House of Commons

European Scrutiny Committee

Thirty-second Report of Session 2019–21

Documents considered by the Committee on 9 December 2020

Report, together with formal minutes

Ordered by The House of Commons to be printed 9 December 2020

HC 229-xxviii
Published on 15 December 2020
by authority of the House of Commons

Notes

Numbering of documents

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

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

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

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

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

Abbreviations used in the headnotes and footnotes

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

Euros

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

Further information

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

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

Staff

The current staff of the Committee are Ravi Abhayaratne (Committee Operations Assistant), Joanne Dee (Deputy Counsel for European Legislation), Alistair Dillon and Leigh Gibson (Clerk Advisers), Nat Ireton and Apostolos Kostoulas (Committee Operations Officers), Luanne Middleton (Second Clerk), Daniel Moeller (Committee Operations Manager), Jessica Mulley (Clerk), Foeke Noppert (Clerk Adviser), Indira Rao (Counsel for European Legislation), Paula Saunderson (Committee Operations Assistant), Sibel Taner (Second Clerk), Emily Unwin (Deputy Counsel for European Legislation) George Wilson (Clerk Adviser), Beatrice Woods (Committee Operations Officer).

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Contents

1 Northern Ireland Protocol: Joint Consultative Working Group[1]

This EU document is politically important because:

- it concerns how the EU will inform the UK about planned EU laws affecting Northern Ireland in the future and how the EU and UK will discuss the implementation of EU laws within the scope of the Ireland/Northern Ireland Protocol; and
- the Government commits to engaging with Parliament and the Northern Ireland Executive and Parliament on future arrangements for governance of the Withdrawal Agreement and the Protocol.

Action

- Report to the House.
- Draw to the attention of the Committee on the Future Relationship with the EU and the Northern Ireland Affairs Committee.

Overview

1.1 As the UK is no longer part of internal EU discussions on draft EU laws, nor has a vote on them, the Withdrawal Agreement establishes a Joint Consultative Working Group (JCWG) to ensure—among other tasks—that there is a channel of communication between the EU and UK on planned EU Acts with which Northern Ireland must align.

1.2 We considered this draft Council Decision concerning the adoption of the JCWG's Rules of Procedure at our meeting of 4 November 2020 and published a Report[2] in which we set out further details of the role of the JCWG and the proposed Rules.

1.3 Following our consideration, we wrote to the Chancellor of the Duchy of Lancaster (Rt Hon. Michael Gove MP) raising queries concerning what constitutes a "planned EU Act" and the extent to which the JCWG might become a forum for debate, given the Government's assertion in its Explanatory Memorandum (EM) that the JCWG would give the UK a "formal opportunity to influence the development of EU law". We went on to seek clarification of the commitment to engaging with us and others to design "governance arrangements" for the Withdrawal Agreement and the Protocol and looked forward to official-level discussions on those arrangements. Concerning the Rules of Procedure, we asked the Government to commit to working with the Commission to ensure that agendas are made public in advance of meetings and to ensure that minutes of

1 Proposal for a Council Decision on the position to be taken on behalf of the EU in the Joint Consultative Working Group established by the Agreement on the withdrawal of the UK from the EU and the European Atomic Energy Community as regards the adoption of its rules of procedure; 11643/20, COM(20) 636; Legal base: Art 50(2) TFEU and Article 218(9) TFEU, QMV; Department: Cabinet Office; Devolved Administrations; ESC number: 41569.

2 Twenty-seventh Report HC 229–xxiii (2019–21), chapter 1 (4 November 2020).

the meetings are consistently published. Finally, we welcomed detail from the Government on the mechanisms that are in place across Government to monitor ongoing EU law developments.

1.4 In her response to our letter, the Paymaster General (Rt Hon. Penny Mordaunt MP) confirms that the Council has adopted the Decision on the Rules of Procedure. The Government, she says, will work with the Commission to progress the establishment of the JCWG as a working body, including the modalities of its operation, and to arrange a date for the first meeting of the Group. She adds that the JCWG is the technical working-level group which allows the UK and the EU to discuss all aspects of implementation of the Protocol. The full detail of how that operates is yet to be determined.

1.5 The Minister goes on to confirm that the commitment to work with us and others on the design of the governance arrangements includes the domestic parliamentary scrutiny of the Withdrawal Agreement and Protocol.

1.6 Concerning the terms of transparency of the JCWG, as set out in the proposed Rules of Procedure, the Minister explains that it will be for the UK and EU co-chairs of the Group to agree any publication of the agenda or the summary of the minutes. The Minister adds that the JCWG will not be a decision-making body and says that the Government must consider how to ensure "proportionate future scrutiny arrangements" around the implementation of the Withdrawal Agreement could work as a whole once the transition period is over.

1.7 Regarding mechanisms to monitor ongoing EU law developments across Government, the Minister indicates that, during the transition period, the Cabinet Office has maintained responsibility for monitoring the publication of, and coordinating scrutiny on, new EU proposals. The arrangements to follow the end of the transition period will be determined in due course, and the Minister will ask officials to meet with our officials to discuss this further.

Our assessment

1.8 Since we wrote to the Chancellor of the Duchy of Lancaster, and since the Paymaster General responded, we have written to the Chancellor of the Duchy of Lancaster, attaching a scoping paper on future EU-related scrutiny, noting the urgency of developing robust mechanisms for future parliamentary scrutiny of EU law and policy that will impact the UK after the end of the transition period.

1.9 While the Paymaster-General's response to us fails to address adequately any of the queries that we raised, we shall pursue our concerns through our engagement on wider EU-related scrutiny matters.

Action

1.10 We are reporting the Paymaster General's response to the House for information and drawing it to the attention of the Committee on the Future Relationship with the EU and the Northern Ireland Affairs Committee.

2 Market access for goods from African, Caribbean and Pacific (ACP) countries[3]

This EU document is legally and politically important because:

- it raises questions about the interpretation of Article 5 of the Protocol on Ireland/Northern Ireland and how it affects the operation of a 2016 Regulation on market access for goods originating in ACP countries which will continue to apply in Northern Ireland, but not the rest of the UK, after the post-exit transition period ends on 31 December 2020.

Action

- Write to the Minister (Rt Hon. Greg Hands MP) at the Department for International Trade asking him to report back once the EU/UK Withdrawal Agreement Joint Committee has agreed criteria on "at risk" goods", explaining how the criteria will affect the way in which EU safeguard measures (tariff quotas and customs duties) adopted under the 2016 Regulation apply in Northern Ireland.

- Draw to the attention of the Northern Ireland Affairs Committee, the International Trade Committee, the International Development Committee and the Committee on the Future Relationship with the EU.

Overview

2.1 This report concerns the operation of a 2016 Regulation setting out the market access arrangements for goods originating in certain countries which form part of the African, Caribbean and Pacific (ACP) group of States.[4] These arrangements apply in the period between the conclusion of negotiations on an Economic Partnership Agreement (EPA) with the EU and its ratification and entry into force. EPAs are trade and development agreements. Their purpose is to encourage sustainable development and poverty reduction in ACP countries through preferential (duty- and quota-free) access to the EU market and rules of origin which encourage the integration of regional supply chains. The 2016 Regulation provides a bridge to these preferential terms. It gives the European Commission power to amend the list of ACP countries to whom the market access arrangements set out in the Regulation apply (for example, by removing a country if it has failed to ratify an EPA within a reasonable period of time) and to make other technical changes. It also allows the EU unilaterally to impose safeguard measures—essentially customs duties or tariff quotas—if there is a surge in imports which (following an investigation) might cause serious injury to domestic industry in the EU, to sectors of the economy, or to agricultural markets.

3 European Commission report on the exercise of delegated powers under Regulation (EU) 2016/1076; Council document 5253/20, COM(20) 7; Legal base—; Dept—International Trade; Devolved Administrations—not consulted; ESC number 41031.

4 See Regulation (EU) 2016/1076 applying the arrangements for products originating in certain states which are part of the African, Caribbean and Pacific (ACP) Group of States provided for in agreements establishing, or leading to the establishment of, economic partnership agreements.

2.2 The 2016 Regulation forms part of the body of EU law listed in Annex 2 of the Protocol on Ireland/Northern Ireland that will continue to apply to Northern Ireland, but not the rest of the UK, when the post-exit transition period provided for in the EU/UK Withdrawal Agreement ends on 31 December 2020.[5] The Protocol also provides that obligations relating to trade in goods which stem from the EU's international agreements (such as the EU's EPAs with certain ACP countries) continue to apply to and in Northern Ireland after transition.[6] In our correspondence with the Government, we have sought to understand how the unique arrangements under the Protocol might affect market access for ACP goods, and the customs and regulatory checks that will apply, if they enter the UK market through Northern Ireland from 1 January 2021.

2.3 The Government has told us that its aim is to bring into force bilateral agreements between the UK and ACP countries that "replicate the effects of the EU EPAs" by the end of 2020.[7] As these agreements include reciprocal safeguard provisions allowing either party to take measures to protect their markets where necessary, the Government sees no need to replicate in domestic law the unilateral safeguard provisions contained in the 2016 Regulation.[8] This might mean, however, that Northern Ireland would be bound by unilateral safeguard measures introduced by the EU under the 2016 Regulation which were not replicated (and so would not apply) in the rest of the UK. According to the Government, the 2016 Regulation would in any event only 'bite' on "at risk" goods—in this case, ACP goods imported into Northern Ireland which are considered to be "at risk" of onward movement to the EU. The criteria for determining which goods are "at risk" and subject to EU customs duties under Article 5(2) of the Protocol have yet to be decided by the Withdrawal Agreement Joint Committee.

2.4 In our letter of 11 November 2020, we asked the Government to explain:

- what would happen if the EU were to introduce unilateral safeguard measures on certain products originating in ACP countries which applied in Northern Ireland but were not mirrored in the rest of the UK, and what the impact would be on businesses and consumers in Northern Ireland; and
- why it considered the "at risk" criteria to be relevant in determining how safeguard measures adopted under the 2016 Regulation would apply in Northern Ireland, given that Article 5(3) and (4) of the Protocol do not appear to be dependent on (or subject to) Article 5(1) and (2) on "at risk" goods *and* that safeguard measures may include tariff quotas as well as customs duties.

2.5 In his response of 25 November 2020, the Minister of State at the Department for International Trade (Rt Hon. Greg Hands MP) reiterates that the Government does not intend to replicate the Regulation's unilateral safeguard provisions, relying instead on bilateral safeguard provisions in the agreements the UK concludes with ACP countries.

5 See Article 127 of the EU/UK Withdrawal Agreement and Article 5(4) of the Protocol on Ireland/Northern Ireland.

6 See Articles 4, 5(4) and Annex 2, point 4, final indent of the Protocol on Ireland/Northern Ireland.

7 See the Explanatory Memorandum of 29 January 2020 submitted by the former Minister for Trade Policy (Rt Hon. Conor Burns MP).

8 See our letter of 23 April 2020 and the letter of 6 May 2020 from the Minister for State at the Department for International Trade (Rt Hon. Greg Hands MP) to the Chair of the European Scrutiny Committee.

He says he is “unable to respond on specific questions of where the EU or the United Kingdom’s tariff regime would apply at this stage” pending the outcome of discussions in the Withdrawal Agreement Committee on “at risk” goods, adding:

> This includes the example given in the question of whether tariff and quota-based safeguards of the 2016 Regulation could apply in Northern Ireland, should the EU apply these measures to goods originating in ACP countries.

2.6 Turning to the impact that different arrangements on the application of safeguard measures in Northern Ireland and in Great Britain might have on businesses and consumers in Northern Ireland, the Minister responds:

> HM Government remains committed to ensuring that Northern Ireland businesses and consumers will benefit from British FTAs, just as the rest of the United Kingdom will. To this end, it remains the position of HM Government that EU tariffs should not be payable on any goods remaining in the United Kingdom. Furthermore, even where goods are classified as ‘at risk’ of entering the EU market, it is HM Government’s intention to make full use of the provisions in the Protocol to waive and/ or reimburse higher tariffs where these have been paid.

2.7 He says that the Government’s new Trader Support Service (TSS) will provide “end-to-end support for traders importing into Northern Ireland” and is intended to “avoid burdening businesses with any potential complexities in the system—including any associated with the ‘at risk’ regime—and will be available to traders at no extra cost”. The Minister continues:

> Although I cannot confirm at this stage on the interactions between the ‘at risk’ regime and the application of the 2016 Regulation and safeguard measure in Northern Ireland, I can confirm that work is well in train to minimise the impact on Northern Ireland business and traders as a result of the Protocol.

2.8 Meanwhile, the Government will “continue to update existing guidance for businesses between now and the end of the transition period”.

Action

2.9 While the Minister says that the Government “continues to work constructively with the EU” in the Withdrawal Agreement Joint Committee, he does not indicate how close the EU and UK are to reaching an agreement on how EU laws (including the 2016 Regulation) made applicable in Northern Ireland by Article 5 of the Protocol will apply in practice. Time is running out. We ask him to report back to us once the Joint Committee has agreed criteria on “at risk” goods”, explaining how the criteria will affect the way in which EU safeguard measures (tariff quotas and customs duties) adopted under the 2016 Regulation apply in Northern Ireland.

2.10 Draw to the attention of the Northern Ireland Affairs Committee, the International Trade Committee, the International Development Committee and the Committee on the Future Relationship with the EU.

Letter from the Chair to the Minister of State (Rt Hon. Greg Hands MP), Department for International Trade

Thank you for your letter of 25 November 2020 concerning market access arrangements for goods traded between the UK and certain African, Caribbean and Pacific (ACP) countries when the post-exit transition period ends on 31 December 2020.

As you know, the EU's Market Access Regulation (2016/1076) forms part of the body of EU law listed in Annex 2 of the Protocol on Ireland/Northern Ireland that will continue to apply to Northern Ireland, but not the rest of the UK, from 1 January 2021. You have been clear that the Government will not replicate the unilateral safeguard provisions in the Regulation which allow the EU to increase customs duties or apply a tariff quota on specific products originating in ACP countries in certain circumstances. This means that different tariff quotas or customs duties could apply in Northern Ireland (bound by the EU measures) and Great Britain (not bound by the EU measures).

You say that you are unable to confirm whether EU tariff and quota-based safeguards or the UK's own tariff regime will apply in Northern Ireland from 1 January 2021 as this will depend on the outcome of discussions in the Withdrawal Agreement Committee on "at risk" goods. You do not indicate how close the EU and UK are to reaching an agreement on "at risk" goods, though time is rapidly running out, or how these criteria will affect the way in which EU laws (including the EU's Market Access Regulation) made applicable in Northern Ireland by Article 5(4) of the Protocol will apply in practice.

We ask you to provide this information once any decisions affecting the implementation of the Protocol have been agreed in the Joint Committee.

3 WTO Airbus-Boeing dispute: application of EU retaliatory measures[9]

This Commission Implementing Regulation is legally and politically important because:

- it concerns the continued application of EU law in Northern Ireland under Article 5 of the Protocol on Ireland/Northern Ireland; and
- it is relevant to the disentangling of EU and UK interests and representation in the World Trade Organisation (WTO) from 1 January 2020.

Action

- Write to the Minister (Rt Hon. Greg Hands MP) asking him to explain: whether the UK would be entitled to apply EU retaliatory duties to US imports from 1 January 2021 based on an authorisation given to the EU by the WTO's Dispute Settlement Body; if not, what steps the Government would need to take to impose its own retaliatory tariffs; the Government's understanding of Article 5 of the Protocol on Ireland/Northern Ireland; and the impact of the EU measures on specific industries or supply chains operating (i) in Northern Ireland and (ii) in the rest of the UK.
- Draw to the attention of the International Trade Committee and the Northern Ireland Affairs Committee.

Overview

3.1 The dispute between the EU and the United States on subsidies for Airbus and Boeing aircraft is one of the longest running in the World Trade Organisation (WTO), extending over 16 years. Both sides claim that subsidies provided to support the manufacture of these aircraft are unfair and distort trade. The US was the first to bring a complaint in 2005, targeting subsidies provided to Airbus companies in France, Germany, Spain and the UK. The EU brought its own complaint against subsidies provided to US Boeing producers in 2006. The WTO's Dispute Settlement Body has determined over the years that both sides have unfairly subsidised their Airbus and Boeing industries. Neither side considers that the other has complied fully with the rulings and recommendations made by the Dispute Settlement Body which are intended to ensure they conform with WTO rules. Both have sought authority to take retaliatory action (countermeasures) to remedy the harm caused to their domestic industries.[10]

3.2 The Commission Implementing Regulation gives effect to the decision taken by the WTO Dispute Settlement Body on 26 October 2020 authorising the EU to impose

9 Commission Implementing Regulation (EU) 2020/1646 of 7 November 2020 on commercial policy measures concerning certain products from the United States of America following the adjudication of a trade dispute under the Dispute Settlement Understanding of the World Trade Organization; Legal base: Article 4(1) of Regulation (EU) 654/2014; Dept: International Trade; Devolved Administrations informed; ESC number 41645.

10 For details of the disputes, see the WTO website summary of the first (US) and second (EU) complaint.

countermeasures on US goods trade with the EU up to a value of US$ 4 billion annually.[11] The countermeasures take the form of additional customs duties on large civil aircraft and other products imported from the US (ranging from foodstuffs, alcohol and tobacco products to consumer goods and tractors) which the EU considers as sufficiently similar to those targeted by the US in its countermeasures against the EU. They apply from 10 November 2020.

3.3 In his Explanatory Memorandum of 24 November 2020, the Minister of State (Rt Hon. Greg Hands MP) at the Department for International Trade says that the UK and other European nations have been harmed by US subsidies to Boeing and have taken all necessary steps to bring their support for Airbus fully in line with WTO law. While acknowledging the EU's right to take retaliatory action against the US, he notes that the UK was not part of the EU decision making process and that the Government "does not believe escalating is the right response", adding, "It is the UK's clear view that the best outcome for all parties is a negotiated settlement".

3.4 The Minister confirms that the UK will be required to apply the EU's retaliatory tariffs until 31 December 2020, the date on which the post-exit transition period ends and EU law (including the Commission Implementing Regulation) ceases to apply. While the UK had no say in the selection of US products subject to additional customs duties, the Government has "engaged with British business associations and industries who may be affected". Based on trade data for the period August 2019 to July 2020, the Minister estimates that the UK could collect up to $100 million in additional duties on the import of non-aircraft products from the US if the measures were in place for a full year and trade flows remained unchanged. He says that similar data on the types of large aircraft targeted by the EU measures are not publicly available.

3.5 From 1 January 2021, the UK will "represent itself independently in disputes at the WTO and shall undertake such actions as are in the best interests of the United Kingdom". The Minister anticipates that the UK will continue to play an important role in resolving the Airbus/Boeing dispute.

3.6 The Commission Implementing Regulation is based on powers conferred by the EU's trade enforcement Regulation (654/2014). This Regulation is one of the measures listed in Annex 2 of the Protocol on Ireland/Northern Ireland which will continue to apply in Northern Ireland (but not the rest of the UK) after transition. The Minister adds that the EU's retaliatory measures take the form of additional customs duties under the EU's Customs Code (Regulation 952/2013), also listed in Annex 2 of the Protocol and applicable in Northern Ireland after transition. Based on the Government's understanding of the relevant Protocol provisions, the Minister says that:

> The additional duties under the [Commission Implementing] Regulation will continue to apply after the end of the transition period to relevant goods entering Northern Ireland which are "at risk" of entering the EU market—a policy under consideration by the Withdrawal Agreement Joint Committee, as part of work implementing the Northern Ireland Protocol (Article 5(1), 5(2), 5(3), 5(4) and Annex 2).

11 See the WTO website: Members grant EU authorization to impose countermeasures against US in Boeing dispute.

3.7 On 9 December 2020, the Secretary of State for International Trade (Rt Hon. Elizabeth Truss MP) announced that the Government would be "suspending retaliatory tariffs resulting from the Boeing dispute in an effort to bring the US towards a reasonable settlement" while "reserving the right to impose tariffs at any point if satisfactory progress towards an agreeable settlement is not made". The suspension would take effect from 1 January 2021 (the date on which the UK ceases to be bound by EU law) with a view to de-escalating trade tensions and paving the way to "the next phase" in the US and UK's trading relationship.

Action

3.8 Write to the Minister requesting further information on the following matters:

- whether the UK would be entitled to apply EU retaliatory duties to US imports from 1 January 2021 based on an authorisation given to the EU by the WTO's Dispute Settlement Body;
- if not, what steps the Government would need to take to impose its own retaliatory tariffs;
- his reasons for considering that the application of EU law under Article 5(3) and (4) of the Protocol on Ireland/Northern Ireland (which provide the legal base for the continued application of the Commission Implementing Regulation in Northern Ireland after transition) is subject to or dependent on the "at risk" criteria to be agreed by the Withdrawal Agreement Joint Committee under Article 5(2) of the Protocol; and
- the impact of the EU measures on specific industries or supply chains operating (i) in Northern Ireland and (ii) in the rest of the UK.

Letter to the Minister of State (Rt Hon. Greg Hands MP), Department for International Trade

Thank you for your Explanatory Memorandum of 24 November 2020 on a Commission Implementing Regulation which gives effect to the decision taken by the WTO Dispute Settlement Body on 26 October 2020 authorising the EU to impose countermeasures—in this case retaliatory tariffs—on US goods up to a value of US$ 4 billion annually as part of the EU's long running dispute with the US on subsidies for Airbus and Boeing.

In an announcement made earlier today, the Secretary of State for International Trade (Rt Hon. Elizabeth Truss MP) said the Government would be "suspending retaliatory tariffs resulting from the Boeing dispute in an effort to bring the US towards a reasonable settlement" while "reserving the right to impose tariffs at any point if satisfactory progress towards an agreeable settlement is not made". The suspension would take effect from 1 January 2021 (the date on which the UK ceases to be bound by EU law) with a view to de-escalating trade tensions and paving the way to "the next phase" in the US and UK's trading relationship.

The retaliatory tariffs set out in the Commission Implementing Decision are based on the authorisation given by the WTO Dispute Settlement Body to the EU, as the complainant in the dispute with the US. To assist our scrutiny, we would welcome further information on the following matters:

First, do you consider that the authorisation given to the EU would have provided a lawful basis for the UK to continue to apply retaliatory tariffs from 1 January, had the Government wished to do so?

Second, do you anticipate that the authorisation given to the EU would provide a lawful basis for the Government to re-impose retaliatory tariffs at a later stage, if it considers that de-escalation is not an effective means of reaching reasonable settlement with the US? If so, how would the retaliatory measures authorised by the WTO Dispute Settlement Body be apportioned between the EU and the UK and would it be possible for the UK to vary the choice of products subject to additional tariffs?

Third, if the authorisation given to the EU would *not* allow the UK to impose its own retaliatory tariffs, what steps would the UK need to take to do so?

Fourth, the Commission Implementing Regulation is based on powers conferred by the EU's Trade Enforcement Regulation (654/2014) and the EU countermeasures take the form of additional customs duties under the EU's Customs Code (Regulation 952/2013). Both Regulations are listed in Annex 2 of the Protocol on Ireland/Northern Ireland and will continue to apply in Northern Ireland (but not the rest of the UK) after transition. Based on your understanding of the relevant provisions of the Protocol, you indicate that the additional duties imposed by the Commission Implementing Regulation will only apply to relevant US goods entering the Northern Ireland market which are "at risk" of onward movement to the EU. We ask you to set out your reasons for considering that the application of EU law under Article 5(3) and (4) of the Protocol on Ireland/Northern Ireland (which provide the legal base for the continued application of the Commission Implementing Regulation in Northern Ireland after transition) is subject to or dependent on the "at risk" criteria to be agreed by the Withdrawal Agreement Joint Committee under Article 5(2) of the Protocol.

Finally, we are pleased to note that you have engaged with business and industries that may be affected by the EU's retaliatory tariffs. Given that the Commission Implementing Regulation will continue to apply in Northern Ireland after transition, we would be interested to hear whether there are specific industries or supply chains operating in Northern Ireland that will be particularly affected by the continuation of the EU's retaliatory tariffs or placed at a competitive disadvantage if the additional duties apply in Northern Ireland but not in the rest of the UK from 1 January 2021. We would also welcome your assessment of the impact that the discontinuation of the retaliatory tariffs in Great Britain from 1 January 2021 may have on the Broughton Airbus production line in North Wales and other UK-based Airbus supply chains.

4 EU Permanent Structured Cooperation in Defence and the European Defence Fund[12]

These EU documents are politically important because:

- they establish the rules for optional participation by non-EU countries, like the UK, in the EU's new programmes for defence capability development (PESCO and the European Defence Fund); and
- while the Defence Fund is largely closed to non-EU participation, technical projects for military cooperation under PESCO are open to expressions of interest by "third States". Although the Government has told us it has not identified any specific projects meriting a formal request for UK involvement at this stage, the option to seek participation in specific PESCO projects would remain open to Ministers in the future.

Action

- Write to the Minister of State at the Foreign Office (Nigel Adams MP) to request confirmation that any future decision by the Government to seek involvement in an EU defence cooperation project under PESCO would be subject to prior parliamentary debate and scrutiny.
- Draw the latest developments around PESCO and the European Defence Fund to the attention of the Committee on the Future Relationship with the EU, the Defence Committee and the Foreign Affairs Committee.

Overview

4.1 The European Union has in recent years sought to intensify cooperation between its Member States on defence matters,[13] amid increasing geopolitical instability on its external borders.

4.2 The 'flagship' scheme of current EU defence and security policy is Permanent Structured Cooperation (PESCO), a voluntary new framework for closer collaboration

12 (a) Council Decision (CFSP) 2020/1639 of 5 November 2020 establishing the general conditions under which third States could exceptionally be invited to participate in individual PESCO projects; Legal base: Article 46(6) TEU; unanimity; Department: Foreign, Commonwealth & Development Office; Devolved Administrations: Not consulted; ESC number: 41642.
(b) Proposal for a Regulation establishing the European Defence Fund; Council and COM number: 10084/18, COM(2018) 476; Legal base: Articles 173(3), 182(4), 183 and 188 TFEU; ordinary legislative procedure; QMV; Department: Ministry of Defence; Devolved Administrations: Not consulted; ESC number: 39894.

13 Recent EU defence initiatives include the Coordinated Annual Review on Defence (CARD) and the Capability Development Plan (CPD); the creation, in July 2017, of a Military Planning and Conduct Capability (MPCC) unit for the EU's non-executive military CSDP missions; the launch of a new European Defence Fund, which will co-finance PESCO projects seeking to develop new military technology at a favourable rate; and the European Commission's Action Plan on military mobility, envisages regulatory measures to remove obstacles to the intra-EU movements of troops and equipment.

in the military field. Launched in late 2017, it allows participating EU Member States[14] to make commitments to each other in relation to increasing their defence expenditure, improving cooperation and making joint plans to close their collective capability gaps identified by the EU's separate Capability Development Plan and Coordinated Annual Review on Defence.[15] As a key component of the EU's push for greater "strategic autonomy", PESCO currently encompasses 46 technical projects to boost cooperation in specific areas like cyber-defence, military training and maritime surveillance. In November 2020, the 25 EU countries currently part of PESCO[16] agreed a set of rules governing how non-EU countries, like the UK, could ask to join specific projects from this list. However, the conditions for involvement by the defence *industries* of non-EU countries are still being debated because of the political sensitivities involved.

4.3 In a separate but linked development, the EU has also begun making funds available from its general budget specifically to support the joint development of EU countries' technological capabilities in the field of defence in a bid to counter market fragmentation and duplication of efforts.[17] Because the European Union cannot provide funding for the actual acquisition of military equipment,[18] these funds are used to co-finance research into, and development of, new military technology. In particular, the EU is close to establishing the legal framework for a €8 billion (£7.3 billion) "European Defence Fund" (EDF) which will act as its funding instrument for such projects over the 2021–2027 period.[19] With formal agreement on the Fund expected before the end of year, companies in EU countries will be able to apply for financial support from this Fund for "new defence products and technologies" from the start of 2021.[20] Although there will be possibilities for involvement by the defence industries of non-EU countries in projects financed by the EDF, these are likely to be limited.[21]

4.4 The added value of both PESCO and the Defence Fund for the EU's collective military capabilities are unproven at this stage, given they are both relatively new projects; the sums involved from the EU budget are small; and participating countries are in complete control over whether to join any of the projects for the development and acquisition of military technology foreseen by the two schemes. EU Defence Ministers have expressed

14 All but Denmark and Malta. As explored further in this chapter, the UK did not join PESCO either while it was still a Member State.

15 PESCO is also meant to contribute to the effectiveness of the EU's centralised military missions under the Common Security & Defence Policy (CSDP), which are currently active in Bosnia Herzegovina, Mali, the Central African Republic, Somalia, the waters off the Horn of Africa (Operation Atalanta) and in the eastern Mediterranean (Operation Irini).

16 Within PESCO, countries can choose which specific projects they wish to participate in.

17 Military capability typically covers force structure, configuration, readiness and sustainability. The EU's financial support focuses on the 'configuration' aspect, which relates to the technical sophistication of forces and their equipment.

18 Article 41 TEU prohibits use of the EU budget for expenditure "arising from operations having military or defence implications".

19 Although the Fund's €8bn budget means that it will constitute only a fraction of defence spending in Europe (especially compared to the original proposal by the European Commission to give it a budget of €13 billion), it would make the EU budget "one of the largest investors in defence research in the EU". In its impact assessment for the Fund, published in 2018, the Commission said that "if the data for 2014 is used as a reference and the UK is excluded, the Fund's contribution will account for approximately 28% of the total defence R&T effort in the EU".

20 Projects undertaken as part of PESCO would get preferential treatment within the Defence Fund in the form of a higher contribution from the EU budget.

21 The European Defence Fund will also be open to formal "association"—i.e. full participation by a "third country", with rights for their industries to bid for all available funding opportunities—for Norway and Iceland as members of the European Economic Area.

the ambition for the current list of PESCO projects "to deliver concrete results or reach full operational capability by the end of 2025". The EDF will be reviewed in the middle of the decade, when the European Commission will start making proposals for the EU's subsequent long-term spending plans for 2028 and beyond.

4.5 The UK of course left the European Union on 31 January 2020. It chose not to join PESCO while it was still a Member State, and no longer has a legal right to do so given it is now a non-EU country. Similarly, UK companies will not be eligible by default to access the European Defence Fund, which is only due to become operational in January 2021.[22]

4.6 Although the legal basis for the EDF largely excludes the possibility of participation by the UK Government or British companies in projects for the development of new defence technology, projects for military cooperation under PESCO would be open, to a limited extent, to optional participation by the UK and possibly its defence industrial base. However, even if the Government were to seek such involvement, the EU would have to agree to that participation and could impose specific restrictions or conditions, notably as regards "export control and intellectual property rights" arising from the project. In November 2020, the Foreign Office informed us that the Government had not identified any PESCO projects as meriting a formal expression of interest at this stage. Should there be a change of Government policy in the future, it is unclear how—and indeed if—Ministers would involve Parliament if it were to formally apply to join a PESCO project participation, given the sensitivity around UK involvement in EU defence structures.[23]

4.7 EU defence policy was a controversial issue for the UK while a Member State and any decision by this or a future Government to participate in PESCO would still solicit strong views. In light of the possibility, even if only theoretical at this stage, that the UK might seek to participate in specific projects for military cooperation under PESCO, we have set out the general context for both EU programmes, the specific conditions the remaining Member States have set for any "third State participation", and the Government's position below. We have also written to the Foreign Office, as shown in the Annex, to request confirmation that the Government would inform Parliament prior to any hypothetical future decision being taken to seek participation in projects under PESCO.

Permanent Structured Cooperation in defence (PESCO)

4.8 The 2009 Lisbon Treaty created the legal basis for "Permanent Structured Cooperation" (PESCO) in the area of defence, a political framework within which EU Member States can choose to make commitments to each other with respect to improved cooperation on defence matters.[24] The framework is intended to facilitate these countries' collective

22 While the UK has a financial settlement with the EU allowing it to continue access funding opportunities from the EU budget as if still a Member State, that arrangement only allows UK-based entities to apply for new EU funding until the end of 2020.

23 The Government's decision not to seek participation in any PESCO projects of course does not affect the UK's bilateral cooperation on defence with individual EU countries, like its Lancaster House Treaty with France, or its contribution to NATO.

24 Articles 42 and 46 TEU, and Protocol (No 10) on Permanent Structured Cooperation.

and individual defence capabilities via specific initiatives and projects, and thereby also strengthen the EU's centralised military operations under its Common Security & Defence Policy in places like the Sahel, the Balkans and elsewhere.[25]

4.9 PESCO was formally launched in December 2017, against a general backdrop of intensified cooperation on defence matters at EU-level[26] amid increasing geopolitical instability on its external borders.[27] Twenty-five EU countries—all of the then-Member States except the UK, Denmark and Malta—joined, making 20 binding commitments to each other about their national defence policies.[28] These commitments cover a range of issues including targets for public defence spending (including investment on defence equipment), capability development, interoperability of forces and the development of major European equipment programmes. One of the founding principles of PESCO is that it should be "in complementarity with NATO, which will continue to be the cornerstone of collective defence for its members".[29]

4.10 The real efforts to increase defence cooperation between the participating EU countries take place via a number of specific technical projects that aim to increase their collective defence capabilities. In November 2018, the list of PESCO projects was expanded to 34 and again to 47 in November 2019.[30] This was reduced to 46 in November 2020, when the project relating to a "European Union Training Mission Competence Centre" was closed. The current list of projects includes "Military Mobility" to facilitate movements of troop and materiel, a cyber-attack "rapid response team" and a space surveillance network.[31] While the above commitments are binding on all participating countries as a precondition for joining PESCO, these specific projects are open on a voluntary basis (and

25 PESCO does not affect the veto of each EU Member State over EU military operations under the Common Security & Defence Policy (CSDP) and other EU foreign policy measures under the Treaties, or their right to decide unilaterally whether to deploy military personnel or equipment to specific EU operations or missions.

26 PESCO was launched against the backdrop of a number of other EU defence initiatives, including the Coordinated Annual Review on Defence (CARD) and the Capability Development Plan (CPD); the creation, in July 2017, of a Military Planning and Conduct Capability (MPCC) unit for the EU's non-executive military CSDP missions; the launch of a new European Defence Fund, which will co-finance PESCO projects seeking to develop new military technology at a favourable rate; and the European Commission's Action Plan on military mobility, envisages regulatory measures to remove obstacles to the intra-EU movements of troops and equipment.

27 In particular, Russia's increased belligerence (such as its illegal annexation of Ukraine's Crimea peninsula), but also increasing state-sponsored cyber-attacks on critical European digital infrastructure, and the conflicts in Libya and Syria.

28 The participation of Ireland required approval by parliamentary vote, with those opposed claiming that involvement in PESCO would undermine the country's military neutrality. See Irish Times, "Ireland joins Pesco defence pact after Dáil vote" (15 December 2017). The vote in the Dáil itself was taken on 7 December 2017, and carried with 75 in favour and 42 against.

29 Four PESCO countries—Austria, Finland, Ireland and Sweden—are not members of NATO.

30 The Council Decision expanding the list of PESCO projects was submitted for scrutiny by the Foreign & Commonwealth Office separately. The Department provided an Explanatory Memorandum on 5 December 2018.

31 In December 2017, the participating countries approved further detailed guidance about what was expected of each them as part of their PESCO commitments. This was followed in early March 2018 by general rules on how Member States will implement their PESCO participation in practice, as well as the first list of 17 projects (the governance of which was then set out in a further Council Decision in June 2018).

most therefore only have a handful of participating countries).[32] This means participating countries can choose to join as few or many of these specific projects as they like. Ireland, for example, has only joined two[33] while Italy participates in at least 26.

4.11 Given that the PESCO was only launched relatively recently, and cooperation through this framework remains voluntary, the practical impact of this new framework for cooperation on the military capabilities of the participating EU Member States, and on the effectiveness of their Common Security & Defence Policy, remains to be seen. In particular, although the commitments undertaken by participating EU countries are described as "legally-binding",[34] there are no legal consequences if they do not meet them and the EU institutions have no concrete powers to force compliance.[35] The European Court of Auditors has already warned that PESCO was one of no less than "four overlapping layers" in the EU's planning and budgeting process to support the development of its Member States' military capabilities, which include the Coordinated Annual Review on Defence (CARD) and the EU Capability Development Plan (CPD).[36] The Centre for European Reform has also stated that the precise relevance of the list of individual projects to the overall PESCO commitments—and to the EU's ambitions in the field of defence more widely—are often unclear.[37]

4.12 In a bid to assess PESCO's added value for the EU's collective defence capabilities, the participating countries have agreed detailed guidance about the way in which they are to report to the EU and each other in their "National Implementation Plans" (NIPs) on progress made towards their PESCO commitments every year.[38] These are collated into an Annual Report by the European External Action Service (EEAS), which are only

32 The "Military Mobility" project has both an intergovernmental component under PESCO, where Member States discuss measures within their national (defence) competence to expedite troop and equipment transports, and an EU 'Community' component that seeks to address regulatory barriers that hinder military mobility, such as customs rules and insufficient dual-use transport infrastructure. See for more information the previous European Scrutiny Committee's Report of 3 July 2019.

33 Ireland is part of the PESCO projects on maritime surveillance and on the European Union Training Mission Competence Centre.

34 See for example the official PESCO website or the website of the European Defence Agency, "Ambitious and more binding common commitments" (both accessed 13 November 2020).

35 For example, the European Commission cannot bring infringement proceedings before the Court of Justice of the EU to force Member States to increase its defence spending because they failed to do so despite their commitment under PESCO.

36 These four overlapping layers were described in an April 2019 paper by IRIS, the French Institute for International and Strategic Relations, as "the Capability Development Mechanism (CDM), which is the responsibility of the military committee of the European Union, with the support of the EU Military Staff; the Capability Development Plan (CDP) of the European Defence Agency; the Coordinated Annual Review on Defence (CARD), which has been entrusted to the European Defence Agency, associated with Permanent Structured Cooperation (PESCO), which is also a capability process in the hands of the member states and with a secretariat provided by the European External Action Service and the European Defence Agency".

37 Centre for European Reform, "Defence without direction" (November 2019).

38 The NIPs includes financial information on military expenditure—to demonstrate a commitment to a collective target of spending 2 per cent of GDP on defence—and how each country intends to contribute financially and in kind to the EU's Common Security & Defence Policy. The European External Action Service (EEAS) circulated its first annual PESCO report in March 2019, reviewing the extent to which the 25 countries are fulfilling the commitments they agreed to. This found that all participating countries had indeed committed to increase their defence budgets in 2018 and 2019 (and a majority also indicated they planned to further increase defence spending in 2021—2025). As expected, the EEAS also found that "further effort is required to deliver projects to improve the availability of European forces and their ability to deploy quickly, and to develop major equipment programmes" (which are, ultimately, the long-term aims of PESCO). The EEAS recommended that more attention should be paid to listing projects with a clear link to one of the PESCO commitments and the EU's 'level of ambition' and that the focus should be on delivering the existing projects rather than substantially expanding the list further.

partially public. The first of these—in March 2019—concluded that more work was still needed before PESCO was fully reflected in the participating countries' national defence plans.[39] The second PESCO Annual Report, dated April 2020, is almost fully redacted but is likely to have made similar points. In November 2020, EU Defence Ministers expressed the ambition for the current list of PESCO projects "to deliver concrete results or reach full operational capability by the end of 2025".

4.13 Only Member States of the European Union have an automatic legal right to participate in PESCO. However, detailed rules have been established for "third States" seeking to join specific technical projects under the PESCO umbrella. In the context of the UK's new status as a non-EU country, we explore the parameters for such involvement in both schemes further below, followed by an assessment of the UK Government's position on seeking such participation.

Participation in PESCO by non-EU countries

4.14 When they launched PESCO in December 2017, the participating Member States also committed to establishing legal rules on the potential involvement of non-EU countries—like the UK after Brexit—in specific PESCO projects.[40] The United States Government in particular has pushed for an ability for non-EU countries to be involved in in PESCO projects, saying the programme could otherwise "produce duplication, non-interoperable military systems, diversion of scarce defence resources and unnecessary competition between NATO and the EU".[41] By extension, of course, it is also seeking to ensure that American defence companies can be involved in projects that may lead to the development and acquisition of new military technology by European countries.

4.15 This detailed legal framework for "third State participation" was eventually approved after several delays in November 2020 as Council Decision 2020/1639.[42] On 25 November, Foreign Office Minister Nigel Adams MP submitted an Explanatory Memorandum summarising the substance of that Decision and the Government's position thereon.[43]

4.16 In essence, if a non-EU country expresses a formal interest in a specific PESCO project, Member States participating in that project have to agree by unanimity whether to endorse the request and notify their decision to the other EU countries. If such endorsement is granted, the request to participate will then be considered by all 25 PESCO-participating

39 High Representative of the Union for Foreign Affairs and Security Policy: Annual Report on the Status of PESCO Implementation (22 March 2019). These conclusions were echoed by the participating countries themselves in a Council Recommendation adopted in May 2019.

40 Article 4(2)(g) of the Council Decision establishing PESCO states that the Council "shall adopt decisions and recommendations establishing, in due time […] the general conditions under which third States could exceptionally be invited to participate in individual projects; and determining in accordance with Article 9(2) whether a given third State satisfies these conditions".

41 Financial Times, "US warns against European joint military project" (14 May 2019).

42 Under the original timetable, a formal decision on these rules was initially due by the end of 2018. However, the negotiations took much longer than anticipated because of the need to accommodate various concerns expressed by Member States on restricting the ability of non-EU countries to participate in PESCO. Some countries favoured a very restricted opportunity for 'third country' access as a way of enhancing PESCO's prospects of delivering more "strategic autonomy" for the EU in military affairs, while others were content with a "case-by-case" assessment allowing them to block participation by countries about which they had particular concerns (such as Greece and Cyprus with respect to Turkey). Still others have pushed for an "open" PESCO, especially as regards the United States, the UK and Norway. See for example IRIS, "Moving PeSCo forward: what are the next steps?" (May 2019).

43 As a non-Member State, the UK of course did not have a formal say over the substance of the rules and did not have a vote when the Council Decision was adopted.

countries in the EU's Council of Ministers. At this stage, they collectively consider whether the non-EU country in question meets a number of general conditions. These include notably:

- the country must have "good neighbourly relations" with the EU, including an operational Security of Information Agreement with the EU and an Administrative Arrangement with the European Defence Agency (EDA) (if the PESCO project in question is coordinated by that Agency);
- it must provide "substantial added value" to the project, such as operational or financial assistance,[44] and contribute to "the availability, deployability and interoperability of forces" and the "strengthening" of the EU's Common Security & Defence Policy as a whole;[45] and
- the country has to agree arrangements restricting the use of any military technology developed within the project outside of PESCO, in particular to make sure it could not be used against the security interests of the EU or of any individual Member State. There may also be restrictions on the intellectual property arising from the project.

4.17 The Council's decision on whether the non-EU country meets these general conditions again requires unanimity, meaning every EU Member State participating in PESCO has a veto. If the request is accepted at this stage, this would trigger a process of negotiating the practical rules for participation between the lead Member State for the project and the 'third country'. This "Administrative Arrangement" must be approved unanimously by all members of the specific project (but not by all EU countries that are part of PESCO more generally). The precise "rights and obligations" incumbent on a third country seeking to join a PESCO project will depend on the precise substance of that arrangement. Matters to be resolved would include that country's attendance at meetings "convened in the framework of the […] project"; its exact contribution, role and responsibilities, such as ensuring the confidentiality of sensitive information; and the scope of its influence over the management and direction of the project.[46]

4.18 There is no requirement within the rules that any "third State" seeking to join a PESCO project would be subject to the legal powers of the EU's supranational institutions like the European Commission or the Court of Justice with respect to any commitments it makes as part of such an Administrative Arrangement, since the endeavours—while conducted at EU-level—are principally intergovernmental in nature. However, there could of course be a political cost to any dispute between such a country and the EU's Member States

44 Council Decision 2020/1639 states: "The means which [the third State] brings into the project must be complementary to those offered by PESCO participating Member States, for example by providing technical expertise or additional capabilities including operational or financial support, thus contributing to the success of the project and hence to the advancement of PESCO".

45 The Council Decision defines "substantial added value" to mean that "the means which [the non-EU country] brings into the project must be complementary to those offered by PESCO participating Member States, for example by providing technical expertise or additional capabilities including operational or financial support, thus contributing to the success of the project and hence to the advancement of PESCO".

46 Council Decision 2020/1639 stipulates that any "part in the decision-making process" would have to "fully respect the decision-making autonomy of the EU as well as the rights and obligations of the participating Member States, including as regards safeguarding the control of a project and its results". It is therefore not clear what practical "decision-making" capability a non-EU country could have within a PESCO project.

over the strategic direction of, or its contribution to, a particular PESCO project. The Council Decision therefore recommends that the Administrative Arrangement contains procedures for "dispute settlement", which would be the subject of negotiations.

Involvement of "third country" defence industries

4.19 Following the successful conclusion of the negotiations on an Administrative Arrangement, the non-EU country then formally joins the project on the date specified in that arrangement. However, this participation would apply only at the governmental level.

4.20 As things stand, even the act of a "third State" joining a PESCO project in this way would *not* give companies in the defence industry of that country an automatic right to contribute to the project: the EU's rules on the involvement of industrial entities—defence contractors—are still being discussed as part of the review of PESCO's overall governance mechanisms.[47] In particular, the participating Member States are in the process of drawing up specific rules for the "conditions and procedures under which entities may be involved in the implementation of PESCO project", including those established in or controlled from non-EU countries. Those talks are centred in particular on the possible eligibility of non-EU companies to access EU financial support from the European Defence Fund if they are contributing to a PESCO project (see below).

4.21 However, Council Decision 2020/1635 does seem to partially pre-empt these wider discussions. First, Article 7 of that Decision essentially states that "entities"—i.e. defence contractors—irrespective of whether they are based in- or outside the EU cannot be involved in a PESCO project after 31 December 2025, unless their involvement is approved before that date.

4.22 Moreover, that same Article also stipulates that companies "established in, controlled by or having their executive management structures in a third State which has not been invited […] to participate in a PESCO project before 31 December 2021 may only become involved in the implementation of PESCO projects after that date" if all EU Member States participating in PESCO approve of that involvement by unanimity.[48] It therefore appears that the defence industries of non-EU countries will need the approval of all 25 countries to contribute to PESCO projects in which their Government is not already participating by the end of 2021. By extension, it would follow that, where an entity is established in or controlled from a non-EU country that *has* been formally invited to join a PESCO project, this restriction would not apply. This could open the door for a less onerous route for defence contractors from such countries to be involved, depending on the outcome of the aforementioned discussions on the detailed rules in this respect.[49]

4.23 The Committee will consider the outcome of the Council's review of the PESCO governance rules, and in particular its implications for the possibility of UK industries to contribute to PESCO projects, in due course.

47 The PESCO participating Member States have committed to reviewing Decision (CFSP) 2018/909, which sets the "common set of governance rules for PESCO projects", by 31 December 2020, "in particular with regard" to "the conditions and procedures under which entities may be involved in the implementation of PESCO projects".

48 The same Article also states that industrial entities "may only be involved in the implementation of PESCO projects after 31 December 2025 on the basis of contracts concluded or procurement procedures launched before that date".

49 The record of the meeting at which the Council Decision was signed off shows that Austria, Greece, Italy and Spain raised concerns about its implementation or ramifications. See: Summary record of the meeting of COREPER on 28 October 2020, p. 5.

Termination of participation in a PESCO project

4.24 The arrangements applicable when a non-EU country wants to *end* its formal participation in a PESCO project are required to be set out in the overall Administrative Arrangement before it even joins. However, the EU can separately also unilaterally terminate a country's involvement if:

- its participation is suspended by unanimity among the EU countries that are part of the project, after which the issue is referred to all PESCO members for a decision to terminate that country's involvement altogether;[50] or
- any EU country "consider[s] that a third State's participation in a PESCO project no longer meets the general conditions" as described above. In that case, it can ask the Defence Ministers of the EU countries that have joined PESCO to consider the matter following a two-month consultation period.[51]

4.25 The crucial difference between these two routes of unilateral termination is that one following a suspension of the 'third State' by the project members requires the unanimous agreement of all PESCO countries. By contrast, a termination following a referral by one Member State because it deems the non-EU country to no longer fulfil the general conditions for participation can result in its exit from the project, unless all PESCO countries—therefore including the one that referred the matter—agree to its continued participation.[52] In practice therefore, a Member State which wants a 'third State' expelled from a PESCO project could force such a course of action by referring the matter directly to the Council, as it can veto its continued involvement in that way.

4.26 The options for participation by third countries in any military research & developments projects co-financed by the aforementioned European Defence Fund (EDF) have a different legal basis from PESCO and are set out separately. We have therefore described the Fund and its rules in more detail below, followed by an assessment of the Government's position on potential UK participation both PESCO and the EDF.

The European Defence Fund

4.27 In parallel to the initial implementation of PESCO and the discussions around the participation of "third States", the EU has also focussed on making financial support available from the EU budget to support the development of new military technology, including for projects run as part of PESCO.

4.28 More specifically, since 2017, the EU has been setting aside part of its budget for investment in research and development of military technology, such as encrypted software and drone technology, as part of a wider effort to make the Union a more cohesive

50 The conditions for such a suspension must also be set out in the Administrative Arrangement governing the country's participation in the project.

51 The "Council in PESCO format" is the Council of Ministers but composed only of the representatives of the Member States that participate in PESCO.

52 Article 6(3) of Council Decision 2020/1635 states: "The Council, acting in accordance with Article 46(6) TEU [i.e. by unanimity], shall discuss and decide on the continuation of the third State's participation".

actor in military affairs.[53] Because the EU Treaties forbid the use of the EU budget for any spending "defence or military implications", this financial support is focussed on research and development of military equipment. Any actual acquisition of the resulting technology would be the exclusive matter for the EU Member States themselves, funded by their own national budgets.

4.29 Under the EU's next long-term budget for the 2021–2027 period,[54] the European Commission has proposed to scale up this type of financial support via a "European Defence Fund" (EDF). Unlike PESCO, this Fund also requires the agreement of the European Parliament in addition to the approval of the Member States in the Council of Ministers.[55] In April 2019, the Parliament and Council reached a provisional agreement on the statutory framework with certain exceptions, such as the Fund's total budget and the rules for involvement by non-EU defence contractors in projects to be financed. On 10 November 2020, as part of a broader deal on the EU's next long-term budget, they agreed a €8 billion (£7.3 billion) allocation for the Defence Fund. A formal agreement on the remaining outstanding issues is expected before the end of 2020.[56]

4.30 In practical terms, once the Defence Fund is operational, the money will be distributed on the basis of annual work programmes specifying the types of military research and technologies for which funding can be sought.[57] These programmes would be drafted by the European Commission, but require the approval of a qualified majority of Member States before they can form the basis for a grant. Similarly, individual awards of funding would also have to be approved in the same way, giving EU countries more control over spending decisions than in most other areas of the EU budget. The Fund can be used to support research & development initiatives undertaken as part of PESCO (see above), but it can also finance other projects (although financial support for PESCO projects would benefit from higher co-funding rates).[58]

4.31 The legal framework for the EDF will also contain specific rules for the participation by non-EU countries and their defence industries in projects financed by the Fund. We consider these further below.

53 EU financial support for the development of military technology was initially provided via small-scale €90 million "preparatory action on defence research" (PADR) (a type of EU budgetary pilot project), coordinated by the European Defence Agency from 2017 to 2019. In June 2018, the EU Member States and the European Parliament also formally established a two-year, €500 million European Defence Industrial Development Programme (EDIDP), which marked the first time the EU budget has been used specifically to fund the development of new military technology after the initial research phase. The UK's defence industry is theoretically able to bid for funding from these because the UK participates in the EU budget until the end of 2020, but such opportunities are limited because the Withdrawal Agreement allow the EU to ban UK bids for funds related to projects which stretch into 2021 and relate to "security-related sensitive information".

54 Known formally as the Multiannual Financial Framework or MFF.

55 The Member States adopted their joint position on the proposal in November 2018, and agreed a "common understanding" on the legal framework of the Fund with the European Parliament—as co-legislator - on 20 February 2019.

56 However, to become operational, the Fund still depends on approval for the EU's overall long-term budget for the 2021–2027 period. This requires the agreement of all Member States and the European Parliament. At present, it is unclear when these formalities will be concluded: the Governments of Poland and Hungary have said they may veto the spending plans because of their opposition to the substance of a new mechanism that would allow EU funding to be suspended to Member States where there are "breaches of the principles of the rule of law". The matter is expected to be discussed at the European Council on 10 and 11 December 2020.

57 The same approach applies under the EDF's current iteration, the European Defence Industrial Development Programme (EDIDP) which runs from 2018 until the end of 2020. The EDIDP Work Programme 2019–20 covered, for example, a call for projects related to CBRN detection capabilities, unmanned air systems, and cyber-defence.

58 It is unclear at this stage what proportion of the Fund is likely to be directed to support PESCO projects.

Participation in the European Defence Fund by non-EU countries

4.32 The aim of the Defence Fund is to “foster the competitiveness, efficiency and innovation capacity of the [EU’s] defence technological and industrial base”. In principle, financial support from the Fund is therefore only available to defence companies in the EU itself.

4.33 However, the Regulation establishing EDF contains an explicit provision permitting Norway and Iceland, as members of the European Economic Area, to seek ‘association’ with the Fund: in return for a financial contribution, and subject to the EU’s agreement, their defence industry would be eligible to bid for EDF funding on the same terms as those of EU Member States. However, such ‘association’ does not provide voting rights over the work programme and individual funding decisions, which would be taken by qualified majority of EU Member States only. The UK, which is not pursuing membership of the EEA, does not qualify for this option.

4.34 For the defence industries of countries like the UK that cannot seek full ‘association’ with the Fund, eligibility for EDF funding would exist but in a very limited form. In particular, the Member States want to allow EU-based subsidiaries of industrial entities based in, or controlled from, non-EU countries to act as a direct or indirect beneficiaries of Defence Fund support. However, this would be allowed only if the EU Member State hosting such a subsidiary can offer certain guarantees that its involvement would not harm the “security and defence interests of the Union and its Member States”. These would include notably restrictions on access to sensitive information, and restrictions on exports of transfers of ownership of the intellectual property arising from projects part-financed by the Defence Fund outside of the EU. In certain cases, industrial companies involved in EDF projects could cooperate with commercial partners outside the EU, but the latter could not draw on financial support from the EU budget.

The Government’s position on potential participation in PESCO and the European Defence Fund

4.35 The UK, while still a Member State of the EU, chose not to join PESCO. Moreover, from its date of withdrawal from the EU on 31 January 2020, the UK in any event lost the right to seek full participation in PESCO as a whole.[59] Similarly, the UK has no automatic right to bid for funding from the European Defence Fund because it is due to become operational on 1 January 2021, when the Treasury is no longer liable to contribute to new EU spending and consequently the UK loses its right to apply for new EU funding unless it has specific agreements to the contrary in place for specific EU programmes (which, as set out above, is not a possibility for the European Defence Fund because this option is limited to Norway and Iceland).[60]

4.36 However, as noted, there are certain options, however limited, for UK involvement in both PESCO and the European Defence Fund should it choose to pursue them.

59 EU countries which are not participants in PESCO can notify their desire to join at any point, which is then subject to a vote by Qualified Majority among the existing participating Member States (Article 46(3) TEU).

60 The Withdrawal Agreement governing the UK’s exit from the EU contains an elaborate financial settlement to resolve the UK and EU’s financial obligations to each other built up during the UK’s membership of the European Union. As part of this arrangement, the UK can continue to access new EU funding until 31 December 2020, and any outstanding amounts due to UK-based recipients after that date will be honoured by the EU.

Possibility of UK participation in PESCO projects

4.37 Notably, under the previous Prime Minister, the Foreign & Commonwealth Office expressed the Government's support for PESCO as having the "potential to help drive up defence investment in Europe and to strengthen capability".[61] It also repeatedly confirmed the UK wanted a clear legal route for participation in individual projects after Brexit (to ensure it can seek involvement where this is in the UK's interest or "where there is clear value in doing so, including for [the] defence industry", and to prevent duplication of efforts between PESCO and NATO).

4.38 From the 17 initial PESCO projects launched in December 2017, the Government in particular identified the "military mobility" project as the one of principal interest to the UK. This is a wide-ranging PESCO scheme which aims to tackle diplomatic, political and legal hurdles to the rapid movement of troops and equipment from one PESCO country through or to the territory of another, for example for training or onward deployment, that need to be addressed intergovernmentally.[62]

4.39 However, despite these initial positive noises, the UK has never formally expressed an intention to seek participation in any PESCO project.[63] Moreover, in May 2019, the Government told this Committee that the then-draft of the rules for non-EU participation in PESCO "set such a high bar to participation that the UK and UK industry may be deterred from participating" (although in July that year, the Foreign Office still maintained the UK did "have an interest in arrangements for third state participation", and wanted them to be "as open and flexible as possible to maintain the option of UK participation in specific projects as a third country where it is in our interests to do so").

4.40 Under the new Prime Minister, who took office in June 2020, this approach—of trying to keep the UK's options open without formally committing to seeking involvement in either PESCO—has remained unchanged. In the revised Political Declaration on the future UK-EU relationship after Brexit, agreed by both sides in October 2019, this ambition is set out in a section headed "Defence capabilities development":[64]

> "[W]hile both Parties should preserve their respective strategic autonomy and freedom of action underpinned by their respective robust domestic defence industrial bases, the Parties agree to consider the following to the extent possible under the conditions of Union law [...] the United Kingdom's

61 Explanatory Memorandum submitted by the then-Minister for Europe, Rt Hon. Sir Alan Duncan MP, on 13 December 2017.

62 The "Military Mobility" project also has an EU 'Community' component that seeks to address regulatory barriers that hinder military mobility, such as customs rules and insufficient dual-use transport infrastructure. See for more information the previous European Scrutiny Committee's Report of 3 July 2019.

63 For example, in an Explanatory Memorandum submitted by the Foreign Office in June 2019, the Government said that it had "consistently supported action to improve military mobility, in particular the closer coordination of EU military mobility initiatives with NATO" and that "under the UK's future relationship with the EU, our expectation is that we would want to continue to work closely with EU institutions and Member States on military mobility".

64 The ambitions set out in the Political Declarations are not in itself a legal agreement and do not establish a binding obligation for UK contributions to, or participation, in the Defence Fund after it has ceased to be an EU Member State.

> collaboration in projects in the framework of Permanent Structured Cooperation (PESCO), where invited to participate on an exceptional basis by the Council of the European Union in PESCO format."[65]

4.41 The Prime Minister's negotiating objectives for the UK's future relationship with the EU, published in February 2020, did not explicitly refer to PESCO. In fact, the word "defence" does not appear in the negotiating objectives at all. However, in his Explanatory Memorandum of November 2020 on the specific rules for "third State" participation in PESCO, Foreign Office Minister Nigel Adams MP told us that it is "too early to assess the utility of PESCO projects". As such, the Memorandum does not rule out the possibility of the UK seeking to participate in specific projects in the future, noting that the Government "will continue to work with UK defence industry to understand how the PESCO third country rules are interpreted [...] in practice, and the extent to which other third countries are able to participate meaningfully". However, he adds that, "if the current third country terms are interpreted strictly, particularly on export control and intellectual property rights, this would make it more difficult for third countries [like the UK] to participate".[66]

Possibility of UK participation in projects financed by the European Defence Fund

4.42 Similar to PESCO, the Government has previously also supported the establishment of the European Defence Fund, citing the benefits to Europe's defensive capabilities.[67] However, given that the UK has left the EU, its defence industry would not have an automatic right to apply for funding from the EDF: the option for full "association" of non-EU countries with the Fund will be open to Norway and Iceland only. Instead, as described above, EU-based subsidiaries of UK industries could potentially become involved in projects financed by the Fund and receive financial support on a case-by-case basis, accompanied by restrictions on the use of any technology or intellectual property the project may generate.

4.43 The extremely restrictive nature of the "third country" provisions in the Regulation establishing the European Defence Fund have meant that the Government has expressed a distinct lack of appetite to pursue UK involvement.[68]

4.44 In particular, although the UK was still asking the EU to widen the criteria for 'association' with the Fund for non-EU countries beyond the EFTA-EEA members by March 2019, even at that stage was concerned about the envisaged restrictions on transfers of intellectual property generated by participants in an EDF-financed project, especially

65 The other two areas of cooperation on defence capability development listed in the Political Declaration are possible UK involvement in "relevant existing and future projects of the European Defence Agency (EDA) through an Administrative Arrangement" and "the participation of eligible United Kingdom entities in collaborative defence projects bringing together Union entities supported by the European Defence Fund (EDF)".

66 To inform the Government's position, the Explanatory Memorandum states that officials will "monitor the ongoing development of new PESCO projects", with a pre-condition for any consideration being given to UK involvement is that they "should help build capabilities that are required by NATO and available to NATO, as well as allowing meaningful cooperation with non-EU NATO allies".

67 Explanatory Memorandum submitted by the Ministry of Defence, 27 June 2018.

68 By November 2018, the then-Minister for Defence Procurement (Stuart Andrew MP) indicated in oral evidence to the Committee about the Defence Fund that the Government would only seek participation where in the UK's interests, rather than 'association' (an option which is, in any event, reserved only for non-EU members of the European Economic Area, see above).

in relation to “products of combined EU-funded and third-party funded results”. As such, the then-Minister for Defence Procurement (Stuart Andrew MP) told Parliament that “the current terms may not provide an adequate framework for participation of the UK or UK industry [in the European Defence Fund] after we leave the EU” on a project-by-project basis, because the benefits to the UK would not outweigh the costs and lack of influence over projects.[69] The possibility of UK industrial involvement in projects financed by the Defence Fund was referenced in the aforementioned Political Declaration on the UK-EU relationship in October 2019, but only “to the extent possible under the conditions of [EU] law”.

4.45 The Government’s lukewarm assessment of the Defence Fund does not appear to have changed since. In a letter dated 16 November 2020 on the latest developments towards the establishment of the Fund, the new Minister for Defence Procurement—Jeremy Quin MP—notes that “entities from non-associated third countries cannot receive EDF funding, and EDF-funded actions will be subject to restrictions on third-party access, particularly in relation to intellectual property rights and export controls”. He adds, sardonically, that “it remains to be seen how this will work in complex pan-European supply chains”. The Minister also notes that the Fund’s future beyond the end of the next EU budgetary cycle in 2027 presents an opportunity for the EU to “review the underlying rules governing the EDF, depending on how it works in reality”, hinting that the framework for “third country” participation in the Fund could change at that stage.

Conclusions and action

4.46 We thank the Government for its latest updates on the rules for the participation of non-EU countries in PESCO and the establishment of the European Defence Fund.

4.47 When the previous European Scrutiny Committee considered the launch of PESCO in December 2017, it concluded it was a major political development—irrespective of the UK’s decision not to participate and its exit from the EU—in light of the intensification of EU-level defence cooperation which it represented, and the Government’s clear interest in seeking the *option* to participate in projects of mutual benefit under the PESCO aegis. Our predecessors therefore recommended the Council Decisions establishing PESCO for debate in the House of Commons, which eventually took place on 26 April 2018. The Defence Committee also raised the issue of PESCO, and the potential “policy, financial, broader resources and legal implications of the UK taking part in the military mobility […] project” in its June 2018 Report on “The Government’s proposals for a future security partnership with the European Union“. This Committee has also drawn the negotiations at EU-level on the European Defence Fund to the attention of the House on multiple occasions.[70]

4.48 As a Committee, we have not taken a position on the added value of PESCO and the Defence Fund for Europe’s military capabilities, or the costs and benefits of any potential UK participation in either scheme. With respect to the European Defence Fund, the restrictions imposed on involvement of non-EU countries and their defence industries largely render the question of formalised UK participation moot. However, it cannot be ruled out that British companies, via their EU subsidiaries or in partnership with EU-based entities, may seek to become involved in Defence Fund projects. The military and

69 Letter from Stuart Andrew MP to Sir William Cash MP, 28 March 2019.
70 See in particular our predecessors’ Reports of 11 July, 12 September and 24 October 2018.

political implications of any such participation, including the extent to which it may affect future decisions on the development or acquisition of defence technology, would need to be considered carefully.

4.49 However, with respect to PESCO, the situation is different. The current Government is taking a wait-and-see approach to formal UK participation. While it has expressed no current intention to seek involvement in any of the 46 PESCO projects, Ministers under this or any future administrations may take a different approach.

4.50 Should the Government consider seeking UK participation in PESCO at a later stage, it would have to address a number of sensitive issues in its negotiations with the EU. Notably, there would need to be an "Administrative Arrangement" on the nature—and cost—of the UK's contribution, its rights to use and transfer of any new intellectual property or technology, and how it could influence the direction and management of the project. Moreover, it is unclear at this stage if the Government could guarantee the full involvement of the British companies in any projects in which the UK participates, because the rules on contributions by industrial "entities" are yet to be established by the EU Member States. This would surely be a key consideration in any cost-benefit analysis, given the substantive importance the Government attaches to the economic vitality of the UK's defence and engineering industries.[71]

4.51 The Committee is therefore of the view that any future decision by the Government to seek formal participation in a PESCO project would require a careful and detailed of assessment of the cost—including any financial or material contribution to the project, and a lack of "decision-making" powers for the UK Government about its strategic direction—against the perceived benefits for the UK's defensive capabilities. Any decision for the UK to become involved in PESCO should also be balanced against the implications for the primacy of NATO for Europe's defence, and how it relates more generally to the UK's defensive autonomy, its relationship with other military allies, and its overall security partnership with the EU and its Member States.

4.52 Given the potentially significant political and military implications of any future UK involvement in PESCO, we consider it imperative that Parliament should be informed in advance of any changes in the Government's current policy. We would therefore expect Ministers to inform the House expeditiously if a formal expression of interest in a particular PESCO project is being considered, and we have written to the Foreign Office to seek confirmation that such notification will be made to enable parliamentary scrutiny and debate in advance.

4.53 In anticipation of the Minister's reply, we draw these particular developments to the attention of the Defence Committee and the Foreign Affairs Committee.

71 We are aware of course about the wider concerns with respect to the attractiveness of the UK as an investment destination for strategic industries, including defence, following our withdrawal from EU. To a large extent these industry concerns are driven by the UK's exit from the Single Market and Customs Union and the consequences for cross-border supply chains and trade, rather than by a decision—or lack thereof—to participate in PESCO and the European Defence Fund specifically.

Letter from the Chair to Minister for Asia (Nigel Adams MP), Foreign, Commonwealth and International Development Office

Thank you for your Explanatory Memorandum of 25 November 2020 on the rules recently agreed by the EU for participation by "third States" like the UK in the 46 projects for closer military cooperation under the EU's new framework for Permanent Structured Cooperation in Defence (PESCO).[72]

We note that the Government has not identified any of the current PESCO projects for closer defence cooperation as meriting a formal expression of UK interest at this stage, but that the situation will be kept under review as the new rules are implemented and the participating EU countries develop these projects further. You cite in particular the potential difficulties that could arise from a strict interpretation of the new rules surrounding the export and transfer of military technology and intellectual property arising from PESCO projects to non-EU jurisdictions as a barrier to potential UK participation.

In light of the significant political and military implications that a future decision for the UK to join a PESCO project may entail, we would be grateful if you could confirm that the Government would notify Parliament in advance of any formal expression of interest being made to the EU, to enable full and detailed parliamentary scrutiny and debate to take place about the costs and benefits of the UK's involvement.

We look forward to receiving your reply by 15 January 2021.

72 Council Decision (CFSP) 2020/1639 establishing the general conditions under which third States could exceptionally be invited to participate in individual PESCO projects.

5 Cross-border police cooperation: the automated exchange of DNA and fingerprint data under Prüm[73]

These EU documents are legally and politically important because:

- they are the trigger for a decision taken by the Government in June 2020 to allow the DNA profiles and fingerprints of criminal suspects held in the UK's national DNA and fingerprint databases to be searched by EU partners under the Prüm data sharing arrangements;
- the decision alters the basis on which Parliament (after a debate and Resolution agreed in December 2015) determined that the UK should take part in Prüm; and
- the documents concern an area of cooperation which the EU and the UK wish to maintain after the transition period ends on 31 December 2020.

Action

- No further action on these documents.
- Write to the Minister for Security (Rt Hon. James Brokenshire MP) noting his assurance that Parliament will have "sufficient opportunity" to scrutinise the outcome of EU/UK future relationship negotiations and asking him to provide a comprehensive overview of the terms of any deal on law enforcement and criminal justice cooperation at the earliest possible opportunity and in sufficient time to inform any debate in Parliament.
- Draw to the attention of the Committee on the Future Relationship with the EU, the Home Affairs Committee, the Justice Committee, the Joint Committee on Human Rights, and the Science and Technology Committee.

Overview

5.1 These two Council Implementing Decisions concern the operation of the Prüm system,[74] an EU-wide legal framework providing for the rapid automated searching of DNA profiles, fingerprint and vehicle registration data held in the national databases of EU Member States (there is no central EU database) to support the prevention and investigation of cross-border crime.

73 (a) Council Implementing Decision (EU) 2019/968 on the launch of automated data exchange with regard to DNA in the UK; Council document—; Legal base: Article 33 of Council Decision 2008/615/JHA on the stepping up cross-border cooperation, particularly in combating terrorism and cross-border crime, QMV, EP consultation; Department: Home Office; Devolved Administrations: consulted; ESC number 40679.
(b) Council Implementing Decision on the launch of automated data exchange with regard to dactyloscopic data in the UK; Council document 14247/19,—; Legal base: Article 33 of Council Decision 2008/615/JHA on the stepping up cross-border cooperation, particularly in combating terrorism and cross-border crime, QMV, EP consultation; Department: Home Office; Devolved Administrations: consulted; ESC number 41121.

74 See Council Decision 2008/615 JHA and Council Decision 2008/616/JHA.

5.2 The first Council Implementing Decision (adopted in June 2019) authorised the UK to take part in the automated exchange of DNA profiles but set a one-year deadline for the UK to "complete a review of its policy of excluding suspects' profiles from automated DNA data exchange", failing which the Council would "re-evaluate the situation with regard to the continuation or termination of DNA data exchange with the UK".[75] The Government announced in June 2020 that it had completed its policy review and had decided to begin sharing the biometric data of criminal suspects through Prüm because of the "important public safety benefits".[76] The second Council Implementing Decision (adopted in August 2020) authorised the UK to begin the automated exchange of fingerprint data. Our earlier Reports provide further background on UK participation in Prüm and our exchanges with the Government.[77]

5.3 In our letter of 21 October 2020 to the Minister for Security (Rt Hon. James Brokenshire MP), we reiterated our concern that the Government's decision to share the DNA profiles and fingerprints of criminal suspects contradicted assurances given to Parliament in December 2015 that the UK would not share biometric data relating to individuals who had not been found guilty of a crime in its Prüm data exchanges with other countries. We expressed deep disquiet that the Government's change of policy had been taken without prior scrutiny by Parliament and without the opportunity for a debate and vote to determine whether the remaining safeguards were adequate.

5.4 We noted that the Minister had nothing of substance to say in response to our request for an update on the progress being made in negotiations with the EU on agreeing capabilities similar to those provided by Prüm as part of a future agreement on criminal justice and law enforcement cooperation. We made clear that we expected far more meaningful engagement from the Government in explaining what successor arrangements would apply from 1 January 2021. We repeated our request for a progress report on negotiations, the Minister's assessment of the main sticking points, the prospects for reaching an agreement, and the likelihood that it would take effect from 1 January 2021.

5.5 In his response of 25 November 2020 the Minister reiterates that the Government "felt it was appropriate to exercise its authority to effect a change to one of a suite of safeguards in light of the significant operational benefits of the change and other strong safeguards in place to protect UK citizens" while acknowledging that we have taken a different view.

5.6 On the terms of a future agreement with the EU on law enforcement and criminal justice cooperation, the Minister considers that "it would not be appropriate for me to expand on the details of a live negotiation at this stage" other than by means of "updates through the usual mechanisms including Committee appearances and statements to the House". The Government's aspiration remains an agreement that "should equip operational partners on both sides with the capabilities that help protect citizens and

75 Council Implementing Decision (EU) 2019/968 was adopted on 6 June 2019. See our Seventy-second Report HC 301–lxx (2017–19), chapter 3 (17 July 2019).

76 See the Written Statement issued on 15 June 2020 by the Minister for Security (Rt Hon. James Brokenshire MP) and his letter of the same date to the Chairman of the European Scrutiny Committee (Sir William Cash MP).

77 See our Fifteenth Report HC 229–xi (2019–21), chapter 5 (2 July 2020), our Nineteenth Report HC 229–xv (2019–21), chapter 9 (3 September 2020) and our Twenty-sixth Report HC 229–xxii (2019–21), chapter 3 (21 October 2020).

bring criminals to justice" and "include arrangements that support data exchange for law enforcement purposes; operational cooperation between law enforcement authorities; and judicial cooperation in criminal matters".

5.7 While noting that discussions have been "constructive" and revealed "a good degree of convergence in what the UK and EU are seeking to negotiate in terms of operational capabilities", the Government nonetheless continues to prepare "for all possible scenarios" when the post-exit transition period ends on 31 December 2020. The Minister adds:

> We have well-developed and well-rehearsed plans in place to ensure the smooth transition to cooperation via alternative, non-EU arrangements should these be necessary.

5.8 He also makes clear that:

> Parliament will of course have sufficient opportunity to scrutinise the UK-EU negotiations in due course.

Action

5.9 As stated in our previous Report, both Council Implementing Decisions have been adopted and we have no further questions to raise on their substance.

5.10 Noting the Minister's assurance that Parliament will have "sufficient opportunity" to scrutinise the outcome of UK-EU negotiations "in due course", write again asking him to provide a comprehensive overview of the terms of any agreement reached on law enforcement and criminal justice cooperation at the earliest possible opportunity and in sufficient time to inform any debate in Parliament.

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

Thank you for your letter of 25 November 2020 concerning the Government's decision to share the DNA profiles and fingerprints of criminal suspects in the UK's Prüm data exchanges with other countries, contrary to assurances given to Parliament in December 2015. These exchanges will end on 31 December 2020 unless the EU and UK agree to establish a similar operational capability as part of a future relationship deal. You indicate that discussions so far have been constructive and that "there is a good degree of convergence in what the UK and EU are seeking to negotiate in terms of operational capabilities".

We note your assurance that "Parliament will of course have sufficient opportunity" to scrutinise the outcome of UK-EU negotiations "in due course". If these negotiations do result in a deal, we expect the Government to provide a comprehensive overview of the terms of any agreement reached on law enforcement and criminal justice cooperation at the earliest possible opportunity and in sufficient time to inform any debate in Parliament.

6 Northern Ireland Protocol: continued application of EU firearms laws[78]

This EU document is politically important because:

- it concerns an EU law—the Firearms Directive—which will continue to apply in Northern Ireland at the end of the post-exit transition period under the Protocol on Ireland/Northern Ireland; and
- it raises questions about regulatory alignment or divergence in the laws applicable in Northern Ireland and Great Britain from 1 January 2021 and the Government's approach to managing the flow of illicit goods to, from and through Northern Ireland (and any other unintended consequences) resulting from the operation of the Protocol on Ireland/Northern Ireland.

Action

- No further action. Draw to the attention of the Northern Ireland Affairs Committee, the Home Affairs Committee, and the Committee on the Future Relationship with the European Union.

Overview

6.1 This Commission Communication sets out the main elements of the EU Action Plan on Firearms Trafficking for the period 2020–25. The illicit trafficking, distribution and use of firearms increases the threat posed by organised crime and terrorism. The purpose of the Action Plan—which is not legally binding—is to establish a framework for cooperation between the EU and the main source countries for illicit weapons in the EU's neighbourhood (the Western Balkans, Moldova and Ukraine). Our Twenty-second Report provides an overview of the main themes set out in the Action Plan and the specific actions the EU intends to take in the period 2020–25.[79]

6.2 A key priority highlighted in the Action Plan is the correct implementation of the EU Firearms Directive.[80] The Directive forms part of the retained EU law which will continue to apply in the UK under the European Union (Withdrawal) Act 2018 but, from 1 January 2021, the UK will be under no legal obligation to keep in step with any changes made to the Directive or to give effect to measures made under it. By contrast, Northern Ireland will be required to remain in lockstep with the Directive and to implement any changes made to it in the future as it is one of the EU laws listed in Annex 2 of the Protocol on Ireland/Northern Ireland which will continue to apply in Northern Ireland after the post-exit transition period ends on 31 December 2020.

6.3 As we noted in our earlier Reports, the Directive does not require full regulatory alignment across the EU—it establishes common minimum rules, leaving Member States

78 Commission Communication: 2020–2025 EU action plan on firearms trafficking; Council number 10035/20 + ADD 1, COM(20) 608; Legal base:—; Department: Home Office; Devolved Administrations consulted; ESC number 41428.

79 See our Twenty-second Report HC 229–xviii (2019–21), chapter 6 (24 September 2020).

80 Directive (EU) 2017/853 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons.

free to exceed them by including more stringent provisions in their national laws should they choose to do so. Nonetheless, the arrangements set out in the Protocol on Ireland/Northern Ireland create a risk of divergence in the laws on legally owned firearms which apply in Northern Ireland and the rest of the UK.

6.4 In his letter of 7 October 2020, the Security Minister (Rt Hon. James Brokenshire MP) noted that there had always been the possibility of policy divergence between Great Britain and Northern Ireland as firearms law (with the exception of prohibited weapons) is an area of devolved competence in Northern Ireland. While Northern Ireland has its own separate legislation, it has tended to align with the law applicable in the rest of the UK, except for handguns which have been permitted in Northern Ireland for historical reasons. The Minister anticipated that the Government "would wish to maintain close alignment of our domestic laws on the legal ownership of firearms within the UK". He added, however, that UK controls on firearms have generally been stricter than those required by the EU, so "any tightening of EU controls is likely simply to bring EU legislation in line with our own". The Minister concluded that "the risks associated with policy divergence from an EU or GB perspective are minimal", adding:

> Furthermore, the potential illicit flow of illegal firearms from the EU, into NI and onto GB is an aspect of serious organised crime already under consideration as part of ongoing work to mitigate the security risks arising from implementation of the Protocol.

6.5 The Minister told us that the Government had requested continued access to the EU's Internal Market Information (IMI) system—the system which governs intra-EU movements of firearms—for the purpose of tracking firearms entering Northern Ireland. Recognising that there would continue to be an organised crime threat across the Irish land border, he explained that the Home Office were taking a "whole system" coordinated approach to guard against potential abuse of the Protocol arrangements and manage the risk of illicit goods entering the UK, working closely with the Northern Ireland Office, Devolved Administrations, the Police Service of Northern Ireland, the Government's Transition Taskforce, HMRC and others.

6.6 In our response of 21 October 2020, we asked the Minister to update us on the UK's application to remain part of the EU's Internal Market Information system. Noting the Government's wish for firearms laws in Northern Ireland and the rest of the UK to remain closely aligned after transition and wider efforts to manage any organised crime threat, we also asked the Minister to:

- inform us promptly of any infringement proceedings brought by the European Commission against the UK *before* (as regards the UK as a whole) or *after* (in relation to the UK in respect of Northern Ireland) the end of the post-exit transition period on the grounds that it considered the UK's implementation of the EU Firearms Directive to be deficient; and

- provide further details on the Government's "whole system" coordinated approach to manage the risk of illicit goods entering the UK.

6.7 The Minister undertakes in his letter of 27 November 2020 to inform us promptly of any infringement proceedings brought by the European Commission against the UK as a whole or specifically in respect of Northern Ireland. On the "whole system" approach he observes:

> As the National Crime Agency advised the Northern Ireland Affairs Committee on 4 November, there will continue to be an organised crime threat across the Irish land border, as is currently the case presently.[81] To guard against potential abuse of the unique arrangements in the Ireland and Northern Ireland Protocol, we are delivering a "whole system approach" to tackle the flow illicit goods entering the UK—not just firearms. This means ensuring strategic alignment between operational partners and the Devolved Administrations, exploring whether we are pulling all the necessary policy levers, effective use of intelligence and a coordinated operational response. By working in this coordinated way we are confident that we will identify changes in the threat and be able to act accordingly.

6.8 Finally, the Minister confirms that the Department for International Trade (DIT) has been given full access to two EU Internal Market Information (IMI) systems which govern intra-EU movements of firearms, for the purpose of fulfilling the UK's obligations under the Protocol on Ireland/ Northern Ireland. This access is not dependent on the outcome of the EU/UK future relationship negotiations.

Action

6.9 We welcome the Minister's undertaking to inform us promptly if infringement proceedings concerning the UK's implementation of the EU Firearms Directive are brought by the European Commission after transition. We anticipate that the Northern Ireland Affairs Committee will wish to monitor closely the operation of the Government's "whole system" approach to managing the flow of illicit goods to, from and through Northern Ireland and any other unintended consequences resulting from the operation of the Protocol on Ireland/Northern Ireland. We have no further questions to raise on the Commission Communication.

81 See the transcript.

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

Department for Business, Energy and Industrial Strategy

(41641) 12593/20 + ADDs 1–5 —	Fitness Check of the 2012 State aid modernisation package, railways guidelines and short-term export credit insurance.
(41667) — COM(20) 715	Report from the Commission to the European Parliament and the Council on the implementation and administration of Directive 2000/14/EC of the European Parliament and of the Council of 8 May 2000 on the approximation of the laws of the Member States relating to the noise emission in the environment by equipment for use outdoors.
(41669) — —	Court of Auditors Annual report on the EU Joint Undertakings for the financial year 2019.
(41670) — COM(20) 738	Report from the Commission to the European Parliament and the Council on the implementation of Decision No 1608/2003/EC of the European Parliament and of the Council on science and technology statistics.

Department of Health and Social Care

(41663) 12719/20 +ADD1 COM(20) 691	Report from the Commission to the European Parliament and the Council Implementation of the third programme of Union action in the field of health (2018).

Department for Transport

(41650) — COM(20) 699	Report from the Commission to the European Parliament and the Council on the implementation of Directive 2014/45/EU on periodic roadworthiness tests for motor vehicles and their trailers repealing Directive 2009/40/EC.
(41659) — —	Report from the Commission to the European Parliament and the Council pursuant to Articles 9(1c), 21a(5) and 24a(4) of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community as amended by Regulation (EU) No 2020/696 of the European Parliament and of the Council of 25 May 2020 in view of the Covid19 pandemic.

(41666) — COM(20) 733	Report from the Commission to the European Parliament and the Council on the implementation of Regulation (EU) No 376/2014 on the reporting, analysis and follow-up of occurrences in civil aviation.

Home Office

(41339) 8721/20 +ADDs1–2 COM(20) 230	Report from the Commission to the European Parliament and the Council concerning the implementation and the results of the Pericles 2020 programme for the protection of the euro against counterfeiting in 2019.

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)

Defence Committee: EU Permanent Structured Cooperation in Defence and the European Defence Fund [(a) Council Decision, (b) Proposed Regulation (SNC)]

Foreign Affairs Committee: EU Permanent Structured Cooperation in Defence and the European Defence Fund [(a) Council Decision, (b) Proposed Regulation (SNC)]

Committee on the Future of the European Union: EU Permanent Structured Cooperation in Defence and the European Defence Fund [(a) Council Decision, (b) Proposed Regulation (SNC)]; Market access for goods from African, Caribbean and Pacific (ACP) countries [Commission Report (SNC)]; Northern Ireland Protocol: Joint Consultative Working Group [Proposed Council Decision (SC)]; Cross-border police cooperation: the automated exchange of DNA and fingerprint data under Prüm [Council Implementing Decisions (SC)]; Northern Ireland Protocol: continued application of EU firearms laws [Commission Communication (SC)]

Home Affairs Committee: Cross-border police cooperation: the automated exchange of DNA and fingerprint data under Prüm [Council Implementing Decisions (SC)]; Northern Ireland Protocol: continued application of EU firearms laws [Commission Communication (SC)]

Joint Committee on Human Rights: Cross-border police cooperation: the automated exchange of DNA and fingerprint data under Prüm [Council Implementing Decisions (SC)]

International Development Committee: Market access for goods from African, Caribbean and Pacific (ACP) countries [Commission Report (SNC)]

International Trade Committee: Market access for goods from African, Caribbean and Pacific (ACP) countries [Commission Report (SNC)]; WTO Airbus-Boeing dispute: application of EU retaliatory measures [Commission Implementing Regulation (SNC)]

Justice Committee: Cross-border police cooperation: the automated exchange of DNA and fingerprint data under Prüm [Council Implementing Decisions (SC)]

Northern Ireland Affairs Committee: Market access for goods from African, Caribbean and Pacific (ACP) countries [Commission Report (SNC)]; Northern Ireland Protocol: Joint Consultative Working Group [Proposed Council Decision (SC)]; WTO Airbus-Boeing dispute: application of EU retaliatory measures [Commission Implementing Regulation (SNC)]; Northern Ireland Protocol: continued application of EU firearms laws [Commission Communication (SC)]

Science and Technology Committee: Cross-border police cooperation: the automated exchange of DNA and fingerprint data under Prüm [Council Implementing Decisions (SC)]

Formal Minutes

Wednesday 9 December 2020

Members present:

Sir William Cash, in the Chair

Jon Cruddas	Mrs Andrea Jenkyns
Allan Dorans	Mr David Jones
Margaret Ferrier	Anne Marie Morris

Scrutiny Report

Draft Report, proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 7 read and agreed to.

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

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

[Adjourned till Wednesday 16 December at 1.45 p.m.

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*)