



House of Commons  
European Scrutiny Committee

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# **Brexit: The future operation of the Channel Tunnel Fixed Link**

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**Thirty-Sixth Report of Session  
2019–21**

*Report, together with formal minutes relating  
to the report*

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## Notes

### Numbering of documents

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

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

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

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

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

### Abbreviations used in the headnotes and footnotes

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

### Euros

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

### Further information

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

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

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# 1 Introduction

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## Document scrutiny

1. In the course of our regular EU document scrutiny, we considered the EU's plans for the operation of the Channel Tunnel after the end of the Brexit transition period (as established by the UK/EU Withdrawal Agreement).<sup>1</sup>
2. The original legal basis for the Channel Tunnel is a 1986 agreement between the UK and France known as the Treaty of Canterbury. In practice, however, EU law governs significant areas of its operation. After the transition period, absent a new UK/France agreement, the governance of the Tunnel would revert to the Treaty of Canterbury. As the transition period has now ended, and without an agreement being reached between the UK and France, this is the situation that now prevails on the Channel Tunnel. The UK/EU Trade and Cooperation Agreement—reached at the end of December 2020—does not cover the operation of the Channel Tunnel.
3. The EU's preferred position was that EU law continued to apply on the UK side of the Tunnel at the end of the transition period with oversight ultimately falling to the EU Court of Justice (the renegotiation of the Treaty of Canterbury would fall to France and the UK but, because of EU law, France would have to negotiate within a mandate provided by the EU). In November 2020, the EU adopted legislation that permitted France to negotiate an agreement with the UK—on the future operation of the Tunnel—subject to the inclusion of these and other related conditions. The Government repeatedly rejected the EU's position and favoured an agreement that was said to be compatible with the UK's status 'as a sovereign nation'.

## Our evidence session with the Minister on 16 December 2020

4. In our Twenty-ninth Report of Session 2019–21,<sup>2</sup> we determined that questions still remained regarding the Government's alternative proposals on Channel Tunnel operations after the transition period and invited the Minister, Parliamentary Under-Secretary of State at the Department for Transport, Rachel Maclean MP, to address these and other related concerns in oral evidence. The Minister appeared before us on 16 December 2020 supported by Andrea Pearson, Deputy Director International Rail, Department for Transport.<sup>3</sup>
5. Our Report, which draws on our earlier scrutiny of the EU's proposals and the Minister's evidence, makes a series of conclusions and recommendations regarding the future operation of the Channel Tunnel. The EU's original proposals—and the Government's counter suggestions—mainly relate to the safety framework that prevails on the Channel Tunnel, in particular, the issuance and recognition of related infrastructure certificates and vehicle authorisations. We have not considered other related issues such as the introduction of new post-Brexit border or customs arrangements on the UK or French sides of the Tunnel.

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1 See Twenty-first Report (2019–21) HC 229-xvii, [Chapter 5](#) (16 September 2020); Twenty-third Report (2019–21) HC 229-xix, [Chapter 4](#) (1 October 2020); and Twenty-ninth Report (2019–21) HC 229-xxv, [Chapter 2](#) (19 November 2020)

2 Twenty-ninth Report (2019–21) HC 229-xxv, [Chapter 2](#) (19 November 2020)

3 European Scrutiny Committee, '[Oral evidence: Brexit: The future operation of the Channel Tunnel Fixed Link](#)' HC 1062

## A brief history of the Channel Tunnel

6. The idea for a rail link under the English Channel connecting the UK and France can be traced to the turn of the 19th century. Serious discussions took place between senior representatives from both countries during 1802–03. In the following years, geological analyses were undertaken, however, technological limitations, an unfavourable political environment and war left the project unrealised. The link was considered again by the UK and French governments in the 1960s but no firm progress was made. In the early 1980s, under the Thatcher government, the idea of a transport link between the UK and France was resurrected and in 1986 the UK/France Treaty of Canterbury was signed.<sup>4</sup> The Treaty set the terms for the construction of the ‘Channel Tunnel Fixed Link’,<sup>5</sup> its future operation (by privately owned companies), and its ongoing (regulatory) management by an Anglo-French ‘Intergovernmental Commission’.

7. The Channel Tunnel Fixed Link is the UK’s only surface transport connection to mainland Europe. The term ‘Fixed Linked’ is used to describe the British and French terminals—at Folkestone and Coquelles respectively—and the tunnel itself (comprising two running tunnels and a service tunnel). Legally, the tunnels comprise a British section and a French section with an international frontier. The image below shows the route of the Fixed Link set against the geography of the UK and France.



Figure 1: Map of the Channel Tunnel (source: Magellan Geographix)

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- 4 For a comprehensive history of the Channel Tunnel see Terry Gourvish, *The Official History of the Channel Tunnel* (Routledge 2016).
- 5 The Channel Tunnel Fixed Link connects to the ‘High Speed 1’ (HS1) rail line at Folkestone and terminates at London St Pancras International railway station (this stretch of line is known as ‘the Channel Tunnel Rail Link’). Throughout this briefing the terms ‘Fixed Link’, ‘Channel Tunnel’ and ‘Tunnel’ are used interchangeably.



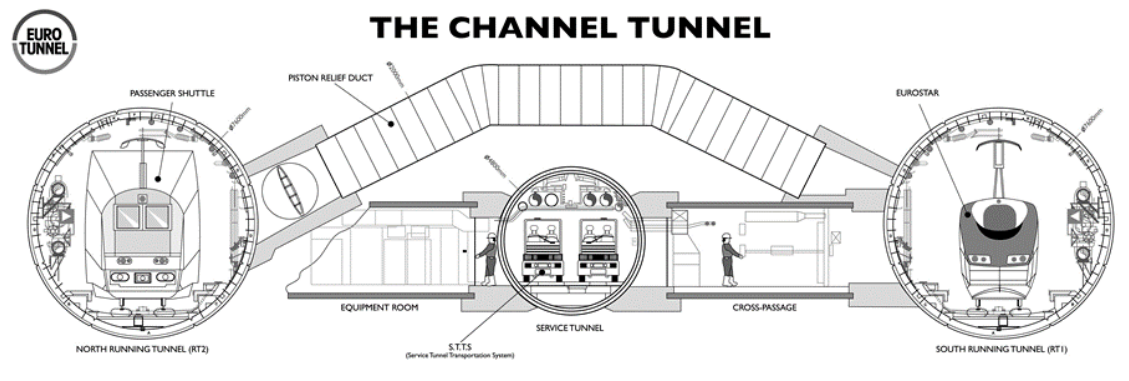


Figure 2: Cross section of the Channel Tunnel (source: [Getlink](#) (2 September 2019))

8. The Tunnel operates on the basis of a concession agreement with Eurotunnel (now known as Getlink), the dedicated infrastructure manager. Getlink runs its own Eurotunnel Shuttle vehicle service on the Tunnel and earns revenue from other services (i.e. DB Schenker freight and Eurostar passenger services). Eurostar passenger trains operate to common high-speed rail specifications.
9. According 2018 figures, the Channel Tunnel accounts for €138bn—£124bn—of trade and carries 28 million passengers each year.<sup>6</sup>

6 Euractiv, [‘The Channel Tunnel: What economic value to European trade?’](#) (4 June 2018); Cabinet Office provided exchange rate on 27 November 2020 (€1 = £0.89442)

## 2 The governance of the Channel Tunnel and EU law

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10. The Treaty of Canterbury sets the legal framework governing the operation of the Channel Tunnel. It provided for the establishment of the Intergovernmental Commission (IGC). The IGC is described as “the conduit for discussion between the public services of the two States involved with the Fixed Link [the UK and France]”.<sup>7</sup> Both countries appoint delegates to the IGC and it has a permanent secretariat in London. As of 23 April 2020, the UK delegation to the IGC comprises officials from the Office of Rail and Road (ORR), the Department for Transport, the UK Border Force, and the Foreign, Commonwealth and Development Office.<sup>8</sup>

11. Although the IGC is formally charged with ensuring the safe operation of the Fixed Link, in practice, the Channel Tunnel Safety Authority (CTSA) is responsible for the day-to-day safe running of the Tunnel. This includes making safety proposals to the IGC, drawing up, monitoring and enforcing safety regulations, and investigating and reporting on any safety incidents.

12. The IGC, through the CTSA, regulates safety on the Channel Tunnel based on a ‘bi-national approach’ that seeks to achieve unified governance—including the setting of rules and standards—whilst accommodating differences between the UK and France’s rail systems. Rules and standards applicable to the UK-side of the Fixed Link are commonly given effect to by Statutory Instrument.

13. In giving an overview of the legal and regulatory framework governing the Channel Tunnel Fixed Link, the Minister drew a distinction between this framework and the concession agreement stipulating Eurotunnel’s rights and duties as the dedicated infrastructure manager (which runs until 2086).<sup>9</sup> Notwithstanding the international law-based origins and management of the Fixed Link, several important EU laws govern the operation of, and provision of services through, the Tunnel. These EU laws include rules on railway safety, interoperability, and the issuance of vehicle and infrastructure certificates and authorisations.<sup>10</sup> The role of EU law on the Fixed Link has grown in importance since the early 2000s with the adoption of successive EU railway ‘packages’.

14. Whereas the IGC was once solely responsible for deciding on the content of safety rules applicable to the Fixed Link, these are now often conditioned by EU-level requirements that, while an EU Member State, the UK was obliged to give effect to.<sup>11</sup> As an example, the EU ‘safety in railway tunnels’ Technical Specification for Interoperability (TSI) was given effect, specifically, to the Channel Tunnel in 2013.

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7 Channel Tunnel Intergovernmental Commission, ‘[The IGC](#)’ (Date of publication unknown)

8 *ibid*

9 Q2 European Scrutiny Committee, ‘[Oral evidence: Brexit: The future operation of the Channel Tunnel Fixed Link](#)’ HC 1062

10 At the end of the transition period (under the UK/EU Withdrawal Agreement), these EU laws were retained in domestic UK law by the EU (Withdrawal) Act 2018.

11 Since the end of the transition period (and with an agreement between the UK and France specifying otherwise having not yet been reached), the UK is no longer required to give effect to EU law on its side of the Fixed Link.

15. In evidence before us, Andrea Pearson, Deputy Director for International Rail, Department for Transport, explained the expansion of EU rail law over the last decade and confirmed the areas that it covers on the Channel Tunnel (including safety certificates, operator licences and technical interoperability rules).<sup>12</sup>

**16. The legal and regulatory framework prevailing on the Channel Tunnel is complicated and includes that provided for by the Treaty of Canterbury and, more recently, EU law. The issues regulated by EU law—which on the UK-side of the Fixed Link have been retained in domestic law since the end of the transition period—are vital to the effective functioning of the Channel Tunnel.**

### 3 The EU's proposals

17. In July 2020, the European Commission published two legislative proposals relating to the future operation of the Channel Tunnel Fixed Link. These were: (1) a [proposal for a Decision](#) that would authorise France to negotiate and ratify an agreement with the UK—to supplement the Treaty of Canterbury—with the aim of ensuring the safe and efficient operation of the Channel Tunnel at the end of the transition period; and (2) a [proposal for a Regulation](#) that would make changes to EU railway rules to ensure compatibility with any agreement reached between France and the UK.

18. These proposals were adopted by the Council on 14 October 2020 and published in the Official Journal of the European Union on 22 October.<sup>13</sup> Their content remains much the same as when originally proposed by the Commission. The Decision authorises France to negotiate and conclude an agreement with the UK on the Tunnel's future governance arrangements whilst the Regulation covers issues relating to its unified safety regime and recognition under EU law.<sup>14</sup> The authorisation for France to negotiate and reach an agreement with the UK on the future operation of the Tunnel has been granted by the EU on the condition that:

- i) the authority responsible for safety on the Channel Tunnel—the IGC—applies all relevant EU law on the Fixed Link in a dynamic way (including on the UK side);
- ii) in the event of a dispute concerning safety on the Tunnel being submitted for arbitration, if the dispute raises a question relating to the interpretation of EU law, the arbitral tribunal should not decide on the matter itself but request a ruling from the Court of Justice of the EU (CJEU) with that ruling being binding on the arbitral panel; and
- iii) in circumstances of emergency or failure of the joint UK/French authority to comply with a decision of the arbitral tribunal, France will retain the right to act unilaterally to regain control of the French section of the Tunnel.

19. During our consideration of the EU's proposals, the Government has been steadfast in its insistence that an agreement between the UK and France—in line with the terms of the EU Decision—would not be consistent with its 'red lines' or reflect the status of the UK as a non-EU Member State. The Government has rejected future dynamic alignment with EU laws on the UK-side of the Fixed Link, oversight of the application and interpretation of EU law in the UK by the CJEU, and any role on UK territory for the European Union Agency for Railways (ERA).

13 [Regulation \(EU\) 2020/1530](#) of the European Parliament and of the Council of 21 October 2020 amending Directive (EU) 2016/798, as regards the application of railway safety and interoperability rules within the Channel Fixed Link; and [Decision \(EU\) 2020/1531](#) of the European Parliament and of the Council of 21 October 2020 empowering France to negotiate, sign and conclude an international agreement supplementing the Treaty between France and the United Kingdom of Great Britain and Northern Ireland concerning the Construction and Operation by Private Concessionaires of a Channel Fixed Link

14 In terms of process, the Commission argued that a Council Decision was needed to enable France to enter into negotiations with the UK as the area concerned—railways law and policy—is heavily regulated at EU-level and falls within the EU's exclusive external competence (meaning that only the EU and not an individual Member State can negotiate an international agreement).

20. The Minister said that the Commission’s proposals were “absolutely unacceptable in their current form”.<sup>15</sup> She explained that this was because they “...cut across the red lines for the UK Government’s position” and requirements such as future dynamic alignment with EU law on the UK-side of the Fixed Link would “...not respect our position as an independent sovereign nation”.<sup>16</sup>

21. The Decision and Regulation refer to EU laws that concern technical safety standards and the issuance and recognition of safety certificates and authorisations. Examples of safety standards include those that specify line layout, track parameters and track resistance to traffic loads. Authorisations –also sometimes referred to as ‘approvals’—relate to the conditions that must be met for locomotives to be placed on the market—by manufacturers—and, for safety certificates, those that must be complied with by railway undertakings to operate services. In the EU, authorisations and certificates are issued by Member State competent authorities, the ERA and the IGG (which is recognised as a ‘national safety authority’ for the purposes of EU law). These terms are used frequently in the transport field and can, more simply, be understood as the safety permissions necessary for train operators to put on services and trains to run on certain tracks.

22. Although not directly addressed by the EU, without an agreement on the future safety framework applicable to the Fixed Link, there is the potential for legal and practical uncertainty; with a lack of clarity over whether EU standards and mandated procedures and practices should continue to apply—on the UK-side—or an alternative system devised.

23. The UK and France share responsibility for safety on the Fixed Link through the IGC. The EU’s Explanatory Memorandum on the proposed Council Decision explained that, until the end of the transition period, the IGC was a ‘national safety authority’ for the purposes of EU law, charged with overseeing matters relating to railway safety and interoperability on the Fixed Link. The EU’s stated position was that it would be preferable, at the end of the transition period, to continue to have a single safety authority applying the same rules across the entirety of the Fixed Link.

24. With the expiry of the transition period, the IGC is a body entrusted by a Member State (France) and a third country (the UK) with tasks relating to railway safety. Importantly, EU law does not foresee the possibility of a national safety authority being made up of a Member State and a third country. Therefore, the Commission was concerned that unless steps were taken, at the end of the transition period, the IGC would cease to be the EU-approved national safety authority for the Fixed Link, and EU law would no longer be applicable to the parts of the Fixed Link within the UK’s jurisdiction.

25. At our evidence session, the Minister rejected that an agreement with France was necessary to ensure the safe operation of the Tunnel after the end of the transition period.<sup>17</sup> The Minister was clear that, in the interim, an agreement is not needed as the IGC will remain the recognised safety authority for the UK-side of the Fixed Link and it is not expected that any significant decisions concerning the operation of the Tunnel will have to be taken.<sup>18</sup> The Minister down-played the potential for disruption should an agreement not be reached and stated that her Department had, nonetheless, put in place adequate contingency measures.<sup>19</sup>

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15 Q8

16 *ibid*

17 Q10

18 *ibid*

19 *ibid*

## The Commission's November 2020 proposal

26. At the end of November 2020, the Commission published a new proposal on the future operation of the Channel Tunnel supplementing the Decision and Regulation agreed in October.<sup>20</sup>

27. The [proposal for a Regulation 'on certain aspects of railway safety and connectivity' on the Fixed Link](#) was adopted by the EU on 23 December 2020 and:<sup>21</sup> (1) extended the validity of the safety authorisation issued to the Channel Tunnel infrastructure manager—Getlink—by the IGC for two months after the end of the transition period; and (2) extended the validity of train operator licences issued by the UK—under EU law—and safety certificates issued by the IGC for nine months from the date of its application.

28. The EU justified the new Regulation as necessary to ensure the continued operation of the Fixed Link in light of slow progress in negotiations between the UK and France.

29. The EU argued that two months was sufficient time for French authorities to issue a safety authorisation covering their half of the Fixed Link. The EU appeared hopeful that an agreement could be reached with the UK on the future role of the IGC, in particular, its ability to issue a single safety authorisation covering the entirety of the Fixed Link. With regard to operator licences and safety certificates, the EU is, in effect, suggesting a period during which it continues to recognise UK licences and IGC authorisations. If an agreement has not been reached after 9 months, the EU is clear that train operators will have to obtain EU licences.

30. We questioned the Minister on whether the Government was aware of the EU's plans—before their publication—to extend the validity of certain safety authorisations and operator licences. The Minister explained that the EU's (then) proposal followed "...considerable pressing from the French authorities" and that the Government and France are "...more aligned on this with each other than perhaps with the Commission".<sup>22</sup> Referencing ongoing UK/EU future relationship negotiations, the Minister stated that a resolution was in the best interests of the UK and France, and was "completely outside of the wider EU dynamics".<sup>23</sup>

31. We raised concerns that the time limits imposed by the EU's new Regulation were short and a resolution would still have to be secured quickly. The Minister assured us that the Government was working with France to secure an outcome that is acceptable to both sides.<sup>24</sup>

32. The new Regulation does not supersede the November Decision and Regulation. France will therefore continue to be authorised only to reach a future agreement with the UK if it meets the conditions that the EU has previously set (i.e. EU law continues to apply on the UK side of the Tunnel; the EU Court of Justice has the final say over the

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20 [The Minister wrote to us by Explanatory Memorandum on the proposal on 14 December 2020](#). We have chosen to formally consider the Commission's proposal in the present Report as it was not possible to assess its implications before the Minister's appearance.

21 [Regulation \(EU\) 2020/2222](#) of the European Parliament and of the Council of 23 December 2020 on certain aspects of railway safety and connectivity with regard to the cross-border infrastructure linking the Union and the United Kingdom through the Channel Fixed Link (Text with EEA relevance)

22 Q16

23 *ibid*

24 *ibid*

interpretation of EU law in a dispute submitted for arbitration concerning EU law; and in circumstances of emergency or failure of the UK to comply with an arbitral decision, France will be able to act unilaterally to regain control of its section of the Channel Tunnel.

33. The EU's new Regulation does not list these conditions as requirements for the extension and recognition of UK issued licences and IGC authorisations, however, specific wording is included in the Regulation that allows the Commission to withdraw this benefit:

Where the Commission has justified doubts that the safety standards applied to the operation of cross-border railway services or infrastructure falling within the scope of this Regulation or the part of the same infrastructure that is situated in the United Kingdom are in line with the relevant provisions of Union law, it shall without undue delay, adopt implementing acts to withdraw the benefit conferred on the holder pursuant to Article 3 [covering the validity of safety authorisations, safety certificates and operating licences].<sup>25</sup>

34. The 'relevant provisions' of EU law to which the Regulation refers are not explicitly defined but it appears that they are Directives 2012/34/EU (relating to the establishment of a single European railway area) and (EU) 2016/798 (on railway safety) (which are listed in Article 4).<sup>26</sup> Although the EU is clear that these contingency measures are intended only to be temporary, the conditions for reciprocity that they require of the UK—i.e. adherence to some EU safety standards—are far less exacting than the kind of substantive rule alignment and CJEU oversight envisioned in the November 2020 Decision (and thus of any future France/UK agreement on the operation of the Tunnel).

35. This approach is not dissimilar to that adopted by the EU in preparing for a 'no-deal' Brexit in March 2019. Our predecessor Committee considered the Commission's 'no-deal' Channel Tunnel proposal at the time and noted its political importance.<sup>27</sup> Since adopted as Regulation (EU) 2019/503,<sup>28</sup> it provided a legal basis for the Commission to extend the validity of certain safety certificates covering the Tunnel for 3 months after a no-deal Brexit.<sup>29</sup>

36. Although not concerning safety and interoperability issues per se, the EU's unilateral extension of certificate validity is conditional on the UK doing likewise and:

...maintaining safety standards and procedures... which are identical to Union requirements being applied to the infrastructure which is used for the purposes of ensuring cross-border rail connectivity with the United Kingdom...<sup>30</sup>

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25 Article 5(2) of the Regulation

26 [Directive 2012/34/EU](#) of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area Text with EEA relevance; and [Directive \(EU\) 2016/798](#) of the European Parliament and of the Council of 11 May 2016 on railway safety (Text with EEA relevance)

27 Fifty-ninth Report HC 301-lvii (2017–19), [Chapter 4](#) (13 March 2019)

28 [Regulation \(EU\) 2019/503](#) of the European Parliament and of the Council of 25 March 2019 on certain aspects of railway safety and connectivity with regard to the withdrawal of the United Kingdom from the Union (Text with EEA relevance.)

29 A 'no-deal' Brexit was defined by the Commission as a situation where the UK/EU Withdrawal Agreement was not ratified either by the UK or EU.

30 Preamble (5) to Regulation (EU) 2019/503

37. We asked about the specific provisions of EU law that the UK would have to uphold, beyond the end of the transition period, for the new Regulation to apply. On behalf of the Minister, Ms Pearson explained that the UK will retain many elements of the EU rail *acquis*—through the EU (Withdrawal) Act 2018—and that, in this respect, the UK and France start from a position of equivalence (in terms of the laws that apply on both sides of the Channel at the end of the transition period).<sup>31</sup> We sought further clarity on the role of the CJEU in the UK after the end of the transition period and what its role would be in interpreting this ‘retained’ EU law. The Minister has since written to us and explained that the new contingency Regulation has not been retained in UK law and any future CJEU case law concerning its application will not be binding on the UK.<sup>32</sup> For retained EU law that covers rail, the Minister explains that, as per sections 5 and 6 of the EU (Withdrawal) Act 2018, it will be interpreted by UK courts in a manner consistent with EU law as it applied before the end of the transition period and that there is no role for the CJEU in this process.

38. **We welcome the Government’s firm rejection of:**

- any future dynamic alignment with EU laws on the UK-side of the Fixed Link;
- oversight of the application and interpretation of EU law in the UK by the EU Court of Justice; and
- any role on UK territory for the European Union Agency for Railways.

39. **We note the Government’s position that an agreement with France along the lines of that envisioned by the European Commission is not necessary to ensure the safe and efficient operation of the Tunnel . We also note that since the end of the transition period, save for disruption related to the Coronavirus pandemic, services continue to operate between Folkestone and Coquelles.**

*40. We are concerned, however, that new arrangements concerning the governance of the Channel Tunnel—which take account of the UK’s status a non-EU Member State—are yet to be agreed. The Government’s discussions with the French authorities and the EU’s extension of certain safety authorisations and operator licences appear to have prevented any immediate disruption but are not a permanent solution for managing safety on the Tunnel. Reaching a longer-term arrangement with France is vitally important. We ask that the Government provide us with monthly updates on the progress of negotiations.*

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31 Q29

32 [Letter from Rachel Maclean MP to Sir William Cash MP](#), 19 January 2021



## 4 The Government's alternative proposals

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41. When we first considered the EU's proposals on the future operation of the Channel Tunnel, the Government was quick to reject its suggestions and argued that conditions such as future alignment with EU law on the UK side of the Fixed Link were not compatible with its red lines and the UK's status as a non-EU Member State. In our subsequent scrutiny, it was not easy to discern a clear alternative plan on the part of the Government for how the Channel Tunnel could operate at the end of the transition period.

42. Examination of previous correspondence from the Minister suggests the Government appeared to favour an approach to the management of safety on the Tunnel built around the IGC and the existing system of bi-national regulation (which seeks to achieve unified governance—including the setting of rules and standards—whilst accommodating differences between the UK and France's rail systems).

43. The Minister has previously explained to us that the use of bi-national regulation would continue in the event that the French rail safety authority—the *Établissement Public de Sécurité Ferroviaire* (EPSF)—and the UK Office of Rail and Road (ORR) take responsibility for their respective halves of the Tunnel and that this system is 'tried and tested'.<sup>33</sup> With the end of the transition period and no agreement between the UK and France, this is the governance arrangement that now prevails on the Fixed Link.

44. The Minister further explained that, after the transition period, the approach would not be substantially different to that which prevailed while the UK was an EU Member State. The same officials and experts would meet and "...only the governance arrangement... [would be] different to retain the sovereignty of the UK".<sup>34</sup>

45. This situation does mean, however, that separate authorisations and certification will now have to be sought from UK and French bodies by the infrastructure manager and affected operators (as the IGC can no longer be relied on as a 'one-stop-shop'). The long-term viability of bi-national regulation, however, is open to question. Bi-national regulation—as it has been agreed and implemented in the past between the UK and France—is premised on substantive rule alignment. This will not necessarily be a problem unless, for example, France wished to give effect to a new EU law standard that the UK did not. Where one side is obliged to comply with a standard (i.e. France by the EU) and the other is not under the same obligation (i.e. the UK) there is the potential for divergence. This situation has not arisen before on the Fixed Link and therefore its potential implications for the safe and efficient operation of the Tunnel are unclear.

46. We raised this point with the Minister, asking what would happen should the UK and France disagree on the application of a new safety rule.<sup>35</sup> The Minister said that there is already a well-established procedure for managing such disagreements but appeared to suggest that it may be necessary for a new UK/France dispute resolution process to be agreed.<sup>36</sup>

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33 [Letter from Rachel Maclean MP to Sir William Cash MP](#), 15 October 2020

34 Q33

35 Q34

36 *ibid*

47. On a linked point, the Minister has previously referred to a ‘joint regulatory’ approach as a way of managing the potential for divergence between EU law standards that France may be required to give effect to and that, for whatever reason, the Government does not wish to apply.<sup>37</sup>

48. It is worth noting that EU safety standards are often highly technical and allow for some variance in their application. This is not the case for those that are more fundamental to safety. A good example is the extended run time that is required of locomotives on the Fixed Link in the event of fire (so that they can make it out of the Tunnel to land). Divergence over such issues is much harder to envisage and could lead to a situation where the UK has little choice but to give effect to EU law.

49. To guard against this possibility, it is imperative that the UK has advanced notice of any new EU proposals that cover the Channel Tunnel and that officials have the opportunity to assess their potential implications for the ways in which safety is managed—and standards are applied—on the UK-side of the Fixed Link.

**50. The Minister’s explanation of the Government’s approach to the future regulation of safety-related issues on the Channel Tunnel is welcome.**

**51. Having reached the end of the transition period without a UK/France agreement on the future operation of the Fixed Link, the fallback for the management of safety consists of: the French rail safety authority—the *Établissement Public de Sécurité Ferroviaire*—and the UK Office of Rail and Road taking responsibility for their respective halves of the Tunnel; and the continuation of the so-called ‘bi-national approach’ to safety regulation. This situation appears very similar to that advocated by the Government as a permanent solution to the future management of the Fixed Link.**

*52. We recommend, however, that this approach be formalised and that any new structures required to solve disputes or provide for joint working are made clear to the public and affected stakeholders, and that the Government clearly outlines how safety on the Fixed Link is now managed, detailing the roles and responsibilities of those bodies and representatives involved.*

*53. We further recommend, to achieve transparency and regulatory certainty, that the Government commit to inform Parliament of changes to the rules and standards applicable on the Channel Tunnel.*

*54. We recommend that the Government establish mechanisms for the UK to be given advance notice of new EU proposals that cover the Channel Tunnel, in particular, to guard against the possibility of France being required to give effect to rail safety standards which the UK may not wish to apply on the UK side of the Fixed Link.*

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37 The ‘joint regulatory’ approach is taken as referring to the process of the ORR and the EPFS coordinating the regulation of the UK and French sides of the Fixed Link.

## 5 Potential implications for affected stakeholders

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55. In our previous consideration of the EU’s proposals, we have raised concerns that changes to the governance framework applicable to the Fixed Link have the potential to cause serious business continuity issues for the concessionary and train operators.

56. When the UK was an EU Member State, the licensing and safety framework applicable to the Fixed Link provided certainty with, amongst other considerations, a stable oversight, development and enforcement regime.<sup>38</sup> Deviation from this, which is all but inevitable given the Government’s unequivocal rejection of a continuing role for EU law and the CJEU on the UK-side of the Tunnel, necessitates contingency planning. This will become more urgent as the safety authorisation and operator licensing extensions provided for by the EU’s most recent contingency Regulation expire. As an example, it could reasonably be expected that operators are, at present, seeking authorisations from both UK and French authorities.

57. Knowing well ahead of time the changes that will likely be made to the current regime would undoubtedly aid businesses in managing this transition. An agreement not being reached would, however, cause more serious problems. Uncertainty surrounding safety and interoperability rules on the Fixed Link—including whether rules are enforced in the same way on both sides of the Tunnel, and how and when they will be changed—would be difficult to plan for and could give rise to complex liabilities that undertakings should not reasonably be expected to shoulder.

58. The Minister stated that the concerns of operators were of paramount importance to the Government. She explained that the Government had been keeping stakeholders closely informed of its plans and was working with them to ensure that they understand “...what we [the Government] are doing and why”.<sup>39</sup> The Minister also reported that stakeholders were supportive of the Government’s approach in terms of the priority that it had placed on the continuity of governance of the Fixed Link.<sup>40</sup>

**59. We welcome the Government’s work to ensure that affected stakeholders are kept up-to-date with progress on negotiations on the future operation of the Channel Tunnel.**

**60. We recommend that changes to the governance of the Fixed Link be communicated in a timely manner to those affected and that the future framework, once agreed between the UK and France, be publicised by the Government on its GOV.UK website.**

**61. For the infrastructure manager and service operators to be able to best manage changes to the operation of the Fixed Link, the Government should prioritise a framework that is clear, transparent and predictable with meaningful opportunities for consultation and engagement.**

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

39 Q36

40 *ibid*

## Conclusions and recommendations

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### The governance of the Channel Tunnel and EU law

1. The legal and regulatory framework prevailing on the Channel Tunnel is complicated and includes that provided for by the Treaty of Canterbury and, more recently, EU law. The issues regulated by EU law—which on the UK-side of the Fixed Link have been retained in domestic law since the end of the transition period—are vital to the effective functioning of the Channel Tunnel. (Paragraph 16)

### The EU's proposals

2. We welcome the Government's firm rejection of:
  - any future dynamic alignment with EU laws on the UK-side of the Fixed Link;
  - oversight of the application and interpretation of EU law in the UK by the EU Court of Justice; and
  - any role on UK territory for the European Union Agency for Railways. (Paragraph 38)
3. We note the Government's position that an agreement with France along the lines of that envisioned by the European Commission is not necessary to ensure the safe and efficient operation of the Tunnel. We also note that since the end of the transition period, save for disruption related to the Coronavirus pandemic, services continue to operate between Folkestone and Coquelles. (Paragraph 39)
4. *We are concerned, however, that new arrangements concerning the governance of the Channel Tunnel—which take account of the UK's status as a non-EU Member State—are yet to be agreed. The Government's discussions with the French authorities and the EU's extension of certain safety authorisations and operator licences appear to have prevented any immediate disruption but are not a permanent solution for managing safety on the Tunnel. Reaching a longer-term arrangement with France is vitally important. We ask that the Government provide us with monthly updates on the progress of negotiations.* (Paragraph 40)

### The Government's alternative proposals

5. The Minister's explanation of the Government's approach to the future regulation of safety-related issues on the Channel Tunnel is welcome. (Paragraph 50)
6. Having reached the end of the transition period without a UK/France agreement on the future operation of the Fixed Link, the fallback for the management of safety consists of: the French rail safety authority—the *Établissement Public de Sécurité Ferroviaire*—and the UK Office of Rail and Road taking responsibility for their respective halves of the Tunnel; and the continuation of the so-called 'bi-national approach' to safety regulation. This situation appears very similar to that advocated by the Government as a permanent solution to the future management of the Fixed Link. (Paragraph 51)

7. *We recommend, however, that this approach be formalised and that any new structures required to solve disputes or provide for joint working are made clear to the public and affected stakeholders, and that the Government clearly outlines how safety on the Fixed Link is now managed, detailing the roles and responsibilities of those bodies and representatives involved. (Paragraph 52)*
8. *We further recommend, to achieve transparency and regulatory certainty, that the Government commit to inform Parliament of changes to the rules and standards applicable on the Channel Tunnel. (Paragraph 53)*
9. *We recommend that the Government establish mechanisms for the UK to be given advance notice of new EU proposals that cover the Channel Tunnel, in particular, to guard against the possibility of France being required to give effect to rail safety standards which the UK may not wish to apply on the UK side of the Fixed Link. (Paragraph 54)*

### Potential implications for affected stakeholders

10. We welcome the Government's work to ensure that affected stakeholders are kept up-to-date with progress on negotiations on the future operation of the Channel Tunnel. (Paragraph 59)
11. *We recommend that changes to the governance of the Fixed Link be communicated in a timely manner to those affected and that the future framework, once agreed between the UK and France, be publicised by the Government on its GOV.UK website. (Paragraph 60)*
12. *For the infrastructure manager and service operators to be able to best manage changes to the operation of the Fixed Link, the Government should prioritise a framework that is clear, transparent and predictable with meaningful opportunities for consultation and engagement. (Paragraph 61)*

## Formal minutes

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**Wednesday 10 February 2021**

Members present:

Sir William Cash, in the Chair

Jon Cruddas	Mr David Jones
Allan Dorans	Craig Mackinlay
Richard Drax	Anne Marie Morris
Margaret Ferrier	Greg Smith

### **Scrutiny Report**

Draft Report (*Brexit: The future operation of the Channel Tunnel Fixed Link*), proposed by the Chair, brought up and read.

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

Paragraphs 1 to 61 read and agreed to.

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

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

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Wednesday 24 February at 1.45 p.m.]

## Standing Order and membership

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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](http://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*)



## Witnesses

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The following witnesses gave evidence. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

### Wednesday 16 December 2020

**Rachel Maclean MP**, Parliamentary Under Secretary of State, Department for Transport; **Andrea Pearson**, Deputy Director International Rail, Department for Transport

[Q1-40](#)

## List of Reports from the Committee during the current Parliament

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All publications from the Committee are available on the publications page of the Committee's website.

### Session 2019–21

Number	Title	Reference
None	30th—Documents considered by the Committee on 25 November 2020	HC 229-xxvi
1st	The EU's mandate for negotiating a new partnership with the UK	HC 218
2nd	COVID-19 pandemic: the EU's policy response and its implications for the UK	HC 275
3rd	Documents considered by the Committee on 26 March 2020	HC 229-i
4th	Documents considered by the Committee on 23 April 2020	HC 229-ii
5th	The EU's mandate for negotiating a new partnership with the UK: outcome of Select Committee consultation	HC 333
6th	Documents considered by the Committee on 30 April 2020	HC 229-iii
7th	Documents considered by the Committee on 7 May 2020	HC 229-iv
8th	Documents considered by the Committee on 14 May 2020	HC 229-v
9th	Documents considered by the Committee on 21 May 2020	HC 229-vi
10th	Documents considered by the Committee on 4 June 2020	HC 229-vii
11th	Documents considered by the Committee on 11 June 2020	HC 229-viii
12th	UK-EU Joint Committee: Decision of 12 June 2020 amending the Withdrawal Agreement	HC 465
13th	Documents considered by the Committee on 18 June 2020	HC 229-ix
14th	Documents considered by the Committee on 25 June 2020	HC 229-x
15th	Documents considered by the Committee on 2 July 2020	HC 229-xi
16th	Documents considered by the Committee on 9 July 2020	HC 229-xii
17th	Documents considered by the Committee on 16 July 2020	HC 229-xiii
18th	Documents considered by the Committee on 23 July 2020	HC 229-xiv
19th	Documents considered by the Committee on 3 September 2020	HC 229-xv
20th	Documents considered by the Committee on 10 September 2020	HC 229-xvi
21st	Documents considered by the Committee on 16 September 2020	HC 229-xvii

<b>Number</b>	<b>Title</b>	<b>Reference</b>
22nd	Documents considered by the Committee on 24 September	HC 229-xviii
23rd	Documents considered by the Committee on 1 October 2020	HC 229-xix
24th	Documents considered by the Committee on 8 October 2020	HC 229-xx
25th	Documents considered by the Committee on 15 October 2020	HC 229-xxi
26th	Documents considered by the Committee on 21 October 2020	HC 229-xxii
27th	Documents considered by the Committee on 4 November 2020	HC 229-xxiii
28th	Documents considered by the Committee on 11 November 2020	HC 229xxiv
29th	Documents considered by the Committee on 19 November 2020	HC 229-xxv
31st	Documents considered by the Committee on 3 December 2020	HC 229-xxvii
32nd	Documents considered by the Committee on 9 December 2020	HC 229-xxviii
33rd	Documents considered by the Committee on 16 December 2020	HC 229-xxix
34th	Documents considered by the Committee on 20 January 2021	HC 229-xxx
35th	Documents considered by the Committee on 3 February 2021	HC 229-xxxi