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European Scrutiny Committee

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Documents considered by the Committee on 20 June 2018

Report, together with formal minutes

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Notes

Numbering of documents

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

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

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

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

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

Abbreviations used in the headnotes and footnotes

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

Euros

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

Further information

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

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

Staff

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Meeting Summary

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

Brexit-related issues

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

Digital Single Market: Tackling illegal content online

- Outside the EU, it will be possible for the Government to adopt distinctive regulatory approaches to digital issues more rapidly than when acting in concert with 27 other Member States and the European Parliament;
- However, a more unilateral regulatory approach may also, contrary to the drive of the UK-led Digital Single Market Strategy, create regulatory fragmentation and inhibit market scale, by requiring businesses to comply with multiple regulatory regimes.

Summary

Whistleblowers and breaches of EU law

The proposed Directive aims to harmonise national laws to a minimum standard on whistleblowing in relation to breaches of EU law. It follows in the wake of recent scandals like Cambridge Analytica. It is accompanied by a Commission Communication which provides background to the lead up to the legislative initiative.

The UK already leads in the EU in the legal protection it affords to whistleblowers (see the Public Interest Disclosure Act 1998 and the Employment Rights Act 1996). However, the Government does not support the proposal as it considers that a non-legislative measure should have first been attempted by the Commission. It highlights the cost and burden on business of setting up internal reporting procedures (the main difference between the proposal and the current UK legal framework).

As the implementation period/transition is due to expire on 31 December 2020, the UK will not have to implement the proposed Directive (the transposition deadline is 15 May 2021). However, we consider that the UK may either have to align with the proposal as part of the core labour or competition provisions of an EU-UK free trade/other agreement or may choose to do so as part of the PM's commitment to build on workers' rights after the UK's exit from the EU.

We ask questions about possible alignment, explain why we are not recommending a Reasoned Opinion and seek some other clarifications from the Government.

Not cleared from scrutiny; drawn to the attention of the Business, Energy and Industrial Strategy Committee, the Work and Pensions Committee, the Public Accounts Committee, the Health Committee, the Defence Committee, the Digital, Culture, Media and Sport Committee, the Joint Committee on Human Rights, the Women and Equalities Committee and the Exiting the EU Committee; further information requested

European Defence Industrial Development Programme

The Committee has asked the Minister for Defence Procurement, Guto Bebb MP, to give evidence in the coming weeks about the new EU Defence Industrial Development Programme (EDIDP), part of the controversial new European Defence Fund. The Committee is critical that the UK will be part-funding the Programme during the transition as part of the £39 billion 'Brexit bill', even though the Ministry of Defence has conceded that the EU can unilaterally exclude UK firms from bidding for funding during that period. For most other EU programmes, like the Framework Programme for Research, the UK will remain eligible to participate as if it were still a Member State during the transition, but the EU is allowed to exclude the UK unilaterally from the EDIDP on the basis of hypothetical security concerns.

Not cleared from scrutiny; Minister invited to give evidence; drawn to the attention of the Business, Energy and Industrial Strategy, Defence and Exiting the EU Committees

Digital Single Market: Tackling illegal content online

The European Commission has built upon its 2017 Communication on tackling illegal content online in a (non-legislative) recommendation which proposes a variety of voluntary operational measure. Various suggestions are proposed which would apply to all illegal content. Specific supplementary measures are proposed for terrorist content. Platforms are asked to report to the Commission biannually on how they have applied the Commission's recommendations, and on a quarterly basis for terrorist content. The Member States are also asked to report to the Commission on how platforms have responded to the recommendation. This evidence base will help the Commission to decide whether further, possibly legislative, action is needed. The Government supports the recommendation and draws attention to its (in development) Digital Charter, which will establish how the UK intends to regulate the digital economy in the future. As the proposal is non-legislative, and the measures are voluntary, the Committee cleared the document from scrutiny.

Cleared from scrutiny

Drinking Water Directive

The European Commission has proposed to revise its Drinking Water Directive to improve the quality of drinking water, modernise the approach to monitoring water quality and provide both greater access to water and information to citizens. Since the Committee last considered the proposal, the House has issued a Reasoned Opinion arguing that access to water through public drinking fountains is best dealt with at the national—rather than EU—level. The Committee considered a recent letter from the Government noting that the Commission has, in most instances, taken a precautionary approach to

water quality parameters, which is unnecessarily constraining and could have unintended consequences. The Committee notes the response and asks for information on the extent to which the Government's concerns are shared.

Not cleared; further information requested; drawn to the attention of the Environmental Audit Committee and the Environment, Food and Rural Affairs Committee

Veterinary medicinal products

The European Commission proposed revised rules in 2014 to increase the availability of veterinary medicinal products and address the public health risk of anti-microbial resistance. Agreement has finally been reached, but the compromise includes a requirement that producers from third countries that export animal and animal products to the EU should follow EU rules on the use of antibiotics. The UK and other Member States have emphasised that the provision—which would affect the UK post-Brexit—would need to be subject to more detailed implementing rules to ensure its compliance with world trade rules. The Committee clears the document from scrutiny, asking for confirmation of the final agreement and an assessment of the potential impact on the UK of the new third country provision.

Cleared; further information requested

EU Pet Travel Scheme

The Committee considered a letter from the Government promising that, post-Brexit, there will be new opportunities for managing pet travel arrangements, ensuring that there are robust controls on disease and animal welfare. The Government would like owners to be able to continue to travel with their pets to and from the EU with the minimum of inconvenience while protecting the EU's biosecurity.

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

EU Chemicals policy

The Committee considered letters from the Government on two documents relating to the UK's future engagement in EU chemicals policy, including possible associate membership of the European Chemicals Agency. The Committee considers it instructive that the Minister does not reject the suggestion that the UK would need to abide by EU rules in the areas covered by the Agency (as well as the rules of the Agency). This would require regulatory alignment with a number of EU Regulations, both as they are currently in force and as they might be amended in the future by the EU institutions. The Committee requests an update on the progress of negotiations.

Not cleared; further information requested; drawn to the attention of the Environmental Audit 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: Apportionment of the EU's concessions on Tariff Rate Quotas (WTO) in view of UK withdrawal from the EU [Proposed Decision, Proposed Regulation (NC)]; Whistleblowing and breaches of EU Law [Proposed Directive, Communication (NC)]; European Defence Industrial Development Programme (EDIDP) [Proposed Regulation (NC)]

Defence Committee: Whistleblowing and breaches of EU Law [Proposed Directive, Communication (NC)]; European Defence Industrial Development Programme (EDIDP) [Proposed Regulation (NC)]

Digital, Culture, Media and Sport Committee: Whistleblowing and breaches of EU Law [Proposed Directive, Communication (NC)]

Environmental Audit Committee: EU Chemicals Policy [Proposed Regulation (NC), Communication (C)]; Drinking Water Directive [Proposed Directive (NC)]

Environment, Food and Rural Affairs Committee: Apportionment of the EU's concessions on Tariff Rate Quotas (WTO) in view of UK withdrawal from the EU [Proposed Decision, Proposed Regulation (NC)]; EU Pet Travel Scheme [Report (C)]; Multi Annual Plan for fishing in Western Waters [Proposed Regulation (NC)]; Drinking Water Directive [Proposed Directive (NC)]

Exiting the European Union Committee: Apportionment of the EU's concessions on Tariff Rate Quotas (WTO) in view of UK withdrawal from the EU [Proposed Decision, Proposed Regulation (NC)]; Whistleblowing and breaches of EU Law [Proposed Directive, Communication (NC)]; Managing EU migration and security databases [Proposed Regulation (NC)]; Proceeds of crime: mutual recognition of freezing and confiscation orders [Proposed Regulation (NC)]

Health and Social Care Committee: Whistleblowing and breaches of EU Law [Proposed Directive, Communication (NC)]

Home Affairs Committee: Managing EU migration and security databases [Proposed Regulation (NC)]; Proceeds of crime: mutual recognition of freezing and confiscation orders [Proposed Regulation (NC)]

International Trade Committee: Apportionment of the EU's concessions on Tariff Rate Quotas (WTO) in view of UK withdrawal from the EU [Proposed Decision, Proposed Regulation (NC)]

Justice Committee: Managing EU migration and security databases [Proposed Regulation (NC)]; Proceeds of crime: mutual recognition of freezing and confiscation orders [Proposed Regulation (NC)]

Joint Committee on Human Rights: Whistleblowing and breaches of EU Law [Proposed Directive, Communication (NC)]

Public Accounts Committee: Whistleblowing and breaches of EU Law [Proposed Directive, Communication (NC)]

Treasury Committee: Apportionment of the EU's concessions on Tariff Rate Quotas (WTO) in view of UK withdrawal from the EU [Proposed Decision, Proposed Regulation (NC)]; VAT: Quick Fixes to tackle fraud and reduce burdens on businesses [Proposed Directive and Proposed Regulation (C)]

Women and Equalities Committee: Whistleblowing and breaches of EU Law [Proposed Directive, Communication (NC)]

Work and Pensions Committee: Whistleblowing and breaches of EU Law [Proposed Directive, Communication (NC)]

1 Whistleblowing and breaches of EU law

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Business, Energy and Industrial Strategy Committee, the Work and Pensions Committee, the Public Accounts Committee, the Health and Social Care Committee, the Defence Committee, the Digital, Culture, Media and Sport Committee, the Joint Committee on Human Rights, the Women and Equalities Committee and the Exiting the EU Committee
Document details	(a) Proposed Directive on the protection of persons reporting on breaches of Union law; (b) Commission Communication: *Strengthening whistleblower protection at EU level*
Legal base	(a)Articles 16, 33, 43, 50, 53(1), 62, 91, 100, 103, 109, 114, 168, 169, 192, 207 and 325(4) TFEU and Article 31 of the Euratom Treaty; ordinary legislative procedure; QMV; (b)—
Department	Business, Energy and Industrial Strategy
Document Number	(a) (39695), 8713/18 + ADDs 1–3, COM(18) 218; (b) (39696), 8725/18 COM(18) 214

Summary and Committee's conclusions

1.1 "Whistleblowing" is commonly understood to be the act of speaking out and disclosing serious wrongdoing, usually by employees. EU law on whistleblowing already applies in some areas such as financial services, transport safety and environmental protection. The Cambridge Analytica,[1] Lux Leaks,[2] Dieselgate[3] and Paradise/Panama Papers[4] scandals have all highlighted the importance but also the vulnerability of whistleblowers. In their wake, the Commission is proposing this Directive (document (a)) to strengthen and

1 Facebook and data analytics firm Cambridge Analytica have been accused of harvesting and using personal to influence the outcome of the US 2016 presidential election and the UK's referendum on EU exit. See the oral evidence session, Christopher Wylie, 28 March 2018 held as part of the DCMS Committee's inquiry into "Fake News".

2 See BBC website, 11 January 2018. In 2014 two whistleblower employees leaked confidential information concerning PricewaterhouseCoopers dealings with multinational companies in relation to tax rulings in Luxembourg between 2002 and 2010. They were originally both convicted by the Luxembourg courts but one had his conviction overturned in January 2018.

3 See BBC website, 10 December 2015. The German car manufacturer Volkswagen has since admitted cheating diesel emissions tests in the US.

4 A House of Common Debate Briefing paper explains that Paradise papers consisted of "material …leaked from two offshore service providers and 19 tax havens' company registries" and reported by some of the UK press "reiterating public concerns as to the scale of tax avoidance and evasion, and the ability of offshore jurisdictions to facilitate these activities". This followed the publication in the previous year of the 'Panama Papers'—a leak of financial records from Mossack Fonseca, a law firm that had provided advice on establishing offshore companies to a wide variety of politicians, celebrities and wealthy people.

extend protection for whistleblowers across the EU who report breaches of a wide range of EU legislation. As this is a minimum harmonisation proposal, it is open to Member States to legislate for higher levels of protection.

1.2 The proposed Directive imposes obligations on Member States but also extends to both private and public sectors. However, requirements relating to setting up internal reporting procedures would only apply to private bodies with 50 or more employees or with an annual business turnover of €10 million[5] or more (though all financial services providers are caught). They would also apply to state and regional administrations[6] and to "other entities governed by public law". Additionally, the proposed Directive would cover a wide category of individuals (or "reporting persons")[7] to be protected, including workers, the self-employed, those working for contractors, shareholders; volunteers, unpaid trainees, job applicants and members (including non-executive members) of corporate boards.

1.3 In terms of obligations on Member States, the proposal would prohibit and provide penalties[8] for all forms of retaliation from anyone including employers, colleagues, suppliers, customers against genuine whistleblowers who reasonably believe their disclosure to be true. Disclosures by whistleblowers can include reports of actual or potential unlawful activities. Member States must also provide access to free advice and adequate remedies for whistleblowers against, for example, workplace harassment or unfair dismissal. This includes a defence where the burden of proof is on the organisation concerned to show that it is not acting in retaliation. Member States are also required to implement a three-tiered reporting system: internal reporting channels (within an organisation), reporting to competent authorities and public media reporting. A more detailed account of that three-tiered system and other aspects of the proposal is set out in paragraphs 1.20–22 below.

1.4 The proposed Directive once adopted[9] would have to be implemented by Member States in their own law by 15 May 2021. If the UK's proposed transition/implementation period ends as scheduled on 31 December 2020, the UK would not have to implement the Directive. However, as the proposal has a strong internal market justification, the UK may want to align existing UK law on whistleblowers (see paragraph 1.7 below) with the proposal depending on obligations it might assume as part of a future EU-UK trade deal or in line with the PM's commitment to building on existing workers' rights after the UK exits the EU.

1.5 The Annex[10] to the proposal lists the EU legislation covered: public procurement, financial services, prevention on money laundering and terrorist financing, product safety, transport safety, protection of the environment, nuclear safety, food and feed safety, animal health and welfare, public health, consumer protection, protection of privacy and

5 £8.8 million using an exchange rate of 1 Euro to £0.8821.

6 Also, municipalities with a population of 10,000 or more.

7 These are "natural or legal persons" who report or disclose "information acquired in the context of his or work-related activities".

8 These 'penalties' must ensure that the Directive is implemented effectively, including penalties against discouraging reporting, penalties for retaliatory actions; and penalties to discourage malicious and abusive whistleblowing.

9 The Government tells us in its EM that Working Party discussions on the proposal were not expected to start before early June.

10 This list might be updated to cover more legislation in time but there are no powers included in the proposal for the Commission to change the Annex by implementing or delegated acts. There are also other annexes to the proposal which are helpful in providing further background information, including who the proposal applies to.

personal data, security of network and information systems, combatting fraud on the EU budget, competition/state aid and corporate tax avoidance. This horizontal approach is reflected in the multiple legal bases on which the proposal is based (see the headnote to this chapter). There is no single legal base specifically allowing the EU to legislate for whistleblowing protection in general.

1.6 The proposal is accompanied by a Commission Communication (document (b)) which sets out the background to the proposal. Together with the EM to the proposal and the accompanying Impact Assessments, the Communication explains why the Commission considers that horizontal legislation is justified at an EU level. Broadly this is because EU law breaches can be cross-border in nature and impact. This warrants a minimum level of protection for whistleblowers across the EU which is not currently achieved by fragmented national approaches to whistleblower legislation. A more detailed account of the justification for the proposal is set out in the "Background" section to this chapter.

1.7 The UK already has whistleblowing legislation:[11] the Public Interest Disclosure Act 1998 (PIDA) which amended the Employment Rights Act 1996 ("the 1996 Act"). The key provisions are contained in Part IVA of the 1996 Act, as amended. The legislation aims to protects workers[12] that disclose information about malpractice at their workplace or former workplace provided certain conditions are met. However, it excludes members of the armed forces, the Security Service, the Secret Intelligence Service and GCHQ.[13]The conditions concern the nature of the information disclosed and the person to whom it is disclosed. If these conditions are met, the 1996 Act protects the worker from suffering detriment because of having made the disclosure. Whereas the UK legislation[14] is limited to protecting workers reporting malpractices by their employers or third parties from victimisation, dismissal and in any ensuring employment dispute, the proposed Directive additionally seeks to provide a reporting framework for whistleblowers.

1.8 Other differences with UK law concern the potential range of individuals protected by proposal,[15] what can count as "retaliation" against them (including non-employment related retaliation).[16] However, there are also areas of analogous protection. UK law provides specific protections to workers who have reported a disclosure to a "prescribed person". These bodies are generally regulators, ombudsmen and other public oversight

11 See these two House of Commons Library Papers for a summary of UK legislation: one on Whistleblowing and Gagging Clauses and one on Whistleblowing to MPs.

12 The whistleblowing legislation protects not only employees but also other workers, including employee shareholders (although only employees and employee shareholders can bring an unfair dismissal claim)."Worker" is defined more widely in relation to whistleblowing than it is in relation to other employment rights under ERA 1996 and can include former workers/employees.

13 See sections 191, 193 and 200 ERA 1996.

14 The Government notes in its EM that the Commission recognises the strength of the United Kingdom whistleblowing framework. A question and answer document accompanying the proposal comments on the strength of the UK's system stating that "The UK has one of the most advanced systems of whistleblowing protection in the EU. However, in most Member States, whistleblowers are only protected in very limited situations".

15 The Government notes in its EM that rather than applying to workers, trainees and some other limited categories (including some self-employed professions in the NHS) as currently under UK law, the proposal affords protections to a wide range of people connected in a work-related way to a concern, including the self-employed, contractors, shareholders or directors.

16 The Government notes in its EM that the proposal covers a wide range of non-employment rated retaliatory activities, from termination of a contract for goods and services, to damage to personal reputation, financial loss (including loss of income) or cancellation of licences or permits.

bodies but also include Members of the UK Parliament.[17] These prescribed persons or bodies generally fulfil a similar role to those of a "competent authority" under the proposed Directive. The Directive also places requirements upon the way that prescribed persons assess or deal with a whistleblowing concern.[18]

1.9 The Parliamentary Under Secretary of State (Andrew Griffiths) set out the Government's view of the documents in his Explanatory Memorandum of 15 June (the link provided for more detailed reference). In summary, he indicates that the Government is not in favour of the proposal. It questions whether the proposal complies with subsidiarity[19] since the Government has already told the Commission that a non-legislative initiative should have been tried first.

1.10 The Government also provides an Impact Checklist which estimates the costs to medium sized and large employers of setting up internal reporting procedures to be between £8.4 million and £17.9 million with the costs of maintaining those systems between £27.1 million to £115.1 million. Cumulative costs forecast for training range from £36.1 million to £105.6 million. There would also be costs of the justice system if there are more employment tribunal cases relating to detriment or dismissal. However, the Checklist also recognises unquantifiable benefits to individuals, companies themselves (where preventative action means the avoidance of litigation resulting from unlawful or harmful activities) and the receipt of otherwise lost tax revenue where evasion or anticipated evasion is reported.

1.11 The Minister further notes that amendments would be required to UK legislation, principally the 1996 Act, but also potentially also on data protection, competition, finance and a wide range of other primary and secondary legislation governing regulators, ombudsmen and other oversight bodies.

1.12 The Government is also concerned that there are no explicit exemptions for disclosures relating to staff in national security or intelligence agencies (excluded from protection under UK law) or disclosure by third parties (for example, journalists) that could undermine national security.[20]

1.13 On legal issues, the Government says it will investigate whether all the multiple legal bases are justified and whether criminal penalties are envisaged by the proposal.

1.14 **We thank the Minister for his detailed Explanatory Memorandum (EM) and Impact Checklist.**

17 See The Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2014. See the House of Commons Library Paper of 17 April 2014 on Whistleblowing to MPs.

18 However, the Government tells us that the UK framework already requires prescribed persons (with some exceptions) to report in writing annually on whistleblowing disclosures made to them as a prescribed person over the previous 12 months. Each report must cover the number of disclosures made by workers in a 12-month period and the number of disclosures where the prescribed person decided to take further action. It must also include a summary of the type of action taken as well as how disclosures have impacted on the prescribed person's ability to perform its functions and meet its objectives (for example, to improve services in a sector). In this regard, requirements for Member States to report on whistleblowing disclosures available at a central level may be able to be gathered from collated reports.

19 See footnote 15 for the Article 5(2) TEU definition of the subsidiarity principle.

20 The Government also states that any exclusion to these categories should also extend to the private sector who have sensitive relationships with UKIC and knowledge of capabilities and assets.

1.15 **We note the Government would prefer the EU to take a non-legislative approach to providing protection for whistleblowers on subsidiarity grounds,[21] "leaving Member States to consider their own legal frameworks". However, we do not recommend that the House issues a subsidiarity Reasoned Opinion for the following reasons:**

- **Action on whistleblowing in relation to breaches of EU law with a cross-border impact or those affecting the EU budget, can only be effective at EU level.**
- **If the Government dislikes the extent or reach of some of the proposals of the Directive, then this is a question of proportionality, not subsidiarity.**
- **Divergent national approaches to whistleblowing would persist in the face of a non-legislative measure such as a non-legally binding Recommendation. This would create an unlevel playing field in terms of the functioning of the internal market and the other areas of EU competence covered by this proposal, with certain companies, businesses and Member States gaining a competitive or protectionist advantage over others by not being held to account for breaches of EU law. As the UK is already comparatively advanced in having some whistleblower legislation, failing to ensure that other Member States are brought up to a minimum standard risks disadvantaging the UK. This will remain the case if, as likely, the UK might not have to implement the proposal before the end of the transition/implementation period. This is because poor enforcement of EU legislation and rules by the EU internally is not in the UK's interest as a future trading partner of the EU.**
- **The Impact Checklist identifies benefits of the proposed Directive, albeit unquantifiable, to UK businesses. These could offset the costs to them of setting up reporting structures, for instance, preventative disclosure of illegal or harmful practices which, if unchecked, could result in detrimental litigation against companies, regulatory action or even enforcement action and prosecution of company management.**

1.16 **Once negotiations progress, we would be grateful for an update in due course and a response from the Minister to the following questions:**

- **Whether the Government has identified any problems with the scope of the proposal and reliance on the corresponding legal bases?**
- **If the penalties envisaged are criminal in nature, is the Government satisfied that they are essential in order to ensure effective implementation of the proposed Directive?**
- **Whether there have been any developments on possible exemptions relating to disclosures which could undermine national security. Does the Government derive any legal comfort from either Recital 21 "this Directive shall be without prejudice to national security" or the national security Treaty exemption in Article 4(2) TEU?**

21 See Article 5(2) TEU: "The Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by Member States, either at central or at regional or local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".

- **If the UK does not have to implement the proposed Directive during the transition/implementation period, does the Government consider it might:**
  - **Have to align with it as part of any future relationship with the EU? This might be to reflect European Council Guidelines that a future trade agreement (FTA) with the UK "…must ensure a level playing field in terms of competition and state aid, and must encompass safeguards against unfair competitive advantages through, inter alia, fiscal, social and environmental dumping." Or as part of a core labour standards chapter in such an FTA?**
  - **Want to align as a reflection of the Prime Minister's commitment in her Lancaster House Speech to not reduce workers' rights protections, but to build on them?**[22]
- **What is the scope of Article 4 in imposing obligations to introduce internal reporting procedures on "(a)state administration" or "other entities governed by public law"? Are state legislatures to be covered by this wording in any respect and more generally by the proposal?**[23]
- **Article 15 refers to the obligation to provide legal aid in accordance with Directive (EU) 2016/1919**[24] **which the UK did not opt into. Currently legal aid is only available in the UK for employment claims involving discrimination. If the UK had to implement the Directive or align with it, would it consider making legal aid available to whistleblowers, given the important public function that they can perform?**

1.17 **If, as the negotiation progresses, the transposition date changes and the UK may have to implement or it becomes clearer that the UK may have to or want to align with the proposal, we would be grateful for a more detailed legal analysis from the Government about required changes to UK law. This might include whether any changes would be required in relation to gagging clauses, a high-profile issue at the moment.**[25]

1.18 **In the meantime, we retain the documents under scrutiny. We also draw the chapter and document to the attention of the Business, Energy and Industrial Strategy**

22 The PM's Lancaster House speech, 17 January 2017. And a fairer Britain is a country that protects and enhances the rights people have at work. That is why, as we translate the body of European law into our domestic regulations, we will ensure that workers' rights are fully protected and maintained. Indeed, under my leadership, not only will the government protect the rights of workers set out in European legislation, we will build on them. Because under this government, we will make sure legal protection for workers keeps pace with the changing labour market—and that the voices of workers are heard by the boards of publicly-listed companies for the first time.

23 We note in Recital 41 to the proposal public sector bodies have been brought within the scope of these requirements because of their involvement in procurement. Further, that "entities governed by public law" in the EU Public Procurement Directive is defined to include bodies financed or part-financed by the State and this has been accepted to extend to the House of Commons. We would welcome clarification of whether the same meaning would be applied in relation to this proposal. At present, although the House of Commons Service is not expressly covered by Part IVA of the Employment Rights Act, there are already some internal procedures in place as a matter of good practice.

24 Directive 2016/1919/EU on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings

25 We understand that Section 43J of the Employment Rights Act 1996 provides that gagging clauses are unenforceable in so far as they purport to preclude the making of a "protected disclosure".

Committee, the Work and Pensions Committee, the Public Accounts Committee (in view of the Report of a previous Committee on Whistleblowing, the Health and Social Care Committee (in view of the Report of a previous Committee covering whistleblowing in the NHS, the Defence Committee (given the national security implications of whistleblowing), the Digital, Culture, Media and Sport Committee, the Joint Committee on Human Rights, the Women and Equalities Committee and the Exiting the EU Committee.

Full details of the documents

(a) Proposal for a Directive of the European Parliament and the Council on the protection of persons reporting on breaches of Union law: (39695), 8713/18, COM (18) 218; (b) Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: *Strengthening whistleblower protection at EU level:* (39696), 8725/18, COM (18) 214

Background

1.19 In the Communication and the EM and Impact Assessment to the proposal, the Commission explains that legislative action is justified for the following reasons:

- recent scandals with cross-border impacts have shown how insufficient whistleblower protection in one Member State can have negative impacts on the functioning of EU policies, including the functioning of the internal market;
- divergent national approaches aggravate that problem with only ten Member States (including the UK)[26] having comprehensive legislation which protects whistleblowers to varying extents and others only having sectoral legislation;
- whistleblowers help prevent damage and detect harm or threat to the public interest but can be discouraged from so doing by fear or threats of retaliation;
- whistleblowers assist investigative journalists in performing a value "watchdog" role in a democratic society and in the indirect enforcement of EU law;
- there has been "very strong support" during the pre-legislative consultation carried out by the Commission for legally binding minimum standards on whistleblower protection particularly to combat fraud, corruption, tax evasion and avoidance and in environmental protection and health and safety;
- only EU level action can align and extend existing EU sectoral whistleblower protection and also to protect the EU budget from fraud;
- in January and October 2017, the European Parliament called on the Commission to present a horizontal legislative proposal by the end of 2017; and
- the proposal is not excessive as it is based on European Court of Human Rights case law on "freedom of expression"[27] and the Council of Europe 2014 recommendation on the Protection of Whistleblowers.

26 The other MS are France, Hungary, Ireland, Italy, Lithuania, Malta, the Netherlands, Slovakia and Sweden.

27 The link is to a 2017 Council of Europe factsheet summarising key cases of Guja v. Moldova n°—14277/04, 12.02.2008; Heinisch v. Germany—28274/08, judgment 21.7.2011; Bucur and Toma v. Romania—40238/02, Judgment 8.1.2013; Marchenko v. Ukraine—4063/04 Judgment 19.2.2009.

Further details of the proposed Directive (document (a))

1.20 Article 4 of the proposed Directive would require:

- companies with more than 50 employees or with an annual turnover of over €10 million (approximately £8.8 million);[28]
- all financial services companies or those vulnerable to money laundering or terrorist financing;[29] and
- many public-sector organisations (state, regional, large municipal administrations and other entities "governed by public law") to set up internal procedures to handle whistleblowers reports.

1.21 Article 5 requires internal reporting channels to guarantee the confidentiality of a whistleblower and to them about follow-up within a reasonable timeframe not exceeding three months. Accessible information on internal reporting procedures and how to report externally to competent authorities must be provided.

1.22 Member States will also need to:

- Nominate competent external authorities[30] to handle whistleblowing reports. These will need to establish independent, secure reporting channels, with designated staff trained in handling reports (Articles 6—12).[31] In addition to the requirement to give feedback to a reporting person within a reasonable timeframe, competent authorities must also keep a record of reports and review procedures every two years. A person can only report to a competent authority if one of six conditions is met;[32]
- Take necessary measures to ensure the protection of whistleblowers: making information and advice accessible to the public on procedures; making remedies available against retaliation, including interim relief; exempting whistleblowers from liability for breach of restrictions on the disclosure of information imposed

28 At an exchange rate of 1 Euro to £ 0.8821.

29 A number of EU Directives already impose some specific requirements upon the financial services sector in relation to whistleblowing and wrongdoing. The Government tells us in the EM that in September 2016, the Financial Conduct Authority and Prudential Regulation Authority introduced new rules to support whistleblowers which require firms to put in place mechanisms that allow employees to raise concerns internally, and to appoint a senior person to take responsibility for these arrangements. However, smaller firms are not covered by this requirement.

30 A competent authority is a body designated by the Member State to receive and deal with disclosures. Member States shall ensure that competent authorities follow up on the reports by taking the necessary measures and investigate the subject-matter of the reports to an appropriate extent. They shall communicate the final outcome of the investigation to the whistleblower. Reports to EU bodies, offices or agencies attract the same protection as reports to national competent authorities.

31 Competent authorities must review their procedures for receiving and following up on reports at least every two years. They must ensure the identity of a reporting person is protected for as long as an investigation is ongoing.

32 These conditions are: (i) the person first reported internally, but no appropriate action was taken; (ii) no internal reporting channels were available or the person could not reasonably be expected to be aware of those channels; (iii) the use of internal reporting channels was not mandatory for that person; (iv) they could not reasonably be expected to use those channels in light of the subject matter of their concern; (v) they had reasonable grounds to believe that using those channels could jeopardise the effectiveness of investigative actions by competent authorities; or (vi) they were entitled to report directly to a competent authority by virtue of EU law .

by contract or by law; and ensuring whistleblowers can rely on having made a whistleblowing report as a defence to legal actions including defamation, breach of copyright or breach of secrecy(Article 15);

- Provide for "effective, proportionate and dissuasive" penalties[33] for taking retaliatory action[34] or attempting to hinder whistle-blowing or making malicious or abusive disclosures under the guise of whistle-blowing (Article 17);
- Apply EU data protection rules: the General Data Protection Regulation (GDPR), the Law Enforcement Directive and the equivalent of these rules for the EU institutions (Article 18); and
- Submit annual reports to the Commission on the number of whistleblowing reports received by competent bodies, investigations, the outcome of resulting proceedings and the estimated financial damage and amounts recovered in proceedings (Article 21).

Previous Committee Reports

None.

33 Remedies against retaliation are not prescribed (other than a requirement that they should include access to interim relief)

34 Retaliation includes but is not limited to: Suspension, lay-off, dismissal or equivalent measures; demotion or withholding of promotion; transfer of duties, change of location of place of work, reduction in wages, change in working hours; withholding of training; negative performance assessment or employment reference; imposition or administering of any discipline, reprimand or other penalty, including a financial penalty; coercion, intimidation, harassment or ostracism at the workplace; discrimination, disadvantage or unfair treatment; failure to convert a temporary employment contract into a permanent one; failure to renew or early termination of the temporary employment contract; damage, including to the person's reputation, or financial loss, including loss of business and loss of income; blacklisting on the basis of a sector or industry-wide informal or formal agreement, which entails that the person will not, in the future, find employment in the sector or industry; early termination or cancellation of contract for goods or services; cancellation of a licence or permit.

2 Drinking Water Directive

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

Summary and Committee's conclusions

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

2.2 We first considered this proposal at our meeting of 7 March 2018 and agreed to issue a Reasoned Opinion, considering that the provisions on access to water breach the principle of subsidiarity—i.e. action should only be taken at the EU level where it cannot be sufficiently achieved by Member States at national, regional or local levels and there is greater benefit to taking action at the EU level. More information was set out in our Report from that meeting,

2.3 Subsequently, the Parliamentary Under-Secretary of State for the Environment (Dr Thérèse Coffey), wrote to us on both 21 March and 22 March 2018.[35] In her second letter, she was clear that the Government would support us in submitting the Reasoned Opinion and agreed that the final legislation must be "unequivocal in its compliance with the principle of subsidiarity." The Reasoned Opinion was debated on 26 March[36] and agreed by the House on 28 March.[37] We have yet to receive a response from the European Commission.

2.4 In addition to our concerns about subsidiarity, we also asked for further information from the Government concerning: the quality parameters proposed by the Commission; the provisions on access to justice; and whether the Government supports the proposed legal base.

35 Letters from Dr Thérèse Coffey to Sir William Cash dated 21 and 22 March 2018.
36 European Committee A, 26 March 2018.
37 Votes and Proceedings, 28 March 2018.

2.5 The Minister for Agriculture, Fisheries and Food (George Eustice) has responded.[38] Regarding the proposed quality parameters, the Government considers that, in most instances, "the Commission has taken a precautionary approach to water quality parameters which is unnecessarily constraining and could have unintended consequences." As an example, he points to the requirement to analyse all water supplies for perfluorinated compounds (PFCs), which is a by-product of firefighting foam. These are currently only monitored where they pose a risk to health as contamination is often localised to specific areas. The UK would prefer to maintain the current risk-based approach.

2.6 Looking to the future, the Government's 25 Year Environment Plan confirms that decisions on managing risk will be proportionate and based on the weight of evidence. The Minister notes that any alignment with others' standards is yet to be decided, but UK standards will remain high.

2.7 Regarding access to justice, the Government does not believe that the relevant provision should be included in the Directive as the UK and other Member States must already comply with such requirements under the Aarhus Convention on access to justice in environmental matters.

2.8 Finally, the Minister confirms that the Government is supportive of the proposed environmental legal base, noting that it allows for the adoption of environmental policies which protect public health.

2.9 **We acknowledge the Government's support for the Reasoned Opinion that we recommended on the proposal and for the timely debate which allowed the House to adopt the Opinion within the eight-week deadline.**

2.10 **We are aware that some Member States have expressed concern about the obligation to ensure access to drinking water for "vulnerable and marginalised groups", which the Commission defines in its explanatory memorandum as "refugees, nomadic communities, homeless people and minority cultures such as Roma, Sinti, Travellers, Kalé, Gens du voyage, etc., whether sedentary or not". Concerns expressed do not relate, we understand, to the concept of universal access but to the risk of defining these terms within EU environmental legislation. We would welcome the Government's observations on this issue.**

2.11 **As to the other matters that we raised, we welcome the Government's response but ask for information on the extent to which the concerns are shared. We would welcome that information within an update on negotiations following the Environment Council on 25 June 2018 at which we understand that there will be some discussion of this proposal.**

2.12 **We retain the proposal under scrutiny and draw this chapter to the attention of the Environmental Audit Committee and the Environment, Food and Rural Affairs Committee.**

38 Letter from George Eustice to Sir William Cash dated 24 May 2018.

Full details of the documents

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

Previous Committee Reports

Eighteenth Report HC 301–xviii (2017–19), chapter 1 (7 March 2018).

3 EU Chemicals Policy

Committee's assessment	Politically important
Committee's decision	(a) Not cleared from scrutiny; further information requested (b) Cleared from scrutiny. Drawn to the attention of the Environmental Audit Committee
Document details	(a) Proposal for a Regulation of the European Parliament and of the Council on persistent organic pollutants; (b) Commission Communication—Commission General Report on the operation of REACH and review of certain elements: Conclusions and Action
Legal base	(a) Article 192(1) TFEU, QMV, Ordinary legislative procedure; (b)—
Department	Environment, Food and Rural Affairs
Document Numbers	(a) (39594), 7470/18 + ADD 1, COM(18) 144; (b) (39540), 39540, 6916/18 + ADDs 1–7, COM(18) 116

Summary and Committee's conclusions

3.1 In her Mansion House speech on 2 March 2018, the Prime Minister proposed that the UK seek associate membership of a number of EU agencies post-Brexit, including the European Chemicals Agency (ECHA). The aim of this approach is to ensure that products only require one series of approvals for accessing both UK and EU markets.

3.2 We raised queries in relation to this issue in our scrutiny of both of these documents. The first document (document (a)) proposed to recast the EU's Regulation on Persistent Organic Pollutants (POPs),[39] including a suggestion that the ECHA be involved in supporting the technical and reporting aspects of the Regulation. This would expand the existing remit of the ECHA. We therefore asked to what extent the uncertainty over UK associate membership of the ECHA could impact on the UK's input into negotiations on the proposal.

3.3 The second document (document (b) reviews the implementation of the "REACH" (Registration, Evaluation, Authorisation and Restriction of Chemicals) Regulation. Drawing on the example of Swiss participation in the European Aviation Safety Agency, we asked whether it was reasonable to assume that associate membership of the ECHA would be conditional on application of the relevant EU legislation and whether this would apply to all of the Regulations covered by the ECHA.

3.4 In his response to the Committee's queries on the draft POPs Regulation (document (a)), the Minister for Agriculture, Fisheries and Food (George Eustice) notes that the UK will discuss with the EU how best to cooperate with regards to the future management of POPs. Progress of the POPs proposal will be relevant, including any new role for the ECHA. The Minister goes on to emphasise that the detailed terms of any associate

39 Examples of POPs include pesticides such as DDT and polychlorinated biphenyls (PCBs). Now largely banned, PCBs continue to occur in the environment through the disposal of old electrical equipment.

membership of the ECHA would be subject to negotiations and that the UK would accept that this would mean abiding by the rules of the agency and making an appropriate financial contribution. While the UK Parliament could choose not to accept those rules, there would be consequences for linked market access rights and agency membership.

3.5 Responding to the Committee's queries on the REACH review, the Minister adds that Switzerland's relationship with EASA exemplifies the concept of associate membership of EU agencies with the aim of ensuring that products only require one series of approvals for accessing both UK and EU markets.

3.6 **The Minister reiterates the Prime Minister's commitment that the EU would abide by the rules of the Agency in order to secure associate membership. While this does not explicitly cover the underlying EU Regulations salient to the work of the Agency, we consider it instructive that the Minister does not reject the suggestion that the UK would also need to abide by EU rules in the areas covered by the Agency. This would require regulatory alignment with a number of EU Regulations, both as they are currently in force and as they may be amended in the future.**

3.7 **We would welcome an update in due course on the progress of negotiations on the POPs proposal (document (a)), which we retain under scrutiny. We have no further queries regarding the REACH review (document (b)) and now clear that document from scrutiny. We draw this chapter to the attention of the Environmental Audit Committee as that Committee has shown considerable interest in the future of chemicals regulation post-Brexit.**

Full details of the documents

(a) Proposal for a Regulation of the European Parliament and of the Council on persistent organic pollutants: (39594), 7470/18 + ADD 1, COM(18) 144; (b) Commission Communication—Commission General Report on the operation of REACH and review of certain elements: Conclusions and Action: (39540), 39540, 6916/18 + ADDs 1–7, COM(18) 116.

Previous Committee Reports

Document (a): Twenty-sixth Report HC 301–xxv (2017–19), chapter 1 (2 May 2018). Document (b): Twenty-fifth Report HC 301–xxiv (2017–19), chapter 4 (25 April 2018).

4 Multi Annual Plan for fishing in Western Waters

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Environment, Food and Rural Affairs Committee
Document details	Proposal for a Regulation of the European Parliament and of the Council establishing a multiannual plan for fish stocks in the Western Waters and adjacent waters, and for fisheries exploiting those stocks, amending Regulation (EU) 2016/1139 establishing a multiannual plan for the Baltic Sea, and repealing Regulations (EC) No 811/2004, (EC) No 2166/2005, (EC) No 388/2006, (EC) 509/2007 and (EC) 1300/2008
Legal base	Article 43(2) TFEU, QMV, Ordinary legislative procedure
Department	Environment, Food and Rural Affairs
Document Number	(39598), 7245/1/18 + ADDs 1–2, COM(18) 149

Summary and Committee's conclusions

4.1 Multi-annual plans (MAPs) set a management framework establishing rules and criteria under which Total Allowable Catches (TACs) and other management measures are adopted. Under the reformed Common Fisheries Policy (CFP), MAPs should cover multiple stocks where those stocks are jointly exploited (i.e. a mixed fishery). On that basis, the Commission proposed this new MAP incorporating Western Waters stocks into a single management plan. Like the earlier North Sea Plan, the Government told us that it considered the new MAP to provide a valuable framework for future cooperation between the UK and the EU.

4.2 We first considered this proposal at our meeting of 2 May, raising the following issues:

- consistency between the North Sea and Western Waters MAPs;
- the importance of flexibility to respond to emergency situations or to respond where an approach adopted based on scientific advice is shown to be misaligned with actual catch levels;
- prospects for agreement before the UK's withdrawal from the EU; and
- arrangements for the agreement of detailed management measures during the implementation period.

4.3 The Minister for Agriculture, Fisheries and Food (George Eustice) has responded.[40] He notes that the Commission's approach is consistent with the North Sea MAP, which he welcomes.

4.4 The Minister explains that some specific matters have emerged already, such as bycatch stocks incorrectly included by the Commission. This could be potentially difficult for the management of mixed fisheries, where inclusion of bycatch stocks could impact on the capture of target stocks. Member States are currently working to provide evidence so that affected stocks can be reclassified as bycatch stocks.

4.5 The Minister agrees with the Committee both that the MAP must be sufficiently flexible to respond to emergency situations and that scientific advice should align with catch levels. He notes that evidence captured by the Cornish Fish Producers Organisation about higher actual levels of haddock in the Western English Channel than set out in the scientific stock assessment will feed into the assessments for 2019.

4.6 Turning to Brexit, the Minister says that the UK would prefer the Western Waters MAP to be agreed before the UK exits the EU and he considers that it is in the interests of the Commission and other Member States to reach agreement within that timescale. As the UK is an important Coastal State in Western Waters, the Minister expected that the country will continue to play an active role in the management of these areas both during the implementation period and beyond.

4.7 **Regarding future UK influence, we note the Minister's expectation that the UK will continue to play an active role. As we noted in our recent Report on the adoption of detailed rules in the fishing sector,[41] there is a need to move beyond expectation to specific arrangements for UK involvement during the implementation period. While we look forward to the Minister's response to our queries in that separate strand of scrutiny, we note its equal relevance in the context of the draft Western Waters MAP.**

4.8 **The Minister notes that some specific matters have arisen already. We look forward to a further update in due course, including further details on matters that have arisen, the progress of negotiations and the outcome of the Department's assessment of the implications of the proposal. In the meantime, the proposal remains under scrutiny. We draw this chapter to the attention of the Environment, Food and Rural Affairs Committee.**

Full details of the documents

Proposal for a Regulation of the European Parliament and of the Council establishing a multiannual plan for fish stocks in the Western Waters and adjacent waters, and for fisheries exploiting those stocks, amending Regulation (EU) 2016/1139 establishing a multiannual plan for the Baltic Sea, and repealing Regulations (EC) No 811/2004, (EC) No 2166/2005, (EC) No 388/2006, (EC) 509/2007 and (EC) 1300/2008: (39598), 7245/1/18 + ADDs 1–2, COM(18) 149.

Previous Committee Reports

Twenty-sixth Report HC 301–xxv (2017–19), chapter 2 (2 May 2018).

40 Letter from George Eustice to Sir William Cash, dated 5 June 2018.

41 Thirtieth Report HC 301–xxix (2017–19), chapter 16 (6 June 2018).

5 Apportionment of the EU's concessions on Tariff Rate Quotas (WTO) in view of UK withdrawal from the EU

Committee's assessment	Legally and politically important; drawn to the attention of the International Trade Committee, Environmental Food and Rural Affairs Committee, Exiting the EU Committee, Business, Energy and Industrial Strategy Committee and Treasury Committee
Committee's decision	Not cleared from scrutiny; further information requested; but scrutiny waiver granted
Document details	(a) Recommendation for a Council Decision authorising the opening of negotiations with a view to apportioning the Union's WTO concessions on Tariff Rate Quotas annexed to the General Agreement on Tariffs and Trade 1994 in view of the withdrawal of the United Kingdom from the Union; (b) Proposal for a Regulation of the European Parliament and of the Council on the apportionment of tariff rate quotas included in WTO schedule of the Union following the withdrawal of the United Kingdom from the Union and amending Council Regulation (EC) No 32/2000
Legal base	(a) Article 218(3) and (4) TFEU; (b) Article 207(2) TFEU, ordinary legislative procedure, QMV
Department	International Trade
Document Numbers	(a) (39734), COM(18) 311; (b) (39735), 2018/0158, COM(18) 312

Summary and Committee's conclusions

5.1 The EU has a single set of WTO tariff commitments for goods[42] (set out in its schedule of concessions and commitments)[43] which are applicable throughout the EU.[44] As such, the UK currently forms part of that EU schedule.[45]

5.2 At the end of the transitional period (31 December 2020) or on the UK's exit on 29 March 2019 if no transitional arrangements are agreed as part of the UK withdrawal

42 https://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm.

43 Annexed to the General Agreement on Tariffs and Trade 1994.

44 The EU is a single customs union with a single trade policy and common external tariff. The EU has exclusive competence in respect of the EU's common commercial policy and customs, see Article 3 TFEU.

45 Both the EU and the UK are members of the World Trade Organisation (WTO) in their own right (as are the other 27 Member States of the EU). When the EU acceded to the WTO in 1995, the EU's WTO schedule of concessions and commitments (annexed to the General Agreement on Tariffs and Trade 1994 (GATT 1994)) was simultaneously annexed to the UK's schedule of commitments.

agreement, the EU's WTO commitments will cease to apply to the UK. The EU has said[46] that its scheduled commitments for goods (its bound tariff rates on imports) will remain applicable to its territory.[47] However, the EU's existing quantitative commitments in the form of tariff-rate quotas (TRQs),[48] which are currently set for the whole of the EU, will need to be split between the EU and the UK.

5.3 The UK and EU wrote jointly to WTO Members on 11 October 2017[49] setting out their proposed methodology for apportioning, as a technical adjustment, the EU's current TRQs between the EU and the UK. This methodology is based on historic trade flows under each TRQ, which in the UK/EU view maintains other WTO members market access levels. This approach has not been agreed by consensus of the other parties.

5.4 The Recommendation for a Council decision in its original form.[50]

- seeks authorisation for the Commission to open negotiations with relevant WTO members[51] under Article XXVIII GATT 1994, with a view to apportioning the EU's TRQ between the EU and UK; and
- authorises the UK to undertake the "necessary procedures" with a view to establishing its own schedule of concessions and commitments annexed to GATT 1994 (and TRQs within that schedule) including negotiations with other WTO Members on the UK's portion of the TRQs currently included in the Union's schedule of concessions (see Article 4).

5.5 The Minister, the Rt Hon Greg Hands MP, wrote to the Committee on 12 June informing the Committee that the Presidency plan to remove the reference to wording at Article 4 of the original text concerning "authorisation" of the UK "to undertake the necessary procedures" to establish its own independent schedule of concessions on goods at the WTO. The Minister went on:

> "Instead, the revised draft decision—which is still in flux—is more likely to recognise the need to take into account the specificities of the UK as a withdrawing Member and against this backdrop, to refer to the Commission's role in ensuring that the duty of sincere cooperation is respected."[52]

5.6 The Proposed Regulation:

- sets out a methodology for how the TRQs will be apportioned between the UK and EU;
- Gives the Commission powers to make changes to the Union's TRQs by tertiary legislation; and

46 See paragraph 1 of the Explanatory Memorandum to the Recommendation for a Decision in relation to tariff rate quotas referenced above.
47 In contrast, the UK will need to establish its own 'independent' schedule of commitments on over 10,000 tariff lines.
48 Limits on imports at a favourable tariff rate.
49 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/651033/Letter_from_EU_and_UK_Permanent_Representatives.pdf.
50 COM(2018) 311, 22.5.2018.
51 Those WTO members with negotiating rights according to Article XXVIII GATT.
52 See paragraph 6 of the Minister's letter.

- Provides that the apportionment of Union TRQs will apply from the date on which "Union law ceases to apply in the United Kingdom" in accordance with either a withdrawal agreement between the EU and UK (31 December 2020) or in the absence of such agreement, 30 March 2019.

5.7 **The Committee thanks the Minister for his Explanatory Memorandum and his subsequent letter to the Committee of 12 June 2018.**

5.8 **The Committee notes that in relation to the proposed change to the text referred to at paragraph 5.5 above (proposed deletion of the words regarding 'authorisation' of the UK), the Minister says "My officials have discussed these amendments in detail with the clerks of the relevant Committees". This sentence might suggest there has been some agreement concerning the proposed wording between the clerks to the Committee and officials. We emphasis there has been no such agreement which is why the Committee asked for a confirmatory letter from the Minister setting out planned changes by the Presidency.**

5.9 **We grant the Minister a conditional scrutiny waiver, valid until the end of the Bulgarian Presidency, on the following basis:**

i) **the text put before the Council for a vote is in the form indicated by the Minister at paragraph 6 of his letter of 12 June (outlined at paragraph 5.5 above);**

ii) **the Committee receives clarification on the matters below within 10 working days; and**

iii) **the Committee is updated expeditiously on any significant developments during the Council decision-making process.**

5.10 **The matters referred to at paragraph 5.9(ii) above are:**

a) **At paragraph 7 of his letter of 12 June 2018, the Minister expressed the Government's support for the Council Decision in its original form. In that original form, Article 4 of the text, inter alia, authorises the UK to undertake the necessary procedures to set out its own WTO goods schedule of concessions and commitments and to negotiate with other WTO Members on its portion of the tariff rate quotas currently included in the Union's schedule of concessions and commitments.**

i) **This raises the legal questions:**

– **Whether it is necessary under the Treaties to authorise the UK to act; or whether there is in fact no breach of the Treaty duty of sincere co-operation (Article 4 TEU) for the UK to negotiate on its own behalf for TRQ adjustments which would only come into force once the UK has left the EU;**

– **Whether it would be necessary under the principle of good faith, set out in Article 4a of the draft Withdrawal Agreement (and agreed in principle) to authorise the UK to act, when draft Article 125(4) (also**

agreed in principle) enables the UK to negotiate on its own behalf for TRQ adjustments which would only come into force at the end of the transition/implementation period.

ii) **Additionally, in his letter of 12 June 2018 the Minister says "We will continue to recommend supporting the Council Decision provided these changes [which includes proposed deletion of the reference to 'authorisation' of the UK] do not materially alter the balance of UK interest". Could the Minister indicate what is meant exactly by this statement. What is the Government's position on the proposed deletion of the reference to 'authorisation' of the UK at Article 4—does it consider it in the UK's interest that the reference to 'authorisation' of the UK is removed, in particular given that inclusion of such an authorisation could set an unwelcome precedent, making it necessary for the UK to obtain prior authorisation from the EU in respect of its taking steps to establish other arrangements it will wish to make with WTO members in order to establish its own WTO arrangements post exit/end of the transition period.**

b) **at paragraph 23 of his EM the Minister says "A group of the biggest agricultural exporters (including US, Australia, Argentina, Brazil, Canada, Thailand, Uruguay and New Zealand) have raised concerns with our approach to apportioning the 4% of tariff lines within our goods schedule that are TRQs".**

i) **Could the Minister explain what elements of the EU/UK approach are a cause for concern by the States listed—is it, for example, the baseline data being used by the EU/UK, the agreed EU/UK methodology (as referred to at Recital 3 of the Proposed Regulation) or is it the effect of splitting the EU TRQ on the market access of an affected WTO member.**

ii) **How far from agreement is the EU and UK with those WTO Members?**

iii) **In his letter of 12 June 2018, the Minister says "we are now in a position to begin the formal steps to establish our goods schedule, the first of which will be to circulate our schedules at the WTO for certification. Should it be necessary, the UK may then move on to a second stage, and open our own Article XXVIII negotiations, on a UK-specific goods schedule and tightly constrained to residual specific Tariff Rate Quota lines where rectification with our partners has not been finalised". In what circumstances does the Minister envisage that it may be necessary to enter formal Article XXVIII GATT negotiations in order to agree TRQ lines with WTO members?**

c) **In apportioning current EU TRQs between the EU-27 on the one hand and the UK on the other, WTO Member exporters into the EU will, to the extent that current 'EU-28 TRQ' is allocated to the UK, lose flexibility in market access (in terms of being able to choose whether to export into either the EU-27 or the UK based, for example, on the prevailing market price of the product, demand and exchange rates). If affected WTO members perceive a worsening in their market access rights, is there a risk that the UK will be**

pressured to give greater concessions than it otherwise would in establishing its own schedule of concessions, for example in setting tariff rates or in giving additional preferential market access to other products by means of TRQs?

d) **In any event, is it the case that some affected WTO members may see the splitting of the EU TRQ and the establishment by the UK of its on schedule of concessions as an opportunity to renegotiate access rights to the UK market more generally? Given the sensitive nature of a number of products that are currently the subject of TRQ lines (in the sense that there is competing national production of that product for example, lamb and sugar), has the Government undertaken any assessment of the impact of increasing preferential market access of those products (or others) on the domestic agricultural sector?**

e) **What are the implications to the UK if the allocation of TRQs between the EU and UK is not agreed by affected WTO Members before the UK's departure from the EU (either on 29 March 2019 or 31 December 2020, depending on agreement being reached on the UK's Withdrawal agreement)? Moreover, if there is a need for the UK to enter formal Article XXVIII GATT negotiations, what impact will this process have on the ability of the UK to reach an agreement on splitting the EU TRQ prior to the UK's exit from the EU/end of the transitional period.[53] If there is no agreement on UK TRQs:**

   i) **what are the risks to UK consumers/businesses?**

   ii) **what are the risks of challenge to the UK/withdrawal, of 'substantially equivalent' concessions from the UK[54] by affected WTO members?**

   iii) **how might the use of the Commission powers (set out in the Proposed Regulation) to make changes to the Union's TRQs by tertiary legislation impact on the UK?**

   iv) **how might the scope and timing of future UK bilateral trade agreement negotiations be affected?**

f) **If the UK is unable to agree its own schedule of concessions for goods with other WTO members before UK exit/end of the transition period:**

   i) **will the UK establish and operate an 'uncodified' (ie unagreed) schedule and if so, on what basis (for example, will it apply the current EU schedule or will it apply more preferential terms); and**

   ii) **what are the risks to the UK, in particular as regards action by a given WTO Member against the UK, should the UK establish and operate an 'uncodified' (ie unagreed) schedule?**

   iii) **how might this impact the scope and timing of future UK bilateral trade agreement negotiations?**

g) **Is the UK seeking to obtain its own country specific post exit/transition period, TRQs with the EU?**

53 Whichever is applicable.

54 See Article XXVIII(3) and (4)(d) of GATT 1994.

Full details of the documents

(a) Recommendation for a Council Decision authorising the opening of negotiations with a view to apportioning the Union's WTO concessions on Tariff Rate Quotas annexed to the General Agreement on Tariffs and Trade 1994 in view of the withdrawal of the United Kingdom from the Union: (39734), COM(18) 311; (b) Proposal for a Regulation of the European Parliament and of the Council on the apportionment of tariff TO schedule of the Union following the withdrawal of the United Kingdom from the Union and amending Council Regulation (EC) No 32/2000: (39735), 2018/0158, COM(18) 312.

Background

5.11 Details of the Recommendation for a Council Decision and the Proposal for a Regulation are set out in the Government's Explanatory Memorandum.

Previous Committee Reports

None.

6 Proceeds of crime: mutual recognition of freezing and confiscation orders

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny, but scrutiny waiver granted; drawn to the attention of the Home Affairs Committee, the Justice Committee and the Committee on Exiting the European Union
Document details	Proposal for a Regulation on the mutual recognition of freezing and confiscation orders
Legal base	Article 82(1)(a) TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Number	(38429), 15816/16 + ADD 1, COM(16) 819

Summary and Committee's conclusions

6.1 The Commission estimates that only around 1% of the proceeds of crime generated within the European Union are confiscated. The proposed Regulation is intended to improve the cross-border enforcement of court orders authorising the freezing and confiscation of the proceeds of crime and is part of a wider package of measures to disrupt and cut off funding for organised crime and terrorism which often has a transnational dimension. It would ensure that an order to freeze or confiscate the proceeds of crime made by a court in one Member State would be recognised and enforced in another Member State as if it were a domestic order. EU mutual recognition measures usually take the form of a Directive, meaning that it is for each Member State to determine how the objectives should be implemented in national law.[55] This is the first time the Commission has proposed a directly applicable Regulation to give effect to mutual recognition arrangements in the criminal law field.

6.2 The proposed Regulation would replace two EU Framework Decisions (adopted in 2003 and 2006) in which the UK currently participates and is subject to the UK's Title V (justice and home affairs) opt-in, meaning that it will only apply if the UK opts in.[56] The Minister for Security and Economic Crime (Mr Ben Wallace) wrote in April 2017 to inform our predecessor Committee that the Government was minded to opt in, even though he recognised that the proposed Regulation was "highly unlikely to take effect" until the UK left the EU. He nonetheless considered that UK participation would "signal our commitment to cooperate in this important area" and would bring "operational

55 Or Framework Decisions, rather than Directives, if the EU measures pre-date the Lisbon Treaty.

56 Council Framework Decision 2003/577/JHA and Council Framework Decision 2006/783/JHA. The 2003 Framework Decision has been partially superseded by Directive 2014/41/EU on the European Investigation Order which establishes procedures for the freezing and transfer of evidence. The UK opted into the Directive and had to implement its provisions by 22 May 2017.

benefits through strengthening the ability for our operational agencies to have our asset recovery orders recognised and executed within certain deadlines".[57] The Minister wrote to confirm the Government's opt-in decision in July 2017.[58]

6.3 The Justice and Home Affairs Council agreed a general approach in December 2017. The UK abstained as the proposed Regulation had not been cleared from scrutiny. In his letter of 29 January 2018, the Minister responds to concerns we raised about the scope of the proposed Regulation and the risk that the inclusion of "preventive type" non-conviction based freezing or confiscation orders might have an adverse impact on the continued use of civil procedures to enforce non-conviction based confiscation orders under Part V of the Proceeds of Crime Act (POCA) 2002.[59] The Minister explains that the type of preventive order envisaged is "unique" to Italy and is designed to tackle the proceeds of Mafia-related crime:

> "These types of orders are not made following a conviction in an Italian court. The order is aimed at preventing the re-use of criminal property that has been proved to have derived from some offences committed in the past, in order to finance new offences or legal business."

6.4 He adds that the effect of the preventive order is to "prevent future money laundering". It can only be made "on the basis of proven facts, and clear evidence that a criminal activity has been committed in the past and that the property has been derived from such criminal activity". The Government supports the inclusion of this type of order within the proposed Regulation, subject to "clear procedural safeguards" and "effective judicial protection", as it will "permit freezing and confiscation in as wide a set of cases as possible". As the Council general approach expressly excludes the recognition and enforcement of orders made in proceedings in civil or administrative matters, the Minister assures us that the UK system of non-conviction based recovery through the civil courts will not be affected by the proposed Regulation.

6.5 Responding to our request for further information on the Government's plans for future cooperation with the EU in the field of criminal justice and law enforcement cooperation post-exit, the Minister refers us to the future partnership paper on Security, law enforcement and criminal justice published last September.[60] The paper sets out the Government's aspiration for "an overarching agreement" that will facilitate "data-driven law enforcement, practical assistance to operations and cooperation through EU agencies". He also refers us to the Government's future partnership paper on Enforcement and Dispute Resolution which includes precedents illustrating the range of "ways in which the parties to international agreements including the EU have [sought and] obtained assurances that obligations […] will be enforced, that divergence can be avoided where necessary and that disputes can be resolved". He does not, however, indicate which of these precedents would be appropriate for a post-exit agreement including provision for UK participation in EU criminal law mutual recognition instruments, stating only that this will depend on "the substance and context of each agreement" and that the UK will not be constrained by precedent.

57 See the letter of 21 April 2017 from the Minister for Security and Economic Crime (Mr Ben Wallace) to the Chair of the European Scrutiny Committee.
58 See the Minister's letter of 19 July 2017 to the Chair of the European Scrutiny Committee.
59 See the Minister's letter of 4 December 2017 and our Report chapter agreed on 13 December 2017.
60 This paper has since been supplemented by the Government's Framework for the UK/EU Security Partnership and a Technical Note on security, law enforcement and criminal justice, both published in May 2018.

6.6 In a further letter of 4 May 2018, the Minister indicates that trilogue negotiations are progressing well but adds that the European Parliament is pressing for the insertion of additional language in the main provisions of the proposed Regulation which would allow a Member State to refuse to recognise or execute a freezing or confiscation order on human rights grounds.[61] Most Member States (including the UK) are opposed, since "all EU legislation has to comply with fundamental rights and […] to include such a clause in the operative text would undermine mutual trust between Member States".

6.7 In his latest update of 14 June, the Minister says that the European Parliament has not accepted a compromise text put forward by the Presidency but adds that negotiations are continuing with a view to reaching a political agreement at a forthcoming Council meeting before the end of June.[62] He invites us to clear the proposed Regulation from scrutiny.

Our Conclusions

6.8 **We infer from the Minister's request for scrutiny clearance that the Government wishes to vote for the adoption of the proposed Regulation. We do not consider that we have sufficient information at this stage to clear the proposed Regulation, given that the outcome of trilogue negotiations remains uncertain, but we are willing to grant a scrutiny waiver so that the Government can support a compromise text if it is brought to the Council for political agreement later this month (before the end of the Bulgarian Presidency).**

6.9 **The European Parliament's insistence on the insertion of a specific provision allowing a competent Member State authority to refuse to recognise or execute a freezing or confiscation order where there is a substantial risk of human rights violations appears to be the main obstacle to agreement. We do not share the Minister's view that the inclusion of an operative clause to this effect in the proposed Regulation would undermine mutual trust between Member States. The Council's objection tends to suggest the opposite—that mutual trust may be in short supply—and is difficult to reconcile with its acceptance of a similar provision in another important mutual recognition measure, the European Investigation Order. Given this precedent, we consider that it should be possible to reach a compromise and ask the Minister to report back to us on the outcome agreed.**

6.10 **We also ask the Minister to report back to us on:**

- **the agreed time limits for recognising and executing freezing and confiscation orders;**
- **the date on which the Regulation will become operational in the UK;**

61 The language proposed would mirror Article 11(1) of the Directive establishing a European Investigation Order (EIO) in criminal matters which provides that a Member State may refuse to execute an EIO where "there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter".

62 The compromise text proposed by the Presidency would allow a Member State to refuse to recognise and/or execute a freezing or confiscation order "in exceptional circumstances", if there are "substantial grounds to believe, on the basis of specific and objective evidence, that the execution of the order would, in the particular circumstances of the case, entail a manifest breach of the right to an effective remedy, the right to a fair trial, or the right of defence, as set out in the Charter".

- **whether prior changes will need to be made to domestic law; and**
- **how the application of the Regulation in the UK will be affected by the UK's exit from the EU (both during and after the expiry of the transition/ implementation period envisaged in the draft EU/UK Withdrawal Agreement).**

6.11 **Finally, we ask the Minister to confirm that the Government intends this Regulation and other EU mutual recognition criminal justice and law enforcement measures to be included in the new internal security treaty it is seeking to negotiate with the EU and to provide an update on the progress made in negotiations.**

6.12 **We draw this chapter to the attention of the Home Affairs Committee, Justice Committee and Committee on Exiting the European Union.**

Full details of the documents

Proposal for a Regulation on the mutual recognition of freezing and confiscation orders: (38429), 15816/16 + ADD 1, COM(16) 819.

Background

6.13 Our earlier Reports listed at the end of this chapter provide a detailed overview of the proposed Regulation and the Government's position.

6.14 The Commission considers that the existing EU regime for freezing and confiscating the proceeds of crime is "out of date" and unworkable in practice, containing loopholes that criminals can exploit. It anticipates that the proposed Regulation would improve cross-border enforcement by:

- establishing a comprehensive framework covering both the freezing and confiscation of proceeds of crime based on directly applicable rules (reducing the risk of incorrect or late implementation by Member States);
- providing for the mutual recognition of all types of freezing and confiscation orders covered by the 2014 EU Confiscation Directive as well as other non-conviction based confiscation orders issued as part of criminal proceedings;[63]
- setting clear deadlines for recognising and executing freezing and confiscation orders issued by another Member State;
- simplifying the mutual recognition procedure by establishing a standard form for freezing orders and a standard certificate for confiscation orders;
- improving communication between the national authorities responsible for issuing and executing freezing and confiscation orders; and
- giving priority to the right of a victim of crime to compensation and restitution.

63 The UK does not participate in the EU Confiscation Directive.

Previous Committee Reports

Fifth Report HC 301–v (2017–19), chapter 12 (13 December 2017), First Report HC 302–i (2017–19), chapter 24 (13 November 2017), Fortieth Report HC 71–xxxvii (2016–17), chapter 1 (25 April 2017), Thirty-fourth Report HC 71–xxxii (2016–17), chapter 1 (8 March 2017) and Thirtieth Report HC 71–xxviii (2016–17), chapter 2 (1 February 2017). See also see our earlier Reports on Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the EU: Tenth Report HC 342–x (2015–16), chapter 21 (25 November 2015); Twenty-eighth Report HC 83–xxv (2013–14), chapter 13 (18 December 2013); Twenty-second Report HC 86–xxii (2012–13), chapter 9 (5 December 2012); Twelfth Report HC 86–xii (2012–13), chapter 5 (12 September 2012); Sixth Report HC 86–vi (2012–13), chapter 4 (27 June 2012); and Sixty-third Report HC 428–lvii (2010–12), chapter 1 (18 April 2012).

7 Managing EU migration and security databases

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee, the Justice Committee and the Committee on Exiting the European Union
Document details	Proposal for a Regulation on the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice
Legal base	Articles 74, 77(2)(a) and (b), 78(2)(e), 79(2)(c), 82(1)(d), 85(1), 87(2)(a) and 88(2) TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Number	(38878), 10820/17, COM(17) 352

Summary and Committee's conclusions

7.1 A new EU Agency—"eu-LISA"—was established in 2012 to oversee the operational management of three EU information systems dealing with asylum, border management and law enforcement. The proposed Regulation would give eu-LISA responsibility for managing several new or planned EU information systems (see the Background section of this chapter for further details). It would also repeal and replace the 2011 Regulation establishing eu-LISA, make some technical changes to implement the findings of a recent external evaluation, and empower the Agency to take the actions needed to make EU information systems for security, border and migration management fully interoperable (this latter task being dependent on the adoption of a further legislative instrument).[64]

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

7.3 The Government has decided to participate in the proposed eu-LISA Regulation to "maximise our influence over how [eu-LISA] operates the IT systems that we take part in and for which it is responsible", but recognises that full UK participation in eu-LISA will depend on the Council adopting a further Decision based on Article 4 of the Schengen Protocol—without it, UK participation would be limited to "eu-LISA's management of the systems that we take part in or have opted into". It would not extend to eu-LISA's management of new information systems in which the UK cannot take part—the EU

64 See Council document 15119/17, summarised in our Sixteenth Report HC 301–xvi (2017–19), chapter 9 (28 February 2018).

Entry/Exit System and European Travel Information and Authorisation System.[65] The Minister for Policing and the Fire Service (Mr Nick Hurd) told us in December that the Government would "keep under review the question of whether to seek a Council Decision".[66]

7.4 We anticipated that securing political support for a Council Decision (which would require the unanimous approval of EU Schengen States) might be difficult given the UK's decision to leave the EU, but encouraged the Minister to pursue this option as it would make clear the basis on which the UK participates in eu-LISA and enhance legal certainty. We were informed in March that officials would explore the prospects for agreeing a Council Decision with other Member States "over the coming months", as well as the practical implications for the UK's participation in eu-LISA if no Decision were to be agreed.[67]

7.5 We were struck by the apparent lack of urgency in the Minister's response, given that the UK would be leaving the EU on 29 March 2019. In our Report agreed on 21 March, we noted that the Government must have considered the implications of failing to secure a further Council Decision and how this would affect the UK's role on eu-LISA's Management Board and in its Advisory Groups when it decided to participate in the proposed Regulation. We reiterated our request for the Minister to explain what partial participation in eu-LISA would mean in practical terms.

7.6 In his letter of 30 May, the Minister assures us that the Government is "fully committed to resolving this matter as soon as practicable" and is in discussion with the Council Legal Service and Member States. He reiterates that, without a Council Decision, "we would not be participating in the Regulation as a whole, as we would be excluded from those parts of it that deal with the new Schengen-building measures that we do not take part in". He considers that a new Council Decision would "avoid the need for separate Regulations and possibly separate configurations of the Management Board dealing with the management of systems in which we do and do not participate". The Minister undertakes to report back to us "once further progress has been made".

7.7 The Minister also responds to our concern that Article 38 of the general approach agreed by the Council in December would limit third country participation in eu-LISA to countries that have concluded agreements with the EU associating them with the "implementation, application and development" of the Schengen rule book *and* with Dublin and Eurodac-related measures (which establish rules to identify the Member State responsible for examining an application for asylum made within the EU). The Government has previously ruled out UK participation in the Schengen internal border-free zone post-exit.[68] The Minister tells us that Article 38:

> "clearly envisages non-Schengen third countries participating in eu-LISA—where those countries have entered into agreements with the EU to participate in the Schengen *acquis* and in Dublin and Eurodac-related

65 See the Written Ministerial Statement issued by the then Home Secretary (Amber Rudd) on 2 November 2017, Hansard 32WS, as well as the letter of 1 December 2017 and the letter of 11 January 2018 from the Minister for Policing and the Fire Service (Mr Nick Hurd) to the Chair of the European Scrutiny Committee

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

67 See the Minister's letter of 6 March 2018 to the Chair of the European Scrutiny Committee.

68 See the Minister's letter of 20 July 2017 to the Chair of the European Scrutiny Committee on the proposed SIS II reform package.

> measures. These are the *only* measures that eu-LISA will manage in which non-EU countries currently participate. Further, Article 38a is also clear that the precise nature of the agreement shall be the subject of negotiation."

7.8 We expressed frustration at the Government's unwillingness to flesh out its objectives for the UK's future internal security partnership with the EU post-exit and state whether it should include UK participation in eu-LISA and in the EU information systems it manages. The Minister responds:

> "On 9 May 2018 HMG published a policy paper that explains the Government's vision for the future UK-EU Security Partnership ('Framework for the UK-EU Security Partnership'). The paper notes that a new internal security treaty with the EU should facilitate multilateral cooperation through EU agencies."

7.9 In a further letter dated 7 June 2018, the Minister informs us that trilogue negotiations on the proposed eu-LISA Regulation concluded earlier than expected and that the final compromise text was sent to Coreper for "political agreement" in early June. He adds:

> "As the dossier had not cleared scrutiny, the UK abstained from the vote seeking unanimous political agreement from Member States. I apologise that we were not able to give you advance notice to clear the dossier."

7.10 The Minister says that the Government "continues to seek discussions with the Council Legal Service on the terms of a new Council Decision", that discussions are "ongoing" and that he anticipates the Decision "will be adopted by the Council at the same time as the Regulation", before the summer recess.

Our Conclusions

7.11 **It is disappointing that the Minister was unable to write to us before the proposed Regulation was sent to Coreper for political agreement. We expect him to seek scrutiny clearance before the Regulation is formally adopted by the Council and to provide the information requested below on:**

- **the prospects for securing a Council Decision to enable the UK to participate fully in eu-LISA;**
- **the inclusion of eu-LISA (and the EU information systems it manages) in the internal security treaty the Government intends to negotiate with the EU; and**
- **the scope of Article 38 of the proposed Regulation on third country participation in eu-LISA.**

A new Council Decision

7.12 **We ask the Minister whether the Government has submitted a request for a Council Decision to extend its participation in the Schengen rule book, as envisaged under Article 4 of the Schengen Protocol. If it has not already done so, we ask him to inform us whether and when he intends to do so.**

7.13 **The Minister says he hopes the Council will adopt the Decision at the same time as the proposed eu-LISA Regulation, before the summer recess. We remind him that we expect the proposed Decision to be deposited for scrutiny (and clearance sought ahead of adoption) in the usual way.**

Eu-LISA and a new EU/UK internal security treaty

7.14 **We can see no reason for the Government to expend effort in securing a Council Decision to enable the UK to participate fully in eu-LISA unless it intends to seek some form of continued UK participation in eu-LISA post-exit. Similarly, we can see no reason for the UK to participate in eu-LISA post-exit unless the Government also intends to participate in at least some of the EU information systems it will be responsible for managing. We ask the Minister if this is what he means when he says a new internal security treaty with the EU post-exit should "facilitate multilateral cooperation through EU agencies".**

Third country participation in eu-LISA

7.15 **As the Minister will be aware, the only third countries that currently participate in eu-LISA are the Schengen-associated countries—Iceland, Norway, Switzerland and Liechtenstein. The wording of Article 38 of the proposed Regulation is consistent with this position, limiting participation to third countries formally associated with "the implementation, application and development of the Schengen *acquis* and with Dublin and Eurodac-related measures". We ask the Minister whether he considers that Article 38 would require *full* participation in the Schengen rule book, or whether third countries that only apply parts of the Schengen rule book (the current UK position) would also be eligible to participate. We also ask whether a third country would have to participate in the Dublin rules and Eurodac as well as some or all of the Schengen rule book to be eligible to participate in eu-LISA.**

7.16 **The Minister appears to conflate the third country agreements envisaged in Article 38 with the "working arrangements" which eu-LISA itself may negotiate with relevant third country authorities under Article 38a of the proposed Regulation. We ask the Minister to confirm our understanding that these Articles pursue different purposes, the former allowing for third country participation in eu-LISA, the latter a looser form of cooperation.**

7.17 **We look forward to receiving this information in sufficient time to enable us to consider clearing the proposed Regulation from scrutiny before it is formally adopted by the Council in the coming weeks.[69] We draw this chapter to the attention of the Home Affairs and Justice Committees and the Committee on Exiting the European Union.**

69 Our scrutiny reserve only applies to decisions taken by a Minister within the Council, not to decisions taken by officials at Coreper. It is nonetheless good practice to provide a progress report and, if appropriate, request scrutiny clearance for proposals that are subject to the scrutiny reserve before they reach Coreper for political agreement.

Full details of the documents

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

Background

7.18 Our earlier Reports listed at the end of this chapter provide a detailed overview of the proposed Regulation and the Government's position.

7.19 It is envisaged that eu-LISA would be responsible for the operational management of eight existing or planned EU information systems. Four of these systems build on parts of the Schengen rule book on border control and visa policy which do not apply to the UK and are not open to UK participation. Others are subject to the UK's Title V (justice and home affairs) opt-in or Schengen opt-out, meaning that the UK can decide whether to participate.

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

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

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

7.21 The Government has completed some of the steps need to participate in the proposed eu-LISA Regulation by:

- opting into those parts of the Regulation dealing with non-Schengen EU information systems—Eurodac, Dublin and ECRIS-TCN—on the basis of the UK's Title V opt-in Protocol; and
- not opting out of those parts of the Regulation dealing with the police cooperation component of SIS II, as provided for in the Schengen Protocol.

7.22 To secure full participation in eu-LISA, the Government would also need to seek a further Council Decision, based on Article 4 of the Schengen Protocol, authorising the UK to participate in the provisions of the Regulation concerning the operational management of new information systems in which the UK is not entitled not take part—the EES and ETIAS.

Previous Committee Reports

Twenty-first Report HC 301–xx (2017–19), chapter 8 (21 March 2018), Eleventh Report HC 301–xi (2017–19), chapter 4 (24 January 2018), Seventh Report HC 301–vii (2017–19), chapter 8 (19 December 2017) and First Report HC 301–i (2017–19), chapter 26 (13 November 2017).

8 European Defence Industrial Development Programme (EDIDP)

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; Minister invited to give evidence; drawn to the attention of the Business, Energy and Industrial Strategy, Defence and Exiting the EU Committees
Document details	Proposal for a Regulation establishing the European Defence Industrial Development
Legal base	Article 173 TFEU; ordinary legislative procedure; QMV
Department	Ministry of Defence
Document Number	(38831), 10589/17 + ADD 1, COM(17) 294

Summary and Committee's conclusions

8.1 As part of wider efforts towards a 'European Defence Union',[70] the EU's Member States and the European Parliament have been engaged in discussions about the establishment of a European Defence Fund, which will for the first time fund research & development of new military technology from the EU budget to underpin the Union's collective defensive capabilities.

8.2 The proposed Fund will consist of a European Defence Research Programme (the 'research window', funding the early stages of the research cycle) and a European Defence Industrial Development Programme or EDIDP (the 'capability window', which will provide finance for the development of prototypes and other stages of development of new technology). In anticipation of the establishment of the full fund under the next long-term EU budget (2021–2027), the Commission laid the groundwork for preparatory versions of both the research and development 'windows'. A small-scale €90 million Preparatory Action on Defence Research (PADR) was launched in 2017,[71] and that same year the Commission published the draft legal framework for the much larger defence industrial programme for 2018–2020 (with a budget of €500 million or £438 million).[72]

8.3 The Government has consistently supported the creation of the European Defence Fund in view of the perceived growth opportunities and economies of scale it offers for the UK's defence industry.[73] In the context of Brexit, it has focused efforts in the negotiations on the industrial component of the Fund on the eligibility criteria for "third country" companies, to provide a mechanism for participation by the UK defence industry in projects funded by the Programme after Brexit (and when the UK would no longer be a contributor to the EU budget).

70 These wider efforts include for example Permanent Structured Cooperation on defence between 25 EU countries, the establishment of a Military Planning & Conduct Capability Unit for advisory EU military missions, and the launch of the 'research' window of the European Defence Fund.

71 See document C(2017)2262: http://ec.europa.eu/DocsRoom/documents/22629.

72 €1 = £0.87680 Or £1 = €1.1405[1] as at 31 May 2018.

73 See for more information the Ministry of Defence's Explanatory Memorandum on the proposal, and also our previous Reports on the EDF and the EDIDP.

8.4 When we last considered the proposal (in May 2018), we retained it under scrutiny because the precise legal restrictions on the involvement of the UK's industry in EDIDP-funded projects had not yet been agreed. Given the Government's insistence that the UK *should* have a role to play in the European Defence Fund from its launch onwards, we specifically queried the UK's position under the EDIDP and the Preparatory Action on Defence Research during the proposed post-Brexit transitional period from March 2019 onwards.

8.5 Under the terms of the draft Withdrawal Agreement the UK would remain a contributor to the EU budget and eligible for EU funding as if it were a Member State from March 2019 until December 2020. However, article 122(7) of the Agreement allows the EU to exclude the UK from EU programmes involving "security related sensitive information" even during the transition (which has been at the root of the Government's very public disagreement with the European Commission about the effective exclusion of UK firms from the next round of tenders under the EU's Galileo satellite programme).[74] We therefore asked the Minister to confirm whether the EU had indicated whether it would invoke the same provision to effectively prevent UK entities from meeting the eligibility criteria for the EDIDP and PADR during the transition, given that defence-related projects might by definition be considered to involve "sensitive" information. If so, that would effectively mean the UK would be paying into the EDIDP without any ability for UK entities to secure direct funding from the Programme.[75]

8.6 We have also expressed concerns about the Government's vision for UK participation in the European Defence Fund beyond the transitional period, if it had no influence over the way in which the Fund would be used, or how the technology developed under its aegis could be deployed as part of the Common Security & Defence Policy. We therefore asked the Minister whether he would seek a formal agreement with the EU to give the UK 'associate' status within the post-2020 European Defence Fund. Such status, which already exists for the EU's civilian research programme, allows third countries to make an annual financial contribution to make their researchers eligible for funding as if they were based in the EU (and gives its Government non-voting observer status on the relevant EU programming committees). The Government subsequently confirmed that it wanted to discuss with the EU precisely such a "model for participation" after Brexit (the implications of which we discuss further in paragraphs 8.4 to 8.17 below).

The agreement on the EDIDP legal framework

8.7 On 22 May 2018, the Member States and the European Parliament reached an informal agreement on the legal text underpinning the 2018–2020 EDIDP.

74 Article 122(7)(b) of the draft Withdrawal Agreement. A technical note published by the Government In May 2018 sought "explicit assurance that Article 122.7b in the draft Withdrawal Agreement relating to 'security-related sensitive information' shall not be applicable to the exclusion of the UK in relation to Galileo and EGNOS in the implementation period". It is unclear at this stage whether the European Commission granted this assurance (although an absence of confirmation of this suggests it was not). The Government has not commented publicly on the possibility that Article 122(7)(b) could see the UK excluded from participation in the EDIDP as well.

75 We also noted that formal participation alone is no guarantee of a fair return in terms of investment. Norway—which participates in the EU's Preparatory Action for Defence Research, the EDIDP's counterpart vehicle to fund early-stage defence R&D—was not awarded any funding from that programme despite being in the Single Market, applying the EU's Defence Procurement Directives and having 'associate' status within the EU's civilian research programme.

8.8 However, the Minister (Guto Bebb) subsequently informed us that some further technical changes had been made, which required further contacts with Member States and the Parliament to ensure the legal text was acceptable to both co-legislators.[76] One of these related to the source of funding from the EDIDP within the EU budget (i.e. from which existing funding programmes money would be diverted). The two institutions eventually agreed that the €500 million funding for the Programme in 2018–2020 would be diverted by reducing funding for the Connecting Europe Facility for transport, energy and digital infrastructure; the EU's space programmes; and the ITER nuclear fusion project,[77] as well as by using the unallocated margin within the EU budget.[78]

8.9 Moreover, there was a last-minute addition to the legal text requiring the European Commission to be notified of "any transfer of ownership of, or granting of a licence in respect of, any of the results generated by the Programme" to an entity in a non-EU country. In particular, if such a transfer or licence was deemed to contravene the objectives of the EDIDP Regulation, then all funding from the EU budget would have to reimbursed. Following an intervention by France and the UK, the application of this notification requirement to granting of licences for the use of technology developed using EDIDP funding was removed.

8.10 We have now considered the finalised legal text for the 2018–2020 EDIDP in the context of the UK's withdrawal. This makes clear that, in cases where the UK were to be excluded from specific EDIDP-funded projects during the transitional period after Brexit (see above), the opportunities for involvement by UK entities would be severely restricted (as we described in our previous Report). The Programme's framework establishes limitations on 'third country' involvement that create a clear difference between funding eligibility for EU-based entities and for those based outside the EU, including for sub-contractors. As a result, the UK defence industry (for projects where it was considered a 'third country' during the transition) would only be able to participate in the EDIDP-funded programmes in one of two ways:

- via EU-based subsidiaries, in which case they could receive EDIDP funding provided they had an "executive management structure" in the EU. Moreover, the EU Member State where the subsidiary is based would have to provide "sufficient assurances in accordance with its national procedures" that such funding would not "contravene […] the security and defence interests" of the EU or the other Member States; and

- in cooperation with EU-based entities from a UK base, but without receiving any funding from the EU budget. Moreover, no UK-based or controlled assets, infrastructure, facilities and resources could be used for the project, except if "there are no readily available competitive substitutes in the EU".

8.11 As noted, the same restrictions apply to sub-contractors engaged by recipients of funding from the EDIDP (i.e. they would also have to meet the EU residence criteria to be

76 Letter from Guto Bebb to Sir William Cash (4 June 2018).

77 The specific diversions of funding agreed are as follows: €116.1 million (£101.7 million) from the Connecting Europe Facility; €108 million (£94.7 million) from the Galileo and EGNOS satellite navigation projects; €63.9 million (£56 million) from the ITER nuclear fusion project; €12 million (£10.5 million) from the Copernic earth observation project; and €200 million (£175.3 million) from the unallocated margin.

78 The 'unallocated margin' is the difference between an expenditure limit in broad headings of the EU's long-term budget (the Multiannual Financial Framework) and expenditure actually committed from that heading.

allocated any of the EU funding by their contractor), including those who have access to 'classified information' to carry out their contractual obligations.[79] All decisions to award funding from the 2018–2020 EDIDP will be made by the European Commission, subject to the approval of a qualified majority of Member States on a 'programming committee'. Given its exit from the EU's institutions, the UK will not have a vote on that Committee after 29 March 2019.

8.12 The Minister's letter of 4 June 2018 also acknowledged the questions put to him in our Report of 9 May 2018 (including with respect to the eligibility of UK firms to receive funding from the EDIDP during the transitional period, or whether they would be classified as 'third country' entities), which he said he "intend[ed] to address in his next correspondence". The Minister's subsequent letter of 13 June 2018 gave further information about the eligibility of UK entities to receive funding from the EDIDP, noting in particular that the Government "has received no notification from the European Commission that it intends to apply the [article 122(7)] derogation to any EDIDP and PADR [i.e. European Defence Fund] projects" during the transitional period.[80]

8.13 As the UK will therefore—in principle—remain eligible for EDIDP funding during the transition as if it were a Member State, the 'third country' restrictions in the Regulation would not apply to UK entities (except for projects where the exclusion in the Withdrawal Agreement was specifically invoked). It is unclear how often this may occur in practice, or how it may affect overall levels of UK participation in the EDIDP. Similarly, although the Ministry of Defence told us in April that it would "be making the case for UK participation in the programme committees" during transition,[81] the Regulation makes no provision for this and the draft Withdrawal Agreement makes any such attendance dependent on a case-by-case invitation from the EU. In any event, the Government will have no vote over decisions to award funding from the Programme during the transitional period.

UK participation in the European Defence Fund after 2020

8.14 With respect to the UK's long-term participation in the European Defence Fund from January 2021 onwards, there are further political hurdles to the level of participation sought by the Government.

8.15 On 13 June 2018, the European Commission published its proposal for the full European Defence Fund for the 2021–2027 period.[82] This largely replicates the structure and eligibility restrictions agreed for the 2018–2020 EDIDP, but does create a mechanism for 'association' with the Fund for non-EU countries. Such status would essentially allow entities in a third country to be considered EU-based entities for the purposes of determining eligibility in return for an annual financial contribution. However, the Commission has proposed to restrict this option solely to the non-EU members of the

79 The Government (unsuccessfully) requested that the text should be amended so that only subcontractors having access to "highly classified" (rather than simply "classified") information would have to pass the funding eligibility tests.

80 The European Commission, however, has noted that "UK undertakings can be eligible [during the transition] unless, for security-related reasons, there would be a need to exclude UK undertakings on an *ad hoc* basis".

81 Letter from Guto Bebb to Sir William Cash (17 April 2018).

82 The European Commission tabled a proposal for the EU's overall long-term budget for the 2021–2027 period, known as the Multiannual Financial Framework, on 2 May 2018. A specific proposal relating to the long-term future of the EDIDP is expected on 12 June.

European Economic Area (Norway, Iceland and Liechtenstein).[83] To create an opportunity for UK 'associate' status, a broadening of the eligibility criteria would have to be agreed by the European Parliament and the Member States as part of the legislative process.

8.16 Any estimate of the size of a UK financial contribution to the European Defence Fund after 2020 in return for 'association' is necessarily speculative, given that the proposal as tabled by the Commission makes no provision for UK participation in this way. However, participation by EEA countries would require an annual contribution calculated by multiplying the EU's own annual budget for the Fund (as decided by the European Parliament and the Member States) with a 'proportionality factor': the size of the third country's economy compared to that of the EU plus that country combined (which, in the UK's case, would be 16 per cent).[84] As the European Defence Fund has a provisional budget of €13 billion for 2021–2027, that would equate to a hypothetical gross Norwegian contribution of €300 million; the UK, which its larger economy, would have to make pay €2.1 billion (£1.84 billion) over the same period, all other things being equal.

8.17 For third countries participating in EU programmes, there is no equivalent to the UK rebate, or any direct link between the size of the contribution and the funding received. A similar approach in this instance would preclude any guarantee to prevent the UK from becoming a net contributor to the European Defence Fund (especially as individual funding decisions are made by the Commission and the Member States, with no voting rights for 'associate' countries). We note in this respect that Norway makes a financial contribution to the Preparatory Action for Defence Research (the existing precursor to the research component of the post-2020 European Defence Fund), but has reportedly not received any funding from it.[85] Even if the eligibility criteria for 'association' to the Fund were widened to include the UK, the Commission has also been pushing for an "automatic correction" to any UK financial contributions so that it cannot be a major net beneficiary of an EU programme when it is no longer a Member State.

8.18 **We thank the Minister for the latest information on developments in the establishment of the 2018–2020 European Defence Industrial Development Programme. Its legal framework is now set to be adopted by the Member States in the Council and the European Parliament in the coming weeks. After repeated requests, the Government has now provided an assurance that the European Commission has not indicated that the EU intend to exclude the UK from full eligibility in the Programme during the transitional period. As such, UK entities are expected to be eligible for funding from the EDIDP during the post-Brexit transitional period, although such exclusion could still take place on a case-by-case basis "for security related reasons". That is clearly a setback from the UK's perspective. However, the practical implications of the possibility that the UK may be excluded from EDIDP-funded projects on an *ad hoc* on its overall levels of participation is not clear.**

83 In practice, given the lack of defence forces in Iceland and Liechtenstein, only Norway is likely to seek participation in the European Defence Fund.

84 The European Commission proposal for the next Framework Programme for Research introduces a new methodology for the calculation of the UK's contribution specifically, increasing it beyond what it would pay under the 'proportionality' approach and instead linking the payments to the funding the UK received from the current Framework Programme while it was a Member State.

85 Norway's contribution in 2017 was €585,000 (£512,000), derived from its proportionality factor of accounting for 2.31 per cent of the GDP of the EU and Norway combined against the EU's budget for the PRAD for that year of €25 million (£22 million).

8.19 **Similarly, the Government has not been successful in securing political representation within the governance structures of the Programme during the transition. Consequently, the Government will have no direct influence over the decisions to award funding and therefore no direct way of ensuring the UK receives a fair share of the Programme's expenditure commensurate with its contribution. This is not a problem that is unique to the EDIDP, as a similar lack of representation will occur for many other EU funding programmes to which the UK will remain a contributor after it ceases to be a Member State.**

8.20 **Significant outstanding questions also remain with respect to the UK's engagement with the European Defence Fund when it becomes fully operational in early 2021. As part of the Government's negotiations for the future security partnership with the EU, the Ministry of Defence has confirmed it wants to discuss a form of 'associate' status with the Fund. This, if it builds on the existing precedent for EEA countries in the Commission's proposal, would give the Government limited (non-voting) representation within its governance structures and formalise the eligibility of UK entities to secure funding from the EDF. In return, the UK would have to make a gross contribution that could run into hundreds of millions of pounds per year.**

8.21 **However, as noted, the proposed European Defence Fund Regulation for 2021–2027 makes no provision for such status for the UK, as it reserves 'associate' status for EFTA-EEA countries (although a broadening of the scope could be introduced by the European Parliament and the Council during the legislative process). We will return to this matter in more detail when we receive an Explanatory Memorandum from the Ministry of Defence on the European Defence Fund proposals in the coming weeks.**

8.22 **At present, there are therefore still significant political and legal unknowns about the precise parameters of UK involvement in the European Defence Fund from 'exit day' on 29 March 2019 onwards. Parliament may also want to consider how UK participation in the Fund could impact on the future direction of the Government's security policies, given that the technology the Fund will support is meant to contribute to military capabilities to underpin the EU's "strategic autonomy" (over which the UK will necessarily have very little influence once outside the Union's foreign policy bodies). The Defence Committee may wish to consider the implications of these developments in more detail.**

8.23 **With respect to the upcoming vote by Member States to formally establish the EDIDP for the 2018–2020 period in July, the Minister has requested we clear the proposal from scrutiny to enable the Government to vote in favour of the Programme. Although we take note of the Minister's assurance that the Government "has received no notification from the European Commission that it intends to apply a derogation to any EDIDP or PADR projects", the use of that derogation remains a possibility, and the UK would have very limited options to effectively challenge it if it was invoked.**

8.24 **We do not believe it is acceptable that the UK should be contributing financially to a programme that funds the development of defensive technology by other countries, when UK entities may be unfairly, and unilaterally, excluded from even bidding for funding. While no EU country is guaranteed a fair return on its contribution to the Programme, their researchers will by default be eligible to bid for funding. Because the UK would always face the possibility of upfront exclusion, our industry would be**

uniquely disadvantaged. Therefore, we are not content to grant scrutiny clearance at this stage. However, we are asking the Minister to give evidence to us in person about the possibility of UK exclusion from the EDIDP during transition before the final vote on the Programme in the Council. We will reconsider our conclusions with respect to scrutiny clearance based on that evidence in the coming weeks.

8.25 **We draw these developments, including our initial observations on the UK's status under the 2021–2027 European Defence Fund, to the attention of the Business, Energy & Industrial Strategy, Defence and Exiting the EU Committees. We will consider these matters again when we have heard from the Minister for Defence Procurement.**

Full details of the documents

Proposal for a Regulation establishing the European Defence Industrial Development Programme aiming at supporting the competitiveness and innovative capacity of the EU defence industry: (38831), 10589/17 + ADD 1, COM(17) 294.

Previous Committee Reports

First Report HC 301–i (2017–19), chapter 30 (13 November 2017); Twelfth Report HC 301–xii (2017–19), chapter 10 (31 January 2018); and [add].

9 Digital Single Market: Tackling illegal content online

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny
Document details	(a) Commission recommendation of 1.3.2018 on measures to effectively tackle illegal content online; (b) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Tackling Illegal Content Online Towards an enhanced responsibility of online platforms
Legal base	—
Department	Digital, Culture, Media and Sport
Document Numbers	(a) (39535), 6717/18, C(18) 1177 final; (b) (39079), 12879/17, COM(17) 555

Summary and Committee's conclusions

9.1 The European Commission has adopted a Recommendation entitled 'on measures to effectively tackle illegal content online', which follows on from an EU Commission communication published on 28 September 2017 entitled 'Tackling Illegal Content Online—towards an enhanced responsibility of online platforms", which the Committee retained under scrutiny in its report on 29 November 2017.

9.2 The Communication did not harmonise the definition of what constitutes illegal content, but provided voluntary guidance to online platforms and online services that host content on the notification and removal of illegal online content.[86] The Communication also clarified that the exemptions from liability granted to service providers by the Electronic Commerce Directive (ECD) would not be affected if providers played an active a role in monitoring and removing illegal content from their platforms. The Government expressed support, in its response to the proposals, for the Commission's guidance, stating that tackling the proliferation of illegal content online was a key Government priority and that EU-level action was appropriate.

9.3 In a response to the Committee's report, the Minister of State at the Department for Digital, Culture, Media and Sport (Margot James) provided an update in which she noted that the Member States were split on whether future legislation was necessary: some Member States reportedly thought that the guidance provided in September 2017 should

86 Actions recommended in Communication 12879/17 include that businesses should follow the rules outlined in the ECD's liability provisions; platforms should cooperate with law enforcement to alert them to any illegal activity on their networks; platforms should give priority to removal of illegal content that is notified by "Trusted Flaggers" (specialised entities who have specific expertise in identifying illegal content and thus can be trusted by platforms that what they are notifying is illegal); illegal content that could cause serious harm should be removed more quickly than other types of illegal content e.g. incitement to terrorism material; action should be taken to prevent the re-appearance of illegal material on platforms.

be made mandatory, others wanted changes to the liability provisions contained in the e-Commerce Directive, while some Member States expressed scepticism about the need for any future legislation and considered that the Commission should give the guidance time to bed in before considering what steps are needed.[87]

9.4 The Commission's recommendation[88] builds upon the Communication and suggests a set of formal, but still voluntary, operational measures for hosting providers to remove illegal material. The recommendation provides guidance to online services that host content only, such as social media, cloud storage, and video sharing sites.

9.5 Two sets of measures are recommended: those which would apply to all types of illegal content; and supplementary provisions which would only apply to terrorism-related content. Both sets of measures are summarised in the background section of this report. Among these are provisions that:

- businesses should have electronic notice-and-takedown procedures which facilitate the provision of sufficiently detailed information for the business make an informed decision;
- content providers should be notified if their content is taken down, and given the opportunity to contest this decision within a reasonable time period;
- hosting providers should be encouraged to publish clear and easily accessible reports on their policy towards the removal of illegal content, including (at least annually) data about how much content they have removed and why, including the time taken to take action;
- hosting providers should put in place proactive approaches to taking down illegal content (alongside reactive approaches, which respond to notices from stakeholders); and
- there should be cooperation between trusted flaggers and hosting providers, including fast track procedures, such as the Internet Watch Foundation and the Medicines and Health Regulatory Authority.

9.6 In relation to terrorist content specifically, it is recommended that hosting providers:

- should set out in their terms and conditions that they will not store such content, and that they should take proactive measures to remove such content; and
- should put in place fast track procedures to deal with referrals from Member State competent authorities and Europol's EU Internet Referral Unit, so that such referrals are dealt with without delay, and, where appropriate, within one hour.

9.7 The recommendation also suggests that platforms and Member States should report on actions taken in response to the Recommendation, in order to establish whether further action, potentially including legislation, is needed. Providers have been asked to report on actions taken within three months for terrorist content and six months for other

87 Letter from the Minister, DCMS, to the Chair of the European Scrutiny Committee (29 January 2018).

88 Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online C(18) 1177 final.

illegal content. Similarly, Member States have been asked to report every three months to the Commission on how well they believe that online businesses have responded to the Commission's recommendation with respect to terrorist content, and every six months with respect to other types of illegal content.

9.8 The Minister of State at the Department for Digital, Culture, Media and Sport (Margot James) states in the Government's Explanatory Memorandum that tackling the proliferation of illegal online content on platforms and other online services is a key priority for the UK Government, and the Government therefore welcomes the recommendation as "another step in the right direction towards making companies more proactive in their approach to tackling online illegal content".

9.9 The Minister indicates that the Government particularly welcomes the stronger voluntary procedures for the more efficient removal of illegal content online, the specific provisions to further curb terrorist content online, and the provisions which encourage transparency through reporting of action taken, noting that this could enable the Government "to judge the impact of the actions they are taking, and if their actions are not sufficient we could consider further action, including regulation".

9.10 The Minister observes that, following the PM's speech at Davos in January, DCMS is reviewing "the legal liability that social media companies have for the illegal content shared on their sites". This work is being carried out under the auspices of the Digital Charter,[89] which was proposed on 25 January 2018, and which outlines a rolling programme of work to agree norms and rules for the online world and to put them into practice. The Minister states that, in addition to the question of legal liability, the Government's priorities for the Charter include supporting the digital economy, tackling online harms, data ethics and innovation, disinformation and cyber security.

9.11 **We have taken note of the Government's support for the Commission's recommendation on tackling illegal content online, which encourages hosting service providers to take a more proactive approach to identifying and removing illegal content, and recommends that both providers and Member States should report periodically on what action has been taken in response to it, in order to establish whether further action is necessary. We welcome this proportionate, methodical, evidence-based approach to determining whether future legislative action is necessary and what its scope should be.**

9.12 **We have also taken note that the Government is proactively exploring related issues under the auspices of its Digital Charter, including whether the exemptions from liability created by the Electronic Commerce Directive (EC) 2000/31 should be modified, following the Prime Minister's speech in Davos in which she observed that "the status quo is increasingly unsustainable as it becomes clear these platforms are no longer just passive hosts". Given that the exemptions in the ECD are generally**

89 HM Gov, Policy paper: Digital charter: A response to the opportunities and challenges arising from new technologies (25 January 2018).

considered to have facilitated the growth of the digital economy, the Government's willingness to review them indicates that it is willing to explore bold approaches in preparing the Charter.[90]

9.13 **This raises the prospect of the UK diverging from EU rules regarding the digital economy in the future. Such divergence would be consistent with the Prime Minister's Mansion House speech,**[91] **in which she observed that "the UK will not be part of the EU's Digital Single Market" and that, given the fast-evolving nature of the digital economy, "it will be particularly important to have domestic flexibility, to ensure the regulatory environment can always respond nimbly and ambitiously to new developments". Outside the EU it will be possible for the Government to adopt distinctive regulatory approaches to digital issues more rapidly than when acting in concert with 27 other Member States and the European Parliament.**

9.14 **However, a unilateral regulatory approach may also have negative consequences for the digital sector: divergence will recreate regulatory fragmentation between the UK and the EU, meaning that businesses would have to comply with multiple regulatory regimes, inhibit market scale (which is paramount for digital businesses, which seek to scale their operations as rapidly as possible), and potentially make larger, more integrated markets more attractive destinations for investment. Paradoxically, regulatory divergence in this area thus risks recreating the regulatory barriers the elimination of which was the underlying logic of the UK's push for the EU to create a Digital Single Market.**

9.15 **We ask the Government to explain to us:**

- **the benefits of leaving the Digital Single Market and establishing an autonomous UK regulatory regime for digital, providing as many specific examples as possible;**
- **whether, given the Government's former support for the creation of an EU-wide Digital Single Market, because of its potential to eliminate regulatory barriers to trade and create a scale market for digital, adopting UK-level regulatory approaches would not risk having the opposite effect (e.g. regulatory fragmentation, a reduction in market scale, increased costs for businesses who have to comply with multiple regimes); and**
- **whether the Government, given its intention to leave the Digital Single Market, has taken a strategic decision to prioritise distinctive UK regulatory approaches to the digital economy over minimising non-tariff barriers to trade in the digital economy between the UK and the EU, even if this will lead to some of the costs and negative effects described above.**

9.16 **We ask for a clear response to these questions by 25 July. We will feed the Government's response into the Committee's ongoing scrutiny of Digital Single Market Strategy proposals. We now clear these non-legislative documents from scrutiny.**

90 We note a previous update to the Committee in which the Parliamentary Under Secretary of State at DCMS indicated that some EU Member States also want to make "changes to the liability provisions contained in the e-Commerce directive itself that would make the larger online platforms more responsible for the content they host", although she concluded that the Member States did not agree on this issue.

91 HM Gov, PM speech on our future economic partnership with the European Union (2 March 2018).

Full details of the documents

(a) Commission recommendation of 1.3.2018 on measures to effectively tackle illegal content online: (39535), 6717/18, C(18) 1177 final; (b) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Tackling Illegal Content Online Towards an enhanced responsibility of online platforms: (39079), 12879/17, COM(17) 555.

Background

Recommendations applicable to all types of illegal content

9.17 Chapter 2 of the Commission's recommendation sets out a range of recommendations which apply to all types of illegal content, with the recommendations organised along functional lines, as set out below.

9.18 Submitting and processing notices:

- businesses should have processes in place to allow users to submit notices in a user-friendly manner via an electronic means; and
- this process should encourage the submission of notices which includes enough detail for the business to be able to make an informed decision as to whether it should remove the illegal content that the notice refers to.

9.19 Informing content providers and counter-notices:

- when a hosting service removes any content that it deems to be illegal, it should inform the owner of that content that it is doing so;
- this does not apply when the content is illegal and or relates to endangering life or safety of persons e.g. indecent images of children and terrorist propaganda;
- the hosting provider should also allow the content provider to contest the removal of their content within a reasonable time period. (this is the counter-notice); and
- should the hosting provider decide the content is not illegal, access should be reinstated without undue delays.

9.20 Out of court dispute settlement:

- Member States are encouraged to facilitate out of courts settlements for disputes relating to the removal of illegal content.

9.21 Transparency:

- hosting services should be encouraged to publish clear and easily accessible reports on their policy towards the removal of illegal content; and
- they should also publish at least annually how much content they have removed and why, as well as data relating to the time taken to take action.

9.22 Proactive measures:

- hosting services should be encouraged to take proactive measures to remove illegal content, before they receive a notification; and
- this could include automated measures for detection and removal of illegal content.

9.23 Safeguard measures:

- hosting services should put in place measures to avoid the removal of legal material;
- however, if a service is using automatic means to detect and remove illegal material, it should put in place safeguards to prevent the removal of legal content.

9.24 Protection against abusive behaviour:

- hosting providers should put in place mechanisms to prevent the submission of spurious notices.

9.25 Cooperation between hosting services providers and Member States:

- Member States and hosting providers should put in place designated point of contacts for matters relating to illegal content;
- there should be a fast track procedure to process notices by trusted authorities/ flaggers e.g. UK Internet Watch Foundation; and
- Member States are encouraged to establish legal obligations for hosting service providers to promptly inform law enforcement authorities, for the purposes of the prevention, investigation, detection or prosecution of criminal offences, of any evidence of alleged criminal offences involving a threat to life.

9.26 Cooperation between hosting providers and trusted flaggers:

- Cooperation between trusted flaggers and hosting providers should be encouraged, especially fast track procedures. UK trusted flaggers include the Internet Watch Foundation and Medicines and Health Regulatory Authority;
- hosting providers should publish clear guidelines as to how they determine who a trusted flagger should be; and
- trusted flaggers should have the necessary expertise to carry out their activities before they are accepted as being competent by the hosting provider.

9.27 Cooperation between hosting services:

- Such services should where possible share technological solutions and best practice to tackle online illegal content.

Recommendations relating specifically to terrorist content

9.28 In addition to the above measures, which also apply to terrorist content, the Commission advocates a range of measures which specifically relate to terrorist content.

9.29 General points include that:

- hosting providers should set out in their terms and conditions that they will not store such content; and
- they should take measures to remove such content including proactive ones.

9.30 Submitting and processing referrals:

- Member States should ensure that competent authorities have sufficient resources to detect and identify such material to enable them to refer such material to hosting providers;
- there should be fast track procedures to process referrals from Europol's EU Internet Referral Unit; and
- hosting providers should deal with such referrals without delay, assessing them rapidly, and where appropriate removing or disabling such material within one hour of referral.

9.31 Proactive measures:

- hosting providers should take specific measures to detect, identify, expeditiously remove or disable and prevent the resubmission of terrorist content.

9.32 Cooperation:

- to prevent the spread of such material, hosting providers should be encouraged to cooperate by sharing of tools that allow for automatic material of such material;
- hosting providers should take measures to improve such tools, to especially enable the more effective removal of terrorist content; and
- competent authorities and hosting providers should work closely with Europol on matters relating to online terrorist content.

9.33 The Commission states that it will monitor actions taken by online platforms in response to this Recommendation and use this to determine whether further steps, including legislation, are required. Platforms have been asked to report within three months (for terrorist content) and six months (for other illegal content) to facilitate this. The Commission also asks that Member States should report to the Commission every three months as to how well they believe that online businesses have responded to this Recommendation with respect to terrorist content, and every six months for all other types of content.

Previous Committee Reports

Third Report HC 301–iii (2017–19), chapter 5 (29 November 2017).

10 Veterinary medicinal products

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; further information requested
Document details	(a) Proposal for a Regulation of the European Parliament and of the Council on the manufacture, placing on the market and use of medicated feed ; (b) Proposal for a Regulation of the European Parliament and of the Council on veterinary medicinal products
Legal base	(a) Articles 43 and 168(4)(b) TFEU, Ordinary legislative procedure, QMV; (b) Articles 114 and 168(4)(b), Ordinary legislative procedure, QMV
Department	Environment, Food and Rural Affairs
Document Numbers	(a) (36338), 13196/14 + ADDs 1–3, COM(14) 556; (b) (36344), 13289/14 + ADDs 1–3, COM(14) 558

Summary and Committee's conclusions

10.1 The Commission proposed revised rules in 2014 to increase the availability if veterinary medicinal products, improve the functioning of the internal market in these products and addressed the public health risk of antimicrobial resistance (AMR).

10.2 We last considered these proposals at our meeting of 21 March 2018, requesting further information about the agreed provisions on AMR and seeking clarity on which (if any) of those provisions the UK might choose not to adopt.[92] The legislation will not apply until mid-2021 at the earliest, meaning that the UK will not be required to implement it during the post-Brexit withdrawal period ending on 31 December 2020.

10.3 The Parliamentary Under-Secretary of State for Rural Affairs and Biosecurity (Lord Gardiner of Kimble) has responded to us, outlining the agreed AMR provisions in both proposals (see "Background" section below).[93] The Minister indicates that the detail represents a significant increase in regulatory oversight of veterinary antiobiotics compared with current requirements but that there is a strong focus on scientific evidence or advice in underpinning measures for addressing AMR. As such, the Government supports both the overall objectives and the objectives of the specific provisions. Given that some of those remain subject to negotiation, though, the Minister considers it would be premature to take a firm view on which provisions, if any, it would not be appropriate to implement.

10.4 The Minister reports that most of the changes negotiated during the trilogue negotiations have been of a technical nature, but that a new provision has been added which would have the effect of requiring producers from third countries that export animal and animal products to the EU to follow the detailed EU rules on the use of antibiotics. This would represent a significant restriction on imports to the EU. There was concern from the

92 Twenty-first Report HC 301–xx (2017–19), chapter 2 (21 March 2018).

93 Letter from Lord Gardiner of Kimble to Sir William Cash, dated 4 June 2018 (received 7 June 2018).

UK and some other Member States that the new provision might not be compatible with the requirement under Article 5 of the World Trade Organisation (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), which requires WTO Members to base their SPS measures on a scientific assessment of risk.[94]

10.5 In response to concerns expressed by the UK and other Member States, the text now includes a proviso on the measure's compatibility with EU obligations under international agreements. Application of this provision will be supplemented with detail adopted through a delegated act.

10.6 The Minister asks the Committee to consider clearing the document from scrutiny ahead of final adoption of the compromise and a ministerial vote in due course.

10.7 **We are aware that, since the Minister wrote, trilogue negotiations between the EU institutions have concluded and that the proposals are expected to proceed for formal adoption in the near future. We understand that they remain largely as outlined by the Minister in his letter.**

10.8 **The Minister's summary of the AMR provisions is helpful, further to our request for that information. On the question of which of those provisions the UK might choose not to apply post-Brexit, we note that this matter has effectively been overtaken by the new clause requiring producers from third countries that export animal and animal products to the EU to follow the detailed EU rules on the use of antibiotics. This means, of course, that discussion of the relevant delegated act will be very important.**

10.9 **We are separately considering the Government's wider approach to AMR post-Brexit through our scrutiny of the Commission's "One Health Action Plan" against AMR.[95] That document remains under scrutiny and we await a further update from the Department of Health and Social Care.[96]**

10.10 **We are now content to clear this document from scrutiny. We would welcome confirmation of the final agreement reached, including the specific provisions pertaining to restrictions on third country imports. We expect the Minister to set out the potential impact of this provision on the UK post-Brexit and we would also welcome an indication of the timeline for proposal and adoption of the relevant delegated act.**

Full details of the documents

(a) Proposal for a Regulation of the European Parliament and of the Council on the manufacture, placing on the market and use of medicated feed : (36338), 13196/14 + ADDs 1–3, COM(14) 556; (b) Proposal for a Regulation of the European Parliament and of the Council on veterinary medicinal products: (36344), 13289/14 + ADDs 1–3, COM(14) 558.

94 SPS measures can be applied to protect human, animal or plant life or health within the territory of a country from risks arising from plant pests (insects, bacteria, virus), additives, residues (of pesticides or veterinary drugs), contaminants (heavy metals), toxins or disease-causing organisms in foods, beverages or feedstuffs, and diseases carried by animals.

95 Communication from the Commission: A European One Health Action Plan against Antimicrobial Resistance (AMR), COM(17) 339.

96 Thirteenth Report HC 301–xiii (2017–19), chapter 1 (7 February 2018).

Background

10.11 The Minister identifies the following AMR-specific provisions in the veterinary medicinal products proposal (document (b)):

- granting of veterinary marketing authorisations for antibiotics taking into account potential risks relating to development of antimi crobial resistance;
- use of antibiotics, including off-label use;
- supply of antibiotics only available on prescription from a veterinary surgeon;
- provisions which would allow for restrictions on certain antibiotics to reserve them for human use;
- a requirement to gather data on the use of antibiotics in animals; and
- provisions to restrict the use of antibiotics in animals for preventative purposes.

10.12 The antibiotic related provisions in the current draft proposal on medicated feed cover:

- interim cross-contamination limits for residual antibiotics in subsequent feed batches; and
- provisions to limit the duration of treatment for medicated feed containing antibiotics.

Previous Committee Reports

Twenty-first Report HC 301–xx (2017–19), chapter 2 (21 March 2018); Fourth Report HC 301–iv (2017–19) chapter 4 (6 December 2017); Fifteenth Report HC 219–xv (2014–15) chapter 2 and chapter 3 (22 October 2014).

11 EU Pet Travel Scheme

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Environment, Food and Rural Affairs Committee
Document details	Commission Report on the implementation of Article 5 of Regulation (EU) No 576/2013 on the non-commercial movement of pet animals
Legal base	—
Department	Environment, Food and Rural Affairs
Document Number	(39533), 6869/18, COM(18) 88

Summary and Committee's conclusions

11.1 The EU Pet Travel Scheme (PETS) governs the non-commercial movement of pet animals.[97] As a rule, a maximum of five pet dogs, cats or ferrets may accompany their owner/authorised person during a single trip. While a derogation from the five-pet rule is permitted for the purposes of competitions, exhibitions or sporting events or training for such events, the Government is concerned that this facilitates fraudulent commercial trade.

11.2 The Commission's Report assessed the effectiveness of the derogation and, while not proposing any changes, encouraged Member States to act to ensure proper implementation and enforcement of the legislation to counter fraudulent practices. Only the UK and one other Member State had reported concerns that the derogation facilitates fraudulent commercial trade. Those Member States suggested further restrictions or revocation of the derogation.

11.3 Responding to the Committee's Report of 25 April 2018, the Parliamentary Under-Secretary of State for Rural Affairs and Biosecurity (Lord Gardiner of Kimble) says that, post-Brexit, the UK would like owners to be able to continue to travel with their pets to and from the EU with the minimum of inconvenience, while protecting the UK's biosecurity. He explains that several strands of work are ongoing to assess potential options for pet travel rules post-Brexit. There will be new opportunities for managing pet travel arrangements, ensuring that there are robust controls on disease and animal welfare.[98]

11.4 **In the light of previous interest of the Environment, Food and Rural Affairs Committee in this matter, we draw this chapter to the attention of that Committee. We clear the Report from scrutiny and require no further information.**

97 Regulation (EU) No 576/2013 on the non-commercial movement of pet animals.

98 Letter from Lord Gardiner of Kimble to Sir William Cash, dated 17 May 2018.

Full details of the documents

Commission Report on the implementation of Article 5 of Regulation (EU) No 576/2013 on the non-commercial movement of pet animals: (39533), 6869/18, COM(18) 88.

Previous Committee Reports

Twenty-fifth Report HC 301–xxiv (2017–19), chapter 3 (25 April 2018).

12 Strategic Partnership Agreement with Japan

Committee's assessment	Legally and politically important
Committee's decision	Cleared from scrutiny (decision of 23 May 2018)
Document details	(a) Joint Proposal for a Council Decision on the signing, on behalf of the European Union, and provisional application of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other Part; (b) Joint Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan of the other Part
Legal base	(a) Article 37 TEU, Articles 212(1) in conjunction with Article 218(5) and the second paragraph of Article 218(8) TFEU; (b) Article 37 TEU, articles 212(1) in conjunction with Article 218(6)(a) and the second paragraph of Article 218(8) TFEU
Department	Foreign and Commonwealth Office
Document Numbers	(a) (39678),—; (b) (39679),—

Summary and Committee's conclusions

12.1 These proposals would enable the EU to enter a Strategic Partnership Agreement (SPA) with Japan setting up a platform for political dialogue. Most of it would be provisionally applied on signature.

12.2 When we first considered these documents we asked a series of questions concerning transparency as to the extent to which the EU (as opposed to the Member States) is exercising competence; and the extent to which the SPA will apply before Brexit and be replicated in a bilateral UK-Japan agreement.

12.3 The Minister (Alan Duncan) has provided a comprehensive reply in his letter of 7 June 2018.

12.4 **We draw the attention of the House to the fact that the Minister does not propose to take any further steps to clarify the extent to which the EU is:**

- **triggering provisional application, despite the norm being that the EU should only do this in respect of matters for which it has exclusive competence and there appear to be provisions in the SPA where this is not the case; and**
- **only acting, by signing and concluding the SPA, to the extent that its competence is exclusive, thus compromising the Government policy being that normally Member States should exercise shared competence, leaving the EU to exercise its exclusive competence only.**[99]

99 Competence exclusive to the EU may only be exercised by the EU; competence shared with Member States may be exercised by the either the EU or the Member States. The SPA contains provisions which are shared competence, but these are not identified in the proposals.

These are further examples of a number of instances, previously raised by us, of the Government fudging competence issues in the field of external EU agreements.

12.5 **We note, and draw the attention of the House to the following:**

- **that the Government's "aim," not yet secured, is that during the transitional/ implementing period of the Withdrawal Agreement between the EU and the UK, new agreements such as this should continue to apply to the UK;**
- **discussions are ongoing with Japan for the UK to secure the benefits of the SPA as well as be subject to its obligations (which fall upon the UK by virtue of Article 124 of the Withdrawal Agreement). In the meantime, the Government makes the point that, as a co-operation agreement, the obligations and benefits of the SPA are, in practice, the same;**
- **discussions are continuing with Japan which "will take stock of […….] EU exit implications in due course and the most appropriate bilateral arrangements to support and develop our political relationship".**

These points apply to a number of EU external agreements. Resolving them in time represents a significant challenge.

Full details of the documents

(a) Joint Proposal for a Council Decision on the signing, on behalf of the European Union, and provisional application of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other Part: (39678),—; (b) Joint Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan of the other Part: (39679),—

Previous Committee Reports

Twenty-ninth Report HC 301–xxviii (2017–19), chapter 12, (23 May 2018).

13 VAT: Quick Fixes to tackle fraud and reduce burdens on businesses

Committee's assessment	Politically important
Committee's decision	(a) Cleared from scrutiny; (b) Not cleared from scrutiny; drawn to the attention of the Treasury Committee
Document details	(a) Proposal for a Council Directive amending Directive 2006/112/EC as regards harmonising and simplifying certain rules in the value added tax system and introducing the definitive system for the taxation of trade between Member States; (b) Proposal for a Council Regulation amending Regulation (EU) No 904/2010 as regards the certified taxable person
Legal base	Article 113 TFEU; special legislative procedure; unanimity
Department	Treasury
Document Numbers	(a) (39085), 12882/17 + ADDs 1–2, COM(17) 569; (b) (39083), 12880/17, COM(17) 567

Summary and Committee's conclusions

13.1 Since the early 1990s, EU VAT legislation has required businesses who purchase goods or services from a supplier in another EU country to account for the VAT on those supplies and remit the correct amount of tax to their national authorities. This is in contrast to the situation for domestic business-to-business purchases, where the *vendor* has to account for the VAT due on the sale.

13.2 To ensure VAT is only paid once for cross-border supplies, such sales within the EU are zero-rated, with no VAT collected by the Member State of the supplier. The buyer then effectively charges VAT to themselves on their next tax return and pays it to their national tax authority (the 'destination' principle). This approach was implemented in the early 1990s as part of the creation of the Single Market, to allow for all border controls on goods moving between Member States to be abolished. As it put the onus for paying VAT on buyers rather than sellers as a 'fix' rather than a permanent solution, this system was meant to be 'transitional' until EU countries could agree on a new system where VAT would be accounted for in the Member State of the supplier (the 'origin' principle).

13.3 Twenty years of negotiations failed to produce a consensus for a VAT system on cross-border supplies centred around the 'origin' principle, as EU legislation related to tax can be vetoed by any Member State.[100] As a result, the European Commission in October 2017 brought forward a proposal for the "definitive VAT system": this would maintain the destination principle for cross-border taxable supplies (meaning the tax would be paid in the Member State of the buyer), but also introduce the concept of a "Certified Taxable Person" (CTP), essentially a certificate of trustworthiness for businesses. Under

100 For more information about the reasons the Member States failed to agree on a VAT system based on the 'origin' principle, please refer to our Report of 6 December 2017, and in particular paragraphs 9.22 to 9.30.

the proposal, if a company held a CTP certificate and made a cross-border supply to another EU Member State, it would have to account for the VAT in the Member State of destination and relieve the buyer of that responsibility.[101] If a supplier did *not* have CTP status, the buyer in an intra-EU sale would remain responsible for accounting for the VAT (as at present).

13.4 The draft legal text presented by the Commission in October last year would only legislate for the principle of this new approach, with the technical rules set out in a supplementary proposal which was only published in May 2018.[102] It has since also tabled flanking measures on reducing VAT-related red tape for small businesses (including reform of the SME VAT threshold, which is also being reviewed by the Government) and proposals to give individual EU countries more flexibility to vary VAT rates.

13.5 In addition to enshrining the "destination principle" in the VAT Directive, the Commission's October 2017 proposal also sought to introduce a number of technical "Quick Fixes" to address known deficiencies in EU VAT rules. These aimed to further restrict opportunities for fraud (by mandating the use of the VAT identification number[103] and introducing new evidentiary standards for proof of intra-EU supplies),[104] and reduce administrative burdens for businesses by changing the VAT treatment of call-off stock[105] and chain transactions of goods.[106] We described these 'Quick Fixes' in more detail in our Report of 6 December 2017. To incentivise uptake of the use of the Certified Taxable Person procedure as part of the "definitive" new VAT system, the Commission proposed that businesses administrative simplifications offered by these short-term reforms should only be available to companies with CTP status.

101 Under the proposal, a supplier which has to account for VAT in another Member State under this new system would not have to register in each EU country for VAT. Instead, they would pay the correct amount of tax to their domestic tax authority, who would then distribute it to the correct Member State(s).

102 We received an Explanatory Memorandum from HM Treasury on this supplementary proposal on [date], which we will consider in the coming weeks.

103 To address the opportunities for missing trader and carousel fraud created by the current system, EU Finance Ministers asked the Commission to propose legislation requiring a supplier to provide a valid VAT identification number for the buyer on their EC sales list before the cross-border supply can be zero-rated. Currently, Member States can impose fines when the identification number is not supplied, but Court of Justice jurisprudence prevents them from refusing to grant the zero-rated exemption. The Commission has therefore proposed to make the provision of a valid VAT number for the buyer a substantive condition before the exemption can be granted.

104 The Council asked the Commission to explore how suppliers might provide evidence to their tax authority of a cross-border sale of goods that qualifies for a zero-rate. In response, the Commission proposed an amendment to the VAT Implementing Regulation which would introduce the types of evidence a supplier could provide that a supply of goods to a buyer in another Member State had indeed taken place, including a document certifying receipt of the goods, a transport company's invoice, or the VAT return of the buyer for that particular purchase.

105 Call-off stock refers to a situation where a supplier transfers goods to a buyer's warehouse, without transferring legal title to the goods until the buyer chooses to take ownership. It is commonly used by online retailers, to ensure stock is available to fulfil orders placed through its website. To ensure a more uniform application of EU VAT rules, the Commission proposed that call-off stock arrangements should give rise to a single supply and acquisition, with the buyer accounting for VAT on that transaction when they take ownership of the goods. This would eliminate the need for the supplier to account for VAT on the fictitious intra-EU acquisition in all Member States.

106 Chain transactions occur where multiple supplies of a good occur but there is only one cross-border transport within the EU (for example when supplier A sells its wares to buyer C via intermediary B, who employ transport company D to physically move the goods directly from supplier A to the buyer). Under the current rules, tax authorities and companies often struggle to identify at which part of this chain the "intra-Community supply" occurs (which is the only element which can be zero-rated). The Commission proposed that, ordinarily, the intra-Community supply should legally take place when the vendor supplies the goods to the first intermediary. The VAT would then be due in the home country of the intermediary.

13.6 By letter of 7 June 2018, the Financial Secretary to the Treasury (Mel Stride) informed us that the Member States had decided to break this proposed link between the CTP status and the 'Quick Fixes'. Instead, the issue of certifying taxable persons would be considered solely in the context of the "definitive VAT system", and in particular to determine whether the buyer or sell in a cross-border business-to-business supply between two Member States would be liable to account for VAT. The Council has also diluted the provisions relating to the principles underpinning the new "definitive" VAT system, having preferred to defer substantive discussions on this element until the national Finance Ministries have had a chance to analyse the Commission's detailed technical rules.

13.7 The Minister also notes that there is, however, "broad agreement" on the technical elements of the "Quick Fixes", which have remained in substance unchanged. The Council has also introduced an additional amendment, creating the option for individual EU countries of permitting a cost sharing exemption for firms in the financial services sector.[107] EU Finance Ministers are expected to adopt their common position on the proposal at the meeting of the ECOFIN Council on 22 June 2018, with formal adoption of the "Quick Fixes" to follow after the European Parliament has delivered its non-binding opinion on the proposals in September this year. They would then enter into force in 2019, meaning the UK would also apply them under the terms of the post-Brexit transitional arrangement.

13.8 **We thank the Minister for his latest update. With the effective removal of the "definitive VAT system" from the Commission proposal while Member States analyse the more recent proposal for the detailed technical rules underpinning the new VAT system for cross-border supplies in the EU, the Council's deliberations at the ECOFIN Council in June 2018 will effectively focus only on the 'Quick Fixes'.**

13.9 **The Government has not expressed any concerns about the 'Quick Fixes', including the mandatory use of the VAT identification number and the VAT treatment of call-off stock and chain transactions. We note that the Minister has been "encouraged" by the Member States' "clarifications" to the relevant legal provisions. As such, we are content to now clear the Quick Fixes proposals from scrutiny to enable the Government to support the adoption of a general approach in June and, eventually, their formal adoption. We retain the proposal introducing the concept of a "Certified Taxable Person" under scrutiny pending further discussions within the Council on the definitive EU VAT system.**

13.10 **We also again put on the record our general concerns about the Government's approach to Brexit and its implications for the UK's fiscal sovereignty in the area of VAT (which accounted for £125.3 billion in tax revenue for the Exchequer in 2017–18).**[108]

13.11 **As we noted in our Report on Brexit and VAT, recent Explanatory Memoranda from the Treasury suggest—albeit only implicitly—that the Government believes EU VAT law may continue to apply in the UK beyond the scheduled end of the post-Brexit**

107 The Minister explains: "This proposal would allow financial services firms to utilise the cost sharing exemption, which applies when two or more organisations with VAT exempt activities join together to form a Cost Sharing Group (CSG). The CSG is an independent entity that enables its members to supply themselves with service at cost and exempt from VAT".

108 See https://www.uktradeinfo.com/Statistics/Pages/TaxAndDutybulletins.aspx.

transitional period in December 2020.[109] More recently, the potential significance of EU proposals related to Value Added Tax has increased further because of the continued uncertainty about the scope of the 'backstop': the fall-back solution to prevent any need for border infrastructure between Northern Ireland and Ireland even in the absence of a free trade agreement or technological fixes to remove the need for border controls.

13.12 **The European Commission had proposed that the backstop should require Northern Ireland to remain aligned with EU legislation on VAT (which, for any goods coming from outside the single VAT area, is treated as an import tax and therefore would otherwise require border controls in both directions). This would shift the fiscal and regulatory frontier to the Irish Sea to goods moving between Northern Ireland and Great Britain, which the Prime Minister has rightly described as an unacceptable proposition.**

13.13 **The Government's own proposal for the fiscal elements[110] of the backstop, published in June 2018 as a technical note on 'temporary customs arrangements', would keep the UK as a whole bound by "provisions of Union law on value added tax" insofar as that is required for the "application of common cross-border processes and procedures for VAT and excise (…), as well as some administrative cooperation and information exchange to underpin risk-based enforcement". Crucially, the Government's proposal does not specify which elements of the VAT Directive and related legislation it proposes should apply to the UK during this period.[111] As a result of this ambiguity, the European Commission has already dismissed the UK proposal as a "piecemeal application of EU VAT and excise rules" which creates "serious risks of fraud".**

13.14 **Nevertheless, it is now official Government policy that at least some parts of new EU VAT legislation which we currently have under scrutiny[112] may have to be applied in the UK even beyond the end of the post-Brexit transitional period. The Government "expects" the backstop arrangement would end by December 2021, but has offered no firm sunset clause. It has also previously hinted that VAT proposals not due to take effect until 2022 at the earliest may have to be applied in the UK. In light of this, the Committee will apply scrutiny to all pending EU proposals relating to VAT (as well as excise and customs, which are also included in the backstop proposal) under the assumption that—once adopted—they may be legally binding on the UK irrespective of their date of application.**

13.15 **Our primary concern is that EU law on taxation is subject to a unanimity requirement among Member States, which currently gives the UK a veto. From 29 March 2019, it will lose that veto but would still be bound by new VAT legislation as it becomes applicable—irrespective of whether it would have been adopted *before* or *after* the UK ceased to be a Member State. Given the typically long implementation periods for new substantive EU VAT law, this was unlikely to lead to difficulties before the scheduled**

109 Under the terms of the draft Withdrawal Agreement, the UK would continue to apply EU law—including on Value Added Tax—under a transitional arrangement that is due to end on 31 December 2020.

110 See the technical note on "temporary customs arrangements" published by the Cabinet Office on 7 June 2018. The proposal deals with fiscal aspects—customs, VAT and excise—only, and refers to the issue of alignment of regulatory controls (such as official controls on animals and animal products) only in passing.

111 We wrote to the Financial Secretary to the Treasury on 13 June 2018 to request more information about the scope of VAT law which the Government proposes should apply to the UK under its version of the 'backstop'.

112 See Annex.

end of the transitional period in December 2020.[113] However, the Government has now proposed the continued application of parts of EU VAT law potentially indefinitely, without specifying the exact scope of its proposed backstop. The 'temporary customs arrangement' proposal does not contain any specific safeguard mechanism allowing the UK to opt-out from having to apply new EU fiscal legislation.[114] The longer the backstop were to last, the larger the volume of legislation the Government would have to implement without having had any substantial say over its contents.

13.16 **We therefore remain seriously concerned about the prospect of the UK still applying EU VAT law well beyond 31 December 2020, including reforms outlined in this Report, without the ability to veto any changes which the Government believes are—or could be—detrimental. VAT raised £125 billion in revenue last year, but in effect the Government could potentially be ceding a significant part of its control over this fiscal resource to the EU. We wrote to the Financial Secretary on 13 June 2018 to seek urgent clarification of the legislative and financial impact of the Government's proposed backstop, and we will continue to press Ministers on these issues. We also draw these developments to the attention of the Treasury Committee, in the context of its inquiry into the future of Value Added Tax in the UK.**

Full details of the documents

(a) Proposal for a Council Directive amending Directive 2006/112/EC as regards harmonising and simplifying certain rules in the value added tax system and introducing the definitive system for the taxation of trade between Member States: (39085), 12882/17 + ADDs 1–2, COM(2017) 569; (b) Proposal for a Council Regulation amending Regulation (EU) No 904/2010 as regards the certified taxable person: (39083), 12880/17, COM(2017) 567.

Previous Committee Reports

Fourth Report HC 301–iv (2017–19), chapter 9 (6 December 2017) and Twenty-Third Report HC 301–xxii (2017–19), chapter 1 (28 March 2018).

Annex: Recent and pending EU VAT proposals

Proposal	Proposed	Document reference	Scrutiny status
VAT: services and distance sales of consumer goods	December 2016	38341	Cleared on 24 January 2018

113 For example, the last major package of VAT reforms (which affect e-commerce) were formally adopted in December 2017, but will mostly take effect in 2021.

114 The Cabinet Office proposal notes only that it "is important that the UK has the ability to continue to help develop the rules that govern trade and customs policy".

Proposal	Proposed	Document reference	Scrutiny status
VAT: location of customers	December 2016	38342	Cleared on 24 January 2018
VAT: administrative cooperation on consumer goods	December 2016	38343	Cleared on 24 January 2018
VAT on books and newspapers	December 2016	38344	Cleared on 25 January 2017
Reverse charge mechanism for domestic B2B transactions	December 2016	38432	Cleared on 25 April 2017
'Quick Fixes' for the VAT system	October 2017	39085	Cleared from scrutiny on 20 June 2018.
Proof of intra-Community supply	October 2017	39084	Cleared on 6 December 2017
VAT: Certified Taxable Persons	October 2017	39083	Remains under scrutiny. Last considered on 20 June 2018.
EU-Norway VAT Cooperation Agreement	October 2017	39174; 39175	Cleared on 6 December 2017
VAT: administrative cooperation to tackle fraud	December 2017	39299	Cleared on 23 May 2018.

Proposal	Proposed	Document reference	Scrutiny status
Minimum standard rate of VAT	December 2017	39391	Cleared on 28 March 2018.
VAT: flexibility to set reduced rates	January 2018	39448	Remains under scrutiny. Last considered on 28 March 2018.
SME exemptions from VAT	January 2018	39449	Remains under scrutiny. Last considered on 28 March 2018.
Detailed rules for the 'definitive VAT system'	May 2018	39795	Awaiting Explanatory Memorandum from HM Treasury
Quick Reaction Mechanism against VAT fraud	May 2018	39796	Awaiting Explanatory Memorandum from HM Treasury

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

Department for Environment, Food and Rural Affairs

(39706) 8878/18 + ADD 1 COM(18) 276	Proposal for a Council Regulation on fixing the export refunds on poultry meat.
(39733) 8438/18 —	Commission Delegated Regulation (EU) …/... of 26.4.2018 amending Delegated Regulation (EU) No 907/2014 as regards noncompliance with payment deadlines and as regards applicable exchange rate for drawing up declarations of expenditure.
(39856) 9739/18 COM(18) 399	Proposal for a Council Decision on the submission, on behalf of the European Union, of a proposal for amending Annexes 2 and 3 of the Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA).

Foreign and Commonwealth Office

(39859) — —	Council Decision extending the mandate of the European Union Special Representative for the Sahel.
(39860) — —	Council decision on extending the mandate of the European Union Special Representative for the Horn of Africa.
(39861) — —	Council Decision extending the mandate of the European Union Special Representative in Kosovo.
(39862) — —	Council Decision extending the mandate of the European Union Special Representative in Bosnia and Herzegovina.

(39863) Council Decision extending the mandate of the European Union Special Representative for Central Asia.

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(39864) Council Decision on extending the mandate of the European Union Special Representative for the South Caucasus and the crisis in Georgia.

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(39865) Proposal of the High Representative of the Union for Foreign Affairs and Security Policy to the Council for a Council Decision concerning the temporary reception by Member States of the European Union of certain Palestinians.

—

(39898) Proposal of the High Representative of the Union for Foreign Affairs and Security Policy to the Council for a Council Decision amending Joint Action 2005/889/CFSP on establishing a European Union Border Assistance Mission for the Rafah Crossing Point (EU BAM Rafah).

8975/18

—

(39899) Council Decision amending Decision 2013/354/CFSP on the European Union Police Mission for the Palestinian Territories (EUPOL COPPS).

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HM Revenue and Customs

(39705) Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 952/2013 laying down the Union Customs Code.

8794/18

COM(18) 259

HM Treasury

(39768) Draft amending budget No 3 to the general budget for 2018: Extension of the Facility for Refugees in Turkey.

9150/18

+ ADD 1

COM(18) 310

(39793) European Fund for Strategic Investments

9477/18

—

COM(18) 345

Formal Minutes

Wednesday 20 June 2018

Members present:

Kate Green, in the Chair

Mr Marcus Fysh	Mr David Jones
Kelvin Hopkins	Andrew Lewer
Darren Jones	David Warburton

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 14 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Thirty-second Report of the Committee to the House.

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

[Adjourned till Wednesday 27 June at 1.45pm.

Standing Order and membership

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

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

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

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

The expression "European Union document" covers—

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

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

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

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

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

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

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

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

Current membership

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

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

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

Steve Double MP (*Conservative, St Austell and Newquay*)

Richard Drax MP (*Conservative, South Dorset*)

Mr Marcus Fysh MP (*Conservative, Yeovil*)

Kate Green MP (*Labour, Stretford and Urmston*)

Kate Hoey MP (*Labour, Vauxhall*)

Kelvin Hopkins MP (*Independent, Luton North*)

Darren Jones MP (*Labour, Bristol North West*)

Mr David Jones MP (*Conservative, Clwyd West*)

Stephen Kinnock MP (*Labour, Aberavon*)

Andrew Lewer MP (*Conservative, Northampton South*)

Michael Tomlinson MP (*Conservative, Mid Dorset and North Poole*)

David Warburton MP (*Conservative, Somerton and Frome*)

Dr Philippa Whitford MP (*Scottish National Party, Central Ayrshire*)