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European Scrutiny Committee

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Report, together with formal minutes

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Notes

Numbering of documents

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

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

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

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

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

Abbreviations used in the headnotes and footnotes

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

Euros

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

Further information

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

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

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Contents

Documents to be reported to the House as legally and/or politically important

1 DCMS Review of the EU General Data Protection Regulation 3

2 DEFRA EU environmental funding—the LIFE Programme 2021–27 8

3 DEFRA Northern Ireland Protocol: Phase-out of dental amalgam 9

4 DfT Brexit: The future operation of the Channel Tunnel 12

5 HMRC Northern Ireland Protocol: Changes to EU alcohol duty legislation 20

6 HMT EU Taxation Action Plan: potential implications for the UK 30

7 HO Preventing the dissemination of terrorist propaganda online 51

Documents not considered to be legally and/or politically important

8 List of documents 55

Annex 57

Formal Minutes 59

Standing Order and membership 60

1 Review of the EU General Data Protection Regulation[1]

This EU document is legally and politically important because:

- it reviews the EU's General Data Protection Regulation (GDPR) which will continue to apply in certain respects to the processing of EU citizens' data after the transition period by UK businesses and other UK data controllers or processors; and

- the Commission's review has to be seen in the light of the Court of Justice (CJEU) ruling in Schrems II in July which is relevant to international transfers of EU citizens' personal data to third countries, such as the UK after transition. The CJEU invalidated the US data adequacy decision (Privacy Shield). The ruling raised standards to be met both for future data adequacy assessments and the use of standard contractual clauses (SCCs) for transferring personal data from the EU to third countries.

Action

- Report the Minister's response to the House, drawing it to the attention of the Digital, Culture, Media and Sport Committee, the Business, Energy and Industrial Strategy Committee, the Science and Technology Committee, the Joint Committee on Human Rights, the Home Affairs Committee and the Committee on the Future Relationship with the EU.

- Write to the Minister, asking him to continue to keep us updated on further developments on: international data transfers in the wake of Schrems II; the pending ruling in the Privacy International litigation; the data adequacy process for the UK and the negotiations of the proposed e-Privacy Regulation.

Overview

1.1 On 3 September we reported to the House on the Commission's first review of the application and operation of the General Data Protection Regulation (GDPR). The review focuses on international transfers of personal data between the EU and third countries. In those circumstances, personal data can only be transferred on a number of legal bases and corresponding mechanisms specified in the GDPR.

1.2 As background to our scrutiny of the document we noted that the UK has applied for Commission data adequacy decisions both under the GDPR and the Law Enforcement Data Directive (LED) to provide a comprehensive legal basis for transfers of EU personal data to the UK after transition. No decisions have yet been adopted.

1.3 In our letter to the Government of 3 September, we asked a number of questions concerning (in summary):

1 Commission Communication "Data protection as a pillar of citizens' empowerment and the EU's approach to the digital transition—two years of application of the General Data Protection Regulation"; COM(20) 264 ; Legal base—; DCMS; Devolved Administrations: Informed; 41363.

- the implications for the UK of the ruling of the Court of Justice (CJEU) in Schrems II[2] that the US data adequacy decision (Privacy Shield) was invalid, considering both immediate transfers of data from the UK to the US and for the prospects of obtaining Commission data adequacy decisions for after transition;
- similarly, the potential implications of the pending CJEU ruling in the Privacy International case; and
- any developments in the data adequacy process and the negotiations of the proposed e-Privacy Regulation.

The Minister's response

1.4 The Minister of State for Media and Data (Rt Hon. John Whittingdale OBE MP) provided his response to us on 18 September. The letter also attaches an annex which sets out the guidance of various data protection bodies following the Schrems II ruling. In summary, the key points he makes are:

- That the Government is disappointed that Privacy Shield was invalidated but pleased that standard contractual clauses (SCCs) remained valid on the condition that transfers under SCCs are to third countries with "essentially equivalent" data protection to that of the EU.[3]
- The wider impacts of the Schrems II ruling on the UK are still being considered and addressed, including the guidance that local data protection authorities are beginning to issue:
  - One of the German federal data protection regulators has suggested that additional safeguards such as encryption is required for international data transfers and has issued a "checklist for compliance" for companies using SCCs.
  - The Irish Data Protection Commission as lead data protection authority for Schrems has issued a 'preliminary order' to Facebook to require them to cease sending EU personal data to the US via SCCs in line with the ruling.
- The Government is working with the Information Commissioner's Office (ICO) to ensure updated guidance will be made available to UK businesses as soon as possible. During transition, this will need to be consistent with advice of the European Data Protection Board (EDPB).[4]
- On 4 September, the EDPB announced the creation of a dedicated taskforce on the supplementary measures that data exporters and importers can be required to implement to comply with CJEU ruling.
- The Commission has also committed to publishing new SCCs that take into account the ruling.

2 Case C-311/18, 16 July 2020.

3 See the Government's statement of 17 July to this effect.

4 A summary of the key statements from the EDPB and ICO guidance published to date is included in Annex A to the Minister's letter.

- The Commission has also stated it regards the Schrems ruling as relevant for both their ongoing reviews of their 12 existing adequacy decisions and the UK's ongoing assessment for adequacy.

- As the UK's data protection framework is already equivalent to the EU's and the data adequacy process is "moving forward", the Government is confident that the EU will adopt adequacy decisions by the end of the transition period.

- At the end of transition, the Government is committed to using its new sovereign powers to remove unnecessary obstacles to international data transfers. This includes developing new and innovative mechanisms for international data transfers with corresponding safeguards.

- The Government does not know when the ruling in the Privacy International litigation will be delivered.

- Discussions between the EU and US on replacing Privacy Shield are ongoing and it would not be appropriate to comment on them at this time.

- Negotiations on the proposed ePrivacy Regulation are ongoing at EU-level and the final text, including developments on the privacy rules that apply to the placement of cookies, is yet to be agreed. This means that the timing of the Regulation's applicability is uncertain.

- The Government is however reviewing opportunities presented by the draft Regulation and giving appropriate consideration to whether any changes to UK laws are needed.

1.5 On what could be an important issue for obtaining data adequacy in our view, the Government further argues that in its view there is "no direct read across from the Schrems II judgment to the UK's National Security framework" for three reasons:

- The CJEU focused on US laws and practices, in the context of the validity of the EU's adequacy decision for the Privacy Shield.

- The sharing of personal data for national security purposes is not within the scope of the GDPR and instead different data protection safeguards are applied. In the UK the rules governing data processing by the intelligence services are provided in Part 4 of the Data Protection Act 2018, so intelligence sharing between the UK and EU will not be directly impacted by this decision.

- The concerns raised by the CJEU in Schrems II are not applicable in relation to the UK.

1.6 In respect of that last point, the Minister says:

> The UK has a robust, transparent, world-leading framework through the Investigatory Powers Act 2016 (IPA), with privacy at the heart of the legislation and strong oversight provided by the independent Investigatory Powers Commissioner. The UK's legislative framework also provides a number of avenues for redress including independent redress through the Investigatory Powers Tribunal.

Action

1.7 We report this Government response to the House and draw it to the attention of the Committees listed above.

1.8 We have written to the Minister (see below), drawing our scrutiny of this particular document to a close but requesting updates on the matters specified. We also highlight inconsistencies in the information the Government has provided to Parliament on the progress of the data adequacy process and flag our disagreement that national security processing by UK intelligence services will not be a relevant consideration for the adequacy process, particularly in the light of the Schrems II ruling and the potential fallout from an adverse ruling for the Government in the Privacy International litigation. We see no point in embarking on further detailed correspondence with the Government at this stage on the issue of processing personal data for national security purposes, given the likely imminence of that ruling.[5]

Letter from the Chair to the Minister of State for Media and Data (Rt Hon. John Whittingdale OBE MP)

Thank you for your letter of 18 September, the contents of which the Committee notes.

First, we wish to flag a specific point of inconsistency in the Government's position concerning progress in the data adequacy process. In your letter you said that "the process was moving forward" and that you "fully expect to have adequacy decisions adopted by the end of the transition period". However, during the Second Reading of the Internal Markets Bill on 14 September the Chancellor for the Duchy of Lancaster said that there had been no progress in the process for obtaining data adequacy decisions.[6]

This is not an isolated instance of inconsistency in information being provided to Parliament on EU matters. It begs the question of whether the Government has considered how it will provide consistent and transparent information to Parliament in future on EU matters, including after transition.

Turning to the particular EU document in hand, we are content to regard our scrutiny as completed. However, this is on the basis that you continue to update us on the following connected issues of ongoing concern to the UK's position after transition. Namely, further developments on:

- international data transfers in the wake of July's Court of Justice (CJEU) ruling in the Schrems II case;
- the pending CJEU ruling in the Privacy International litigation, since we continue to consider it relevant to data adequacy decisions under the General Data Protection Regulation and Law Enforcement Data Directive—not least because

5 The Advocate General's opinion in the proceedings which concern the ePrivacy Directive was published on 15 January 2020. Given that an interval of some 8 months has now elapsed since then, it is reasonable to assume that a CJEU ruling must be fairly imminent.

6 Hansard, 14 September, Col 129 "The EU is bound by a system of what are called autonomous processes to ensure that we have equivalence on data and financial services, and that we are listed as a third country for the export of food and other products of animal origin. There has been no progress on any of those."

national security is stated to be a relevant consideration for the Commission when assessing adequacy under Articles 45 and 36 of the respective legislation; and

- the data adequacy process for the UK and the negotiations of the proposed e-Privacy Regulation.

Please note that I am copying this letter to the Chairs and Clerks of the following other Committees of the House: Digital, Culture, Media and Sport Committee, the Science and Technology Committee, the Joint Committee on Human Rights, the Home Affairs Committee and the Committee on the Future Relationship with the EU.

2 EU environmental funding—the LIFE Programme 2021–27[7]

This EU document is politically important because:

- The Government confirms that the UK will not seek participation in the Programme after the end of the post-Brexit Transition Period.

Action

- Report to the House.

Overview

2.1 'LIFE', the EU's funding Programme for environment and climate action, aims to contribute to the implementation, updating and development of EU environmental and climate policy and legislation. Our predecessors considered on a number of occasions the European Commission's proposal for the Programme over the period 2021–27, with a budget of €5.45 billion (£4.84 billion). Their outstanding query was related to arrangements for third country participation, which would be relevant to the UK should it decide to participate.

2.2 The Parliamentary Under-Secretary of State (Rebecca Pow MP) has written to us confirming that the UK will not, however, participate.

Action

2.3 As the UK does not intend to participate in the future LIFE Programme, we have no outstanding queries on this document and require no further information.

2.4 We are reporting the Minister's letter to the House as a matter of public interest in the context of the UK's future relationship with the EU.

7 Proposal for a Regulation establishing a Programme for the Environment and Climate Action (LIFE) and repealing Regulation (EU) No 1293/2013; Council and COM number: 9651/18, COM(18) 385; Legal base: Article 192 TFEU, QMV, Ordinary legislative procedure; Department: Environment, Food and Rural Affairs; Devolved Administrations: Consulted; ESC Number: 39829.

3 Northern Ireland Protocol: Phase-out of dental amalgam[8]

This EU document is politically important because:

- the Commission signals an intention to propose that the use of dental amalgam be phased out, likely through an amendment to the EU Mercury Regulation which will continue to apply in Northern Ireland after the Transition Period;
- the Government considers that the suggested change would be challenging for Northern Ireland if pursued by the Commission; and
- there is no intention to propose a phase-out of dental amalgam in Great Britain, although there is action to reduce the use of dental amalgam in line with EU retained law and international requirements.

Action

- Write to the Minister.
- Draw to the attention of the: Environmental Audit Committee; Environment, Food and Rural Affairs Committee; Committee on the Future Relationship with the EU; Health and Social Care Committee; and the Northern Ireland Affairs Committee.

Overview

3.1 Dental amalgam—used to fill cavities caused by tooth decay and to repair tooth surfaces—is an alloy of mercury and other metals. In 2018, it was used for around 25% of dental fillings in the UK. Mercury, though, is a toxic element and is recognised as a substance of global concern, with environmental and public health implications.

3.2 The international Minamata Convention on Mercury, applied in EU law through the Mercury Regulation,[9] requires a phase-down in the use of dental amalgam, but the EU's Regulation went further by prohibiting the use of dental amalgam, as from 1 July 2018, for dental treatment of milk teeth and for dental treatment of vulnerable members of the population, i.e. children under 15 years and pregnant or breastfeeding women.

3.3 The Commission's document assesses the progress of implementing the Mercury Regulation and considers possible future changes. It concludes that the phase-out of dental amalgam is technically and economically feasible before 2030 and the Commission will therefore commence preparatory work before presenting a legislative proposal in 2022 to phase out the use of dental amalgam.

3.4 The Commission also indicates that the EU will actively participate in the international negotiations to extend the list of mercury-added products regulated under the Minamata

8 Commission Report on the reviews required under Article 19 (1) of Regulation 2017/852 on the use of mercury in dental amalgam and products; COM (20) 378; Legal base:—; Department: Environment, Food and Rural Affairs; Devolved Administrations: Consulted; ESC number: 41472.

9 Regulation (EU) 2017/852 on mercury.

Convention. The principal aim will be to add to its Annex A mercury-added products whose placing on the EU internal market is already prohibited, but their manufacture and export remain possible.

3.5 The Parliamentary Under Secretary of State (Rebecca Pow MP) notes in her Explanatory Memorandum that the EU's Mercury Regulation is included in Annex 2 of the Northern Ireland Protocol and, as such, will continue to apply in Northern Ireland after the Transition Period has ended. She observes that the Commission makes a commitment to draft legislation phasing-out the use of dental amalgam but does not confirm that it would do this by proposing to amend the Mercury Regulation.

3.6 If the Mercury Regulation was eventually amended, though, to phase-out the use of dental amalgam, Northern Ireland would need to comply. Were the Commission to propose such an amendment, the Government may need to conduct a formal consultation in respect of Northern Ireland. A phase-out could have financial implications for Northern Ireland, says the Minister, because dental amalgam is still widely used in Northern Ireland. The cost of dental amalgam might also increase for those countries still using it due to a diminished European market.

3.7 The Minister cautions that it is difficult to assess how palatable a phase-out proposal would be to EU Member States given that dental amalgam is still widely used in France and some Eastern European states.

3.8 The Government, says the Minister, does not currently intend to implement a phase-out of dental amalgam in Great Britain. It is the view of the UK's Chief Dental Officers, the Department of Health and the relevant health departments in the other administrations in the UK that dental amalgam remains a suitable restorative option for patients.

3.9 The Minister explains that there is little evidence of direct adverse health effects of dental amalgam in humans. Dental amalgam often remains the best restorative option for older and middle-aged patients, and for re-treatments which are more common than primary treatments. Given the UK's growing elderly population, maintaining the ability to source dental amalgam therefore remains important to good oral health outcomes in the UK.

3.10 The UK is, however, taking action to phase-down the use of dental amalgam—as required by the Minamata Convention and the Mercury Regulation—mainly through work to improve oral health across the population, to prevent decay and thereby reducing the need for dental amalgam. Other actions underway include adopting an increasingly preventative model of care; dental workforce education in the use of alternative filling materials; communication with dental patients; and incorporation of new treatments and technologies into dental services.

Our assessment

3.11 We are pleased that the Minister has identified the potential impact on Northern Ireland of a future legislative initiative in this area. We note the uncertainty around the legislative instrument that the Commission might choose—i.e. a proposal to amend the existing Mercury Regulation or a proposal for an entirely new EU law. Even if it is a new

EU law, though, it could still be added to Annex 2 of the Northern Ireland Protocol if both the UK and EU were to agree in the Joint Committee established by the Withdrawal Agreement.

3.12 We are uncomfortable that the Minister has not set out any intention to engage any further on this. She says, for example, that a formal consultation in respect of Northern Ireland might be required upon publication of a legislative proposal. On the other hand, the Commission says that it will now start preparatory work. We will ask the Minister whether the Government will wait to see what the Commission does in 2022 or whether the Government will engage with the Commission at all on behalf of Northern Ireland before 2022.

Action

3.13 We have written to the Minister as set out below, seeking clarity on whether the Government intends to engage with the Commission on behalf of Northern Ireland. We are copying our letter to the Environmental Audit Committee; Environment, Food and Rural Affairs Committee; Future Relationship with the EU Committee; Health Committee; and the Northern Ireland Affairs Committee.

Letter from the Chair to the Parliamentary Under-Secretary of State (Rebecca Pow MP), Department for Environment, Food and Rural Affairs

We have considered your Explanatory Memorandum on the above Commission Report.

You helpfully recognise the potential impact on Northern Ireland of a possible future EU legislative initiative to phase-out the use of dental amalgam. We ask that you tell us, though, whether you will seek to engage with the Commission—on behalf of Northern Ireland—before the Commission publishes any draft legislation or whether you plan to wait and see what is published in 2022 and then consult and engage at that stage. We note the Commission's intention to begin preparatory work imminently.

We would welcome a response within ten working days.

4 Brexit: The future operation of the Channel Tunnel[10]

These EU documents are legally and politically important because:

- they concern the operation of the Channel Tunnel Fixed Link at the end of the Transition Period on 31 December 2020, in particular, the application and enforcement of the Tunnel's joint UK/France safety arrangements.

Action

- Write to the Minister, Rachael Maclean MP, seeking further information on: the potential implications for UK users and operators should an agreement on the future operation of the Fixed Link not be reached by the end of the Transition Period, and whether the Government's preferred 'joint regulation approach' is consistent with its own 'red lines' on no dynamic alignment with EU law.

- Draw to the attention of the Transport Committee, the International Trade Committee, and the Committee on the Future Relationship with the E U.

Background

4.1 In our Twenty-first Report of Session 2019–21,[11] we considered two EU legislative proposals on the future operation of the Channel Tunnel Fixed Link.[12] These were: (1) a proposal for a Decision that would authorise France to negotiate and ratify an agreement with the UK with the aim of ensuring the safe and efficient operation of the Channel Tunnel at the end of the Transition Period;[13] and (2) a proposal for a Regulation that would make changes to EU railway rules to ensure compatibility with any agreement reached between France and the UK. A full background and assessment of the Commission's proposal can be found in our previous Report.

4.2 The Commission argues that to ensure the safe and efficient operation of the Tunnel after EU law ceases to apply in the UK, it would be preferable to amend the Treaty of Canterbury which provides for the joint UK/France governance of the Tunnel. If adopted, the EU documents would authorise France to negotiate and conclude an agreement with the UK, subject to the conditions set out below:

10 Document (a) Proposal for a Decision of the European Parliament and of the Council empowering France to negotiate an agreement supplementing its existing bilateral Treaty with the United Kingdom concerning the construction and operation by private concessionaires of a Channel Fixed Link; Council and COM number; 9972/20 and COM(20) 622; Legal base; Article 91 TFEU, QMV; Dept: Transport; Devolved Administrations; consulted; ESC number; 41434. Document (b) Proposal for a Regulation of the European Parliament and of the Council amending Directive (EU) 2016/798, as regards the application of railway safety and interoperability rules within the Channel Fixed Link; Council and COM number; 9976/20 and COM(20) 623; Legal base; Article 91 TFEU, QMV; Dept; Transport; Devolved Administrations; consulted; ESC number: 41435.

11 Twenty-first Report (2019–21) HC 229–xvii, Chapter 5 (16 September 2020).

12 The term 'Fixed Linked' is used to describe the British and French terminals—at Folkestone and Coquelles respectively—and the tunnel itself (comprising two running tunnels and a service tunnel). Throughout this Report chapter the terms 'Fixed Link', 'Channel Tunnel' and 'Tunnel' are used interchangeably.

13 As established by the UK/EU Withdrawal Agreement.

i) that the UK/French authority responsible for safety on the Channel Tunnel applies all relevant EU law (including on the UK side);

ii) that in the event of a dispute concerning safety on the Tunnel being submitted for arbitration, if the dispute raises a question relating to the interpretation of EU law, the arbitral tribunal should not decide on the matter itself but request a ruling from the Court of Justice of the EU (CJEU), with that ruling being binding on the arbitral panel; and

iii) that in circumstances of emergency or failure of the joint UK/French authority to comply with a decision of the arbitral tribunal, France will retain the right to act unilaterally to regain control of the French section of the Tunnel.

4.3 We wrote to the Minister responsible for the EU documents, Rachel Maclean MP, on 16 September 2020 requesting further information on the Government's proposals for the future operation of the Fixed Link at the end of the Transition Period. We were concerned that, despite rejecting the EU's proposals, the Government had not set-out an alternative model for the operation of the Fixed Link. This led us to question whether safety on the Tunnel would be compromised should an agreement between the UK and France not be reached.

4.4 The Minister responded to the Committee's requests for further information on 23 September 2020.[14] The Minister's letter provides details on the Government's plans for how the Fixed Link could operate at the end of the Transition Period (asserting that it respects the Government's 'red lines' of no dynamic alignment with EU law in the UK and oversight by the CJEU). The Minister's response, considered in further detail in the next section, does, however, leave a number of unanswered questions relating to:

- the safety of the Tunnel should a formal agreement not be reached between the UK and France;
- the implications of a move away from the current safety system—where EU safety laws apply across the Fixed Link—to more informal and *ad hoc* arrangements for the concessionary and operators, specifically, for business continuity and liability purposes; and
- the Government's alternative proposals—labelled the 'joint regulation approach'—and whether they are consistent with its own 'red lines' on no dynamic alignment with EU law.

The Government's letter of 23 September 2020

4.5 In its Explanatory Memorandum of 11 August 2020 accompanying the EU's proposed Decision and Regulation, the Government stressed that future dynamic alignment with EU laws, and oversight of the application and interpretation of EU law in the UK by the CJEU, would not be consistent with its 'red lines' or reflect the status of the UK as a non-EU Member State. The Government did not, however, outline its alternative proposals for

14 Letter from Rachel Maclean MP to Sir William Cash MP, 23 September 2020.

how the Channel Tunnel Fixed Link could operate at the end of the Transition Period. With this in mind, the Committee requested further information from the Government on:

- Whether it is possible for different rules on safety and interoperability to apply on the UK and French sides of the Fixed Link or, for safety, technical or other reasons, the same rules have to apply across the entirety of the Fixed Link.
- if the application of two sets of rules is possible (i.e. EU rules and those that would satisfy the Government's 'red lines'), whether the role of the Intergovernmental Commission (IGC) would have to be clarified to take account of this;
- if one set of identical rules has to apply on both sides of the Fixed Link, what a system that satisfies current EU laws, but does not require (dynamic) alignment on the UK-side of the Tunnel, would look like.
- Whether there is any difference in terms of the safety and interoperability requirements applicable to rail infrastructure on the Fixed Link versus High Speed 1.[15]
- Whether the UK will request that the (forthcoming) ability for the ERA to issue authorisations and certificates for rail services and vehicles applicable to the French side of the Fixed Link is disapplied so as to protect the role of the IGC.

4.6 In response to our requests, the Minister stresses that the Government is committed to the safe and effective operation of the Channel Tunnel but reiterates that the EU's proposals are not acceptable to the UK in their current form. The Minister is clear that the Government does not consider:

> …that the Council Decision is necessary, as it is not essential for the IGC to continue its role as joint safety authority for the Fixed Link in order for France to be compliant with its EU law obligations, or for the continuation of a unified safety regime in the Tunnel.

4.7 The Minister explains that in the event that an agreement cannot be reached with France, services will continue to operate on the Fixed Link and, furthermore, that the safety of the Tunnel will in no way be compromised.

4.8 However, on the Committee's first main question, regarding whether it would be possible for different rules on safety and interoperability to apply on the UK and French sides of the Fixed Link, the Minister says that this would be difficult and that the continued application of a single set of rules is favoured by the Government.

4.9 The Minister goes on to outline the Government's idea for a 'joint regulation approach' as a way of managing safety-related issues on the Fixed Link.

4.10 The joint regulation approach would be achieved by means of regulation by the UK and French national safety authorities responsible for their respective halves of the Tunnel: the Office of Rail and Road (ORR) for the UK half and the *Établissement public de sécurité ferroviaire* (EPSF) for the French half. The Minister explains that the Government does

15 The Channel Tunnel Fixed Link connects to the 'High Speed 1' (HS1) rail line at Folkestone and terminates at London St Pancras International railway station (this stretch of line is known as 'the Channel Tunnel Rail Link').

not believe that it is essential for the IGC to continue in its role as joint safety authority for the Fixed Link under EU law and instead envisages it playing a coordinating role between the ORR and EPSF. The Minister states that this model would ensure that the UK maintains full control over the rules and regulations that apply on the UK half of the Tunnel.

4.11 As mentioned above, the Minister argues that the nature of the Fixed Link means that substantive rules on safety and interoperability in the UK and French halves of the Tunnel would have to remain aligned. The Minister does suggest, however, that different sets of safety and interoperability rules—applicable to the UK and French sides of the Tunnel—may be possible where they concern issues relating to minor details such as periodic reporting requirements.

4.12 The Minister suggests that under a joint regulation approach, the content of these rules would be negotiated between the UK and France "in line with the legal obligations and principles of both countries… and [implemented] through domestic legislation". Furthermore, "…elements of relevant EU legislation that were not appropriate for the UK to implement as a third country… would not apply uniformly across the whole of the Fixed Link".

4.13 The Minister foresees a cooperation agreement between the ORR and EPSF that would provide for the sharing of information to enable both parties to meet their international obligations. The Minister also speaks of cooperation between UK and French officials in order that the UK can remain up-to-date with any proposed changes to EU safety rules that may have to be given effect to on the UK-side of the Fixed Link.

4.14 The Government envisages that the IGC would still play an important role in overseeing the Channel Tunnel framework, however, formal responsibility for the Fixed Link would fall to the respective regulators for the UK and France. The IGC would provide a forum for UK and French delegations to discuss and agree jointly on safety and interoperability matters. The Minister suggests that the Treaty of Canterbury would have to be amended to give effect to this change.

4.15 We also enquired whether there are any differences in terms of the safety and interoperability requirements applicable to rail infrastructure on the Fixed Link versus High Speed 1 (HS1) (the line running from Folkestone to London St Pancras International).

4.16 The Minister confirms that it is the case that the safety and interoperability requirements applicable to rail infrastructure on the Fixed Link also apply to a large extent to the infrastructure of HS1 network. This is said to be necessary to ensure services can run to and from St Pancras via the Fixed Link.

4.17 On our third question, we noted in our previous Report that the role of the IGC as a recognised national safety authority—under EU law—is due to end on 31 December 2020 and thus its ability to issue safety certificates and authorisations valid for the entirety of the Fixed Link will also end on that date. This change is in line with the EU's vision for the EU Agency for Railways (ERA) as the sole issuing authority for certificates and authorisations covering cross-border EU journeys between Member States.

4.18 If a new agreement was reached with France that allowed the IGC to continue as joint safety authority, the likely role of the ERA is not clear. If the EU suggested that the

ERA should be the relevant issuing authority for the whole of the Fixed Link, that would create an asymmetry, with a diminished role for the ORR. In response, the Minister suggests that in a joint regulation scenario—where the ORR operates as the national safety authority for the UK half of the Tunnel and the IGC is no longer recognised as such—this problem would not arise. The Minister goes on to explain that the Government would seek a Memorandum of Understanding with the EPSF so that any authorisations/certificates issued for the French half of the Tunnel would be notified to the UK. Seemingly in reference to the ERA, the Minister states that decisions as regards the French side of the Tunnel are for France, taking account of their continuing obligations under EU law.

4.19 The Minister is clear that the Government cannot accept any agreement which provides for the jurisdiction of ERA on UK territory or the ability for ERA to issue safety certificates on UK territory including in the UK half of the Channel Tunnel.

Analysis

4.20 There are fundamental differences between the EU's proposals for the future operation of the Channel Tunnel Fixed Link and those outlined by the Government. Whereas the EU's plans are based around the continued operation of the 'unified safety system' with little to no amendment—including the application of EU law on the UK-side of the Fixed Link and oversight by the CJEU—the Government's 'joint regulation' proposals would see UK and French regulators take-on greater responsibility for the regulation and oversight of their respective halves of the Tunnel with the IGC playing a coordinating role.[16]

4.21 The terms of the Decision authorising France to enter into negotiations with the UK—and, specifically, the strict conditions that it requires of any agreement reached on the future operation of the Fixed Link—means that the likelihood of an initial formal compromise between both sides is limited. It would appear that for anything approaching the model advocated by the Government to be agreed, a further Decision amending the EU's position would be required.[17]

4.22 We note the Minister's statements that safety and the provision of services through the Fixed Link will not be adversely affected should an agreement not be reached between the UK and France. It is difficult to reconcile this position with the fact that the EU has published proposals concerning its future operation and the Minister has outlined the Government's alternative approach to us. Put plainly: if the Fixed Link can continue to operate in a safe and efficient way at the end of the Transition Period, in reliance on the Treaty of Canterbury, why are additional measures necessary?

4.23 We are also concerned that if an agreement is not reached between the UK and France, the resulting legal and practical uncertainty could have serious business continuity implications for the concessionary and those operating services on the Fixed Link. The current licencing and safety framework prevailing on the Fixed Link provides this certainty with, amongst other considerations, a stable oversight, development and enforcement regime.[18] Any deviation from this, which is all but inevitable given the Government's

16 Rather than continuing to act as joint safety authority for the Fixed Link.

17 As outlined above, the Government is of the opinion that a Decision is not required for the IGC to continue its role as joint safety authority for the Fixed Link, for France to be compliant with its EU law obligations, or for the continuation of a unified safety regime in the Tunnel.

18 This 'regime' is taken in the round as including the IGC, its role as a national safety authority for the purposes of EU law, and the application and enforcement EU law (i.e. TSIs).

unequivocal rejection of a continuing role for EU law and the CJEU on the UK-side of the Tunnel, necessitates contingency planning. As an example, it could reasonably be expected that operators are, at present, seeking authorisations from both UK and French authorities. Knowing well ahead of time the likely changes that will be made to the current regime would undoubtably aid businesses in managing this transition. An agreement not being reached would, however, cause more serious problems. Uncertainty surrounding safety and interoperability rules on the Fixed Link—including whether rules are enforced in the same way on both sides of the Tunnel, and how and when they will be changed—would be difficult to plan for and could give rise to complex liabilities that operators are not willing to shoulder. We note that the Government does not offer an assessment of how likely it is that a new agreement along these lines will be reached and ready to be implemented before the end of 2020 nor outlines the contingency arrangements that would have to be put in place in the absence of such an agreement.

Issues arising from the joint regulation approach

4.24 The Minister's response to our last Report on this matter focusses heavily on the Government's alternative model for the safe operation of the Fixed Link at the end of the Transition Period (the so-called 'joint regulation approach').

4.25 Central to the Government's joint regulation approach is the maintenance of equivalent standards on the UK and French sides of the Fixed Link. For the French side, new standards would be adopted as and when relevant EU law is updated, for example, when new EU technical standards (TSIs) are given effect to by way of EU tertiary legislation. In this regard, the Minister notes the ability of the Secretary of State to publish "…updates to the suite of NTSNs [the new UK category of technical standards based on EU TSIs that will come into force at the end of the Transition Period] to ensure consistent technical standards throughout the Fixed Link as [EU] TSIs evolve in the future".

4.26 This process appears to follow the idea of 'mirroring'; whereby the content of EU laws will be copied over directly into UK domestic law. It is unclear what the implications would be for the operation of the Fixed Link if the UK did not agree to give effect to an EU TSI. Importantly, NTSNs will be given effect to in the UK by administrative means and will not attract the same level of scrutiny as EU TSIs (which are tertiary EU law and can be objected to before adoption by the Council and/or European Parliament).[19]

4.27 As such, if the Government's joint regulation approach gains traction during negotiations with France, thought must be given to Parliament's role in scrutinising EU TSIs that are likely to be given effect to on the UK-side of the Fixed Link. This is all the more important given that this role has been performed by the European Scrutiny Committee whilst EU law has applied in the UK.

4.28 On a linked point, the Minister's description of joint regulation reads very much as an idea underpinned by the UK giving effect to EU TSIs with the converse, the EU giving effect to UK NTSNs, not discussed. The quote above is illustrative of this "[the] Secretary of State is able to publish updates to the suite of NTSNs… *as [EU] TSIs evolve in the future*" [emphasis added]. If the approach envisaged by the Government is one-way, it would amount to little more than the dynamic form of rule alignment proposed by the EU—that it has unequivocally rejected—but in a repackaged form.

19 This is, however, dependent on the process provided for in the parent EU legal act.

4.29 In terms of the legal framework envisaged for a joint regulation approach, it is interesting to note that the Minister speaks of cooperation arrangements with France covering the exchange of information "to enable both parties to meet their international obligations". The Minister also mentions the idea of a Memorandum of Understanding with the EPSF for authorisations and certificates for the French-side of the Tunnel to be notified to the UK. It is not clear why these arrangements could not be made under the auspices of the Treaty of Canterbury or what the international obligations the Minister refers to are.

Action

4.30 The Committee has written to the Minister responsible for the handling of the documents, Rachael Maclean MP, and requested further information on: the safety of the Tunnel should a formal agreement not be reached between the UK and France; the implications of a move away from the current safety system—provided for within the framework of the Treaty of Canterbury—to more informal and *ad hoc* arrangements for the concessionary and operators, specifically, for business continuity and liability purposes; and the Government's alternative proposals—labelled the 'joint regulation approach'—and whether they are consistent with its own 'red lines' on no dynamic alignment with EU law.

4.31 We have drawn this chapter to the attention of the Transport Committee, the International Trade Committee, and the Committee on the Future Relationship with the European Union.

Letter to the Parliamentary Under Secretary of State (Rachel Maclean MP), Department for Transport

The Committee has asked me to thank you for your letter of 23 September 2020 on the two above listed documents.

The safe and efficient operation of the Channel Tunnel Fixed Link at the end of the Transition Period is vitally important to the UK economy. Since services first ran on the Fixed Link in 1994/5, it has revolutionised how millions in the UK, France and Europe conduct business and holiday. We appreciate the detailed response you have provided to our requests for further information but we remain unclear on the Government's position on a number of important issues.

In your letter of 23 September, you appear to suggest that safety on the Fixed Link will not be compromised in the event that an agreement on its future operation is not reached between the UK and France. We find this position hard to reconcile with the fact that the EU has published proposals concerning its future operation and you have outlined the Government's alternative approach to us. To be clear, do you believe that the Fixed Link can, from a technical perspective, operate safely and effectively at the end of the Transition Period without an agreement—including any formal or informal reciprocal commitments—being reached with France? If so, we request an explanation as to why this is the case.

Following on from this question, it appears plain to the Committee that the present uncertainly regarding the future operation of the Fixed Link has—and likely will have—

serious business continuity implications for the concessionary and those operating services on the Tunnel. Does the Government agree that a formal agreement covering the future oversight, development and enforcement of rules on the Fixed Link should be reached before the end of the Transition Period? Furthermore, we are keen to know if this is a Government priority.

In your letter you speak of a 'joint regulation approach' between the UK and France for managing the future operation of the Fixed Link. In this regard, you outline cooperation agreements and Memoranda of Understanding that the Government will seek with France and relevant authorities (namely the EPSF). The Committee requests further information on why these arrangements cannot be made under—or by renegotiating—the Treaty of Canterbury. Furthermore, you explain that such arrangements would allow the UK and France to "meet their international obligations". We request further information on what these international obligations are.

You note the success of the binational approach under the Treaty of Canterbury and the Committee agrees that it has provided a trusted, transparent and predictable framework for the governance of the Fixed Link. The Committee is concerned that *ad hoc* or interim arrangements reached outside of the Treaty of Canterbury framework, would not match the high standards of governance that the concessionary and operators have come to expect and rely on. We request your view on whether a move away from the Treaty of Canterbury—to supplementary arrangements outside of its auspices—would have liability implications for the concessionary and operators. We would welcome the details of meetings that the Government has had with stakeholders on this issue.

Finally, the Committee struggled to distinguish between the Government's plans for how a single set of safety and interoperability rules could function across the entirety of the Fixed Link—as you describe under the 'joint regulation approach'—and the EU's proposals for dynamic rule alignment. In this regard, we note your statement that "[the] Secretary of State is able to publish updates to the suite of NTSNs… *as [EU] TSIs evolve in the future*" [emphasis added]. If the approach envisaged by the Government is one-way (as it reads), it would amount to little more than dynamic alignment with EU rules but in a repackaged form. Therefore, we ask that you outline the possible scenarios in which the UK would not agree to implement an EU-derived TSI, and what the potential implications of such a rejection would be for the operation of the Fixed Link. We are also interested to hear of the potential scenarios in which the UK would request that an NTSN be given effect to on the French-half of the Fixed Link.

On a linked point, the Committee understands that NTSNs will be given effect to in the UK by administrative means. Whilst an EU Member State, EU 'parent' TSIs were directly applicable EU tertiary law which were scrutinised by the European Scrutiny Committee in the Commons. Any system that copies over or gives equivalent effect to the content of EU TSIs in the UK must provide the opportunity for Parliament to assess their legal and/or political importance. We seek an undertaking from you that, should the form of joint regulation you propose be taken forward with France, you will give due regard to Parliament's role in assessing their potential implications for UK law and policy.

We require a response to this letter within 10 working days.

5 Northern Ireland Protocol: Changes to EU alcohol duty legislation[20]

These EU documents are politically important because:

- they amend EU legislation on alcohol duty, which is due to remain applicable in Northern Ireland beyond the end of the post-Brexit transition period under the terms of the Protocol on Ireland/Northern Ireland in the Withdrawal Agreement.

Action

- Write to the Exchequer Secretary to the Treasury (Kemi Badenoch MP) to seek information on the implications of these legal changes for Northern Ireland under the Protocol.
- Draw these developments to the attention of the Northern Ireland Affairs Committee and the Committee on the Future Relationship with the EU.

Overview

5.1 Excise duty is a tax on certain goods that are damaging to consumer health or the environment. Within the EU, it is one of few taxes for which extensive European legislation exists, since most forms of taxation are still governed mostly or exclusively at the domestic level in each Member State.[21] In essence, EU membership requires a country to apply minimum rates of excise duty to alcohol, tobacco and energy products like fuel and electricity. As tax measures, EU rules relating to excise have to be approved unanimously by all EU countries before they can take effect.[22]

5.2 In December 2019 and July 2020, the EU agreed on several technical, but significant, changes to its rules on alcohol duty and the general administrative requirements applicable to movements of any kind of excisable good to counter duty evasion. The amendments, which our predecessors described in their Reports of 27 June 2018 and 9 January 2019 when they were still being debated, are due to take effect in 2022 and 2023. Although the UK of course left the EU on 31 January 2020 and will cease to be bound by EU law when the post-Brexit transition period ends at the end of the year, it has also agreed a special Protocol on Ireland/Northern Ireland with the EU under which European rules on goods,

20 (a) Proposal for a Council Directive laying down the general arrangements for excise duty; (b) Proposal for a Decision on computerising the movement and surveillance of excise goods (recast); (c) Proposal for a Council Regulation amending Regulation (EU) No 389/2012 on administrative cooperation in the field of excise duties as regards the content of electronic register; (d) Proposal for a Council Directive amending Directive 92/83/EEC on the harmonization of the structures of excise duties on alcohol and alcoholic beverages; Council and COM number: (a) 9571/18 + ADDs 1–3, COM(18) 346; (b) 9567/18 + ADD 1, COM(18) 341; (c) 9568/18, COM(18) 349; (d) 9570/18 + ADDs 1–2, COM(18) 334. Legal base: (a), (c) and (d) Article 113 TFEU; special legislative procedure; unanimity; (b) Article 114 TFEU; ordinary legislative procedure; QMV; Department: HM Revenue & Customs; Devolved Administrations: Not consulted; ESC numbers: (a) 39854; (b) 39847; (c) 39840; (d) 39836.

21 The other exception to this rule is Value Added Tax (VAT), which is also the subject of extensive EU legislation. See for more information the separate chapter in this Report on the European Commission's Taxation Action Plan of July 2020.

22 Under Articles 113 and 115 TFEU, taxation policy is one of the few remaining areas of EU competence where measures must be agreed by unanimity among all Member States, rather than by Qualified Majority. See for more information the chapter on the EU's "Taxation Action Plan" elsewhere in this Report.

including those relating to excise duty, are meant to continue applying in Northern Ireland until at least 2026.[23] As part of this arrangement, amendments to such legislation—even if agreed at EU-level only after the UK ceased to be a Member State—would in principle also apply in Northern Ireland like they do in the EU.

5.3 The Government's recent proposals under the Internal Market Bill, which would allow Ministers to unilaterally alter the operation of certain elements of the Protocol, would not in themselves affect the envisaged continued application of EU excise duty legislation in Northern Ireland.[24] We have therefore considered the recent amendments to the EU's Excise Directives in more detail in the remainder of this chapter.

The EU's excise duty legislation

5.4 Excise duty, like Value Added Tax (VAT), is extensively regulated at European level because common rules are considered necessary "to prevent trade distortions in the Single Market, ensure fair competition between businesses, and reduces administrative burdens for companies".[25] The EU's current Excise Directives[26] principally serve to set the *minimum* duty rates that Member States must apply to many products like cigarettes, wine and beer.[27] Individual countries are free to impose *higher* rates of duty on these products, and many do so. For example, there is no requirement under EU law to apply any duty on wine, but the UK nevertheless imposes an excise duty rate of £2.98 per litre on most bottles of wine.[28]

5.5 The other major function of the EU's excise legislation is to establish the so-called "common provisions", for example to determine which EU country excise duty revenue on a specific sale belongs to,[29] as well as setting out "rules on the production, storage and movement of excise products".[30] Goods covered by the Directives become subject to excise duty at the moment they are produced or imported into the EU, but the payment of the

23 The regulatory alignment provisions of the Protocol can become inoperative by vote of the members of the Northern Ireland Assembly, which will hold a vote on this matter for the first time by December 2024. If they vote against continued alignment with the EU, the relevant provisions of the Protocol—including Article 8 on VAT and excise—will cease to apply at the end of 2026.

24 The Bill would allow the Government to dis-apply the State aid provisions of the Protocol and any requirements under EU law to observe customs-related "exit procedures"—such as export or exit summary declarations—on goods moved from Northern Ireland to Great Britain. That would also affect the movement of excise goods in that direction. The longer term political and legal implications of the disagreement over the Protocol are unclear.

25 European Commission, "Excise duties on alcohol, tobacco and energy" (accessed 27 August 2020).

26 There are five main pieces of EU excise legislation: the Common Provisions Directive (Directive 2008/118/EC); the Alcohol Duty Structures Directive (Directive 92/83/EEC); the Alcohol Duty Rates Directive (Directive 92/84/EEC); the Tobacco Duty Directive (Directive 2011/64/EU); the Energy Taxation Directive (Directive 2003/96/EC); and the Excise Movement & Control System Decision (Decision 2020/263).

27 However, the minimum excise duty rates contained in the EU rules have not been updated since the early 1990s and most Member States—the UK included—exceed the thresholds by substantial margins. for example, there is no minimum level of excise duty on wine under EU law, but the UK applies a standard rate of £288,65 per hectolitre of still wine.

28 The applicable duty rate differs depending on whether the wine is still or sparkling, and the alcohol content.

29 EU law states that "excise duty shall become chargeable at the time, and in the Member State, of release for consumption". It also defines what this means in different circumstances.

30 The so-called 'Common Provisions Directive' also contains, for example, guidance on the amounts of excise goods that private individuals are allowed to buy for their own use and transport from one EU country to another without being taxed on crossing the border.

tax is often deferred until the product is released for consumption. The responsibility for payment of excise duty to the relevant tax authority can lie with different companies, depending on the situation.[31]

5.6 To ensure the right amount of duty is paid, excise goods are subject to certain specific controls under EU law:

- Excise goods that enter the EU from non-Member States[32] must first clear customs and other regulatory formalities—including, if necessary, physical checks—at the EU's external border before they can be sold and consumed.

- There are no such border controls anymore between EU countries, having been abolished as part of the Single Market in the 1990s. Instead, a dedicated electronic infrastructure has been in place since 2010 to track movements of excise goods within and between Member States of the EU.[33] This Excise Movement & Control System (EMCS) must be used for example by traders where they send excise goods on which duty has not yet been paid ("duty suspension") to another Member State, to allow the EU's national tax authorities to track such movements.[34]

- Businesses also have the possibility of moving excise goods throughout the EU under "duty paid", where excise duties are paid in advance in the Member State of dispatch or importation, and then again in the country of destination (at which point the excise duty paid at dispatch can be refunded).[35] This procedure accounts for only a small proportion of all movements of excise goods between EU countries, because of the high up-front cost.

Reform of the EU Directives on alcohol duty and movement of excise goods

5.7 Although reforms of the EU's Excise Directives are typically slow because of the need for all Member States to agree on any changes unanimously, the legal framework is not

31 European Commission, "Paying excise duties" (accessed 3 September 2020).

32 This is a simplification, as EU excise rules on intra-EU movements of excisable goods do not apply to certain special territories of its Member States. Conversely, they do apply to certain non-EU countries and territories (namely Marino, Andorra and the UK Sovereign Base Areas in Cyprus, with the latter set to continue applying certain EU rules despite the UK's withdrawal from the EU under the Protocol on the Sovereign Base Areas included in the Withdrawal Agreement).

33 This electronic system replaced an earlier paper-based approach, which was not considered robust enough. The specific system to track movement of excise goods is considered necessary because the duty collected relative to the value of the goods is often high, and evasion therefore carries a potentially significant cost to national exchequers. In addition, where excise duty is used in pursuit of particular public policies—such as a decrease in alcohol or tobacco consumption—this effect is lost if the duty can be evaded.

34 This process requires the business sending the goods to have in place a "movement guarantee", a financial security which can be used if all or some of the goods do not reach their destination to compensate for the loss of tax receipts.

35 National registration or authorisation procedures for "duty paid" tend to be simpler than "duty suspension", because of the lower fiscal risk, but it costs more up-front and there is an additional administrative burden on companies because of the need to apply for refunds.

static. In December 2019 and July 2020, the EU agreed on certain reforms to Alcohol Duty Structures Directive[36] and the administrative requirements linked to movements of excise goods,[37] on the basis of proposals made by the European Commission back in May 2018.[38]

5.8 As a result of the agreed amendments to EU excise legislation, a number of changes will occur including the following:

- The maximum alcohol volume in lower-strength beer to which EU countries can apply a reduced rate of excise duty, rather than the general minimum rate,[39] will be increased from 2.8 per cent to 3.5 per cent.[40] This change is said to encourage consumers "to choose low-strength alcoholic drinks over stronger ones, thereby reducing alcohol intake" and incentivise brewers "to be innovative and create new products of lower alcoholic strength".

- The existing option for Member States to apply a reduced rate of excise duty to drinks made by small, independent beer and ethyl alcohol producers—subject to thresholds relating to production volumes which vary by country[41]—will be extended to producers of other types of alcoholic drinks, including wine, cider and port.

- A common certification system will be put in place requiring each EU country issue official confirmation of a brewer's status as a small producer, or allowing them to self-certify as such. The company can then use this certificate when selling its products in another EU Member State, to make it easier for the tax authorities there to determine whether the producer meets the relevant domestic requirements to benefit from the reduced duty rate for small producers in that country. The new rules state that "Member States shall […] recognise the certificate for producers […] issued by another Member State, except in duly justified circumstances" such as suspected duty "evasion, avoidance or abuse".[42]

36 More specifically, in July 2020 the Council of the EU agreed to amendments to the Alcohol Structures Directive (Directive 92/83/EEC) by means of Directive 2020/1151/EU.

37 These changes, formally adopted in December 2019, were made via three new pieces of EU legislation: Council Directive (EU) 2020/262 laying down the general arrangements for excise duty (recast); Regulation (EU) 2020/261 on administrative cooperation in the field of excise duties as regards the content of electronic registers; and Decision (EU) 2020/263 on computerising the movement and surveillance of excise goods (recast).

38 Our predecessors had described the draft EU legislation in more detail in their Reports of 27 June 2018 and 9 January 2019.

39 Typically, EU law requires EU Member States to apply excise duty to beer of €1.87 per hectoliter or €0.74 per hectoliter per degree Plato. Plato is a measurement of how much beer has been mixed with non-alcoholic additives or beverages; its application to determine the relevant excise duty (which, under EU law depends on alcohol content) varies between the Member States that use it. Degrees Plato are not used in the UK.

40 Article 5 of the Alcohol Structures Directive currently states that "Member States may apply reduced rates, which may fall below the minimum rate, for beer with an actual alcoholic strength by volume not exceeding 2,8 % vol."

41 EU excise legislation sets the maximum annual production volume before a brewer or producer becomes ineligible to benefit from reduced duty rates on its product under all circumstances. These thresholds are set at 10 hectoliters for ethyl alcohol producers, and 200,000 hectoliters for beer. Under these latest amendments, the thresholds for other products will be 250 hectoliter for "intermediate products" like port and sherry; 15,000 hectoliters for "other fermented beverages" like cider; and 1,000 hectoliter for wine.

42 This new arrangement was introduced because small brewers at present may struggle to prove they are entitled to a lower rate of duty when selling their products in another Member State, because the tax authorities in the country of sale do not know if the production volumes are below the statutory threshold. Customs authorities in the EU country of sale can request confirmation from the country of origin about those production volumes for a specific producer, but not all EU Member States issue formal confirmation of this kind and, secondly, not all Member States recognise the validity of such confirmation even when it is issued

- The legal text containing the conditions for application of the exemption from excise duty rules for denatured alcohol not meant for human consumption, used for example in cleaning products, is to be made clearer.

- There will be a number of "highly technical" changes[43] to the EU's general legal framework for excise duties on alcohol, tobacco and energy products, with the aim of facilitating trade and increasing the transparency of movements of excise goods as a means of reducing excise duty fraud.[44]

- Two optional exemptions from excise duty for certain alcoholic products sold in the UK will be removed, as they are no longer applied by HMRC and therefore obsolete.[45]

5.9 The changes relating to the application of excise duty to alcoholic drinks are due to take effect from 1 January 2022, while the technical changes to the administrative framework for movements of excise goods are scheduled to be fully operational by February 2023. The amendments recently agreed do not include any increase or decrease in the minimum duty rates that EU countries must impose for different types of alcohol or other excise goods.[46]

Implications of the EU's excise reforms for the UK

5.10 The UK left the European Union on 31 January 2020, subject to the conditions set out in the Withdrawal Agreement ratified by both sides earlier this year. In particular, the Government will be required to continue applying EU legislation—including excise rules—until the end of the post-Brexit transition period on 31 December 2020. Moreover, to avoid the need for customs and regulatory infrastructure to check goods at the UK's border with Ireland after the transition period ends, the Withdrawal Agreement also contains a "Protocol on Ireland/Northern Ireland" ("the Protocol"). In essence, this requires the Government to continue applying EU legislation on goods in respect of Northern Ireland until at least 2026.[47]

5.11 Of particular relevance here is that Article 8 of the Protocol specifically includes EU excise (and Value Added Tax) legislation in this arrangement, meaning the aforementioned Excise Directives will continue to apply in Northern Ireland beyond the end of 2020. In practice, this means that traders can continue to transport alcohol, tobacco and energy products across the land border on the island of Ireland without physical customs formalities for the foreseeable future, for example through continued use of the "duty suspension" procedure referred to earlier. However, this also means that excise goods

43 They were described as such in the Explanatory Memorandum submitted by HM Treasury on the original European Commission proposals on which the new legislation is based (16 June 2018).

44 The changes include, for example, increased alignment between the EU's customs and excise procedures to ensure consistency across the two regimes for excise goods imported into the EU from non-EU countries.

45 These obsolete exemptions from excise duty were for certain 'concentrated malt beverages' and certain 'aromatic bitters'.

46 A 2006 proposal to increase the minimum rates of excise on alcoholic drinks (which were established in 1992) in line with inflation was formally withdrawn in 2015 because there was no unanimous support among the Member States for the changes proposed. See Commission document COM(2006) 486.

47 The regulatory alignment provisions of the Protocol can become inoperative by vote of the members of the Northern Ireland Assembly, which will hold a vote on this matter for the first time by December 2024. If they vote against continued alignment with the EU, the relevant provisions of the Protocol—including Article 8 on VAT and excise—will cease to apply at the end of 2026.

entering Northern Ireland from outside the EU—*including from Great Britain*—would in principle need to undergo fiscal formalities and clearance as imports on entry into ports like Belfast and Larne.[48]

5.12 The provisions of the Protocol that require continued regulatory alignment of Northern Ireland with EU law are "dynamic". This means that any references to specific EU legislation "shall be read as referring to that Union act as amended or replaced".[49] As a result, the changes to EU excise legislation described in paragraph 8 above will in principle also apply in Northern Ireland when they take effect. However, Article 8 of the Protocol also provides the basis for potential derogations, waivers, or adaptations from EU law for Northern Ireland. In particular, the UK-EU Joint Committee established by the Withdrawal Agreement can take formal decisions, with the consent of both sides, to "adopt measures for [their] proper application, as necessary", including by "taking into account Northern Ireland's integral place in the United Kingdom's internal market".

5.13 The Joint Committee has not taken any Decisions supplementing Article 8 of the Protocol as of 1 October 2020, and the Government has not publicly stated whether it has proposed any specific adaptations or derogations for Northern Ireland relating to excise duty for the EU to consider. Any such discussions on the implementation of Article 8 are likely, in any event, to have been caught up in the wider political disagreement surrounding the Protocol following the publication of the Government's Internal Market Bill in September 2020.

5.14 In terms of the practical effect of the changes to EU excise rules described above as and when they apply in Northern Ireland, any facilitations that make trade in excise goods between EU Member States easier will also, in principle, apply to trade between Northern Ireland and the EU. Similarly, any new options for reduced rates for specific types of alcoholic drinks, or for drinks made by small, independent producers, will also be available for Northern Irish products at the UK Government's discretion.[50] However, we note that the Government has recently announced it intends to reduce the availability of small brewers duty relief for craft beer breweries,[51] and it has not made use of the option, under EU law, of introducing duty relief for small spirits producers. Whether the Government may therefore introduce new duty relief schemes for wine and cider in Northern Ireland under the Directive is unclear.

5.15 As regards the new certification system for small, independent producers of alcoholic drinks, brewers in Northern Ireland will be able to obtain such a certificate that may make it easier for them to sell their products under reduced duty rates in EU Member States. Certification issued under the Alcohol Duty Structures Directive relating to Northern Irish companies should, in principle, be treated the same as those issued in or by one of the remaining 27 Member States (and therefore automatically recognised in the EU "except in

48 Similarly, the UK's exit from the EU's excise arrangements means new formalities and checks will be applied to excise goods moved from Great Britain to the EU, in addition to other applicable customs and regulatory controls on goods transported between the UK and the EU when it leaves the Single Market and Customs Union.

49 Article 13 of the Protocol on Ireland/Northern Ireland.

50 This is irrespective of whether it chooses to implement them in the rest of the UK, where excise legislation can be set without the constraints of EU law after the transition period ends.

51 Written Ministerial Statement HCWS400 (21 July 2020). The Financial Secretary to the Treasury used this Statement to announce that the Finance Bill 2021–2021 would introduce an earlier start to the tapering of Small Brewers Relief, with only those producing 2,100 hl or less per year able to get the full 50 per cent duty relief on their beer (compared to a threshold of 4,999 hl at present).

duly justified circumstances”). While there is nothing to stop the Government from also issuing similar certification to brewers based elsewhere in the UK, the requirement for EU countries to accept such certificates as proof that a producer meets the locally-applicable requirements to benefit from reduced duty would not apply. They would therefore be free to reject or ignore UK-issued certification of “small brewer” status for companies in Great Britain.

The Government’s position on the EU excise reforms agreed in December 2019 and July 2020

5.16 The changes to the EU’s rules on alcohol duty and movement of excisable goods were first proposed by the European Commission in May 2018. The Government therefore had the ability to provide input into the negotiations on the final shape of the draft legislation for a considerable period of time before the UK formally left the European Union on 31 January this year.

5.17 In the Government’s original Explanatory Memorandum on the proposals in June 2018, the then-Exchequer Secretary to the Treasury (Robert Jenrick MP) broadly welcomed the proposed changes.[52] In December 2018, the Minister wrote with a further update on the negotiations within the EU’s Council of Ministers on the excise reform package, which had resulted in broad agreement on the technical finishes to the proposals. He noted that the UK is “in favour [of] or neutral” on the draft legal texts, with “no ‘red line’ issues”. Ultimately, the Government voted in favour of the amendments to the EU’s excise legislation on movements of goods when it was presented to the Council for formal adoption in December 2019.[53] It did not have a vote on the amendments to the Alcohol Duty Structures Directive, because it was voted on in July 2020, after the UK had already left the EU.

5.18 We are not aware of any public statements from the Government about either the substance of the latest EU excise reforms or their potential implications for Northern Ireland under the Protocol specifically. Indeed, as regards the continued effect of EU excise legislation in Northern Ireland more generally, information has been lacking. While the European Commission in March 2020 published information on how it expects these rules to be applied under the Protocol,[54] the UK Government, by contrast, is yet to publish detailed information on the practical ramifications of the Protocol for movements of excise goods between Great Britain and Northern Ireland.

5.19 In the section on “VAT and excise” in its Command Paper of 20 May 2020 on implementation of the Protocol, the Government said only that it was “confident that we

52 At the time, he expressed some reservations with respect to the interaction between a proposed EU definition of ‘cider’, since abandoned, with current UK practice, as well as the cost-benefit analysis of extending the EMCS to ‘duty paid’ intra-EU movements.

53 Council Regulation (EU) 2020/261 of 19 December 2019 amending Regulation (EU) No 389/2012 on administrative cooperation in the field of excise duties as regards the content of electronic registers, Decision (EU) 2020/263 of the European Parliament and of the Council of 15 January 2020 on computerising the movement and surveillance of excise goods (recast), and Council Directive (EU) 2020/262 of 19 December 2019 laying down the general arrangements for excise duty (recast).

54 The Commission’s notice confirms, in particular, the EU’s view that transactions involving movements of goods between Northern Ireland and the other parts of the United Kingdom will be regarded as imports or exports for the purpose of EU rules on excise, while movements of excise goods between Northern Ireland and EU Member States “will be treated as movements between Member States”. In addition, the taxation of excise goods—e.g. the minimum rates—“will be subject to the applicable product specific Directives on excise structure and rates”.

can use the flexibilities available, in the context of the wider commitments to Northern Ireland's place in the UK internal market, to implement these aspects of the Protocol in a way which minimises new costs and burdens on businesses in Northern Ireland". However, as noted, the Government has not published the specifics of proposals (if any) presented to the EU within the Joint Committee to minimise the impact of the continued application of EU excise laws in Northern Ireland. In particular, it is unclear if the Government is seeking to agree any derogations from the excise-related border formalities that EU law will otherwise require HM Revenue & Customs to apply when alcohol, tobacco and energy products are moved between Great Britain and Northern Ireland under the Protocol.

5.20 It is also relevant in this respect that the EU's adoption of new rules on alcohol duty and movement of excise goods are only the start of a wider process of excise duty reform. The European Commission is also considering draft legislation to amend the EU's Directives governing excise duty on tobacco and energy products, as well as preparing potential changes to the European rules on cross-border distance sales of excise goods. As the underlying EU legislation that would be the subject of such amendments is included in the alignment provisions of the Protocol, those proposals—whose legislative timetable is uncertain—will equally be relevant for the UK. If the Protocol is still in effect when any new EU legislation in those areas becomes applicable, they are likely to affect the Northern Irish excise system and potentially also the movement of goods to and from the rest of the UK.

5.21 More broadly, for future European Commission proposals to amend or replace any of the pieces of EU legislation to which Northern Ireland must stay aligned under the terms of the Protocol, the Government's role will be limited. The Withdrawal Agreement does not accord the UK any continued formal role in the EU's legislative processes, even where it is considering rules that will or may apply in Northern Ireland. The Government will—at best—have a consultative role in the process establishing any new EU legislation that may in due course need to be applied in Northern Ireland, and be able to propose, but not impose, derogations or adaptations to such legislation within the UK-EU Joint Committee.

Conclusions and action

5.22 The continued application of EU excise law in Northern Ireland under the terms of the Protocol in the Withdrawal Agreement raises many questions, with only a few months left before these new and untested arrangements are due to become operational when the transition period ends. In light of the recent amendments to the EU's Excise Directives agreed by the remaining Member States, we have written to the Exchequer Secretary to the Treasury (Kemi Badenoch MP) to clarify if the Government has any concerns about this new EU legislation in the context of its application to Northern Ireland in the future. A copy of that letter is annexed to this Report.

5.23 We will also continue to push the Government for clarity on the practical implementation of the new excise arrangements more generally, in particular the way in which EU legal requirements for specific excise-related customs formalities on alcohol, tobacco and energy products will be applied to movement of such goods between Great Britain and Northern Ireland. Similarly, the potential ramifications of the upcoming negotiations at EU-level for reform of the excise duty rules applicable to tobacco and energy

products may have important consequences for Northern Ireland. The Government will need to inform Parliament, in due course, about its engagement with the EU institutions to ensure any resulting legislation, insofar as it may be applicable under the Protocol, is compatible with the interests of Northern Ireland and the UK as a whole.

5.24 In a separate chapter of this Report, the Committee has also considered the broader ramifications of EU tax policy for the UK following its withdrawal, in light of the European Commission's recent Taxation Action Plan.

5.25 In anticipation of the Minister's reply, we draw these developments to the attention of the Committee on the Future Relationship with the EU, the Northern Ireland Affairs Committee and the Treasury Committee.

Letter from the Chair to the Exchequer Secretary to the Treasury (Kemi Badenoch MP)

As you will be aware, the EU has recently agreed certain amendments to its legislation on excise duties, in particular the Alcohol Duty Structures Directive and general arrangements for excise duty, including the Excise Movement & Control System.[55] We understand the changes, to take effect mostly from January 2022, relate in particular to the maximum permitted alcohol content of low-strength beer, as well as the option for countries to apply a reduced rate to different types of alcohol drinks made by small businesses and a new certification system for such "small independent producers" to make it easier for them to sell their products at a reduced rate under the applicable legislation in other EU Member States.

In light of the continued, dynamic application of EU excise legislation in Northern Ireland foreseen under the Protocol on Ireland/Northern Ireland (the Protocol) in the Withdrawal Agreement beyond the end of the transition period on 31 December this year, these changes are still directly relevant for the UK. We note in particular that the clauses of the Internal Market Bill relating to the Protocol would not give Ministers the power to alter or dis-apply its provisions relating to EU excise duty legislation.

While the changes appear relatively technical, the negotiations between EU Member States lasted well beyond the timetable envisaged by your predecessor in his letter of 13 December 2018, at which point he expected "agreement […] in early 2019". We also note that the Government, in December 2019, voted in favour of the sub-set of the amendments related to the general arrangements for excise duty, while discussions on alcohol duty continued until their formal adoption in July this year.

In light of this, we are writing to request:

- the Government's assessment of the implications of the recent EU excise duty reforms for Northern Ireland under the Protocol, and in particular whether there

55 We are referring in particular to Council Directive (EU) 2020/262 of 19 December 2019 laying down the general arrangements for excise duty (recast); Decision (EU) 2020/263 of the European Parliament and of the Council of 15 January 2020 on computerising the movement and surveillance of excise goods (recast); Council Regulation (EU) 2020/261 of 19 December 2019 amending Regulation (EU) No 389/2012 on administrative cooperation in the field of excise duties as regards the content of electronic registers; and Council Directive (EU) 2020/1151 of 29 July 2020 amending Directive 92/83/EEC on the harmonization of the structures of excise duties on alcohol and alcoholic beverages.

are any elements which the Government believes are detrimental or otherwise of concern, especially in respect of Northern Ireland's unfettered access to the UK's internal market when the Protocol takes effect;

- more generally, whether the Government sees any need for particular adaptations to or derogating measures from EU excise legislation for Northern Ireland under the Protocol, by means of a Decision of the UK-EU Joint Committee or by similar means to the unilateral powers contained in the Internal Market Bill; and
- what, if any, policy changes the Government envisages making to alcohol duty arrangements in Northern Ireland as a result of the new flexibilities that will take effect under EU law from January 2022, in particular with respect to the certification process for small producers and the new small producers' duty relief schemes.

More generally, as you will be aware from our correspondence with your colleague, the Financial Secretary to the Treasury, the Committee remains very concerned about the lack of information about the practical implementation of Article 8 of the Protocol and how EU VAT and excise duty legislation will be applied in Northern Ireland and to its trade with the rest of the UK from 1 January next year. In light of the European Commission's on-going preparations on further legislative proposals to revise the rules on tobacco, energy and distance selling of excise goods, all of which may also apply in Northern Ireland in due course, we will want to question the Government in due course about its engagement with the EU to ensure that any such reforms take into account the interests of Northern Ireland and the UK as a whole.

6 EU Taxation Action Plan: potential implications for the UK[56]

These EU documents are politically important because:

- this "Action Plan" sets out the European Commission's agenda for reform of EU tax policy over the coming years. Some of the proposals it contains are likely to have an impact on the UK outside the EU in due course as one of its closest and biggest trading partners; and
- in particular, the Action Plan refers to multiple proposals for changes to EU VAT and excise duty legislation, which are of direct relevance as they may apply in Northern Ireland beyond the end of the post-Brexit transition period under the terms of the Protocol on Northern Ireland in the Withdrawal Agreement governing the UK's exit from the EU.

Action

- Draw the European Commission's tax reform agenda to the attention of the Business, Energy & Industrial Strategy Committee, the Committee on the Future Relationship with the EU, the Northern Ireland Affairs Committee and the Treasury Committee.

Overview

6.1 In July 2020, the European Commission published an 'Action Plan' for reform of EU tax policy over the coming years. It is aimed at addressing tax avoidance and tax-based anti-competitive practices, and streamlining European tax rules to make doing business in the EU, especially between different Member States, easier. The UK left the European Union on 31 January 2020, but is likely to be affected, directly or indirectly, by several of the EU tax policy initiatives contained in the Action Plan even after EU law ceases to apply to the UK at the end of the post-Brexit transition period on 31 December 2020.

6.2 In particular, the Commission confirmed its intention to table a series of proposals to reform EU legislation on VAT and on excise duties for alcohol, tobacco and fuel. These are of direct relevance to the UK, because Northern Ireland will be required to continue applying European VAT and excise rules affecting goods beyond the end of the transition period under the terms of Article 8 of the Protocol on Ireland/Northern Ireland in the Withdrawal Agreement. The Protocol itself has recently become the focal point of a serious political disagreement between the UK and the EU following the publication of

56 (a) An Action Plan for Fair and Simple Taxation supporting the Recovery Strategy; (b) Communication from the Commission on Tax Good Governance in the EU and beyond; (c) Proposal for a COUNCIL DIRECTIVE amending Directive 2011/16/EU on administrative cooperation in the field of taxation; Council and COM numbers: (a) COM(2020) 312; (b) COM(2020) 313; (c) 9753/20, COM(2020) 314; Legal base: (a) and (b) Not applicable; (c) Articles 113 and 115 TFEU; special legislative procedure; unanimity; Department: HM Treasury; Devolved Administrations: Northern Ireland consulted; ESC numbers: (a) 41409; (b) 41410; (c) 41411.

the Government's Internal Market Bill. While Ministers are seeking powers under that Bill to unilaterally override certain provisions of the Protocol,[57] these powers as drafted do not relate to Article 8 on VAT and excise.[58]

6.3 In addition, some parts of the Action Plan may have ramifications for the UK's economic and political relationship with the EU more broadly in the future irrespective of the Protocol.

6.4 For example, the Commission has proposed expanding the scope of administrative cooperation between tax authorities in the EU, an area in which it is seeking legal commitments from the Government as part of the new UK-EU trade agreement. It also wants to overhaul the EU's process for the screening of alleged anti-competitive non-EU tax regimes, the so-called "Code of Conduct" process, in which the UK is likely to be included when the transition period ends. More specifically, the Commission is seeking a more comprehensive toolkit of "defensive" (retaliatory) measures where a non-EU country refuses to alter a tax regime to which the EU objects. Given the UK's economic size and proximity, the Commission's plans are linked closely to the wider, and difficult, discussions that are on-going between the Government and the EU on the issue of State aid under a "level playing field" arrangement between the two.[59] In the absence of a bilateral mechanism to resolve disputes about selectively-beneficial tax policies when the UK leaves the EU's State aid regime at the end of transition, for example in relation to the tax incentives the Government is planning for free ports, the EU could use its Code of Conduct mechanism to exert pressure on the UK.

6.5 In light of the continued relevance of certain aspects of EU tax policy for the UK, we have described the political and legal context of the recent Action Plan, and the individual proposals it contains, in more detail below. We consider that Parliament should monitor closely the implementation of those policies that will be of direct relevance to Northern Ireland under the Protocol, as well as those that may affect the UK's economic and political relationship with the EU more generally.

The European Commission's Taxation Action Plan of July 2020

6.6 Taxation is an area of public policy where the European Union has relatively limited competence to set legislation. The EU Treaties restrict its ability to direct the national tax laws of its Member States, primarily in cases considered necessary to protect the "functioning of the internal market" of the EU collectively, namely where divergent or discriminatory national approaches could hinder the free flow of goods, services and

57 The Bill would allow the Government to dis-apply the State aid provisions of the Protocol and any requirements under EU law to observe "exit procedures"—such as export or exit summary declarations—on goods moved from Northern Ireland to Great Britain. That would also affect the movement of excise goods in that direction. The longer term political and legal implications of the resulting disagreement over the implementation of the Protocol are unclear.

58 The Government is reportedly seeking similar powers to dis-apply certain elements of the Protocol under the upcoming Finance Bill in relation to import duties on trade between Great Britain and Northern Ireland. The Government has referred to the imposition of import VAT on such trade in this context, meaning the Bill could also include proposals relating to Article 8. The Committee will revert to this matter in the future if necessary.

59 Separately, the European Commission is also preparing other EU tax policies, for example a carbon levy on imports and new taxes to fund the EU budget, which it had already announced before publication of the Action Plan and are therefore not considered in detail in this chapter.

capital between Member States.[60] It is also one of the few areas where the adoption of new EU rules, after being proposed by the European Commission, still requires unanimity among the Member States in the Council of Ministers, in effect giving each country a veto.

6.7 The result of this approach has been a slow but gradual expansion of EU tax rules over the years, which affect some aspects of its Member States' domestic taxation systems more than others. Laws on 'indirect taxes'—Value Added Tax (VAT) and excise duty—have been extensively harmonised, given their impact on cross-border trade within the 'internal market', whereas EU rules on direct taxes—like income tax and corporate levies—are still the preserve of individual EU countries, but subject to mandatory exchanges of information on the tax affairs of individuals and businesses between Member States to counter tax evasion.[61] The unanimity requirement has also meant that discussions on further EU legislation related to corporation tax,[62] a financial transactions tax,[63] and VAT reform[64] have been on-going for years without an agreement currently in sight. Nevertheless, even in the absence of specific EU rules, the European Commission can bring infraction proceedings against a Member State before the Court of Justice of the EU (CJEU) if a national tax regime discriminates against companies or individuals from other Member States, and invoke 'State aid' legislation against EU countries that it believes are distorting competition by giving specific companies preferential tax treatment.[65]

6.8 Against this complex legal and political backdrop, taxation remains high on the political agenda, even more so because of the economic damage caused by the COVID-19 pandemic in 2020 and its impact on public finances across Europe. In July 2020, the European Commission published an Action Plan for reform of EU tax policy in the coming years, accompanied by a policy paper on removing unfair national tax regimes within and outside the EU. The key objectives set out in these documents are to address tax avoidance and tax-based anti-competitive practices, and to streamline European tax rules to make doing business in the EU, especially across Member State borders, easier.[66] It includes, for example, various proposals to simplify EU VAT rules, an overhaul of the

60 EU legislation harmonising the tax rules of its Member States is based on Articles 113 and 115 TFEU, which give the EU competence to act with respect to indirect taxes and direct taxes respectively. The difference is that Article 113 allows "harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition", whereas Article 115—used for other types of tax legislation—allows the EU to "issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market".

61 The rules on exchange of information on the tax affairs of individuals and businesses between EU Member States are set out in the Directive on Administrative Cooperation (DAC), which we discuss further elsewhere in this chapter in the context of the UK-EU negotiations on a new economic relationship.

62 European Commission, "Common Consolidated Corporate Tax Base (CCCTB)" (accessed 11 August 2020).

63 European Commission, "Taxation of the financial sector" (accessed 11 August 2020).

64 European Scrutiny Committee, "Value Added Tax: EU proposals for reform and the implications of Brexit" (April 2018).

65 The use of State aid rules to address EU countries' tax regimes has not been wholly successful, as shown for example by the CJEU's dismissal of the European Commission's case against Ireland in July over the latter's tax treatment of Apple. However, as a legal principle, "Member States' tax systems and tax treaties must in any event respect the fundamental Treaty principles on the free movement of workers, services and capital and the freedom of establishment […] and the principle of non-discrimination". See: European Commission, "The Lisbon Treaty and tax legislation in the EU" (accessed 11 August 2020).

66 The Commission's proposals to achieve these objectives are set out in two separate policy papers, namely a "Tax Action Plan", focussed on the specific EU taxation policies and reforms the Commission intends to pursue within the legal limits set by the Treaties, and a "Communication on tax good governance", which deals with how the Commission intends to engage with both EU Member States and non-EU countries on national tax policy issues.

EU's 'blacklisting' process for tax havens, and potential harmonisation of rules on 'tax residence'. Formal legislative proposals in these areas are expected to follow from 2021 to 2023.

6.9 In addition, the Commission's Action Plan also seeks to address the recurrent difficulty in agreeing new EU tax legislation resulting from the continued requirement for unanimity among all Member States. Instead, it wants such laws to be adopted by Qualified Majority Voting (QMV).

6.10 As we described in our Report of 19 February 2019, the Commission's efforts to introduce QMV for EU tax policy is not new: in January 2019 it proposed to make use of a "passerelle" clause[67] in the EU Treaty to gradually abolish the unanimity requirement without the need for formal amendments that would require national ratification in the Member States. The proposals did not go further because they themselves required unanimity among EU countries. The Commission's ambitions were likely also affected by a ruling of the General Court of the EU in July 2020, which quashed a decision by the European Commission requiring Ireland to seek backdated tax payments from Apple because it had failed to demonstrate the company had enjoyed an unfair tax advantage under EU State aid rules.[68] This demonstrated the limits of the EU's powers under current legislation to address what it perceives as unfair competition created by Member States' divergent national corporate tax systems.

6.11 In light of this, the Taxation Action Plan notes in particular that the Commission "will explore how to make full use of the provisions of the Treaty [….] that allow proposals on taxation to be adopted by ordinary legislative procedure", meaning the Member States would need to agree by QMV rather than each having a veto. In particular, the document refers to the potential use of article 116 TFEU as a legal base for future EU tax legislation.[69] This provision, which has not been used to date, allows the EU to adopt Directives to eliminate a "distortion" in competition within the EU caused by the "law, regulation or administrative action" of a particular Member State, for example a preferential tax regime for a particular multinational company, if consultation with the country concerned does not resolve the issue. This approach is likely to be politically controversial if EU countries feel their right to veto EU tax rules is being circumvented, and could be vulnerable to legal challenge before the Court of Justice of the EU (CJEU) if the resulting legislation is nevertheless adopted by QMV.[70]

67 A passerelle clause enables changes to be made to the EU Treaties without the need for a formal amendment to the Treaties requiring an Intergovernmental Conference and national ratification of an amending Treaty. In the area of tax, the Commission had proposed the use of a passerelle in Article 48(7) TEU, which would allow the applicable legislative procedure where unanimity applies—like taxation—to be changed to Qualified Majority Voting (QMV). This passerelle requires the unanimous consent of all Member States in the Council and can be vetoed by any national Parliament.

68 The European Commission can appeal this decision, on points of law, to the Court of Justice of the EU (CJEU) for a final ruling within two months and ten days, in this case by 25 September 2020. It is not yet clear if it intends to do so.

69 The Commission is also considering proposing an amendment to the VAT Directive that would allow it to adopt Implementing Acts—a type of EU Statutory Instrument—with technical VAT rules with the support of a Qualified Majority of Member States, avoiding the current need for unanimity in the Council. This is part of the wider effort, described elsewhere in this chapter, to move away from the unanimity requirement for EU tax policy.

70 Member States could argue that the legislation in question should have been based on the traditional legal basis for EU tax law (Articles 113 or 115 TFEU), which require unanimity. In any event, Article 116 TFEU could presumably not be used to harmonise a particular element of taxation law EU-wide, because that would go beyond what is needed to eliminate the 'distortive' effect of a particular national tax measure.

6.12 The Action Plan only contains high-level information about the substance of the individual elements of tax reform the Commission intends to pursue, with further details expected to be made public gradually in the coming years. Our initial assessment of the potential relevance to the UK of the policy initiatives contained in the Action Plan is set out below.

The continued relevance of EU tax policy for the UK

6.13 The UK left the European Union on 31 January 2020, and EU law—including tax legislation—will generally cease to have effect in the UK at the end of the post-Brexit transition period on 31 December 2020. Nevertheless, several of the EU tax policy initiatives announced in the Action Plan in July 2020 will, or are likely to be, relevant for the UK. There are, broadly speaking, three reasons why this might be the case:[71]

- First, in the Withdrawal Agreement governing the UK's exit from the EU, the Government agreed a special Protocol for Northern Ireland to avoid the need for any customs or regulatory controls on goods moving across the land border on the island of Ireland. As part of this, EU law on VAT 'concerning goods', and on excise duty, would continue to be binding in Northern Ireland until at least 2026, including amendments to those laws adopted after the UK left the EU.[72] It follows that any reform of such laws under the Action Plan can impact Northern Ireland directly and potentially its place within the UK's own internal market.[73]

- Secondly, the EU is seeking specific commitments from the UK with respect to tax cooperation and governance as part of the broader negotiations on a new UK-EU trade agreement. For example, it has proposed a mechanism for cooperation on cross-border VAT and recovery of tax claims. The EU has also asked the Government to continue applying EU rules on the exchange of information on the tax affairs of individuals and businesses with the 27 Member States on the basis of the relevant EU law as it stands at the end of the transition period. The Government appears to have resisted this to date, but with the negotiations now stretching into October 2020 the final obligations with respect to tax policy the UK and EU may make to each other are not yet known.

- Thirdly, beyond the tax-related legal commitments under the Northern Ireland Protocol and any that may be included in a future UK-EU trade agreement, there may be an inherent impact of changes to EU tax policy on the UK as a 'third country' (as they would on any other economic partner of the EU). This

71 EU law, including tax legislation, also continues to apply to and in the UK during the post-Brexit transition period set out in the Withdrawal Agreement. However, the transition is due to end on 31 December 2020, well before any of the initiatives announced by the Commission will take effect. This is therefore not relevant when considering the relevance of the Action Plan for the UK.

72 The regulatory alignment provisions of the Protocol are subject to the periodic democratic consent of the members of the Northern Ireland Assembly. They are due to vote on whether to keep those provisions in effect for the first time by 1 January 2025, and if they reject them that element of the Protocol will become inoperative after a two-year period, i.e. from 1 January 2027.

73 The clauses of the Government's Internal Market Bill, which would allow it to unilaterally alter the operation of the Protocol by means of regulations, would not apply to Article 8 on VAT and excise. Although the Government will reportedly include additional such clauses for different parts of the Protocol in the upcoming Finance Bill, their proposed scope is unclear at this stage.

would be the case in particular where EU tax policies are aimed specifically at non-EU countries, such as its 'black list' of tax havens or the carbon levy on goods imported into the EU.

6.14 Of course, new EU law on tax matters will impact the UK far less directly now that it has left the EU than it would otherwise. However, such ramifications will still exist in particular cases and the Government no longer has a veto over new EU tax legislation, even where there is an impact on the UK or its economy. By extension, the European Commission's continued efforts to introduce Qualified Majority Voting in EU tax policy are also relevant. In areas where the UK is or may still be affected by European tax rules, any weakening of the unanimity requirement could potentially magnify the impact of new EU legislation on the UK by making the adoption of such rules proceed more speedily than in the past and also, when free from the constraints of 27 national vetoes, enable the EU to pursue more ambitious or far-reaching tax legislation that would previously have been blocked.

6.15 In the sections below, we have taken a more detailed look at the policy initiatives announced in the Commission's Tax Action Plan that are, or appear to be, relevant for the UK because of one of the reasons described above.

Tax in the Northern Ireland Protocol: reform of EU VAT and excise legislation

6.16 As previously noted, the UK and EU have agreed a special arrangement for Northern Ireland in the context of the UK's withdrawal from the EU. A Protocol to the Withdrawal Agreement aims to maintain the absence of customs and regulatory infrastructure on the UK-Ireland land border even though the UK is leaving the economic structures—the Single Market and Customs Union—which led to their abolition in the first place. As part of this, EU legislation relating to the production, trade and sale of goods will continue to apply in Northern Ireland until at least 2026.

6.17 Article 8 of the Protocol requires the continued application of European rules on VAT, insofar as it "concerns goods", and on excise duty in and to Northern Ireland. This is because goods entering the EU—and therefore Ireland—are normally subject to fiscal controls to ensure the right amount of tax is paid: this covers not only any applicable import tariff, but also VAT and excise. However, for goods moved *between* EU Member States such border controls were abolished as part of the Single Market in the 1990s, based on a harmonised EU-wide statutory framework, information exchange systems based on submission of sales data by companies, and legal oversight by the European Commission and the Court of Justice. As a result, goods can currently be moved between Northern Ireland and Ireland without controls.

6.18 The Protocol aims to keep these systems and mechanisms in place even when the UK as a whole leaves the Single Market at the end of transition, meaning no new infrastructure is necessary on the land border to apply fiscal controls. However, the consequence is that the relevant VAT and excise formalities will instead be carried out on goods entering

Northern Ireland from outside the EU, including from Great Britain.[74] This arrangement is unique and untested, and we have repeatedly raised concerns with the Government about its implications for Northern Ireland, the burden it places on businesses there, and for its place within the UK's internal market.[75] The European Commission recently proposed a specific amendment to the EU VAT Directive in relation to the VAT identification number for businesses in Northern Ireland under the Protocol.[76] We have considered this proposal in a separate chapter of this Report.

6.19 The Protocol itself has recently become the focal point of a serious political disagreement between the UK and the EU following the publication of the Government's Internal Market Bill While Ministers are seeking powers under that Bill to unilaterally override certain provisions of the Protocol,[77] these powers as drafted do not relate to Article 8 of the Protocol on VAT and excise.[78] Nevertheless, the exact way in which EU VAT and excise law will operate in Northern Ireland is subject to further uncertainty because the European Commission has made a number of substantial proposals for reform of EU VAT rules in recent years, which remain under negotiation.

6.20 These pending EU VAT proposals cover, in particular, the minimum rates applicable to specific goods and how businesses account for VAT on sales between EU countries (and, while the Protocol is in force, Northern Ireland).[79] To add to this complexity, the Commission's new Taxation Action Plan announced a *further* suite of proposed legislative changes to EU VAT and excise law beyond those already pending. While the Protocol is in force, these reforms—as and when enacted by the EU's Council of Ministers—will be directly relevant for Northern Ireland and therefore merit special attention from both the Government and Parliament.[80]

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74 The Protocol also contains special arrangements with respect to the application of customs duties on goods entering Northern Ireland from Great Britain and from non-EU countries. These are beyond the scope of this Report, but are covered extensively in the Northern Ireland Affairs Committee Report, "Unfettered Access: Northern Ireland and customs arrangements after Brexit" (14 July 2020).

75 See for example our 11th Report of the Session 2019–2021.

76 European Commission document COM(2020) 360.

77 The Bill would allow the Government to dis-apply the State aid provisions of the Protocol and any requirements under EU law to observe "exit procedures"—such as export or exit summary declarations—on goods moved from Northern Ireland to Great Britain. That would also affect the movement of excise goods in that direction. The longer term political and legal implications of the resulting disagreement over the implementation of the Protocol are unclear.

78 The Government is reportedly seeking similar powers to dis-apply certain elements of the Protocol under the upcoming Finance Bill in relation to import duties on trade between Great Britain and Northern Ireland. The Government has referred to the imposition of import VAT on such trade in this context, meaning the Bill could also include proposals relating to Article 8. The Committee will revert to this matter in the future if necessary.

79 The technical detail of the application in Northern Ireland of EU VAT law concerning goods as it currently stands is still subject to discussions between the Government and the EU within the UK-EU Joint Committee established by the Withdrawal Agreement. The Joint Committee, by mutual consent of the UK and EU, can adopt formal Decisions containing derogations or exemptions for Northern Ireland where EU VAT law would otherwise apply, but it is not clear what the Government has proposed in this respect, or what the EU is willing to countenance.

80 Under the Protocol, the UK may have to apply any changes agreed by the remaining 27 Member States to EU VAT and excise law where they fall within the scope of the alignment provisions of the Protocol. However, the Government will have no formal input when this new EU legislation is drafted and, more importantly, it no longer has a veto. The Protocol only provides for a "Joint Consultative Working Group" in which "the [EU] shall inform the United Kingdom about planned Union acts within the scope of this Protocol, including Union acts that amend or replace the Union acts listed in the Annexes to this Protocol".

6.21 This Committee and its predecessors have covered the Commission's earlier VAT reform proposals on rates and cross-border sales extensively in previous Reports,[81] and will continue to report any relevant developments in that regard to the House while an EU scrutiny system is in place. With respect to the additional proposals announced in the Action Plan in July 2020, it is not yet possible to establish the precise implications under the Protocol given that the Commission is only expected to publish draft legal texts from 2021 to 2023. However, to make clear the extent to which EU legislative activity in this area will continue to be relevant to UK, we have listed those EU VAT and excise reforms announced in July 2020 which appear to be relevant to Northern Ireland below and for which further scrutiny is likely to be required due course.

6.22 In particular, the European Commission intends to propose:[82]

- the introduction of a single EU VAT identification to replace national registration, which a company from any EU country would be able to use when selling goods or services both domestically and in other EU Member States. It is unclear how this might affect Northern Ireland, given it remains bound by EU VAT law only insofar as it concerns trade in goods;

- extending the 'One Stop Shop' (OSS) mechanism for declaration and payment of VAT on business-to-consumer sales. The OSS in many cases allows a business in one EU country selling goods or services to a consumer in another EU Member State to account for the VAT domestically rather than having to follow the VAT rules of the country of the customer and thus making it easier to sell on a cross-border basis.[83] The Commission wants to expand the scope of the mechanism to all business-to-consumer (B2C) sales not yet covered, so that businesses "should then be able to report all B2C transactions in the EU through a single VAT return to be submitted in their Member State of establishment". The OSS mechanism is expected to be open to Northern Irish businesses when selling goods to consumers in Ireland or other EU countries;

- a new mechanism for the resolution of disputes relating to Value Added Tax claims between EU countries, which might apply to any VAT disputes involving the sale of goods between Northern Ireland and an EU Member State like Ireland.

- adapting the VAT Directive to the digital economy, to clarify when persons offering goods or services via online platforms like Amazon must charge VAT, the responsibilities of platforms in collecting the tax on their behalf, and the VAT treatment of the service offered by the platform itself in facilitating such transactions;

- further harmonisation of VAT reporting obligations for businesses, especially in respect of cross-border trades between Member States (and, potentially,

81 In particular, the European Scrutiny Committee considered the then-pending proposals for reform of EU VAT law extensively in its Report of April 2018, "Value Added Tax: EU proposals for reform and the implications of Brexit".

82 Depending on the detail of the listed Commission proposals in due course, it may be necessary to read "EU country" or "EU Member State" in the descriptions as including the UK in respect of Northern Ireland.

83 The tax authority of the Member State where the business is based then remits the amount collected to its counterpart in the Member State of the customer, where the tax is due. The OSS was originally applied only to the sale of digital services from one EU country to a consumer in another, but will be expanded from 2021 to B2C sales of other services and distance sales of goods.

Northern Ireland with respect to goods). The Commission is also investigating the possibility of further automated exchange of tax-related data on cross-border transactions, to increase detection rates for VAT fraud and evasion on trade between EU countries. HM Revenue & Customs will retain access to the EU's 'VAT Information Exchange System' (VIES) in respect of cross-border sales of goods between Northern Ireland and EU countries, this may also affect its legal obligations under the Protocol;[84]

- the creation of a reinforced analytical capacity to identify and address VAT fraud within Eurofisc, a network where EU countries exchange and jointly analyse data on suspected VAT fraud and evasion. Depending on the nature of the Commission proposal, this may have implications for the information HM Revenue & Customs will be required to share in respect of businesses in Northern Ireland, or even be directed to carry out investigations there at the request of the tax authorities of an EU country;[85] and

- with respect to the special excise duty rules applicable to sales of alcohol and tobacco within the EU, the Commission intends to look at simplifications that would make it easier for businesses to "distance sell" such goods online. While not strictly part of the Taxation Action Plan because it had already been announced, the Commission is also considering the options for a more general overhaul of the EU's excise duty rules and rates for tobacco and fuel and electricity, both of which continue to apply in Northern Ireland under the Protocol. In July 2020, the EU's Member States reached agreement on a revision of the EU's Directive on alcohol duty, with respect to which we have written to the Treasury separately to ascertain its effects for Northern Ireland.[86]

6.23 The Action Plan also contains various initiatives related to VAT levied on services.[87] As the Protocol in the Withdrawal Agreement only covers trade in goods, any such changes would not apply in Northern Ireland, where VAT on services will be in the UK's exclusive domestic control. However, they may still have broader economic effects that could have an impact on the UK.[88] The EU has proposed a further Protocol between the UK and the EU on "administrative cooperation and mutual assistance" to fight VAT

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84 VIES is the principal replacement for fiscal border controls on goods sold from one EU country to another, with national tax authorities able to access information on goods and services reported to have been bought from or sold to a business in their jurisdiction by or from a business in another EU country. At present, such information is exchanged on a 'manual' (i.e. ad hoc) basis. See Council Regulation 904/2010 (listed in the Protocol on Ireland/Northern Ireland).

85 The UK, when it was an EU Member State, refrained from joining a working group within Eurofisc, called Transaction Network Analysis (TNA), because it "raises potential sovereignty concerns—for example, there is a risk that the new tool will evolve into a wider and more prescriptive joint risk analysis. This could require even more trader data and undermine UK tax sovereignty. It might also lead to HMRC investigators being directed by other Member States as to which businesses they should visit." See for more information our predecessors' Report of 23 May 2018.

86 See for more information the relevant chapter of this Report.

87 In particular, the Commission intends to evaluate the EU's approach to VAT for travel agents, financial services and passenger transport services.

88 For example, the Commission's description in its Action Plan of the planned review of VAT for both the financial services and travel agents sector refers to the effects on the "international competitiveness" of the EU's businesses in those industries. With respect to financial services, it notes that the evaluation "will take account of the rise of the digital economy (fintech) and the increase in the outsourcing of input services by financial and insurance operators as well as the way this sector is structured".

fraud and facilitate recovery of tax claims more generally as part of the wider free trade agreement.[89] In July 2020, the Treasury confirmed the UK was discussing the merits of such an arrangement with the Commission.[90]

6.24 Finally, although not a change in the substance of EU VAT law as such, the Commission also wants to introduce a limited form of Qualified Majority Voting (QMV) for the adoption of certain detailed technical rules to implement the VAT Directive, as part of its broader pursuit of the introduction of QMV for EU tax policy.[91] This new approach would in itself, however, require an amendment to the VAT Directive that can only be adopted by unanimity, and can therefore be blocked by any EU Member State.[92] The implications of such a change for Northern Ireland under the Protocol would depend on the precise areas in which QMV would be used for measures to implement EU VAT rules, and in particular whether they are relevant under Article 8 of the Protocol, as well as the extent to which the removal of the unanimity requirement in those areas might affect the substance of those rules.

Exchange of information on tax matters

6.25 In addition to the subset of European tax legislation that is directly relevant under the Northern Ireland Protocol, the EU is also seeking further legal commitments from the UK about continued cross-border cooperation to address tax evasion and avoidance as part of the new bilateral economic relationship after the end of the transition period.[93] There is some overlap between the EU's proposals in this regard and the contents of the Taxation Action Plan.

89 European Commission proposal for a "Protocol on administrative cooperation and combating fraud in the field of Value Added Tax and on mutual assistance for the recovery of claims relating to taxes and duties" (March 2020).

90 HM Treasury Explanatory Memorandum on the Taxation Action Plan (31 July 2020). It states: "The UK is committed to the principles of fair and simple taxation including through seeking to simplify the taxation process, increasing compliance and facilitating administrative cooperation internationally in so far as it is compatible with UK tax sovereignty. In respect of administrative cooperation, the Government is currently engaged through the Future Trade Agreement (FTA) talks in discussions of the Commission's proposed VAT and Recovery Protocol."

91 More specifically, the Commission wants to secure a legal authority to set such rules by means of Implementing Acts, a type of EU Statutory Instrument which are subject to the approval of a Qualified Majority of the Member States, rather than needing to obtain the unanimous agreement of all EU countries as at present. In its Action Plan, the Commission refers to this proposal as modifying its VAT Committee—an informal group of experts from the Member States—into a formal "Comitology Committee" which would have the power to approve Implementing Acts. Such an arrangement is already in place for certain the adoption of certain technical rules related to EU excise duty legislation, as well as for administrative cooperation.

92 In its Action Plan, the Commission is circumspect about the exact areas in which it wants to be able to exercise the ability to supplement the VAT Directive without the need for unanimity, noting that "the precise scope of [its] implementing powers would have to be determined". A legislative proposal on the nature of the VAT Committee is due in the fourth quarter of 2020.

93 The EU's detailed negotiating position for the trade talks with the UK, adopted by the remaining 27 Member States on 25 February 2020, stated that the UK-EU Agreement should "prevent distortions of trade and unfair competitive advantages" by upholding "common high standards in [...] relevant tax matters" that rely on "appropriate and relevant Union and international standards". These standards, they said, should be subject to "effective implementation [...], enforcement and dispute settlement, including appropriate remedies", and give either side the "possibility to apply autonomous interim measures to react quickly to disruptions of the equal conditions of competition" in areas including tax.

6.26 First, as noted above, the Commission has proposed a detailed Protocol within the UK-EU free trade agreement on "administrative cooperation and combating fraud in the field of Value Added Tax and on mutual assistance for the recovery of claims relating to taxes and duties".

6.27 Secondly, in the draft treaty text for a UK-EU agreement published by the European Commission in March 2020, the Government would in essence also be asked to continue applying the substance of existing EU legislation in relation to "exchange of information" between HM Revenue & Customs and the EU twenty-seven national tax authorities as regards "income, financial accounts, tax rulings, country-by-country reports, beneficial ownership and potential cross-border tax-planning arrangements".[94] The rules governing such exchange of confidential taxpayer data are set out in the EU's Directive on Administrative Cooperation (DAC).[95] It is relevant therefore that, alongside its Action Plan, the Commission in July 2020 also published a formal proposal to amend that Directive.[96] This would notably extend existing EU mechanisms for automatic exchange of information on income generated by sellers via digital platforms like eBay[97] and to income from royalties. The draft legislation also aims to strengthen administrative cooperation by amending how information is exchanged in relation to groups of individuals and the conduct of joint audits of a taxpayer by the authorities of multiple EU countries.

6.28 Under the Commission's version of a trade agreement with the UK, the rules on exchange of tax information between the Government and the EU's Member States would be those as in effect under EU law at the end of the transition period on 31 December 2020. The latest proposal to amend the DAC Directive would therefore have no direct implications for the UK even if it were to accept the EU's arrangements for cooperation on tax matters: the new Directive will not take effect before the end of the transition period, and therefore would not be included in the regulatory provisions 'grandfathered' into the UK-EU trade agreement as proposed by the Commission.[98]

6.29 In any event, the EU's approach to exchange of tax information appears to imply continued alignment of UK law with an EU Directive and a potential role for the Court of Justice of the EU in interpreting its provisions beyond the end of the transition period.[99]

94 In the same vein, the EU also proposed that the UK should continue applying EU rules "in relation to the fight against tax avoidance practices" (the Anti Tax Avoidance Directive) and public country-by-country reporting by credit-institutions and investment firms" (Article 89 of the Capital Requirements Directive). However, these are not subject to any changes under the Taxation Action Plan and therefore not directly relevant to this chapter.

95 On 28 May 2020, UK Chief Negotiator David Frost characterised the EU's ask as "non-regression on three specific tax measures about antiavoidance, which really equate to EU directives, again policed by a dispute settlement mechanism that involves the European Court of Justice", and the Government "have some problems with that aspect of this".

96 As the original DAC has been amended five times previously, the proposal is known as "DAC7".

97 The Treasury has stated that the proposed reporting rules for digital platforms "draw heavily on model reporting rules recently agreed at the Organisation for Economic Cooperation and Development (OECD)". However, it notes that "there are a few differences", notably the fact that the Commission proposal has a broader scope by including sales of goods, and not including the OECD's optional exclusion for start-up platforms.

98 The Commission proposal foresees the new Directive applying from 1 January 2022, but this is dependent on the agreement of all EU Member States on both the substance and timing of the proposed legislation.

99 Albeit, as noted, only with respect to the text of the Directive as it stands by the end of the transition period, notwithstanding any future amendments.

As such, the Government appears to have opposed the proposed arrangement.[100] Instead, it is seeking a much less well-defined commitment to exchange information and cooperate on tax matters. However, the proposals relating to exchange of information on income generated through digital platforms are based on international standards developed by the OECD, and in an Explanatory Memorandum the Treasury has said that it "is giving further consideration to signing up to the OECD model reporting rules" (which would, if so, provide the basis for exchange of such information between the UK and other jurisdictions, including the EU).[101]

6.30 As the negotiations with the EU on a trade agreement are on-going, the final shape of any tax-related commitments the Government may make in this context are not yet known. It is likely that the EU's requests for specific legal commitments of the UK with respect to exchange of information on tax matters may develop in the future in light of the proposed amendments to the DAC published by the Commission in July 2020, even if the Government continues to reject these. It may be appropriate for Parliament to consider this new EU legislation further in due course if it appears that the suggested changes to the Directive may be somehow included in a future UK-EU agreement.[102]

The EU screening process for non-cooperative tax jurisdictions

6.31 Lastly, there is the potential for new EU tax policies to have an impact on the UK even where there is no legal obligation for the UK Government to implement or follow them. In particular, certain EU tax measures specifically target non-Member States, known formally as 'third countries'.[103] In this regard, the major initiative of interest to the UK in the Commission's Action Plan and the accompanying paper on tax governance is the planned revision of the EU's "Code of Conduct on Business Taxation".

6.32 The Code of Conduct itself dates back to 1997 and was drawn up as a political framework to guide discussions between EU countries. Its purpose was to allow for a more or less objective determination of whether existing or planned national tax rules in an EU country constitute "harmful tax competition" by "unduly affecting" the location of business activity in the EU by providing specific businesses "with a more favourable

100 In the draft UK-EU trade agreement published by the Government in May 2020, there is a single substantive article on cooperation on tax matters that would not establish mandatory exchange of information between the UK and the EU, and it would be excluded from any binding dispute settlement procedures. In particular, Articles 29.1 and 29.2 of the draft UK-EU free trade agreement published by the Government read: "The United Kingdom and the Union will promote good governance in tax matters and improve international cooperation in the tax area. The Parties recognise and commit to implementing the principles of good governance in the area of taxation reflecting the OECD principles concerning fair tax competition, the global standards on tax transparency and exchange of information, and the OECD minimum standards against Base Erosion and Profit Shifting (BEPS). [...] The provisions of this Chapter shall not be subject to dispute settlement".

101 The Treasury has also noted that the Commission proposals to amend the DAC "suggest that the UK could be affected as a third country, in so far as UK companies or permanent establishments could be included in scope of the rules if they operate in a Member State. The rules could also apply where a UK company facilitates relevant activities in a Member State without being incorporated, managed or having a permanent establishment there. The current proposals do not give much detail to which platforms would be captured, how this would work in practice, or how it would be enforced".

102 The European Commission's draft legal text for the UK-EU trade agreement would allow the 'Partnership Council', a forum of the UK Government and the EU, to "modify the common standards [on tax] in order to include therein additional areas or to lay down higher standards".

103 The UK will automatically be treated as such under EU law when the transition period ends, which is the reason that—as we set out in our Report of 10 September 2020—trade and transport links between the UK and the EU are likely to face disruption when the UK loses its preferential treatment as a 'Member State' under EU law, which is how it is treated in a legal sense in most respects during transition.

tax treatment than that which is generally available in the Member State concerned". A specific working group composed of the representatives of all EU countries meets regularly to discuss tax measures that are relevant in this regard. However, the Code of Conduct has no legal force, meaning the European Commission cannot take Member States to the Court of Justice for failing to eliminate a specific tax measure on the basis that it could be seen as "harmful tax competition" under the Code.[104]

6.33 Although the Code of Conduct was originally conceived as a mechanism to address unfair tax competition *between* the EU's Member States, since 2016 however, it has also formed the basis for periodic assessments by the EU of whether other countries and territories operate tax regimes are deemed to hurt the EU's economic interests.[105] In particular, where non-EU countries are not considered to have addressed harmful tax regimes singled out by the EU on the basis of the Code, they can be placed on a tax haven blacklist, known formally as the "list of non-cooperative jurisdictions".[106]

6.34 There are, however, very few automatic consequences for blacklisted countries under EU law. Mostly, a listing affects a country's ability to receive funding from the EU budget (which is unlikely to be relevant for most developed countries). Instead, reflecting the fact that tax policy remains largely a Member State competence, individual EU countries can decide individually which of the 'defensive measures' they wish to impose against any given listed country, based on non-binding guidance last updated by EU Finance Ministers in December 2019. Such measures typically aim to increase the tax paid by entities in a blacklisted jurisdiction with operations in a particular EU country, to decrease the benefit it derives from using the alleged offshore tax regime. EU countries also can—and do—maintain their own national tax haven blacklists, which can vary from the one established centrally at EU-level under the Code.[107]

6.35 As part of its Taxation Action Plan, the European Commission in a separate paper on tax governance has argued that the Code of Conduct "is in need of reform and modernisation". In particular, it wants the Member States to widen the scope of the Code—with respect to both Member State and overseas tax regimes—to "cover all measures which pose a risk to fair tax competition" (including in areas other than corporation tax, such as tax residency rules, tax reliefs designed to attract wealthy individuals or very low rates of general taxation).[108] It has also suggested that the working group of Member State officials that oversees the implementation of the Code could "introduce qualified majority voting, to speed up decision-making, and consider effective consequences for Member States that do not comply with the Group's decisions on time".

104 Of course it remains open to the Commission to bring legal proceedings against a Member State in relation to corporate tax policy where it sees ground for doing so under EU law, for example under State aid rules.

105 Non-EU countries are assessed against three criteria: tax transparency, fair taxation and the implementation of the OECD Base Erosion and Profit Shifting (BEPS) minimum standards.

106 The countries on the EU blacklist as of August 2020 are American Samoa, the Cayman Islands, Fiji. Guam, Oman, Palau, Panama, Samoa, the Seychelles, Trinidad & Tobago, the US Virgin Islands and Vanuatu.

107 At EU-level, countries can also be 'grey-listed', meaning that—in the EU's views—they "do not yet comply with all international tax standards but have committed to reform".

108 Over the longer term, the Commission also considers that new standards on minimum effective taxation of multinationals should be incorporated into the Code, either based on globally-agreed standards as currently under discussion within the OECD, or—"if there is no consensus on minimum taxation at global level", as an EU standard "to ensure that all businesses pay their fair amount of tax when they generate profits in the Single Market".

6.36 With respect to the EU's engagement with non-EU jurisdictions on tax matters, where the Commission says the Code has had a "remarkable impact on the global tax environment in recent years",[109] five key changes are proposed:

- As a first step, the EU will seek to incorporate a standard "tax good governance clauses" in the trade agreements the EU is negotiating with its economic partners.[110] The Commission notes that, in the event that a country "refuses to accept the clause, or insists on changing it to the extent that it no longer serves the intended purpose", it "could be scrutinised" under the Code of Conduct.
- Secondly, the European Commission intends to publish by the end of 2020 an updated recommendation on the "most relevant jurisdictions to screen" under the Code of Conduct, also taking into account any negotiations on a tax governance clause as referred to above.
- Third, the Commission suggests that the Member States should review the criteria used to decide whether a non-EU jurisdiction subject to screening should be formally listed as "non-cooperative" (i.e. a tax haven), for example by including an assessment of their transparency of beneficial ownership of companies and trusts and by linking the Code to any emerging international or EU standards on minimum effective taxation of multinationals.
- Fourth, the Commission describes the Member States' current guidance on defensive measures to be applied against listed tax havens as "lack[ing] ambition" because it allows them to "choose which and how many measures to apply". Therefore, it may propose in 2022 a formal legislative proposal to enshrine rules on retaliatory measures to be applied under the listing process in EU law.
- Lastly, it calls for more intensive engagement with countries subject to the screening process to "clarify the EU's expectations when it comes to tax good governance worldwide". As part of this, the Commission wants the Member States to align their national tax haven lists with the central EU list "for coherence and to provide clarity".

Implications of the Code of Conduct for the UK

6.37 Although the outcome of the process to revise the EU's approach to tax matters in its engagement with non-EU countries, including changes to the Code of Conduct on Business Taxation, will not be clear for some time,[111] it is undoubtedly relevant for the UK.

109 In its policy paper on tax governance, released alongside the Taxation Action Plan, the Commission states that "by the start of 2020, over 120 harmful tax regimes had been eliminated globally in direct response to the EU listing process" and "dozens of third countries had also taken concrete measures to improve their tax transparency standards, in line with EU requirements".

110 The text of the standard clause was endorsed by the Member States, then including the UK, in May 2018. It reads: "The Parties recognise and commit themselves to implement the principles of good governance in the tax area, including the global standards on transparency and exchange of information, fair taxation, and the minimum standards against Base Erosion and Profit Shifting (BEPS). The Parties will promote good governance in tax matters, improve international cooperation in the tax area and facilitate the collection of tax revenues."

111 Any amendments to the Code of Conduct, as an EU tax policy instrument, require the agreement of all 27 EU Member States. This applies irrespective of whether the changes relate to the assessment of EU countries' own tax regimes, or the screening process for non-EU countries.

6.38 The Commission has already included the EU's standard tax governance clause in its draft text for a new UK-EU trade agreement. However, it also added a further "commitment to curb harmful tax measures" and asked the Government to continue to adhere to the EU's Code of Conduct for business taxation "as applicable at the end of the transition period". The UK Government's proposed text on tax governance, by contrast, omits any reference to the Code. Similarly, the EU is seeking specific commitments from the UK that it will accept restrictions on how it can subsidise businesses—including by means of tax advantages or reliefs—as part of a new "level playing field" arrangement for State aid. The Government has also consistently rejected this to date.

6.39 As such, in the absence of a bilateral agreement, the EU's unilateral tools to address what it sees as unfair tax competition are likely to become directly relevant for the UK. In particular, from the end of the transition period, the Government's tax policies could be subject to a "non-cooperative jurisdiction" assessment under the Code of Conduct if the EU decides to include the UK in this process (as it may do on the basis of the new recommendation for the geographical scope of the screening exercise, which the European Commission is due to make by the end of the year).[112] The Commission's efforts to expand the scope of the Code of Conduct to areas other than corporate tax, and to strengthen the imposition of "defensive measures" to secure elimination of foreign tax regimes the EU has judged to be harmful are clearly relevant in this respect.

6.40 Future disagreements over particular British tax policies—for example in relation to the tax incentives the Government is planning for free ports—could lead to formal retaliatory measures under the Code,[113] and therefore have ramifications for the wider UK-EU economic and political relationship. The European Commission has also set out its initial suggestions for a new, general anti-subsidy tool that would restrict the EU-based operations of companies in support of subsidies from non-EU governments. As we set out in our Report of 16 July 2020, this new "Level Playing Field" mechanism would also apply to businesses in receipt of financial support, including by means of implicit subsidies in the form of tax breaks, at UK taxpayers' expense.[114]

Other EU tax reform initiatives

6.41 The Commission's Action Plan also lists a number of further tax reform initiatives that do not fit into the above categories and as such do not appear to have any significant direct or indirect implications for the UK at this stage.

6.42 For example, the Commission has suggested potential new rules harmonising the criteria for determining the 'tax residence' of individual taxpayers within the EU, an initiative on withholding of tax relief at source, and the extension of the Directive on Administrative Cooperation to allow for the exchange of information between EU countries

112 Since the screening process was established in 2016, the EU's Code of Conduct working group screened 95 jurisdictions, selected on the basis of their economic ties with the EU, their institutional stability, and the importance of the country's financial sector. Based on those criteria, and the fact that Switzerland has previously been 'screened', it might be expected that the UK will also be included in the process.

113 For example, concerns have consistently been raised about the accuracy of the UK's register of ultimate beneficial ownership (UBO) of companies, and the Commission now refers to UBO as a new area to be included in assessments under the Code.

114 Similarly, as we set out in our Thirteenth Report of 2019–2021, the UK will at the end of the transition period become a 'third country' for the purposes of the EU's Anti-Money Laundering Directive, which could also lead to restrictions on cross-border capital flows and require the Government to commit to continued alignment with EU rules in return for preferential access to the EU market for British financial services providers.

on income and capital gains denominated in crypto-assets like bitcoin.[115] Separately, the European Commission intends to publish a separate 'Action Plan for Business Taxation for the 21st century' on 28 October 2020, which is also likely to contain policy proposals relevant to the UK as a major trading partner of the EU.

6.43 The Committee is also aware that the European Commission separately continues to work on other strands of EU tax policy that are not technically part of the Action Plan because they predate it. This includes in particular the question of minimum levels of taxation of digital services providers, a common set of rules to allocate taxable profits of multinationals between EU Member States,[116] as well as new "EU taxes" whose revenues to fund the EU budget (in part to pay off the €750 billion the EU is intending to borrow on the capital markets to finance its Coronavirus Recovery Fund).[117] In addition, as already noted, the Commission is preparing amendments to the Energy Taxation Directive[118] and a revision of the Directive on tobacco duty (both of which will continue to apply in Northern Ireland under the Protocol). It also plans to introduce draft legislation for a "Carbon Border Adjustment Mechanism", which will tax imports into the EU—including from the UK—with respect to their environmental footprint.[119]

6.44 We have already published Reports on some of these other EU tax initiatives to analyse their potential impact on the UK, and will continue to update the House on relevant developments where appropriate. It may of course be necessary to revisit our assessment of the potential relevance for the UK of any of the above when further details about these initiatives are made public in due course, including in the light of any agreements on tax cooperation between the UK and the EU or their general ramifications for non-EU countries.[120] Given that the Action Plan does not in itself provide a comprehensive overview of the EU tax policy agenda, the Annex to this chapter contains an overview of all pending and upcoming EU tax initiatives of which we are aware that will or may be relevant to the UK.

The Government's position

6.45 The Financial Secretary to the Treasury (Rt Hon. Jesse Norman MP) submitted an Explanatory Memorandum on the European Commission's Taxation Action Plan on 31 July 2020.

6.46 As regards the numerous proposals announced by the Commission to amend the EU's VAT Directive and associated legislation, the Minister acknowledges the potential

115 The Commission is separately also preparing draft EU legislation on the regulation of crypto-assets more generally. A legal text is expected to be published later in 2020.

116 This is known formally as the proposal to establish a Common (Consolidated) Corporate Tax Base or CCCTB.

117 As noted in the section on EU VAT and excise duty reform, the Commission is also preparing amendments to the EU's legislation on excise duties on alcohol and tobacco and has already proposed significant changes to the EU's VAT Directive.

118 The Commission notes that the primary aim of the revision of the Energy Taxation Directive is "to ensure that taxation supports the EU's objective of reaching climate neutrality by 2050".

119 There is no reference in the Action Plan to the controversial Financial Transactions Tax (FTT), which is still being formally pursued by a sub-set of 10 EU Member States but on which an agreement remains elusive.

120 Other non-legislative initiatives announced in the Action Plan include the exploration of options for further digitalisation of tax administration, a report on the Tax Recovery Assistance Directive, a "Cooperative Compliance" framework for a preventive dialogue between tax administrations and businesses for the common resolution of cross-border tax issues, the establishment of an expert group on transfer pricing for transactions between related parties, and a "Charter on taxpayer's rights" which will take stock of taxpayers' existing rights under EU law.

ramifications for Northern Ireland under the Protocol. He says the Government "will be watchful for proposed changes […] which could have a negative impact on UK based business by increasing burdens on them without commensurate benefits to them or the UK tax authorities", in particular with respect to the "the proposals for modernising VAT reporting and revised cross-border audit arrangements". The Minister also notes that the Government anticipates that the UK-EU Joint Committee "will be able to explore aspects of future proposals brought to the attention of the Committee" to assess how these would affect Northern Ireland specifically, and—presumably—discuss how any negative impact in that regard might be mitigated by formal Decisions of that Committee. The Memorandum did not make clear that the Government was at that stage preparing legislation to unilaterally override certain elements of the Protocol.

6.47 With respect to administrative cooperation on tax matters between the EU and the UK more generally, the Minister notes that the Government is currently engaged through the Future Trade Agreement (FTA) talks in discussions of the Commission's proposed VAT and Recovery Protocol. While referring to the need to protect the UK's "tax sovereignty", the Minister does not indicate to what extent this may involve continued UK application of the substantive rules on exchange of information on taxpayers pursuant to the EU's legislation on administrative cooperation in VAT and other tax matters.

6.48 With respect to the Code of Conduct and the proposed changes to the EU's listing of "non-cooperative jurisdictions" in the area of tax, the Minister makes no assessment at all of the potential consequences if the UK were to be included in the screening process, or of the EU's proposal asking the Government to "reaffirm [its] commitment to the Code of Conduct for business taxation" as part of the trade agreement.

Action

6.49 Given the potential implications of EU tax policy for the UK, in particular for Northern Ireland under the Protocol, the Committee is of the view that Parliament should continue to closely monitor the implementation of the Commission's Taxation Action Plan and other EU taxation initiatives. In this context, any moves towards the introduction of Qualified Majority Voting on new EU tax legislation within the Council of Ministers would also remain an area of interest.

6.50 We will seek to update the House again on the specific EU tax initiatives announced by the European Commission and when there are relevant developments to report, in particular in light of the Commission's upcoming policy paper on corporate taxation and the reform of EU VAT and excise legislation, with the latter being especially relevant for Northern Ireland and, by extension, potentially for the UK as a whole. In this context, we would also need to consider the implications of the Internal Market Bill or any subsequent legislation, should an Act of Parliament give Ministers the ability to unilaterally override certain elements of the Northern Ireland Protocol.

6.51 We also consider that the application of the EU's screening process for non-EU tax regimes under its Code of Conduct on Business Taxation, and the Commission's suggested changes to this process, are of direct relevance to the UK. They may have significant ramifications in the longer term if there is a divergence in the approach to tax policy and related issues between the UK and the EU. This should also be seen in the context of the on-going negotiations on a 'Level Playing Field' under a new UK-EU free trade agreement,

where the EU is seeking to pre-empt future divergence by seeking a commitment from the Government to continue observing both the Directive on Administrative Cooperation and the Code of Conduct itself. The Committee therefore believes Parliament should stay informed of any changes to the Code of Conduct, as it will form part of the EU's political and legal framework for potential retaliatory measures against the UK in case of disputes about the harmful effects of tax policies, if there is no bilateral framework in place to manage such issues.

6.52 In the meantime, we draw the EU's overall tax reform agenda, and our assessment thereof, to the attention of the Business, Energy & Industrial Strategy Committee, the Committee on the Future Relationship with the EU and the Treasury Committee. We also draw the elements that may affect Northern Ireland under the Protocol in the Withdrawal Agreement to the particular attention of the Northern Ireland Affairs Committee.

Annex: Overview of pending and upcoming EU tax policy initiatives

6.53 The table below lists the key pending and upcoming EU tax policy initiatives referred to in this chapter, in particular where there is a direct or potential relevance for the UK. It is not a comprehensive overview of the European Commission's tax reform agenda, in particular because it omits many non-legislative initiatives.

Area	Initiative	Status	Note
Corporate taxation	Common Consolidated Corporate Tax Base	Legislative proposals published in October 2016, negotiations appear suspended since March 2020	UK companies would not be covered but may have indirect economic impact
Corporate taxation	Taxation of the digital economy	Legislative proposals published in March 2018, negotiations suspended pending global talks at OECD	May impact on wider UK-EU trading relationship
Corporate taxation	Corporate Taxation Action Plan	Publication expected in October 2020	Likely to contain information on the EU's approach relevant to the UK's new economic relationship with the EU
Environmental taxation	Carbon Border Adjustment Mechanism	Proposal expected in 2021	Would impact on UK exports to the EU
Tax avoidance and evasion	Revision of the Code of Conduct on Business Taxation for EU Member States and non-EU jurisdictions	Timing unclear	-
Tax avoidance and evasion	Update of the geographical scope of the EU's assessment of non-cooperative tax jurisdictions	Commission recommendations expected by the end of 2020	Could lead to the UK being included in the EU's assessment process for harmful tax regimes

Area	Initiative	Status	Note
Tax avoidance and evasion	EU-wide defensive measures against non-cooperative tax jurisdictions	If taken forward, the Commission may publish further information in 2022	Any EU-level defensive measures in retaliation for alleged unfair tax competition could potentially be applied to the UK
Tax avoidance and evasion	Common criteria for tax residence in the EU to avoid double (non-)taxation	Further details expected in 2022	-
Tax avoidance and evasion	Amendment to the Directive on Administrative Cooperation on direct taxation as regards crypto-assets and e-money	Further details expected in Q3 2021	Potential area for UK-EU cooperation under the new economic relationship
VAT & excise	Minimum VAT rates on goods and services	Legislative proposal published in January 2018, negotiations on-going	May be applicable in Northern Ireland under the Protocol in due course and affect divergence in VAT rates between Great Britain and Northern Ireland
VAT & excise	VAT treatment of cross-border transactions in the EU	Legislative proposal published in May 2018, negotiations on-going	May be applicable in Northern Ireland under the Protocol in due course
VAT & excise	VAT identification code for Northern Ireland	Legislative proposal published in Q3 2020, negotiations on-going	Directly relevant to Northern Ireland under the Protocol as it is part of the EU's preparations for its operationalisation from 1 January 2021
VAT & excise	"VAT in the digital age" package[121]	Further details expected in 2022	May be relevant for Northern Ireland under the Protocol
VAT & excise	VAT dispute resolution mechanism between tax authorities	Further details expected in 2022	May be relevant for Northern Ireland under the Protocol and potentially for the wider UK-EU trading relationship
VAT & excise	Distance selling of excise goods	Further details expected in 2022	May be relevant for Northern Ireland under the Protocol

121 This encompasses the proposals described earlier in this chapter with respect to the VAT rules applicable to the "gig economy", the extension of the "One Stop Shop", a single EU VAT registration, streamlining of VAT reporting obligations and e-invoicing.

Area	Initiative	Status	Note
VAT & excise	Revision of the Energy Taxation Directive	Proposal expected in June 2021	May be applicable in Northern Ireland under the Protocol, and potentially be relevant to the wider UK-EU trading relationship and cooperation on environmental matters
VAT & excise	Revision of the Tobacco Taxation Directive	Timing unclear	May be applicable in Northern Ireland under the Protocol, and potentially be relevant to the wider UK-EU trading relationship and cooperation on health matters
VAT & excise	Revision of the "Eurofisc" anti-VAT fraud platform	Further details expected in 2023	May be relevant for HMRC under the Protocol in respect of VAT fraud involving businesses in Northern Ireland
VAT & excise	Automated exchange of VAT-related data on cross-border transactions	Further details expected in 2023	-
VAT & excise	Introducing Qualified Majority voting for implementing rules under the VAT Directive	Proposal expected in Q4 2020	-
VAT & excise	VAT on financial services	Further details expected in Q4 2021	Not applicable to Northern Ireland under the Protocol as it concerns services, not goods[122]
VAT & excise	Review of EU VAT rules for travel agents and passenger transport	Further details expected in 2022	Not applicable to Northern Ireland under the Protocol as it concerns services, not goods[123]

122 There may nevertheless be an indirect impact on the UK insofar as this legislation, in due course, contributes to the European Commission's stated objective of "enhancing the international competitiveness of EU companies".

123 There may nevertheless be an indirect impact on the UK insofar as this legislation, in due course, contributes to the European Commission's stated objective of ensuring "the international competitiveness of the EU travel industry".

Area	Initiative	Status	Note
Other	Financial Transactions Tax	Draft Directive under enhanced cooperation under discussion since February 2013. Negotiations appear suspended since September 2019.	-
Other	Rules on withholding tax relief at source	Further details expected in 2022	-
Other	EU "own resources" to fund the EU budget	Timing unclear	-
Other	Charter on Taxpayers' Rights under EU law	Policy paper expected in Q3 2021	May be relevant for Northern Ireland under the Protocol

7 Preventing the dissemination of terrorist propaganda online[124]

This EU document is legally and politically important because:

- it concerns an area of policy which is "inherently cross-border in nature" and in which the Government is keen to ensure alignment of EU and UK law after the post-exit transition period ends on 31 December 2020.

Action

- Write to the Minister for Security (Rt Hon. James Brokenshire MP) requesting further updates on the progress of negotiations on the proposed Regulation and on the implications for the UK's own domestic legislation on online harms.
- Draw to the attention of the Home Affairs Committee, the Justice Committee, the Digital, Culture, Media and Sport Committee and the Joint Committee on Human Rights.

Overview

7.1 This proposal for a Regulation, first put forward in September 2018, seeks to fulfil the commitment made by the previous European Commission President, Jean-Claude Juncker, in his September 2018 State of the Union speech to establish "new rules to get terrorist content off the web within one hour—the critical window in which the greatest damage is done".[125] The proposal would require online platforms to take proactive measures to prevent the dissemination of terrorist content; empower national authorities to issue a legally binding order for the removal of terrorist content from the web within an hour; introduce penalties for platforms which fail to act promptly; and strengthen cooperation amongst Member States and with Europol. The new power to issue a removal order would operate alongside existing voluntary referral mechanisms, but with a clear obligation on hosting service providers to put in place the necessary operational and technical measures to ensure that referrals are dealt with expeditiously.[126] The proposed Regulation also includes a range of safeguards in recognition of "the fundamental importance of freedom of expression and information in an open and democratic society".[127] Our predecessor Committee's Report agreed on 24 October 2018 provides a detailed overview of the proposal.[128]

7.2 In his informative Explanatory Memorandum (see part one and part two), the then Minister for Security and Economic Crime (Rt Hon. Ben Wallace MP) welcomed the prospect of EU regulatory action to tackle online terrorist content. Whilst acknowledging the value of voluntary cooperation with service providers, he considered that tech

124 Proposal for a Regulation on preventing the dissemination of terrorist content online; Council number 12129/18 + ADDs 1–3, COM(18) 640; Legal base—Article 114 TFEU, ordinary legislative procedure, QMV; Department—Home office; Devolved Administrations consulted; ESC number 40069.

125 For an overview of the Commission's proposal, see the European Commission's fact sheet published on 12 September 2018, A Europe that protects: Countering terrorist content online.

126 Article 5.

127 See Articles 3(1) and 6(4).

128 Forty-first Report HC 301–xl (2017–19), chapter 6 (24 October 2018).

companies had "not gone far enough or fast enough" and that the approach proposed by the Commission in seeking to balance public security and fundamental rights set "a helpful precedent" and would "lay the groundwork and support our own intention to legislate on illegal online content". He shared the Commission's view that a fragmented framework of national rules would be burdensome for companies operating within the EU's digital single market.

7.3 The EU Justice and Home Affairs Council agreed a general approach to inform negotiations with the European Parliament ('EP') in December 2018. Reporting back on the outcome of the Council (which took place before the UK's exit from the EU), the Minister said that Member States had recognised the urgency of the threat posed by online terrorist content and were determined to strengthen the EU's "toolbox" of counter-measures, but some had questioned whether the general approach struck "the right balance between removal of content and fundamental rights", cited potential conflicts with their own national constitutions, and called for further reflection and expert analysis. The (then) Presidency had offered assurance that "various points of objection" could be addressed in trilogue negotiations with the EP.

7.4 The EP agreed its negotiating position in April 2019.[129] The Government considered that the text proposed by the EP "in certain parts, moved quite significantly from the versions put forward by the Commission and Council" and that some (though not all) of it would be difficult for the Government to support,[130] prompting our predecessor Committee to conclude (in September 2019) that there was little prospect of the Council and EP reaching agreement on a compromise text before the UK left the EU. Noting the important synergies between the proposed Regulation and the Government's domestic agenda for legislating to tackle a broader range of online harms, as well as the Government's view that regulation would be more effective in areas which are "inherently cross-border in nature" if there was close alignment between the UK's domestic law and the EU's legal framework, the Committee requested regular reports on the progress and outcome of trilogue negotiations.

The Minister's update on trilogue negotiations

7.5 In his letter of 14 September 2020, the Minister for Security (Rt Hon. James Brokenshire MP) informs us that negotiations between the Council, European Parliament and Commission were "put on hold due to COVID-19" and that there have been no material developments since our predecessors last considered the proposed Regulation in September 2019. Following the UK's exit from the EU, the UK no longer has "formal access" to negotiations on the proposal but the Minister makes clear that the Government "remain committed to working constructively with the EU in a transparent manner to prevent terrorist use of the internet" and will "seek to continue to influence the TCO [terrorist content online] Regulation as a third country and to understand the impacts on the UK". He continues:

129 See our predecessor Committee's Seventy-third Report HC 301–lxxi (2017–19), chapter 6 (4 September 2019) for further details on the European Parliament's position. See also ESC's Forty-sixth Report HC 301–xlv (2017–19), chapter 16 (28 November 2019) and Fiftieth Report HC 301–xlix (2017–19), chapter 5 (9 January 2019).

130 See the letter of 24 July 2019 from the then Minister for Security and Economic Crime (Rt Hon. Ben Wallace MP).

> I am hopeful that the TCO Regulation will remain an ambitious file and will complement the UK's domestic online harms legislation given the important synergies and cross-border nature of terrorist use of the internet.

7.6 The Minister expects the German Presidency to restart trilogue negotiations shortly and undertakes to provide further updates on their progress.

Action

7.7 Write to the Minister requesting further updates on the progress and outcome of negotiations on the proposed Regulation and on the implications for the UK's own domestic legislation on online harms.

Letter to the Minister for Security (Rt Hon. James Brokenshire MP), Home Office

Thank you for your letter of 14 September 2020 informing us that the German Presidency is expected to recommence negotiations between the Council, European Parliament and Commission on a proposed Regulation to prevent the dissemination of terrorist content online. We do not expect this to be an easy negotiation, given significant differences in the approach taken by the Council and the Commission on the one hand, and the European Parliament on the other, to the intensity of regulation in this area, as well as the difficult balance that has to be struck between public safety and freedom of expression.

We retain a keen interest in the trilogue negotiations for two reasons. First, we recognise that there are important synergies between the EU's approach to regulation in this important area and the Government's domestic agenda—EU legislation on online terrorist content would cover some of the ground outlined in the Government's Online Harms White Paper, published in April 2019, which set out proposals for a new regulatory framework in the UK to hold companies to account for harmful user-generated content hosted on their platforms.[131] Second, anticipating the UK's exit from the EU, the Government made clear (in July 2019) that it would nonetheless "want to ensure alignment of UK and EU law, particularly in an area which is inherently cross-border in nature".[132] **We therefore welcome your offer of progress reports on the trilogue negotiations**.

We would also welcome some indication of the Government's timescale for publishing its own proposals for a domestic regulatory framework to counter online harms. Does the Government intend to do so before the EU finalises the Regulation on terrorist content online? If not, how might the EU's regulatory choices affect or constrain the approach taken by the Government in its domestic legislation?

Finally, we share the view of our predecessor Committee that the UK's ability to inform and influence legislative and policy developments within the EU will continue to matter once the post-exit transition period ends and EU law ceases to apply to the UK. It will be important to ensure that the way in which the Government engages with EU institutions and Member States post-transition is transparent. We foresee an important role for

131 See Command Paper 57. In February 2020, the Government published an initial response to the consultation launched by the White Paper. It said that legislating on Online Harms was a key priority for the Government but has yet to publish a draft Bill.

132 See the letter of 24 July 2019 from the then Minister for Security and Economic Crime (Rt Hon. Ben Wallace MP).

Parliament in ensuring that the influence and reach of EU law, and how it may affect the development of new domestic regulatory frameworks in the UK, is properly understood. We look forward to discussing in greater detail with the Government future scrutiny arrangements as the end of the post-exit transition period approaches.

We would be grateful for an initial update by the end of October on the progress of trilogue negotiations and on the Government's legislative plans for combatting online harms.

8 Documents not considered to be legally and/or politically important

Department for Business, Energy and Industrial Strategy

(41473) 10240/20 COM(20) 263	Report from the Annual Report on the Safety of Offshore Oil and Gas Operations in the European Union for the Year 2018.
(41501) 10424/20 + ADDs 1–2 COM(20) 476	Report from the Commission to the European Parliament and the Council On the implementation of the European Energy Programme for Recovery and the European Energy Efficiency Fund.

Department for Environment, Food and Rural Affairs

(41471) — COM(20) 387	Report from the Commission to the European Parliament and the Council 13th Financial Report from the Commission to the European Parliament and the Council on the European Agricultural Fund for Rural Development (EAFRD) 2019 Financial Year.
(41505) — COM(20) 475	Report from the Commission to the European Parliament and the Council 13th Financial Report from the Commission to the European Parliament and the Council on the European Agricultural Guarantee Fund 2019 Financial Year.
(41506) — COM(20) 483	Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2018/848 on organic production as regards its date of application and certain other dates referred to in that Regulation.
(41507) — COM(20) 488	Proposal for a Council Decision on the position to be taken on behalf of the European Union in the framework of the Convention on Future Multilateral Co-operation in the North-East Atlantic Fisheries as regards the application for accession to that Convention submitted by the United Kingdom and repealing Council Decision (EU) 2019/510.
(41508) — COM (2020) 489	Proposal for a Council Implementing Decision on the authorisation of the United Kingdom to express its consent to be bound, in its own capacity, by certain international agreements to be applied during the transition period in the area of the Union's common fisheries policy.

Home Office

(41333) 8525/20 + ADD 1 COM(20) 217	Report from the Commission to the European Parliament and the Council Asset recovery and confiscation: Ensuring that crime does not pay.
(41402) — COM(20) 309	Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 514/2014 of the European Parliament and the Council, as regards the decommitment procedure.

Annex

Documents drawn to the attention of select committees:

('SNC' indicates that scrutiny (of the document) is not completed'; 'SC' indicates that scrutiny of the document is completed)

Business, Energy and Industrial Strategy Committee: COVID-19: EU Taxation Action Plan: potential implications for the UK [(a) Action Plan, (b) Communication, (c) Directive (SC)]; Review of the EU General Data Protection Regulation [Commission Communication (SC)]

Digital, Culture, Media and Sport Committee: Review of the EU General Data Protection Regulation [Commission Communication (SC)]; Preventing the dissemination of terrorist propaganda online [Proposed Regulation (SNC)]

Environmental Audit Committee: Northern Ireland Protocol: Phase-out of dental amalgam [Commission Report (SNC)]

Environment, Food and Rural Affairs Committee: Northern Ireland Protocol: Phase-out of dental amalgam [Commission Report (SNC)]

Committee on the Future of the European Union: Northern Ireland Protocol: Changes to EU alcohol duty legislation [Proposed (a)(d) Directive, (b) Decision, (c) Regulation (SNC)]; COVID-19: EU Taxation Action Plan: potential implications for the UK [(a) Action Plan, (b) Communication, (c) Directive (SC)]; Northern Ireland Protocol: Phase-out of dental amalgam [Commission Report (SNC)]; Review of the EU General Data Protection Regulation [Commission Communication (SC)]; Brexit: The future operation of the Channel Tunnel [Proposed (a) Decision, (b) Regulation (SNC)]

Health and Social Care Committee: Northern Ireland Protocol: Phase-out of dental amalgam [Commission Report (SNC)]

Home Affairs Committee: Review of the EU General Data Protection Regulation [Commission Communication (SC)]; Brexit: The future operation of the Channel Tunnel [Proposed (a) Decision, (b) Regulation (SNC]; Preventing the dissemination of terrorist propaganda online [Proposed Regulation (SNC)]

Joint Committee on Human Rights: Review of the EU General Data Protection Regulation [Commission Communication (SC)]; Preventing the dissemination of terrorist propaganda online [Proposed Regulation (SNC)]

International Trade Committee: Brexit: The future operation of the Channel Tunnel [Proposed (a) Decision, (b) Regulation (SNC)]

Justice Committee: Preventing the dissemination of terrorist propaganda online [Proposed Regulation (SNC)]

Northern Ireland Affairs Committee: Northern Ireland Protocol: Changes to EU alcohol duty legislation [Proposed (a)(d) Directive, (b) Decision, (c) Regulation (SNC)]; COVID-19: EU Taxation Action Plan: potential implications for the UK [(a) Action

Plan, (b) Communication, (c) Directive (SC)]; Northern Ireland Protocol: Phase-out of dental amalgam [Commission Report (SNC)]; Review of the EU General Data Protection Regulation [Commission Communication (SC)]

Science and Technology Committee: Review of the EU General Data Protection Regulation [Commission Communication (SC)]

Transport Committee: Brexit: The future operation of the Channel Tunnel [Proposed (a) Decision, (b) Regulation (SNC]

Treasury Committee: COVID-19: EU Taxation Action Plan: potential implications for the UK [(a) Action Plan, (b) Communication, (c) Directive (SC)]

Formal Minutes

Thursday 1 October 2020

After consulting all Members of the Committee, the Chair was satisfied that the Report represented a decision of the majority of the Committee and reported it to the House.

(Order of the House of 24 March 2020).

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)

Tahir Ali MP (*Labour, Birmingham, Hall Green*)

Jon Cruddas MP (*Labour, Dagenham and Rainham*)

Allan Dorans MP (*Scottish National Party, Ayr Carrick and Cumnock*)

Richard Drax MP (*Conservative, South Dorset*)

Margaret Ferrier MP (*Scottish National Party, Rutherglen and Hamilton West*)

Mr Marcus Fysh MP (*Conservative, Yeovil*)

Mrs Andrea Jenkyns MP (*Conservative, Morley and Outwood*)

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

Stephen Kinnock MP (*Labour, Aberavon*)

Mr David Lammy MP (*Labour, Tottenham*)

Marco Longhi MP (*Conservative, Dudley North*)

Craig Mackinley MP (*Conservative, South Thanet*)

Ann Marie Morris MP (*Conservative, Newton Abbot*)

Charlotte Nichols MP (*Labour, Warrington North*)

Greg Smith MP (*Conservative, Buckingham*)