euratom research programme which funds these activities expires at the end of 2018, and the European Commission has proposed extending it by a further two years to give the Member States time to negotiate a comprehensive new programme for 2021 and beyond. The proposed Regulation for the 2019–2020 Euratom programme makes no substantive changes to the existing framework, and is therefore expected to be adopted by the Council in March 2018.[131] In parallel, the Commission has also published an interim evaluation of the Euratom research programme with recommendations for its successor after 2020.[132]

11.3 The Parliamentary Under Secretary of State Department for Business, Energy and Industrial Strategy (Richard Harrington) submitted an Explanatory Memorandum on the

130 The Committee looked at the EU's contribution to the ITER project, which is facing an escalation in costs, in its Report of 10 January 2018.

131 Unlike the EU's general Framework Programme for research (Horizon 2020), which can be adopted by qualified majority, the Euratom research & training programme must be endorsed unanimously by all Member States. The European Parliament is consulted but does not have a vote.

132 See Commission document COM(2017) 697.

proposal on 11 January 2018.[133] He underlined the Government's support for the extension of the research programme, and also emphasised the UK's objective of securing additional funding for the JET project after the current grant agreement ends in December 2018.

11.4 As regards the implications of Brexit for the UK's cooperation with other EU countries on nuclear energy research, he notes that Euratom provides "a resource which we would not be able to be duplicate at the national level". The Minister also references the provisional Brexit financial settlement, under which UK organisations would remain eligible for participation in the Euratom programme in 2019 and 2020 in return for continued UK contributions to the EU budget. He is silent about any contribution to Euratom after 2020 in return for continued UK participation.

11.5 **As in previous years, the extension proposed by the Commission does not make substantive changes to the Euratom research programme for the final two years of the current Multiannual Financial Framework. In view of the Government's support for the extension of the Euratom research programme, we now clear the proposed Regulation and the interim evaluation from scrutiny. We also draw these developments to the attention of the Business, Energy and Industrial Strategy and the Science and Technology Committees.**

11.6 **Given the value of the Euratom research programme to the UK, the Government has said that it will seek to remain closely associated with the programme after Brexit. However, the Government has refused to enter into detail about the proposed substance of the legal agreement with Euratom that would be necessary to make this a reality—both during and after any post-Brexit transitional period.**

11.7 **The decision to leave Euratom raises a number of legal, technical, and financial questions about the UK's cooperation with the EU on nuclear matters. We already referred to a number of these in our Report on Euratom of 10 January 2018.[134] With respect to UK involvement in the EU's nuclear research programme, the immediate implications of Brexit are:**

- **during the transition, the UK would remain a participant in—and contributor to—the Euratom research programme, but under the arrangements proposed by the EU,[135] the Government would no longer have a vote on individual funding decisions within the Euratom Programme Committee[136] or sit on the Governing Board of the Fusion for Energy Agency (see paragraph 11.35);**
- **the UK will not have a vote within the Council on the next Euratom Research Programme Regulation, which will set the EU's nuclear research priorities**

133 Explanatory Memorandum submitted by the Department for Business, Energy & Industrial Strategy (11 January 2018).

134 See for more information our Special Report on the European Atomic Energy Community (10 January 2018).

135 The EU has taken an uncompromising stance on UK representation in its institutions and bodies during the transition, with UK representation only foreseen on an "exceptional" and "case-by-case" basis, at the invitation of the remaining Member States. See for more information the negotiating directives on transition as adopted by the General Affairs Council on 29 January 2018.

136 The Euratom Programme Committee, composed of Member State representatives, has to approve by qualified majority the European Commission's proposals for work programmes and funding decisions for indirection actions under the Euratom research programme.

and financial envelope for 2021–2025. A proposal is due to be presented by the Commission in draft later this year, but likely will not be adopted by the other Member States until 2020 (see paragraph 11.30);

- **after the transitional period ends, the UK would no longer automatically participate in the Euratom programme. The UK will have to apply for "association" with the Euratom research programme to continue close collaboration with other EU countries on nuclear research matters after the post-Brexit transitional period, most likely requiring a continued annual financial contribution proportional to its GDP and with observer status only in the Euratom Programme Committee (see paragraph 11.37); and**
- **to continue participating in the international ITER fusion energy project, the UK will have to apply to join the EU's Fusion for Energy Agency—requiring some, although limited acceptance, of the powers of the European Commission and the European Court of Justice, or request to become an independent party to the ITER Agreement (see paragraph 11.42).**

11.8 **Moreover, in a "no deal" Brexit scenario, the UK would abruptly cease to be part of both Euratom, Fusion for Energy and the ITER project in March 2019. We assume that, in such an eventuality, any extension of funding for the JET in Oxfordshire beyond 2018 would also be terminated unilaterally by the EU. There would also be implications for the UK's nuclear research sector more broadly, given that it would no longer be part of what the Minister described as a "resource which we would not be able to be duplicate at the national level".**

11.9 **The UK's exit from Euratom therefore continues to raise important questions about the future of its nuclear research industry, and the political and financial mechanisms the Government would consider acceptable to keep the UK involved in Euratom and its research programme as a non-Member State. The Committee will continue to press the Government for clarity about the post-Brexit cooperation with the EU on research collaboration, including in the field of nuclear energy.**

Full details of the documents

(a) Report from the Commission: Interim evaluation of the Euratom Research and Training Programme 2014–2018: (39314), 15388/17 + ADDs 1–4, COM(17) 697; (b) Proposal for a Council Regulation on the Research and Training Programme of the European Atomic Energy Community (2019–2020): (39315), 15387/17 + ADD 1, COM(17) 698.

Background

11.10 The Treaty establishing Euratom (the European Atomic Energy Community) enables the EU's Member States to establish a "research and training" programme on civilian uses of nuclear power. The current Euratom programme was established in 2014 and, in line with the Euratom Treaty, runs for five years until the end of 2018.[137] It complements Horizon 2020, the EU's 8th Framework Programme for research and

137 Council Regulation (EU) 1314/2013.

innovation for 2014–2020. The European Parliament is only consulted on the Euratom programme and does not have a binding say such, as it does for the general Framework Programme.

11.11 The Euratom programme for 2014–2018 was given a budget of €1.6 billion (£1.4 billion), which is funded by the general EU budget. The programme finances nuclear research and training with an emphasis on fusion and fission energy, nuclear safety and security, radiation protection and radioactive waste management. This is done using two mechanisms:

- **Direct actions**, which are research activities undertaken by the Commission through its Joint Research Centre (JRC) and cover only nuclear fission research. None of these are undertaken in the UK, although UK organisations can participate; and
- **lndirect actions**, where research is undertaken by participants in Member States or countries associated with Euratom, but funded by the EU.

Fusion energy

11.12 One of the main focus areas of the Euratom research programme has been research into developing a capability to generate electricity from fusion on a commercially viable basis. As the name suggests, fusion power is generated by fusing atoms together through a process of magnetic confinement, producing heat that can be converted into electricity. The Member States earmarked €728 million (45 per cent) of the Euratom programme budget between 2014 and 2018 for research in this area.

11.13 EU-funded nuclear fusion research is undertaken by:

- Eurofusion, a consortium of 30 European research organisations and universities, which runs the Joint European Torus (a fusion research facility) at the Culham Centre in the UK;[138] and
- The "Fusion for Energy" Agency, the EU's contribution to ITER, an international research projects that will try to generate fusion power as a reliable, commercially-viable energy source.

Eurofusion and the Joint European Torus

11.14 In 2014, the EU and its Member States launched the Eurofusion Consortium. It is the umbrella organisation responsible for the EU's collective scientific exploitation of the JET experiment.

11.15 JET (the Joint European Torus)[139] is a leading fusion energy project. It is run by the UK Atomic Energy Authority (UKAEA) at the Culham Centre for Fusion Energy

138 The Euratom Work Programme for 2014–15 notes that "the operation of JET will be funded via a separate bilateral operation contract between the Commission and [the Culham Centre]".

139 A torus is a geometrical three-dimensional shape, perhaps most easily compared to a doughnut or an inner tube. The JET has its name because it has a tokamak design, a magnetic confinement device that forces the plasma needed for fusion power into the shape of a torus.

near Oxford, but its facilities are owned by the European Commission,[140] which provides them as an in-kind contribution to Eurofusion. Moreover, its research is largely funded by Euratom, which provided its latest non-competitive grant to the facility, worth €238 million (£209 million), in 2014. The research undertaken at JET contributes to the preparatory work for the launch of ITER in the middle of the next decade (see below).

11.16 Euratom's grant agreement with Eurofusion for the exploitation of JET expires in 2018. A decision on whether to extend the existing contract to 2020 under the next Euratom programme, which is the outcome sought by the Government, is pending. The Business Secretary (Greg Clark) has said that the Government wants to "ensure that the UK maintains its leading role in European nuclear research", including "a close association with […] the Joint European Torus".[141] It has also confirmed that, should the Commission agree to extend the JET contract, the UK would "underwrite its fair share of JET's running costs".[142] In any event, the Government has already agreed to contribute to the EU budget, and therefore to the Euratom research programme, in 2019 and 2020 as if it were still a Member State.

11.17 The European Commission will decide on the possible extension of the grant agreement for the JET project at Culham for another two years after the draft Regulation extending the Euratom programme until 2020 is formally adopted. This is scheduled for the meeting of EU Science Ministers in Brussels on 12–13 March 2018.[143]

Fusion for Energy and ITER

11.18 The International Thermonuclear Experimental Reactor (ITER) is an international programme exploring nuclear fusion-based energy. The UK currently participates in this programme via its membership of Euratom. ITER is different from the Eurofusion and JET projects, as it is an intergovernmental organisation with seven members (the EU, the USA, India, China, South Korea, Russia and Japan).[144] Switzerland participates via its association agreement with Euratom.

11.19 The aim of the project is to lay the groundwork for DEMO, a prototype fusion reactor that should demonstrate industrial-scale fusion electricity by the middle of the century. The signatories to the ITER Agreement[145] share the cost of project construction, operation and decommissioning, and also share in the experimental results and any

140 The facilities are owned by the EU because the JET project was established by the then-European Economic Community/ Council Decision 71/237/Euratom established a five-year research programme into nuclear fusion. In 1975, Council Decision 75/330/Euratom released EEC funding for the design and preparation of JET, and Council Decision 78/471/Euratom established the JET Undertaking and fixed its location at Culham, Oxfordshire. See the Euratom Work Programme for 2014–15, p. 31.

141 Written Ministerial Statement on Energy Policy (HCWS399), January 2018.

142 BEIS, "Government commits to continue funding its share of Europe's flagship UK-based nuclear fusion research facility" (27 June 2017).

143 Any funding for the JET beyond 2020 will not be decided until after the UK's projected date of exit from the EU in March 2019, as such a grant would require an additional funding decision under the post-2020 Euratom programme Regulation, which is yet to be put in place. In its interim evaluation of the Euratom R&T programme, the European Commission said: "Any future Euratom support to fusion research and Euratom support to all relevant research facilities beyond 2020 will be the subject of an impact assessment accompanying the Commission proposal for the future Euratom research programme."

144 The ITER Organization has also concluded non-Member technical cooperation agreements with Australia (through the Australian Nuclear Science and Technology Organisation, ANSTO in 2016) and Kazakhstan (through Kazakhstan's National Nuclear Center in 2017).

145 Agreement on the Establishment of the ITER International Fusion Energy Organization for the Joint Implementation of the ITER Project (December 2006).

intellectual property generated by the project. The EU and Switzerland are responsible for the largest portion of construction costs (45.6 percent);[146] the remainder is shared equally by the other parties (9.1 percent each). The participating countries mainly make their contributions to ITER in kind, in the form of completed components, systems or buildings.

11.20 Each party to the ITER Agreement has had to create a Domestic Agency to fulfil its procurement responsibilities to ITER. These agencies employ their own staff, have their own budget, and contract directly with industry. For Euratom, the domestic agency is Fusion for Energy,[147] funded primarily from the Euratom research programme.[148] It manages the EU's contribution to the ITER project, One of its main tasks is cooperating with industry, small and medium-sized businesses and research organisations to develop and provide a range of technology components, as well as engineering, maintenance and support services to underpin the project.

Extension of the Euratom programme

11.21 As the current Euratom programme will expire in December 2018, the European Commission set out the details of a proposal to effectively extend the Programme by two years in December 2016.[149] This will align it with the EU's current budgetary cycle (2014–2021). This has also been the usual practice in previous years.[150]

11.22 A proposal for the Euratom research programme for 2021–2025 will be presented by the Commission later this year as part of the wider negotiations on the next Multiannual Financial Framework.

The Commission proposal

11.23 The proposed Regulation for the 2019–2020 Euratom programme extension maintains the same scope as the current programme, and is based on the original impact assessment produced by the Commission in 2011.[151] It is therefore expected to be adopted by the Council after a relatively short period of deliberation. The Bulgarian Presidency of the Council hopes to secure formal adoption of the Regulation at the meeting of EU Science Ministers on 12–13 March 2018.[152]

11.24 The Commission lists a small number of substantive changes to the R&T programme for 2019–2020 compared to the current programme, including:

- In article 4, the budget for direct and indirect actions has been updated for 2019–2020, recommending a total of €770 million (£680 million), an increase of 20 per cent on an annualised basis compared to the budget for 2014–2018; and

146 Of this share, 80% is funded from the EU budget and 20% by France as the ITER host country.

147 Its full name is the "European Joint Undertaking for ITER and the Development of Fusion for Energy". The agency was established by the Member States via Council Decision 2007/198/Euratom.

148 See article 12 of Council Decision 2007/198/Euratom.

149 European Commission Roadmap, 22 December 2016.

150 See for example Council Decision 2012/93/Euratom, which extended the Euratom R&T programme for 2007–2011 until 2013.

151 See for example the Annexes to Commission document SEC(2011) 1427.

152 Unlike the EU's general Framework Programme for research (Horizon 2020), which can be adopted by qualified majority, the Euratom research & training programme must be endorsed unanimously by all Member States. The European Parliament is consulted but does not have a vote.

- Annex I,[153] which lists specific activities to be funded, has been amended in relation to the UK-based Joint European Torus (JET) project, to reflect the fact that continued funding from the EU budget will depend on the outcome of the Brexit negotiations (see paragraph 11.16 below).

11.25 The Parliamentary Under Secretary of State Department for Business, Energy and Industrial Strategy (Richard Harrington) submitted an Explanatory Memorandum on the proposal on 11 January 2018.[154] He underlines the importance of the Euratom programme for the UK nuclear research sector, noting that the UK Atomic Energy Authority receives around €65 million (£56 million) annually for the JET operating contract, on top of the €4.4 million (£3.8 million) in funding for fission research UK organisations receive on average per year. He adds:

> "UK organisations also benefit from access to the unique JRC [Joint Research Centre][155] nuclear facilities of which the UK currently has no equivalent. As a consequence of this direct funding, UK organisations and researchers have access to all research programmes funded partially or in full by Euratom, providing a resource which we would not be able to be duplicate at the national level."

11.26 With respect to the implications of Brexit, the Minister notes that the provisional financial settlement for the UK's withdrawal from the EU will allow the UK to continue participating in the Euratom research programme (and all other EU funding instruments) during a transitional period after March 2019, until the end of the current Multi-annual Financial Framework in December 2020. In return, the UK will make its contributions in 2019 and 2020 as if it were still a Member State (including the rebate). It will also assume liability for a share of the EU's expenditure commitments made before 31 December 2020 which have not yet been paid by that date.[156] However, as noted, this arrangement does not guarantee that the Commission will provide funding for the JET in Oxfordshire beyond the end of 2018.

11.27 As regards the post-transition relationship between the UK and Euratom, the Minister reiterates the objective set out in the Government's "future partnership paper" on science and innovation,[157] namely that the UK "hopes to find a way to continue working with the EU on nuclear R&D". He does not provide any further detail about the Government's plans for the substance of such a partnership, or its financial implications.

The interim evaluation of the current Euratom research programme

11.28 In parallel to its proposal to extend the Euratom research programme until the end of 2020, the European Commission also published an interim evaluation of the current programme to date.[158]

153 See European Commission document COM(2017) 698, Annex I.

154 Explanatory Memorandum submitted by the Department for Business, Energy & Industrial Strategy (11 January 2018).

155 The JRC is the European Commission's in-house scientific research division.

156 The difference between the EU's financial commitments and actual payments is known as the Reste a Liquider (RAL). By the end of 2020, RAL is estimated to stand at approximately €254 billion (£223 billion). The UK's share of this is expected to be roughly 13 per cent.

157 DExEU, "Collaboration on science and innovation—a future partnership paper" (6 September 2017).

158 See European Commission document [x/y]. The Commission also published an interim evaluation of Horizon 2020, which we have considered separately in a different chapter in this Report.

11.29 The evaluation assesses the "relevance, effectiveness, efficiency, coherence and EU added value" of the 2014–2018 Euratom research programme up until the end of 2016. It presents a generally positive view of the programme to date, noting that the research challenges addressed by the programme are "relevant for future economic development and the safety and wellbeing of European citizens".

11.30 The report also sets out a series of recommendations made by independent expert groups established by the Commission for the next Euratom programme, which will run from 2021 to 2025. These cover a range of issues, including recommendations to reinforce the training elements of the programme through specific objectives and to introduce greater synergy with other EU research activities and to address means of increasing the participation of new and emerging contributors. There is also a recommendation for the launch of a European Joint Programme in nuclear waste management research. The European Commission is studying these recommendations, and the result of its assessment will be incorporated into the upcoming proposal for the Euratom research programme after 2020.

11.31 Of particular relevance to the UK is the expert groups' recommendation that funding for the JET experiment should be continued until 2024. However, given the sensitivities around the Brexit negotiations, the Commission refused to accept this recommendation directly, repeating that "all decisions concerning the funding of concrete fusion activities, are to be taken by the Commission as part of the Euratom work programme 2019–2020, once the new Regulation is adopted".

11.32 In his Explanatory Memorandum on the interim evaluation of the Euratom research programme, the Minister reiterates the Government's favourable view of the programme for the UK, and its support for the extension of the programme until the end of 2020.[159]

Our assessment

11.33 As in previous years, the extension proposed by the Commission does not make substantive changes to the Euratom research programme for the final two years of the current Multiannual Financial Framework. Our main concern therefore relates to the wider political context created by the UK's withdrawal from the EU, and its implications for UK involvement in collaborative European nuclear research.

Implications of Brexit

11.34 When the Government invoked Article 50 of the Treaty on European Union to notify its intention to withdraw from the EU, it gave parallel notice to withdraw from Euratom. As a result, the UK will cease to be a member of Euratom in March 2019 unless the Article 50 negotiating period is extended or the Withdrawal Agreement provides for a different date.

159 Explanatory Memorandum submitted by the Department for Business, Energy & Industrial Strategy (11 January 2018).

11.35 As a consequence of the decision to leave Euratom, the relationship between the UK and the EU's nuclear research programme will change in a number of ways when the UK ceases to be a Member State:

- during the transition, the UK would remain a participant in—and contributor to—the Euratom research programme, but under the arrangements proposed by the EU,[160] the Government would no longer have a vote on individual funding decisions on the Euratom Programme Committee,[161] or sit on the Governing Board of the Fusion for Energy Agency;
- the UK will not have a vote within the Council on the next Euratom Research Programme Regulation, due to be presented by the Commission in draft later this year but likely to be adopted by the other Member States in 2020;
- after the transitional period ends, the UK would no longer automatically participate in the Euratom programme. The UK will have to apply for "association" with the Euratom research programme to continue close collaboration with other EU countries on nuclear research matters after the post-Brexit transitional period, most likely requiring a continued annual financial contribution proportional to its GDP and with observer status only in the Euratom Programme Committee; and
- to continue participating in the international ITER fusion energy project, the UK will have to apply to join the EU's Fusion for Energy Agency—requiring some, although limited acceptance, of the powers of the European Commission and the European Court of Justice, or request to become an independent party to the ITER Agreement (see paragraph 11.40).

11.36 We note in this respect that the exact rules for association of non-EU countries with the Euratom research programme after 2020 are yet to be determined. However, there is precedent for third-party involvement in fusion research via participation in the Euratom R&T Programme and the Joint Undertaking for ITER (known as Fusion for Energy), with Switzerland the only non-EU country to participate in both.[162]

Potential UK financial contribution to the Euratom programme

11.37 If the UK negotiated an association agreement with the Euratom research programme similar to that of Switzerland after the post-Brexit transition,[163] it would have to make a financial contribution each year. The contribution would be dependent on the EU's annual budget for the programme, over which the UK would no longer have

160 Negotiating Directives on the post-Brexit transition adopted by the General Affairs Council on 29 January 2018, para. 18: "In line with the European Council guidelines of 15 December 2017, the United Kingdom will however no longer participate in or nominate or elect members of the Union institutions, nor participate in the decision-making or the governance of the Union bodies, offices and agencies."

161 The Euratom Programme Committee, composed of Member State representatives, has to approve by qualified majority the European Commission's proposals for work programmes and funding decisions for indirection actions under the Euratom research programme.

162 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32007D0198.

163 Norway is fully associated with Horizon 2020 but does not participate in the Euratom R&T programme as it has no domestic nuclear industry. The only other non-EU country that participates in the Euratom programme is Ukraine.

control.[164] In return, UK-based organisations would be eligible for funding for indirect action (such as the Joint European Torus),[165] and to participate in actions undertaken by the Commission's Joint Research Centre.

11.38 However, while non-EU countries who participate in the Euratom research programme are allowed to send observers to the Euratom Programme Committee (which has to approve funding decisions and work programmes put forward by the European Commission), only EU Member State representatives have a vote. At present, given the use of qualified majority voting on the Committee, the UK has a significant influence.

11.39 The Government has not provided any detail about its desired substance for an agreement on the UK's association with the Euratom research programme, or its view on the financial contribution it would be expected to make.

Implications of Brexit for participation in ITER

11.40 The UK's exit from EU also affects its status under international agreements concluded by Euratom on behalf of its Member States.[166] In the field of nuclear research, this is principally the ITER Agreement (see paragraphs 11.18 to 11.20 above).

11.41 Although the UK is not independently party to the ITER Agreement, it is the Government's stated objective to remain involved in the ITER project after Brexit. During the transitional period, if one is negotiated, the UK would remain a contributor to the EU's Fusion for Energy Agency. However, whether the other parties to the ITER Agreement will accept this as the legal basis for the UK's continued involvement in ITER is unclear.

11.42 In June 2017, the European Commission spelled out the two options open to the Government to remain involved in ITER after Brexit and any transitional phase:

- seek to be associated to Euratom's ITER activities through Fusion for Energy (in a manner similar to Switzerland). The Commission notes that, "whether this will be acceptable and under which conditions will be a matter for consideration of the 27 Euratom Member States and negotiation between Euratom and the United Kingdom"; or

- seek to participate directly in the ITER project by becoming a party to the ITER Agreement, subject to the unanimous approval of the existing ITER Members, including Euratom. This would require a change to the treaty.[167]

11.43 The Government has not indicated which of these options it would prefer as the long-term solution for continued participation in ITER. The Committee requested further

164 To participate in the programme, Switzerland has to make an additional contribution which is added to the EU's budget for the programme. This contribution is calculated as a fixed proportion of the budget set by the EU in relation to Switzerland's GDP compared to that of the EU. For example, if the EU's budget was €100 million, and Switzerland's GDP was 3 per cent of the EU's GDP, it would have to make a contribution of €3 million, bringing the total budget for the programme in that year to €103 million. This is also the same approach taken to financial contributions by non-EU countries to other EU programmes, for example under the EEA Agreement.

165 Any continued EU funding the JET project in Oxfordshire after 2020 could require an additional contribution by the UK, given that it would be the direct beneficiary of a disproportional tranche of Euratom's annual funding for fusion energy research.

166 The UK's participation under international agreements concluded by the EU and Euratom, including the ITER Agreement, will automatically lapse on the day it ceases to be a Member State.

167 European Commission document COM(2017) 319.

information from the Minister for Science on this point in January 2018, but has not yet received a reply.[168] Continued association with ITER through association with the Fusion for Energy Agency might be more straightforward to negotiate, considering that discussions with the EU on the future partnership on nuclear matters will take place in any event and no treaty change would be necessary. Under EU law, such association would require the UK to:

- conclude a cooperation agreement with Euratom in the field of controlled nuclear fusion;
- make an annual financial contribution to the work of Fusion for Energy, in addition to its general financial contribution to the Euratom research programme (see paragraph 11.37);
- accept the oversight of the European Commission and the EU's anti-fraud body OLAF—including their ability to conduct site visits in the UK—in respect of funding awarded for the purposes of furthering the work of the Joint Undertaking; and
- accept the jurisdiction of the Court of Justice over the final interpretation of the Council Decision establishing the Fusion for Energy Agency, and any contracts concluded by the Agency's Governing Board.

11.44 If the UK were to join Fusion for Energy, it would sit on its Governing Board with voting rights. Whether it retains its seat for the duration of the transitional period (i.e. in between ceasing to be a member of the EU and concluding a new association agreement with Euratom) is yet to be negotiated.

11.45 The Committee will continue to press the Government for more detail about its proposals for the post-Brexit partnership with Euratom, including the legal and financial implications of an "association agreement" with its nuclear research programme and the Fusion for Energy Agency.

Previous Committee Reports

None.

168 See Report of 10 January 2018.

12 EU-US commercial data transfers: review of Privacy Shield

Committee's assessment	Legally and politically important
Committee's decision	Cleared from scrutiny; further information requested; drawn to the attention of Exiting the EU Committee, the Science and Technology Committee, and the Digital, Culture, Media and Sport Committee and the Home Affairs Committee
Document details	Report from the Commission to the European Parliament and the Council on the first Annual Review of the functioning of the EU-US Privacy Shield
Legal base	—
Department	Digital, Culture, Media and Sport
Document Number	(39148), 13524/17 + ADD 1, COM(17) 611

Summary and Committee's conclusions

12.1 The ability to continue to share commercial data with the EU after Brexit will be crucial to the UK's future trading relationship with the EU. It may also be a concern during any transition or implementation period. Personal data can only be shared by data processors and controllers in the EU with third countries who provide equivalent levels of data protection. This is usually established by a Commission implementing act[169] called an "adequacy decision". The necessary implementing powers for the Commission are provided by the EU parent legislation, currently the Data Protection Directive 95/46/EC (the DPD).[170] It is also a matter of concern that after Brexit the UK can share data with countries who already have an EU adequacy decisions.

12.2 On 12 February 2016 the EU and US came to political agreement on a framework for EU-US personal data transfers for commercial purposes. On 12 July, the Commission adopted a partial adequacy decision which approved the Privacy Shield.[171] This followed the invalidation of the previous adequacy decision, known as Safe Harbor in the *Schrems* case[172] for incompatibility with the DPD and Articles 7 and 8 of the Charter of Fundamental Rights (right to a private and family life and right to protection of personal data).

12.3 The proposed Commission Implementing Decision for the approval of the Privacy Shield was itself deposited at the request of the previous Committee who scrutinised it closely.[173] A summary of the content of Privacy Shield is provided at paragraphs 6.12–6.14 of our last Report.[174]

169 A form of EU tertiary legislation.

170 The Directive is itself an EU secondary legislative measure.

171 C (2016) 4176. Commission Implementing Decision 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield.

172 C-362/14 Maximillian Schrems v Data Protection Commissioner, 6 October 2015.

173 See the Report listed under "Previous Committee Reports" for (37695) at this end of this Report chapter.

174 Third Report HC 301–iii (2017–19), chapter 6 (29 November 2017).

12.4 The current document is the first annual review of the Privacy Shield. Overall, the Report shows that the Privacy Shield continues to ensure an adequate level of data protection for personal data transfers for commercial purposes from the EU to the 2,400 participating companies in the US. Details of the Commission's review are provided at paragraphs 6.15–6.19 of our last Report.[175]

12.5 The Government told us in its Explanatory Memorandum that the UK was a firm supporter of the Privacy Shield agreement being finalised and viewed it as a major step forward for restoring certainty and a stable legal footing for transatlantic data flows. It also says that the EU-US Privacy Shield is essential to UK businesses, who would find other mechanisms for transfer more complicated and expensive.

12.6 We expressed our disappointment in our last Report that the Government did not address, to any extent, the Brexit implications of the UK sharing personal data with third countries or the EU. However, we were already engaged in ongoing scrutiny of how the UK will share data with the EU after Brexit in relation to the Commission's Communication on "Exchanging and Protecting Data in a Globalised World".[176] We had also taken the opportunity to ask the Government questions about its Future Partnership paper "The exchange and protection of personal data" when it was sent to us for our information.[177] We therefore decided not to duplicate that scrutiny. So instead, we focussed on the Minister's comments about exploring how to share data with the US after Brexit. We asked to hear more broadly from the Government on this third country issue and how the UK will continue to exchange data with the EU and with third countries who have an adequacy decision with the EU:

a) during any transitional/implementation period; and

b) after Brexit.

12.7 We were also interested in the legal longevity of the EU-US Privacy Shield, in the light of current legal challenges, *Digital Rights Ireland*[178] and *La Quadrature du Net*.[179] We asked the Government for an update, including whether the UK was intervening in these proceedings.

12.8 **We thank the Minister (Margot James) for her letter of 29 January 2018 and her responses to our questions.**

12.9 **We appreciate current uncertainties over the precise arrangements for the UK to exchange personal data with both the EU and third countries during a transition/implementation period.[180] However, we would request that the Minister write to us when specific agreement on transitional arrangements has been reached. We would like the Minister to address these specific areas of recent concern:**

175 See footnote 6.

176 (38493), 5191/17. See reports listed under "Previous Committee Reports" for 38493 at the end of this Report chapter.

177 See Letter from Sir William Cash, Chairman, European Scrutiny Committee to the Minister for Digital (Matt Hancock) at the Department of Digital, Culture, Media and Sport dated Monday 13 November 2017. The position paper accessible from the DEXEU website at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639853/The_exchange_and_protection_of_personal_data.pdf

178 Digital Rights Ireland v Commission, Case T-670/16.

179 La Quadrature du Net and Others v Commission, Case T-738/16.

180 We note that the cumulative effect of paras 1 and 6 of Article X+1 "Scope of the transition" of the proposed legal text on Transitional Arrangements published by the MS27 on 7 February 2018 would appear to be that the UK would be treated as an EU Member State and not as a third country during transition for the purposes of EU legislation and law, including that on data protection and data sharing, subject any relevant restrictions stated in the second sub para of 6.

a) **The Council's negotiating directives adopted on 29 January,[181] reflected more precisely in the MS27 legal text published on 7 February, state that the UK will no longer attend meetings of Commission experts' groups, committees or other similar entities where Member States are represented.[182] However, exceptionally on a case-by-case basis, the UK might be invited to attend one of these meetings without voting rights.[183] As things stand there is no specific arrangement for UK national data protection experts to be involved in any way in relation for the comitology process for making third country adequacy decisions during the transition/implementation period. These decisions could be of important precedential value for future EU-UK data-sharing. We would be interested to learn, in due course, what, if any arrangements, have been agreed for the UK to continue to have some expert input into adequacy decisions and other data protection instruments during transition.**

b) **Connected with (a), we note the oral evidence of the UK Information Commissioner (Elizabeth Denham) provided in late January to the Science and Technology Committee about the loss of UK influence as a third country regulator:**

> **"I have the experience of once being a third-country regulator in Canada, because Canada is an adequate jurisdiction to the EU. I can tell you that Canada is not horrendously influential in what happens in the EU. That said, the ICO has a strong influence around the table with our European Union counterparts, because we are a really, large authority. We are probably the largest data protection authority in Europe and perhaps globally.**
>
> **"However, if we were a third country, and even if we had an equivalent law, if we are not a decision-maker in trans-border cases and we are not making decisions, then we are not going to be as influential as we are now. The EU is a large block of data protection supervisors."[184]**

In the light of this, we would be interested to learn what cooperation is envisaged between the Information Commissioner's Office as the UK data protection regulator and EU data protection bodies both during transition and as part of a future EU-UK relationship.

c) **The recent Court of Appeal judgment in the *Watson* case[185] has applied the earlier CJEU ruling in those proceedings to the Data Retention and Investigatory Powers Act 2014 (now repealed) with implications for the Investigatory Powers Act 2016. It serves as reminder of the exigencies of EU law when it comes to obtaining an adequacy finding from the Commission**

181 Negotiating directives adopted by the Council on 29 January 2018

182 Para 1 of Article X+2 "Institutional Arrangements" of the proposed draft legal text on Transitional Arrangements published by the MS27 on 7 February 2018.

183 Para 4 of Article X+2 "Institutional Arrangement" of the legal text on Transitional Arrangements published by the MS27 on 7 February 2018.

184 Oral evidence taken before the Science and Technology Committee on 23 January 2018, HC 351 (2017–19), Q319 [Elizabeth Denham]

185 Secretary of State for the Home Department (Appellant) and (1) Tom Watson MP (2) Peter Brice (3) Geoffrey Lewis and Respondents (1) Open Rights Group (2) Privacy International (3) The Law Society of England and Wales, Judgment of the Court of Appeal, 30 January 2018.

as to the level of data protection afforded by a third country. Related to these developments, we would be interested in any information the Government has about progress in the *Bulk Personal Datasets*[186] preliminary reference to the CJEU by the Investigatory Powers Tribunal, including the expected date of a ruling. We note that this case concerns whether the CJEU's judgment in the *Watson* case[187] covers data retained for national security purposes. We would therefore also like to know whether any ruling would have implications for UK data-sharing or surveillance for national security purposes during a transition/implementation period. We appreciate that these matters might fall within the remit of the Home Secretary but are confident that an answer can be provided through cross-departmental liaison.

12.10 **We will consider the Minister's responses to our questions in paragraphs 9(a)-(c) above in the context of our continuing scrutiny of the Commission Communication on Exchanging and Protecting Data in a Globalised World.**

12.11 **Given that, we now clear this non-legislative report from scrutiny. We also draw it and this chapter to the attention of the Exiting the EU Committee, the Digital, Culture, Media and Sport Committee, the Science and Technology Committee and the Home Affairs Committee.**

Full details of the documents

Report from the Commission to the European Parliament and the Council on the first Annual Review of the functioning of the EU-US Privacy Shield: (39148), 13524/17+ ADD 1, COM(17) 611.

The Minister's letter of 29 January 2018

12.12 The Minister for Digital and the Creative Industries at the Department for Digital, Culture, Media and Sport (Margot James) says:

> "The Committee has asked a number of follow-up questions relating to how the UK intends to continue sharing data with the EU and third countries (regarded as adequate by the EU) when we leave the EU. The Committee has also asked for further detail on the current legal challenges against the EU-US Privacy Shield and the UK's approach to them.
>
> "As set out in our Future Partnership Paper on data, the UK recognises the need for, and is one of the leading drivers of, high data protection standards across the globe. After our exit, the UK will remain a global leader on data protection, by promoting both the flow of data internationally and appropriate high levels of data protection rules.

186 Privacy International v Secretary of State for Foreign and Commonwealth Office, Secretary of State for the Home Office, GCHQ, Security Service and Secret Intelligence Service: Order for a Preliminary Ruling request dated 18 October 2017.

187 Joined Cases C-203/15 and C-698/15 Tele 2 Sverige and Watson.

> "Furthermore, and as my predecessor set out in his letter to the Committee of 26 October (in response to the Committee's EU Data Protection Package report), the Government recognises the importance of maintaining uninterrupted data flows with the EU after UK exit.
>
> "In the light of the recent agreement that sufficient progress has been made to move to the second phase of EU exit negotiations, we will propose a strictly time-limited implementation period from our exit to our future partnership arrangements. Our goal is to ensure that the unhindered free flow of data between the UK and the EU continues after the UK's exit from the EU. Combined with that, the EU (Withdrawal) Bill will ensure that the remainder of the GDPR is incorporated into domestic law post exit."

12.13 The Minister adds that the Data Protection Bill's Statement of Intent states:

> "The ability to transfer data across international borders is crucial to a well-functioning economy. We are committed to ensuring that uninterrupted data flows continue between the UK, the EU and other countries around the world. The Data Protection Bill will place us on the front foot in allowing the UK to maximise future data relationships with the EU and elsewhere."

12.14 She continues

> "On the EU-US Privacy Shield, the UK has intervened in both legal challenges brought against the framework. In the case of La Quadrature du Net, the UK submitted written observations to the Court. We understand that the challenge brought by Digital Rights Ireland has been struck out by the Court and therefore will not require further action from a UK perspective at this time. The UK remains a strong supporter of the Privacy Shield and believes it provides a resilient framework for data transfers that meet the requirements set out by the Court of Justice of the European Union in the Schrems litigation. It also provides the most efficient method for transatlantic data transfers, and it is important to UK businesses to ensure that they can continue sending personal data to the US."

Previous Committee Reports

Third Report HC 301–iii (2017–19), chapter 6 (29 November 2017). See also (38493), 5191/17: Thirty-fourth Report HC 71–xxxiii (2016–17), chapter 5 (8 March 2017); also (37695),—: Seventeenth Report HC 71–xv (2016–17), chapter 10 (2 November 2016); Eighth Report HC 71–vi (2016–17), chapter 7 (13 July 2016); and Third Report HC 71–ii (2016–17), chapter 3 (25 May 2016).

13 Access to EU environmental justice at EU and Member State level

Committee's assessment	Legally and politically important
Committee's decision	Cleared from scrutiny; further information requested; drawn to the attention of the Environmental Audit and the Environment, Food, and Rural Affairs Committees
Document details	(a) Proposal for a Council Decision on the position to be adopted, on behalf of the European Union, at the sixth session of the Meeting of the Parties to the Aarhus Convention regarding compliance case ACCC/C/2008/32; (b) Commission Notice on Access to Justice in Environmental Matters.
Legal base	(a)Articles 192(1) and 218(9) TFEU;—; QMV (b)—
Department	Environment, Food and Rural Affairs
Document Numbers	(a) (38876), 10791/17, COM (17) 366; (b) (38700), 8752/17 + ADD 1, COM (17) 2616

Summary and Committee's conclusions

13.1 The Aarhus Convention is a multilateral agreement aiming to guarantee the public rights on access to information, access to public participation and access to justice in environmental matters. It has been ratified by the EU but also by Member States, including the UK.

13.2 Document (a) is a proposed Council Decision on the position to be adopted in the sixth session of the meeting of the parties to the Aarhus Convention regarding a compliance case brought against the EU. It therefore concerns access to environmental justice at EU level. As we reported in November, the Decision was adopted in July 2017.

13.3 Document (b) is a Commission Notice on the case law of the Court of Justice on the obligations of Member States to ensure access to environmental justice at national level, in fulfilment of their obligations under the Convention as part of the EU.

13.4 When we considered these documents in November, we asked the Government questions on document (a) concerning the UK's decision to support the EU against the Compliance Committee's findings. We wondered whether this was because of the UK's own difficulties in complying with the Convention requirement to provide access to justice which is not "prohibitively expensive" (Article 9(2) paragraph 4). On document (b) we asked about Brexit implications. In particular, whether the UK would need to take additional steps to ensure compliance with the Convention after Brexit when it remains a party in its own right. We wondered whether the Government would need to compensate for the absence of EU enforcement mechanisms, including any plans for a national environmental enforcement body.

13.5 The Minister (Dr Thérèse Coffey) has now sent two letters in response. It informs us, amongst other things, that discussions on EU compliance with the Convention have now been deferred until 2021, that the Government has no current plans to use delegated powers under the European Union (Withdrawal) Bill once enacted to change environmental "EU retained law" and that it is consulting on a new, independent statutory body to challenge Government and possibly other public bodies on environmental legislation and to enforce standards.

13.6 **We thank the Minister for her helpful letters and their targeted focus on the specific questions we asked in our Report on these documents from 22 November 2017.**[188]

13.7 **The proposed Council Decision (document(a)) was adopted back in July 2017 and so is no longer subject to our scrutiny reserve. We understand from Minister's letter of 12 January that the decision in the forum of the Meeting of the Aarhus Parties on the Compliance Case against the EU has now been deferred until the Meeting in 2021. This would be after Brexit and presumably after an implementation period/transition, assuming a provisional end-date of 31 December 2020.**[189] **Taking all these considerations into account and the fact that the document (b) is merely non-legislative guidance, we now clear these documents from scrutiny.**

13.8 **However, we note that the Minister's letters do not mention a couple of recent but highly relevant developments:**

a) **on 15 December 2017, the Aarhus Compliance Committee decided that a Friends of the Earth complaint**[190]**—that there was no public consultation on the European Union (Withdrawal) Bill was admissible. The complainant argues that any failure to consult would amount to a breach of Articles 3 and 8 of the Convention.**[191] **Further, that the White Paper on the Great Repeal Bill was not a public consultation and that the effect of repealing the European Communities Act 1972 and the withdrawal from the EU could have a significant effect on the environment. We note from the public documents available that the Government refutes that there has been a lack of consultation and the White Paper invited feedback with an email address being provided for comments by return. It also relies on other arguments in a letter of 7 December 2017**[192] **which we do not attempt to summarise in this chapter; and**

b) **in 2017 changes were made in UK law which removed the fixed cap on the costs of hearings in environmental legal challenges. These were referred to in the Minister's EM on document (b): "The Aarhus Convention requires**

188 Second Report, HC 301–ii (2017–19), chapter 14 (22 November 2017); (b) Second Report, HC 301–ii (2017–19), chapter 13 (22 November 2017).

189 Supplementary Council directives for the negotiation of an agreement with the UK setting out the arrangements for its withdrawal from the European Union, adopted 29 January 2018

190 ACCC/C/2017/150 United Kingdom

191 In particular, Article 8 provides "Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment". It adds "To this end, the following steps should be taken: (a) Time-frames sufficient for effective participation should be fixed; (b) Draft rules should be published or otherwise made publicly available; and (c) The public should be given the opportunity to comment, directly or through representative consultative bodies. The result of the public participation shall be taken into account as far as possible"

192 UK comments on admissibility, 17 December 2017

that relevant challenges under the Convention should not be 'prohibitively expensive'. This obligation is secured in England and Wales by the environmental costs protection regime (ECPR) established under the Civil Procedure Rules (CPR). The ECPR was amended in February 2017 to take account of developments in UK and EU law". However, those amendments to the ECPR have been subsequently challenged in the High Court in September 2017 in the case of *RSPB and others v Secretary of State for Justice.*[193] The outcome of that partially successful challenge was that subsequently the court ordered some changes to be made to the 2017 amendments. However, there remains concerns amongst environmental interest groups[194] though that despite those further changes, the overall effect of the reforms will have a freezing effect on meritorious environmental challenges.

13.9 **We ask the Minister to provide us with the Government's views on these developments. In particular, whether they indicate that the UK is committed fully to complying with the Aarhus Convention both when still an EU Member State and in the future when only a Contracting Party in its own right.**

13.10 **We draw these documents and this chapter to the attention of the Environmental Audit Committee and the Environment, Food and Rural Affairs Committee.**

Full details of the documents

(a) Proposal for a Council Decision on the position to be adopted, on behalf of the European Union, at the sixth session of the Meeting of the Parties to the Aarhus Convention regarding compliance case ACCC/C/2008/32: (38876), 10791/17, COM (17) 366; (b) Commission Notice on Access to Justice in Environmental Matters: (38700), 8752/17+ ADD 1, COM(17) 2616.

The Minister's letter of 12 January on document (a)

13.11 The Parliamentary Under Secretary of State for the Environment (Dr Thérèse Coffey) says:

> "With regards to your first question, the UK rationale to support the Commission's assessment to reject the findings of compliance case ACCC/C/2008/32 is correctly noted in your draft report in paragraphs 13.20–13.21. There are no additional reasons.
>
> On your second question regarding the legal standing of findings agreed at an Aarhus Convention MoP, we agree with the Commission assessment that findings that are adopted and become MoP decisions "would gain the status of official interpretation of the Aarhus Convention and [are] therefore binding on the Contracting Parties and the Convention Bodies".

193 The Royal Society for the Protection of Birds Friends of the Earth Ltd & Anor v Secretary of State for Justice the Lord Chancellor [2017] EWHC 2309 (Admin), 15 September 2017.

194 These issues were discussed during an oral evidence session before the Environmental Audit Committee: Ministry of Justice Environmental Sustainability Overview, HC 545, Q47– 49, 14 November 2017.

We also consider that MoP decisions are legally binding in international law. The UK will continue to fulfil its international obligations under the Convention and this will not be affected by our departure from the EU.

"I also wanted to update on you the status of this compliance case. As you know the UK position was to 'take note' and consider' the findings and recommendation of the Compliance Committee's report.

"During the discussion at the Meeting of the Parties, it became evident that there was no unanimity amongst the Parties to adopt a decision that would 'take note' of and 'consider' the findings and recommendation.

"As this is a Convention that has always made its decision on consensus, there were three options available to the EU, as the Party concerned, led by the Commission. They were to: (i) adopt the draft report including the finding and recommendations; (ii) request a vote on the draft decision to reject it—the first in the history of the Convention; or to postpone consideration of the draft decision to the next Meeting of the Parties in 2021.

"The UK considered this carefully and agreed with other member states and the Commission for the EU to request for the draft decision to be referred to at the next Meeting of the parties in 2021. On this basis, and in agreement with the Convention's secretariat, the draft decision was unanimously deferred. Looking ahead we will continue to work with the Commission and other Member States in maintaining our original position".

The Minister's letter of 8 January on document (b)

13.12 The Minister says in response to us in this letter:

"I write with reference to your Committee's Draft Report of 22 November 2017 in particular paragraphs 13.7 to 13.11. You asked three questions: the first, about whether the UK would have to take to take any additional steps to ensure that we continue to comply with the Aarhus Convention once we leave the EU; the second, on any plan to make changes using the delegated legislation powers on "retained" EU law which implements Aarhus Convention obligations; and finally information on post exit planning for the enforcement of EU-derived environmental law and standards. I will address each in turn.

"The UK ratified the Aarhus Convention in 2005. We independently meet our Convention obligations. We will not therefore have to take any additional steps to ensure that we continue to comply with the Aarhus Convention as a Contracting Party.

"In relation to your second question, we do not plan to make changes using the delegated legislation powers provided by the European Union (Withdrawal) Bill) to any "retained" EU law that implements Aarhus Convention obligations for both the EU and Member States.

"Finally, I can share that on 12 November 2017 the Secretary of State for the Department for Environment, Food and Rural Affairs announced his plans to consult in early 2018 on a new, independent, statutory body to advise and challenge government and potentially other public bodies on environmental legislation, stepping in when needed to hold these bodies to account and enforce standards. You can read more at this link: https://www.gov.uk/government/news/new-environmental-protections-to-deliver-a-green-brexit."

Previous Committee Reports

(a) Second Report, HC 301–ii (2017–19), chapter 14 (22 November 2017); (b) Second Report, HC 301–ii (2017–19), chapter 13 (22 November 2017).

14 EU Aviation Safety Agency (EASA)

Committee's assessment	Politically important
Committee's decision	Previously cleared from scrutiny; further information requested; drawn to the attention of the Exiting the EU and the Transport Committee
Document details	Proposed Regulation on aviation safety and establishing a EU Aviation Safety Agency
Legal base	Article 100(2) TFEU; ordinary legislative procedure; QMV
Department	Transport
Document Number	(37381), 14991/15 + ADDs 1–5, COM(15) 613

Summary and Committee's conclusions

14.1 This chapter considers the implications of EU exit for the UK's future participation in or co-operation with the European Aviation Safety Agency (EASA)—an EU agency with regulatory and executive responsibilities in the field of civilian aviation safety.

14.2 The document nominally concerned is the European Commission's proposed revision[195] of the EASA Regulation 216/2008[196] which sets the aviation safety framework at EU level (hereafter "the Regulation"), on which the Government deposited an Explanatory Memorandum in January 2016.[197] The Parliamentary Under Secretary of State of State at the Department for Transport (Baroness Sugg) has provided the Committee with an update[198] on the outcome of trilogue negotiations regarding this proposal. The outcome is in line with UK objectives and she therefore intends to endorse the provisional agreement in the Council of Ministers. A summary of the provisional agreement is provided at the end of this chapter.

14.3 Although the Committee cleared this document from scrutiny in our report on 23 November 2016,[199] subsequent Brexit-related developments regarding EASA warrant closer scrutiny. Specific developments include the Government's widely reported intention to continue to participate in EASA,[200] which the Minister's letter only partly confirms that; the publication of the European Commission's Article 50 Taskforce's slides[201] on future UK participation in the Single Aviation Market, which infer from the Government's negotiating red lines that the UK will leave EASA; and evidence on the implications of

195 Proposal for a Regulation of the European Parliament and of the Council on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and repealing Regulation (EC) No 216/2008 of the European Parliament and of the Council COM(15) 613 final.

196 Regulation (EC) 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency.

197 Explanatory Memorandum from the Minister, DFT, to the Chair of the European Scrutiny Committee (6 January 2016).

198 Letter from the Minister, DFT, to the Chairman of the European Scrutiny Committee (18 December 2017).

199 Nineteenth Report HC 71–xvii (2016–17) chapter 12 (23 November 2016).

200 Sky News, Govt to stay in EU air safety body in blurring of Brexit red line (1 December 2017).

201 Taskforce 50, Internal EU27 preparatory discussions on the framework for the future relationship: "Aviation" (17 January 2018).

Brexit for the aviation sector given to Select Committees in the Commons and the Lords (see: Stakeholder views), as well as statements by other stakeholders including the chief executive of the UK Civil Aviation Authority.

14.4 Article 66 of the Regulation[202] allows third countries to become members of EASA. The participation of third countries as EASA members differs little from that of EU Member States (i.e. EASA rules are accepted and implemented by third country regulators; the CJEU has jurisdiction; contributions to EASA finances and staff are required), with the exception that non-EU members do not have voting rights. UK participation is thus a possibility, although not a right, and would be subject to negotiation of an agreement with the EU.

14.5 **We thank the Minister for a helpful and clear update.**

EASA and Brexit

14.6 **In addition to ensuring high air safety standards throughout the EU, EASA's single safety standard also facilitates the free movement of goods within the EU market, enabling UK aerospace manufacturers to frictionlessly move components through their cross-border supply chains and end-products to customers.[203] EASA also currently acts as UK aerospace manufacturers' route to global aviation markets for UK firms, as many third countries have agreements with the EU which recognise EASA standards, thereby allowing, for example, UK-manufactured parts to be used by US airlines.**

14.7 **UK non-participation in EASA would raise significant challenges for stakeholders. The UK Civil Aviation Authority (CAA) would be required to replicate the current EASA regulatory regime at short notice and considerable expense. Doing so would increase compliance costs for businesses and impede supply chains, and potentially result in disruption while the CAA developed its capacity to discharge its new responsibilities. Strikingly, the Civil Aviation Authority has decided not to plan for a new independent aviation safety system in the UK on this basis that "it would be misleading to suggest that [this is] a viable option".[204]**

14.8 **While leaving EASA would be highly detrimental for UK stakeholders, UK non-participation would also have a significant negative impact on EASA, to which the UK is, along with France, the largest contributor in terms of both staff and expertise. A UK exit would potentially have the effect of reducing air safety in the UK and the EU—an outcome both parties should seek to avoid.**

202 Article 66 of Regulation (EC) 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency—replicated by Article 118 of the proposed Regulation.

203 It is important to note that these benefits are also reliant on a range of other EU measures, such as the customs union and intra-EU VAT arrangements.

204 Civil Aviation Authority, Speech by Andrew Haines (5 September 2017).

The Government's position

14.9 **Regarding the implications of EU exit, we note the Government's assessment that:**

- **the UK industry values having a single regulatory system for aviation safety in the EU and believes that it would be beneficial to remain part of the EASA system after the UK has left the EU;**
- **the Regulation permits the EU to enter into agreements with third countries for their participation in the EASA system; and**
- **remaining part of the EASA system will be considered as an option for the exit negotiations with the EU.**

Third country participation in EASA

14.10 **Article 66 of the EASA Regulation (Article 118 of the proposed Regulation) permits the EU to enter into agreements with third countries which allow their participation in the EASA system, but we observe that these agreements require such countries to:**

- **adopt and apply EU law in the field covered by the EASA Regulation and its implementing rules, without voting rights;**[205]
- **accept the role of the CJEU in the EASA system; and**
- **make financial and staffing contributions to the agency's operation.**[206]

14.11 **However, we also note the views of industry stakeholders that EASA is a technical agency and operates on the basis of consensus, so voting rights are less important than being able to be present at meetings and to provide detailed input. We also note that the CJEU has never issued a ruling in relation to a decision by EASA.**

The Commission position

14.12 **We note the analysis of the European Commission Article 50 Taskforce that the Government's negotiating objectives (including regulatory autonomy, no CJEU jurisdiction, no free movement of persons) are incompatible with continued UK participation in EASA.**[207] **We conclude that the possibility of a UK exit from EASA should not be dismissed.**

Questions

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

- **Does the Government desire to become a member of EASA on terms similar to those of Norway and Switzerland, and if not what terms of participation**

205 In addition, during the transition period proposed by the European Commission's supplementary negotiating directives EASA rules would continue to apply to the UK but the UK would have no voting rights on the agency.

206 This position reflects the requirements of Article 66 of the current Regulation.

207 Taskforce 50, Internal EU27 preparatory discussions on the framework for the future relationship: "Aviation" (17 January 2018).

does it seek? Is the Government willing to adopt and apply EU law and EASA rules in this policy area, and to accept the indirect jurisdiction of the CJEU, lack of voting rights, and ongoing financial contributions to the agency as the price of continued UK participation in EASA?

- **The Article 50 Taskforce (TF50) slides on aviation (see above) conclude that the Government's negotiating red lines preclude future UK participation in EASA. To what extent does the Government believe that the EU is willing to separate the issue of continued UK participation in EASA from the wider UK-EU negotiations regarding aviation (i.e. traffic rights) and trade?**

- **The Chief Executive of the CAA has said that UK non-participation in EASA is not a viable option,[208] and that the CAA has therefore decided not to plan for a new independent aviation safety system in the UK. Does the Government consider non-participation in EASA to be a viable option? Given that the EU infers from the Government's negotiating red lines that the UK will be leaving EASA, is it prudent to make no contingency preparations for this scenario? Is any part of Government making contingency plans for this possibility (if so, please describe these)?**

- **The TF50 slides on aviation envision a future Bilateral Aviation Safety Agreement (BASA), alongside a bilateral UK-EU Air Transport Agreement, as the basis of future UK-EU cooperation in aviation safety. It states that this would entail separate safety certification systems, simplified certification processes of products from other side "if there is reciprocal trust", as well as administrative arrangements between EASA and the CAA to facilitate acceptance of EU and UK products, but no mutual recognition. Based on the Government's engagement with the sector, and its acceptance of the benefits of participation in EASA, what is its assessment of the impact of an arrangement of this kind on industry stakeholders, including aerospace manufacturers and carriers? How significant an issue would the loss of mutual recognition be for these stakeholders?**

- **Which of the three "options for the future" identified in the European Commission's slides on future UK-EU aviation arrangements (or other options that the Government envisages) does the UK consider to represent the most likely outcome: "Type 1: Common Aviation Area"; "Type 2: Neighbourhood"; or "Type 3: Overseas" (a classical Air Transport Agreement)? Please explain the reasoning behind the Government's assessment.**

14.14 **We ask for the Minister to respond to these questions by 21 March 2018. We draw this chapter to the attention of the Exiting the EU Committee and the Transport Committee.**

208 Civil Aviation Authority, Speech by Andrew Haines (5 September 2017).

Full details of the documents

Proposed for a Regulation on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and repealing Regulation (EC) No 216/2008 of the European Parliament and of the Council: (37381), 14991/15 + ADDs 1–5, COM(15) 613.

Background

EASA and the EU Single Market

14.15 The European Aviation Safety Agency (EASA)[209] is a decentralised EU agency with regulatory and executive responsibilities in the field of civilian aviation safety. EASA's role is central to most aspects of safety regulation including design and production of aircraft, their operation, flight crew licensing, and oversight in relation to air traffic services. National civil aviation authorities—e.g. the UK's Civil Aviation Authority (CAA)—implement EASA rules within the Member States.

14.16 The Government's account of the role of EASA, produced as part of its assessment of the implications of EU exit for the aviation sector,[210] is reproduced below:

> "EASA was created in 2003 and reached full competency in 2008 through the introduction of Regulation 216/2008 which sets out common safety rules and objectives for civil aviation in Europe. EASA has competence (either full or shared) over:
>
> - initial, additional and continuing airworthiness certificates of aircraft and products;
> - air crew and flight limits;
> - air operations;
> - third Country Operator Authorisations that certify compliance with safety requirements for foreign aircraft;
> - prohibiting unsafe airlines;
> - safety oversight in Air Traffic Management and Air Navigation Services;
> - air Traffic Controller licences and certificates;
> - airspace and airborne collision avoidance; and
> - administrative procedures related to aerodromes.
>
> "EASA prepares draft rules for consideration and adoption by the European Commission. Member States' National Aviation Authorities (NAAs) then implement the adopted rules with monitoring from the Agency. The UK's NAA is the CAA. EASA also has a number of executive tasks,

209 EASA, The Agency https://www.easa.europa.eu/.

210 HM Government, Aviation Sector Report, published by the Exiting the European Union Select Committee (21 December 2017).

for example the initial airworthiness certification of new and modified products (e.g. specific models of aircraft and engines) and the certification of organisations based in third countries. The Department for Transport and UK stakeholders are currently involved in more than 50 rulemaking activities within EASA and the UK is one of the NAAs that contributes the most technical expertise to these working groups.

"The system is underpinned by the set of common safety rules which are designed for uniform application across the EU. Those rules apply both to the air transport industry, individuals, organisations and products and to the NAAs themselves.

"All regulations that derive from the EASA Basic Regulation (EU 216/2008) are currently subject to a vote by the EASA Committee as part of the comitology process. As a member of the EU, the UK is represented at the EASA Committee, which is the EU comitology committee on aviation safety, and has a seat on the EASA Management Board, which is the Agency's management body. While third countries are able to propose regulations and shape their development at EASA, they do not have a vote at this stage. However, they do have observer status in the EASA Committee. In practice, regulations proposed by EASA as the technical advisory body are rarely voted against by Member States on safety policy grounds, as they prepared on a consensus-based approach.

"Norway and Switzerland participate in the EU's safety systems through their agreements with the EU. Norway and Switzerland are both associate members of EASA and both make a financial contribution to the running of the organisation."[211]

14.17 It is important to emphasise that, although EASA's principal objective is to ensure a high level of aviation safety within the Union, a subsidiary objective is the free movement of goods. Where EASA introduces harmonised safety standards in Europe, goods placed on the market within the EU which comply with these standards are recognised throughout the Union, facilitating their free movement. A component that is manufactured in the UK can be used in a German plane, or vice-versa. Any aircraft certified in the UK can go on any national aircraft register in the EU. Similarly, maintenance organisations and training organisations, if accredited, can provide maintenance and issue approvals/issue licenses in any Member State.

14.18 In these ways, EASA effectively acts as the route to the European market for the aerospace sector and, to a lesser extent,[212] air carriers. Furthermore, because a number of other regions' air safety regulators, including the US Federal Aviation Authority (FAA), have bilateral agreements with EASA, EASA also currently acts as the UK aviation and aerospace sectors' route to the global market.

211 HM Government, Aviation Sector Report, published by the Exiting the European Union Select Committee (21 December 2017).

212 Air carriers do not gain full access to the Single Aviation Market solely by virtue of membership of EASA and compliance with its standards. The Single Aviation Market, and the traffic rights that it confers on 'community carriers', are governed by Regulation (EC) 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community.

The proposal

14.19 In December 2015 the Commission proposed a revising Regulation[213] which would modernise the role of EASA, currently laid out in the EASA Basic Regulation.[214] Substantive changes included:

- new principles to be applied to aviation safety regulation;
- a requirement for the production of Aviation Safety Programmes and Plans for Aviation Safety at both EU and Member State level;
- a limited extension of scope of the EASA's remit to include ground handling service providers, all unmanned aircraft (remotely piloted aircraft systems or RPAs) and some aspects of aviation security;
- changes to the comitology procedure,[215] including giving the Commission the power to adopt implementing rules under Delegated Acts;
- introduction of provisions to support cooperative oversight between Member States and permit the transfer of responsibilities;
- introduction of provisions on information sharing and, in particular, setting up of a central repository of licensing information; and
- introduction of enhanced governance mechanisms for the EASA.

14.20 When the Committee first considered[216] the proposed Regulation in January 2016 the Government told us that it welcomed the Commission's proposal to update the aviation safety regulatory system, but also identified areas where it sought further clarification or amendment of the proposal. In a subsequent letter to the Committee,[217] the Government reported in detail on clarifications which had been received or amendments which had been made on all these issues, and said that the Presidency hoped to reach agreement on a General Approach on the proposal, which the Government intended to support, at Transport Council on 1 December 2016. The Committee cleared the proposal from scrutiny in its report of 23 November 2016.[218]

Implications of EU exit

14.21 The Royal Aeronautical Society (RAS) has produced a briefing[219] which considers the possible implications of leaving EASA, in the context of Brexit. Explaining the rationale for EASA's existence, the RAS states that ensuring high levels of safety requires that rules

213 Proposal for a Regulation of the European Parliament and Council on common rules in the field of civil aviation and establishing a European Union Aviation and establishing a EU Aviation Safety Agency, and repealing Regulation (EC) No 216/2008 of the EP and Council COM(15) 613.

214 (Consolidated) Regulation 216/2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC.

215 The comitology procedure enables EU subordinate legislation to be adopted by means of Implementing Acts to be scrutinised by a Committee of the representatives of the Member States, but has no European Parliament involvement.

216 Eighteenth Report HC 342–xvii (2015–16), chapter 9 (13 January 2016).

217 Letter from the Minister, DFT, to the Chair of the European Scrutiny Committee (15 November 2016).

218 Nineteenth Report HC 71–xvii (2016–17) chapter 12 (23 November 2016).

219 Royal Aeronautical Society, "Civil Aviation Regulation: What future after Brexit?" (September 2017).

are developed which cover each of the sub-systems within aviation, including airports, Air Traffic Management [ATM], General Aviation and unmanned aircraft systems, construction and maintenance of aircraft, engines, aircraft systems and components, and that rules are also developed to govern the interactions between the sub-systems. Having an independent central body that develops these rules, supported by industry experts, for each of these sub-systems and for the system as a whole, is a necessity.

14.22 The RAS identify the following main implications of UK exit from EASA for UK stakeholders:

Design Approvals

- Within the EU, products, systems and components for aircraft must be approved by EASA, which issues them with a 'Design Organisation Approval' or DOA. If the UK CAA were to take back responsibility for safety regulation, these EASA approvals would lapse;
- If the UK CAA were to take back responsibility for all NAA activities, they would be responsible for certifying products designed in the UK. A new system would need to be put in place, with regulatory oversight by the CAA;
- Companies would still be required to show their products matched up to EASA standards, and it would be possible that products would have to be approved by both EASA and the CAA, with duplication of costs for supply chains;

Maintenance and airworthiness records

- The CAA would also have to take back responsibility for assessing Continued Airworthiness of products and systems on an ongoing basis;
- For example, should a European seek to purchase a UK aircraft, aircraft parts and/or contract UK maintenance services for which the airworthiness had been overseen by a UK company compliant with UK safety legislation, extra checks would need to be performed to bring the aircraft, parts and/maintenance standards up to those of the destination country's NAA;
- Aerospace companies based in countries without aviation regulatory compliance with EASA or the FAA, when selling aerospace products and providing aviation services to the US and Europe, would therefore be subject to additional procedures and work;

Component maintenance

- Component workshops based in the UK would cease to be EASA Part 145 approved should the UK withdraw from EASA. Companies could apply for certification from EASA, but this would not be as simple as the current process through the national authority, and any gap in approval at the time of EU exit would lead to disruption and loss of revenue; and

Pilot Certification

- The EASA Airline Transport Pilot's Licence [ATPL] is a common licence standard that has been agreed by 28 European states. There is a process for certified pilots outside the EU to convert their licences into European ones but it is not straightforward.

UK-EU flights

14.23 Although traffic rights are not primarily dependent on the UK's relationship with EASA in the first instance, when the UK leaves EASA UK operators, as third country-based entities, will have to apply to obtain licences from EASA. Until these were issued, air traffic to the EU would have no legal basis. While this is a cause for concern, the European Commission's slides on aviation indicate that contingency arrangements should be put in place to mitigate this risk.[220]

Summary

14.24 In summary, UK exit from EASA could have the following implications:

- for aerospace manufacturers in the UK, loss of mutual recognition of their products within the EU and increased administrative costs of having to comply with multiple regulatory frameworks (this report does not consider wider impacts on goods trade with the EU, such as tariffs, rules of origin, etcetera);
- for the UK Government and the Civil Aviation Authority, who would have to, at short notice and significant expense, put in place a comprehensive new UK air safety regulatory framework as well as arrangements for monitoring compliance with it; and
- for carriers flying to and from the UK, who rely on the UK having an effective air safety regime in place that is recognised in the EU and worldwide, in the absence of which flights could be disrupted.

Third country provisions in the EASA Regulation

14.25 Article 66 of the EASA Basic Regulation[221] indicates that agencies of *European* third countries may *participate in* (not be Member States of) the work of EASA, where they:

a) are signatories to the Chicago Convention; and

b) enter into agreements with the EU to:

   i) adopt and apply EU law in the field covered by the Regulation and its implementing rules;

   ii) agree arrangements on financial contributions and staff.

220 Taskforce 50, Internal EU27 preparatory discussions on the framework for the future relationship: "Aviation" (17 January 2018).

221 (Consolidated) Regulation 216/2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC.

14.26 Article 50 (Actions before the Court of Justice) of the EASA Basic Regulation states that the Court of Justice of the European Union (CJEU) has jurisdiction over decisions taken by EASA. Third countries that participate in EASA must respect this jurisdiction. What this effectively means is that if the Court of Justice ruled that a particular EASA decision was inapplicable, or had to be modified, EASA would adjust its rules in line with the CJEU's decision, and the third country would have to accept EASA's rules.

14.27 It is important to emphasise that UK participation is thus a possibility under the treaties, although not a right, and would therefore be subject to negotiation.

Third country participation in / cooperation with EASA

14.28 A number of different models exist for third country participation in, or cooperation with, EASA.

The EFTA countries

14.29 In line with the above provisions, the non-EU EFTA states, Iceland, Norway, Switzerland and Liechtenstein (which, in practice, is represented by Switzerland) participate in EASA. They adopt and apply EASA rules in the fields covered by the Regulation.

14.30 The only major difference between the participation in EASA of, for example, France and Norway is that is that the non-EU members of EASA do not have voting rights[222] on the Management Board or the technical committee which rubber-stamps technical decisions (the Brussels Committee). However, it is rare for votes to be taken in EASA, which is a technical body and tends to operate by consensus.

14.31 Third country states of EASA retain their right to conclude international agreements/bilateral agreements with other third countries; however, they may not conclude agreements which would contradict the interests of EASA.

Non-EFTA participants

14.32 The Western Balkan partners (Albania, Bosnia and Herzegovina, the Former Yugoslav Republic of Macedonia, Georgia, Moldova, Montenegro and Serbia) do not yet participate in EASA but, as part of the European Common Aviation Area (ECAA) Agreement[223] are cooperating with EASA to bring their regulatory systems up to its standards. Once fully implemented, the Agreement will effectively integrate the Western Balkan partners in the EU internal aviation market, but the extent of integration is currently limited. The Agreement specifies that—at the end of the second transitional period—the Joint Committee established under the Agreement shall determine the precise status and conditions for the participation in EASA.

222 EASA, Decision of the Management Board adopting the rules of procedure of the Management Board of the European Aviation Safety Agency (June 2011).

223 Multilateral Agreement between the European Community and its Member States, the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo* on the Establishment of a European Common Aviation Area (ECAA).

Bilateral Air Safety Agreement

14.33 The EU has Bilateral Air Safety Agreements (BASAs) with a number of countries with large aeronautical sectors (such as the US, Canada, Brazil), in order to minimise duplication of effort. Both partners retain their separate safety certification systems and, if reciprocal trust is developed, simplified certification processes of products from each side are permitted. A summary of the EU-US BASA states that:

> "the main purposes of the agreement are to automatically accept certain approvals issued within the other certification system (an approval issued by one party constitutes a valid approval by the other party) and enable the reciprocal acceptance of findings of compliance during validation processes."[224]

14.34 The agreement of BASAs is a detailed and time-consuming undertaking, as one has to first identify the two systems, then get confidence that the other side is applying its systems properly, and then identify those areas where potentially problematic differences or discrepancies remain, to establish what additional checks would need to be conducted. Given that the UK does not currently have its own air safety regulatory framework, it is highly unlikely that a fully-functioning BASA including a high level of recognition could be agreed in the short term.

Other working arrangements

14.35 A wide range of third countries have less comprehensive arrangements with EASA which aim to reduce the burden of certification procedures, without having a bilateral air safety agreement in place.

Stakeholder views

14.36 The House of Commons Transport Committee, and the House of Lords EU Internal Market and External Affairs Sub-Committees, have received evidence regarding the implications for UK participation of EASA.

14.37 Mr Paul Everitt, Chief Executive Officer, ADS Group, told the Lords EU External Affairs Committee that EASA was the sector's "route to market … it is through EASA that we gain access to all of our major markets, whether that is the US, China, Japan or elsewhere".[225] Mr Everitt also said that current membership of EASA cost the UK around £1 million per annum, whereas incorporating these responsibilities into the UK Civil Aviation Authority would cost "tens if not hundreds of millions". Mr Simon Whalley, Head of External Affairs at the Royal Aeronautical Society, told the House of Lords EU Foreign Affairs Committee that membership of EASA was the RAS's "number one ask of the UK Government".[226]

224 EASA, Agreement between the United States of America and the European Union on cooperation in the regulation of civil Aviation Safety (2011).

225 House of Lords EU Committee, Brexit: Trade in Goods, p. 54 (14 March 2017).

226 House of Lords EU Committee, Brexit: Trade in Goods, p. 55 (14 March 2017).

14.38 The House of Commons Transport Select Committee held a one-off evidence session on Monday 30 October 2017, as part of an inquiry on Aviation and Brexit which has not yet reported. At this session, Willie Walsh, Chief Executive of the International Airlines Group, recently told the House of Commons Transport Select Committee that:

> "We do not want multiple regulatory regimes in place that make it unnecessarily complex. … It is in the interests of the industry globally that we continue to participate and have a common regulatory environment for aircraft design, aircraft certification, aircraft operation and aircraft safety. There is absolutely zero justification to move away from it."[227]

14.39 Mr Walsh also stated that the CAA would not be able to replicate EASA's current functions:

> "I do not believe the UK will be able to replicate a UK structure like it had in the past under the UK CAA. The expertise that existed within the CAA has long since gone, and much of it is used at European level."

14.40 Sophie Dekkers, UK Director, easyJet, told the Transport Committee that:

> "The whole industry supports maintaining the same structure and framework going forward. We certainly would not ask for anything different, and would look to have a replication. We do not want different regulations in different countries, because that adds complexity. We want to work to the highest levels. Why would we not want to continue with EASA for that reason?"[228]

14.41 The House of Lords EU Internal Market Sub-Committee also recently took oral evidence from stakeholders on the subject of EU exit and aviation. In response to concerns about CJEU jurisdiction and the probable loss of voting rights on EASA, Dr Barry Humphreys CBE, BKH Aviation, said that:

> "The fact remains that EASA is a technical body that reaches decisions primarily by consensus. The UK and France are the two principal contributors to EASA."
>
> "The ECJ has never made a decision on EASA; it has never been involved. I believe the Commission has threatened to use it once or twice, but it has got no further, so in practical terms the answer seems obvious. The UK should continue to be as full a member of EASA as possible, and the fact that it will not have a vote on the management board, and that decisions are theoretically subject to the ECJ, should not, in the view of most people in the industry, be a factor at all. That is what most people want to see."[229]

14.42 Outside Parliament, other stakeholders have also commented on the possible consequences of the UK leaving EASA. The US Federal Aviation Authority (FAA) stated that:

227 Transport Committee, Oral Evidence on Aviation and Brexit (30 October 2017).
228 Transport Committee, Oral Evidence on Aviation and Brexit (30 October 2017).
229 EU Internal Market Sub-Committee, Brexit: Trade in Non-financial Services—follow up (30 November 2017).

> "If there is now no EASA regulatory oversight over the United Kingdom's manufacturers we have no way of relying on EASA's oversight and certification so therefore we would need to make our own findings, manufacturer by manufacturer. And that is highly disruptive, highly costly for manufacturers to ensure that they can comply with FAA standards for manufacturing."[230]

14.43 Jeegar Kakkad, the chief economist for ADS, the trade body for British aerospace, has suggested that it would take 10 years for the country's civil aviation authority to create the necessary certification infrastructure. Mr Kakkad said that: "It would be catastrophic for [UK] industry if there was a backlog of parts not being certified".

CAA and Government positions

14.44 On 5 September 2017, Andrew Haines, Chief Executive of the Civil Aviation Authority, gave a speech in which he stated that:

> "We at the CAA are very explicit that we want to remain full members of EASA. I have to say in my 8 years in the aviation sector, I don't think I have ever come across an issue that has such broad consensus in the sector. It's almost universal. It makes no sense to recreate a national regulator. At best, you replicate the vast majority of European regulation, and you'd have to do it over an extended period of time. At worst, you create unnecessary barriers, and you start to breach my first successful outcome. What does this do to trade, and what does this to choice and value for consumers?"[231]

14.45 In the same speech, he stated that the CAA was not undertaking any preparatory work for taking back responsibility from EASA, as it did not consider doing so to be a viable option:

> "We are very uncompromising in our view that we should not be planning for a new independent aviation safety system in the UK. Indeed, we have consciously decided not to do that work as it would be misleading to suggest that's a viable option."

14.46 The Government has published little official information about its position regarding future UK participation in EASA, however on 1 December 2017 it was reported[232] that, following pressure not just from UK and European airlines, but also the US Federal Aviation Authority, the Government planned to tell the EU that it wished to remain in EASA, and that the Department for Transport had been privately reassuring the aviation industry and aeronautical manufacturers that Britain would stay within EASA. This position is only partly confirmed by the Government's letter to the Committee,[233] summarised at the end of this chapter, in which the Government acknowledges the benefits of UK participation in EASA and that "it would be beneficial to remain part of the EASA system after the UK has left the EU", but concludes that "remaining part of the EASA system *will be considered as an option* [our italics] for the exit negotiations".

230 Reuters, Top U.S. official calls for clarity on post-Brexit aviation safety (13 December 2017).

231 Civil Aviation Authority, Speech by Andrew Haines (5 September 2017).

232 Sky News, Govt to stay in EU air safety body in blurring of Brexit red line (1 December 2017).
Financial Times, UK wants to remain in EU aviation safety agency (1 December 2017).

233 Letter from the Minister, DFT, to the Chairman of the European Scrutiny Committee (18 December 2017).

Article 50 Taskforce slides on aviation

14.47 On 17 January 2018 the European Commission Article 50 Taskforce published a set of slides on the subject of aviation,[234] which were used for information purposes at a meeting of the Article 50 Council Working Party on 16 January.

14.48 The Commission slides take as their starting point the Government's statement of its 'red lines' (regulatory autonomy, the end of ECJ jurisdiction, and the end of free movement of persons) and the EU27's 'guiding principles' in the negotiations (autonomy of the Union and its legal order, including ECJ jurisdiction, integrity of the Single Market, no "cherry picking", level playing field and consistent approach towards third country partners).

14.49 From these principles, the Commission concludes that the only consistent outcome is that the UK will leave the Single Aviation Market, and that the EU-UK future aviation relationship will be based on 'classical' agreements, such as those that exist with a large number of third countries.

14.50 The Commission identifies the following consequences of this for the UK:

- the UK will cease to be part of fully liberalised EU Aviation Market;
- UK carriers will lose their EU-based traffic rights (e.g. loss of the seventh and ninth freedoms of the air, within the EU);
- third country restrictions on ownership and control will apply;
- end of mutual recognition of certificates and approvals; and
- end of participation in the European Aviation Safety Agency (EASA).

14.51 In terms of a transition period, the Commission states in the slides that the status quo would be retained if the UK applied the acquis and kept participating in the Single Market for a limited period (in line with the negotiating mandate). This is consistent with the negotiating directives on the transition period which were agreed on 29 January 2018.[235]

14.52 The EU envisages a Future Aviation Safety relationship which would take the form of a Bilateral Aviation Safety Agreement (BASA) between the EU and the UK, which would have separate simplification systems, and simplified certification processes of products from either side (but not mutual recognition).[236]

14.53 Importantly, the Article 50 Taskforce paper notes that, in the event of an overall 'no deal' scenario, it would be essential to establish EU-wide contingency measures to ensure basic connectivity, which would include a bare-bones EU-UK agreement on traffic rights and safety.

234 Taskforce 50, Internal EU27 preparatory discussions on the framework for the future relationship: "Aviation" (17 January 2018).

235 http://www.consilium.europa.eu//media/32504/xt21004-ad01re02en18.pdf.

236 Taskforce 50, Internal EU27 preparatory discussions on the framework for the future relationship: "Aviation" (17 January 2018).

The Minister's letter of 18 December 2017[237]

14.54 Trilogue discussions have concluded and the Minister now provides the Committee with an update on the provisional agreement reached. The Parliamentary Under Secretary of State for Transport (Baroness Sugg) states that this will be submitted to the European Parliament plenary and to a future Council of Minister for approval, following a meeting of COREPER.

14.55 The Minister states that, having assessed the final text, she believes that the Regulation will achieve the objective of the original proposal, and is broadly in line with the UK's policy objectives. It will ensure that the requirements adopted by EASA are proportionate and, wherever possible, performance based rather than prescriptive. The Minister intends to endorse the provisional agreement in the interests of the aviation industry and consumers.

14.56 The Minister's account of the main aspects of the provisional agreement is summarised below.

Extension of scope

14.57 The Minister states that the extension of the scope of EASA's remit has been limited to ground handling service providers, aspects of aviation security where there are interdependencies with safety, and drone safety. On this basis, she states that the scope of the Regulation is proportionate and is in line with UK aims.

Subordinate legislation

14.58 The Minister says that compromises have been made with the European Parliament regarding the use of Delegated Acts. Delegated Acts are now used to amend Annexes II to IX and for issues where the Commission or EASA is responsible, which the Government accepts is appropriate, whereas Implementing Acts are mainly used where Member States will be responsible for implementation. Delegated Acts have been proposed for the adoption of detailed technical requirements in "a small number of areas where Member States will be responsible for implementation", but the Minister states that Member States will retain influence on the development and finalisation of the requirements in these areas as EASA are required to undertake full consultation on any proposals for introducing (or amending) requirements in these areas, and the Commission has stated that they would also wish to consult Member States on any delegated acts in these areas before they were adopted.

Transfer of responsibilities

14.59 The emergency oversight mechanism proposed by the Commission, which the Government supported, was removed in the General Approach; however, this has now been reintroduced as an oversight support mechanism to assist states that are struggling to provide an adequate level of oversight.

237 Letter from the Minister, DFT, to the Chairman of the European Scrutiny Committee (18 December 2017).

Drones

14.60 To reach a draft agreement with the European Parliament, the Minister reports that the Presidency has provisionally agreed to the inclusion of a threshold for the registration of drones. Drones with a potential energy on impact of 80 joules (roughly equivalent to a maximum mass of 900g) or more will require to be registered. The Minister states that this is much higher than the 250g threshold for registration of drone users that is currently being considered in the UK, but that Member States remain free to impose additional requirements on non-safety grounds and it is likely that a 250g threshold for legislation could still be established in the UK. She adds that the registration threshold set in the Regulation may be amended by delegated acts.

EU exit

14.61 The Minister states that:

- if the provisional agreement is approved the Government's expects the new Regulation will be in force by the date the UK exits the EU. It will therefore be retained under the EU Withdrawal Bill even in the event of a non-negotiated exit;
- the UK industry values having a single regulatory system for aviation safety in the EU and believes that it would be beneficial to remain part of the EASA system after the UK has left the EU;
- the Regulation permits the EU to enter into agreements with third countries for their participation in the EASA system; and
- remaining part of the EASA system will be considered as an option for the exit negotiations with the EU.

Previous Committee Reports

Nineteenth Report HC 71–xvii (2016–17), chapter 12 (23 November 2016); Eighteenth Report HC 342–xvii (2015–16), chapter 9 (13 January 2016).

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

Department for Business, Energy and Industrial Strategy

(39326) 15566/17 COM(17) 826	Proposal for A Regulation of the European Parliament and of the Council amending Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and Repealing Council Regulation (EC) No 1083/2006 as regards support to structural reforms in Member States.
(39469) — —	Special report No 01/2018: Joint Assistance to Support Projects in European Regions (JASPERS)—time for better targeting.

Department for Education

39440 5464/18 + ADDs 1–2 COM(18) 24	Proposal for a Council Recommendation on Key Competences for Lifelong Learning.

Department for Environment, Food and Rural Affairs

(39435) 5485/18 + ADD 1 COM(18) 10	Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions EU actions to improve environmental compliance and governance.

Department for Exiting the European Union

(39457) 5534/18 COM(18) 38	Report from the Commission to the Council and the European Parliament on the use made in 2016 by the institutions of Council Regulations No 495/77, last amended by Regulation No 1945/2006 (on standby duty), No 858/2004 (on particularly arduous working conditions), and No 300/76, last amended by Regulation No 1873/2006 (on shift work).

Foreign and Commonwealth Office

(39484) — —	Council Decision (CFSP) 2018/89 of 22 January 2018 amending Decision (CFSP) 2016/849 concerning restrictive measures against the Democratic People's Republic of Korea.
(39485) — —	Council Implementing Regulation (EU) 2018/87 of 22 January 2018 implementing Regulation (EU) 2017/1509 concerning restrictive measures against the Democratic People's Republic of Korea.
(39490) — —	Council Decision to amend Decision 2015/259/CFSP to support activities of the Organisation for the Prohibition of Chemical Weapons (OPCW) in the framework of the implementation of the EU Strategy against Proliferation of Weapons of Mass Destruction.
(39493) — —	Council Implementing Decision (CFSP) 2018/168 of 2 February 2018 implementing Decision (CFSP) 2015/740 concerning restrictive measures in view of the situation in South Sudan.
(39494) — —	Council Implementing Regulation (EU) 2018/164 of 2 February 2018 implementing Article 22 (1) of Regulation (EU) 2015/735 concerning restrictive measures in respect of the situation in South Sudan.

HM Treasury

(39424) 5277/18 COM(18) 17	Report from the Commission to the Council on Directive 2011/64/EU on the Structure and Rates of Excise Duty Applied to Manufactured Tobacco.

Office for National Statistics

(39439) 5467/18 —	Proposal for a Regulation of the European Parliament and of the Council on European business statistics amending Regulation (EC) No 184/2005 and repealing 10 legal acts in the field of business statistics—Opinion of the European Central Bank.

Formal Minutes

Wednesday 21 February 2018

Members present:

Sir William Cash, in the Chair

Geraint Davies	Darren Jones
Steve Double	Mr David Jones
Richard Drax	Stephen Kinnock
Marcus Fysh	Andrew Lewer
Kelvin Hopkins	Michael Tomlinson

2. Scrutiny report

Draft Report, proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 15 read and agreed to.

Summary agreed to.

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

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

[Adjourned till Thursday 22 February at 10.20 am

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*)