House of Commons

European Scrutiny Committee

Thirty-ninth Report of Session 2019–21

Documents considered by the Committee on 10 March 2021

Report, together with formal minutes

Ordered by The House of Commons
to be printed 10 March 2021

HC 229-xxxiv
Published on 16 March 2021
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 (Senior Committee Specialists), Nat Ireton and Apostolos Kostoulas (Committee Operations Officers), Luanne Middleton (Second Clerk), Daniel Moeller (Committee Operations Manager), Jessica Mulley (Clerk), Foeke Noppert (Senior Committee Specialist), Indira Rao (Counsel for European Legislation), Paula Saunderson (Committee Operations Assistant), Emily Unwin (Deputy Counsel for European Legislation), Dr George Wilson (Second Clerk), Beatrice Woods (Committee Operations Officer).

Contacts

All correspondence should be addressed to the Clerk of the European Scrutiny Committee, House of Commons, London SW1A 0AA. The telephone number for general enquiries is (020) 7219 3292/5467. The Committee's email address is escom@parliament.uk.

Contents

1 2021 Fishing Opportunities[1]

These EU documents are politically important because:

- they relate to UK fishing opportunities during 2021 and beyond.

Action

- Write to the Minister.
- Draw to the attention of the Environment, Food and Rural Affairs Committee.

Overview

1.1 Following the UK's withdrawal from the European Union and the end to the post-Brexit Transition Period on 31 December 2020, the UK is in the process of negotiating its 2021 fishing opportunities as an independent coastal state based on the parameters agreed in the EU-UK Trade and Cooperation Agreement (TCA).

1.2 While the proportions of each stock available to the EU and UK respectively were agreed in the TCA, the total volume of the various catches—the Total Allowable Catches (TACs)—is yet to be resolved.

1.3 Responding to our letter of 25 November 2020, the Minister for Farming, Fisheries and Food (Victoria Prentis MP) wrote to us on 3 March 2021 updating us on the progress of negotiations, observing that these annual negotiations with the EU mark an important milestone for the UK as it sits at the table as an independent coastal state and in a new relationship with the EU.

1.4 The Minister explained that there were two formal EU-UK negotiating rounds in February but that the UK had expressed concern about the rate of progress and suggested both Parties should agree a date for a mutual exchange of the full package of information necessary to negotiate effectively. The Minister expressed hope that negotiations would be able to move forward at pace once that information had been shared.

1.5 In the meantime, the UK—like the EU—had set provisional catch limits up to 31 March 2021. Following the principles set out in the TCA, the UK had set provisional limits for the first quarter of the year at 25% of the UK's share of the science-advised TAC for 2021. This 25%, noted the Minister, represented one quarter of the fishing year and so was suitable for a three-month period. For some stocks, the UK had made exceptions. For example, for stocks like mackerel—a winter fishery—the UK set the catch limits at 50% of the UK's share rather than 25%. There is higher uptake in winter than other parts of the year and so a bigger share of the TAC was allocated for the January to March period. The

1 (a) Proposal for a Regulation fixing for 2021 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters (b) Commission Communication—Towards more sustainable fishing in the EU: state of play and orientations for 2021; Council and COM number: (a) 12189/20, COM(20) 668 (b) 8871/20, COM(20) 24 ; Legal base: (a) Article 43(3) TFEU, QMV (b)—; Department: Environment, Food and Rural Affairs; Devolved Administrations: Consulted; ESC numbers: (a) 41612 (b) 41347.

UK had also made exceptions for vulnerable stocks or for mixed fisheries with vulnerable stocks by reducing the provisional catch limits on a precautionary basis. A revised version of the provisional catch limits was published on 2 March 2021.[2]

1.6 In developing a UK position, said the Minister, the Government had been working closely with Devolved Administrations (DAs) across the UK, and with stakeholders including the fishing industry and environmental organisations. The Government had taken into account the UK's obligations under international agreements as well as its objectives for improved sustainability as set out under the Fisheries Act 2020.

1.7 In passing the Fisheries Act, and in concluding numerous new fisheries agreements, the UK had made clear its intention to continue to operate on the world stage as a leading, responsible, independent coastal state. The UK's approach in these annual negotiations would always be to seek solutions that were founded on the best available science, but those solutions must also be pragmatic, realistic and deliverable in practice. Achieving a balanced approach had been aided by listening to the different views of stakeholders, including different parts of the UK fleet as well as the views of recreational interests and environmental NGOs.

1.8 A key priority for the UK was to deliver TACs which provide for sustainable and proportionate fisheries management. This management approach would integrate the UK's commitments to all three elements of sustainability: environmental, social and economic. The UK's proposals sought to provide sustainable fishing opportunities that increase the number of TACs fished consistent with their Maximum Sustainable Yield, and consistent with wider scientific advice for TACs covered under the Precautionary Approach framework. The UK's proposals would also be informed by the need to account for the complexities inherent in mixed fisheries and the need to avoid choke.[3]

Our assessment

1.9 On the timing of negotiations, we note the Minister's frustration at the slow pace of negotiations, but we also note that the desire to proceed at pace appears to be shared by the European Commission and EU Member States. The Director General of the European Commission's Fisheries Department (Ms Charlina Vitcheva) indicated to the European Parliament Fisheries Committee on 22 February that everyone (the Commission, Member States and UK) had agreed on the need to complete negotiations as soon as possible.[4] A timely conclusion was required, she said, in order to replace the temporary fishing opportunities from 1 April. The Director General envisaged that the negotiations could be concluded within two to three weeks (i.e. by mid-March), although she cautioned that the negotiations were time-consuming, complex and demanding and particularly important as they would set a precedent for future such EU-UK negotiations. The tone of negotiations, she added, was therefore important.

2 Secretary of State determination of fishing opportunities for British fishing boats, Department for the Environment, Food and Rural Affairs, March 2021.

3 "Choke" refers to a species with a low quota that can cause a vessel to stop fishing even if they still have quota for other species.

4 Audiovisual recording of the meeting of the European Parliament Committee on Fisheries, 22 February 2021, European Parliament Multimedia Centre.

1.10 In responding to the Minister, we express our hope that the negotiations will be completed in short order and request an update not only on the EU-UK agreement but on all of those agreements which the UK has been negotiating with coastal states. We also ask for an update in the event of a failure to reach agreement, including an analysis of the impact on stock sustainability.

1.11 Concerning the setting by the EU and UK of provisional catch limits until 31 March 2021, we note that the EU agreed on 17 December 2020[5]—prior to the TCA agreement—to set most limits until 31 March 2021 at 25% of the EU's fishing opportunities in 2020, with the exception of some seasonal and vulnerable stocks. That approach is not in line with the principles set out in the subsequently-agreed TCA that provisional quotas should be based on scientific advice and it does not reflect the agreements reached on how catches should be allocated between the EU and UK. It means that the EU will likely need to implement significant cuts in order to ensure that sustainable levels are reached by the end of the year. The final Council Regulation on the provisional limits is clear that definitive fishing opportunities for 2021 will be set in line with the TCA.[6]

1.12 The TCA sets out a clear structure for the adoption of fishing opportunities for the following year, requiring that, by 31 January of each year, the Parties shall cooperate to set the schedule for consultations with the aim of agreeing TACs for shared stocks for the following year or years. TACs should be agreed by 10 December each year for the following year or years. We would hope that the setting of TACs for 2022 will be much better prepared than this year, recognising the profound complexity of setting these catch limits. With that in mind, we ask the Minister to provide the agreed schedule for EU-UK consultations concerning the agreement of TACs for 2022. We invite the Minister to set how else the Department is preparing itself for the negotiation of the 2022 fishing opportunities to avoid a repeat of the timing difficulties experienced in negotiating the 2021 TACs, a particular victim of which has been Parliamentary scrutiny of Government policy in this regard. As the UK takes its place as an independent coastal state, so it is incumbent on the Government to submit its approach to effective scrutiny by Parliament. We seek the Minister's commitment to effective scrutiny and ask her to explain how she will support that scrutiny process.

1.13 Finally, the Minister makes no reference to the UK's negotiations with other coastal parties and we will therefore seek an update on those discussions, including plurilateral negotiations where relevant.

Action

1.14 We consider that the matters raised are politically important because they relate to UK fishing opportunities during 2021 and beyond. We have written to the Minister as set out below raising the issues identified above concerning the completion of negotiations, preparation for negotiation of the 2022 TACs and Parliamentary scrutiny.

1.15 We report the Minister's letter to the House and draw this chapter and our letter to the attention of the Environment, Food and Rural Affairs Committee.

5 "Agreement on fishing opportunities in the Atlantic, North Sea, Mediterranean and Black Sea for 2021", Council of the European Union, 17 December 2020.

6 Council Regulation (EU) 2021/92 of 28 January 2021 fixing for 2021 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters.

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

We considered your letter of 3 March 2021 on documents relating to the negotiation of fishing opportunities for 2021 at our meeting of 10 March.

As you note, there is a need to move forward at pace with these negotiations with a view to concluding them so that definitive fishing opportunities can be introduced by 1 April 2021 given that both the EU and UK have put in place provisional fishing opportunities covering the first three months of the year. The EU appears to share your desire to make progress according to the comments made by the European Commission's Director General for Maritime Affairs and Fisheries at the European Parliament Fisheries Committee on 22 February. We therefore trust that the negotiations are progressing well with a view to a swift outcome and we look forward to confirmation from you that agreement has been reached, not only with the EU but with the other coastal states with which the UK is negotiating.

If there is not a negotiated outcome (or if it is incomplete), we ask that you write to us at the earliest possible opportunity setting out the implications, including for the sustainability of fish stocks. It would be helpful in that instance to provide us with a table including the science-advised TAC and the cumulative total of unilateral catch limits adopted. If any of the cumulative totals are higher than the scientific advice, your specific analysis of those stocks would be required.

We are sure that you will share our frustration at the delays to the agreement of the 2021 fishing opportunities and the lack of opportunity that Parliament has had to scrutinise the Government's approach. The timescale and the lack of scrutiny are both factors that we ask you to address ahead of negotiations for the 2022 fishing opportunities.

Helpfully, the Trade and Cooperation Agreement sets out a clear structure for the adoption of fishing opportunities for the following year, requiring that, by 31 January of each year, the Parties shall cooperate to set the schedule for consultations with the aim of agreeing TACs for shared stocks for the following year or years. TACs should be agreed by 10 December each year for the following year or years. Have the EU and UK cooperated this year to set the schedule for consultations on agreeing TACs for 2022? If so, what is the schedule? If not, why has that Treaty commitment not been met?

In addition to establishing a schedule with the EU and other negotiating parties, we ask you to set out how else the Department is preparing itself for the negotiation of the 2022 fishing opportunities to avoid a repeat of the timing and Parliamentary scrutiny difficulties experienced in negotiating the 2021 TACs. As the UK takes its place as an independent coastal state, so it is incumbent on the Government to submit its approach to effective scrutiny by Parliament. We seek your commitment to effective scrutiny and ask you to explain how you will facilitate that scrutiny process.

We ask for a response to our letter by 7 April 2021 at the latest, or earlier in the event of swift conclusion of the negotiations.

2 The EU Trade Enforcement Regulation: Brexit implications[7]

This EU Regulation is legally and politically important because:

- it has important implications for the UK as a third country which now has its own bilateral trade agreement with the EU and participates as a member in its own right in the WTO;
- the Regulation authorises the EU to take unilateral action (countermeasures) such as increased customs duties or quotas on goods, or restrictions on trade in services, if a trade partner obstructs the resolution of a trade dispute within the WTO or under a trade agreement with the EU; and
- the Regulation continues to apply in Northern Ireland under the Northern Ireland Protocol—as most (if not all) goods entering Northern Ireland which are subject to EU countermeasures will be considered "at risk" of onward movement to the EU, they will also be subject to the EU's retaliatory tariffs.

Action

- Draw to the attention of the International Trade Committee and the Northern Ireland Affairs Committee.

Overview

2.1 Resolving trade disputes before they escalate into disruptive and damaging trade wars is one of the core functions of the World Trade Organisation ("WTO"). The WTO's Appellate Body plays a crucial role in the settlement of disputes if one of the parties decides to appeal the initial ruling made by a WTO-appointed panel of independent trade experts. The rulings of the Appellate Body are binding on the parties to a trade dispute and, in many cases, are a vital step in determining whether retaliatory action in response to a breach of WTO rules is justified. The Appellate Body is currently unable to function as the term of office of its seven members has expired and the United States continues to block the appointment of new members. This blockage has created a void at the heart of the WTO's dispute settlement system and made it difficult for the EU to take effective action if its trading partners are in breach of WTO rules. The EU's 2014 Trade Enforcement Regulation[8] only authorises the EU to take retaliatory action—trade countermeasures—after obtaining a binding and enforceable ruling at the end of a dispute settlement procedure. As the WTO's Appellate Body is currently unable to function, it is possible for the EU's trading partners to escape a binding ruling and thereby avoid EU trade sanctions by appealing a WTO panel report "into the void".

7 Proposal for a Regulation amending the EU Trade Enforcement Regulation; Council number 15088/19, COM(19) 623; Legal base—Article 207(2) TFEU, ordinary legislative procedure, QMV; Dept—International Trade; Devolved Administrations consulted; ESC number 40999.

8 Regulation (EU) 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules.

2.2 To counter this risk, the European Commission proposed changes to the EU's 2014 Trade Enforcement Regulation which have been formally adopted and entered into force on 13 February 2021. For disputes governed by WTO rules, the Regulation amending the 2014 Trade Enforcement Regulation allows the EU to take immediate trade countermeasures once it has obtained a favourable ruling from a WTO panel if the other party wishes to appeal it and is unwilling to accept binding arbitration.[9] The EU and 23 other WTO member countries[10] have established a multi-party interim appeal arbitration arrangement to operate as a stop-gap solution while there is no functioning WTO Appellate Body.[11] The UK is not one of the participating countries.

2.3 The amended Regulation also allows the EU to take countermeasures if a trading partner blocks the use of a specific dispute settlement procedure contained in a bilateral or regional free trade agreement with the EU so that it cannot function effectively. This type of obstruction includes "undue delay" if it amounts to non-cooperation in the dispute settlement process.[12] As well as enabling the EU to act unilaterally sooner, the amended Regulation expands the EU's toolkit of trade countermeasures to include services and the commercial aspects of intellectual property rights (previously they were limited to tariffs and/or quotas on goods and the suspension of concessions in the field of public procurement).

2.4 In a declaration issued alongside the amended Regulation, the European Commission makes clear its preference to resolve disputes with other WTO member countries through the interim appeal arbitration arrangement rather than proceed immediately to trade countermeasures. The European Commission, European Parliament and Council all underline their commitment (in a separate Joint Declaration) to "cooperate in all endeavours aiming to reform the WTO Dispute Settlement Mechanism which can ensure the effective functioning of the WTO Appellate Body".

2.5 The revised and strengthened Trade Enforcement Regulation forms part of a wider package of measures underpinning the EU's policy of "open strategic autonomy"—an approach which seeks to reconcile the EU's commitment to a rules-based system of global trade governance with a more assertive defence of the EU's economic interests and a level playing field for fair and sustainable trade. The EU appointed its first Chief Trade Enforcement Officer (a Commission official, Mr Denis Redonnet) in July 2020[13] and its most recent Trade Policy Review, published in February 2021, calls for the "assertive enforcement" of market access and sustainable development commitments in the EU's trade agreements.[14] This more robust approach reflects a broader concern that certain third countries are using their economic power to bypass or weaken multilateral institutions and, in the process, undermine the EU's strategic interests and values. A further Joint

9 Article 25 of the WTO's Understanding on rules and procedures governing the settlement of disputes allows the parties to a trade dispute to agree by mutual consent to binding arbitration.

10 The 23 members are: Australia; Benin; Brazil; Canada; China; Chile; Colombia; Costa Rica; Ecuador; the European Union; Guatemala; Hong Kong, China; Iceland; Mexico; Montenegro; New Zealand; Nicaragua; Norway; Pakistan; Singapore; Switzerland; Ukraine; and Uruguay.

11 See https://trade.ec.europa.eu/doclib/press/index.cfm?id=2176. See also the details on the WTO website. The interim arrangement is based on Article 25 of the WTO's Understanding on rules and procedures governing the settlement of disputes. This European Commission infographic shows how the revised Regulation will work in practice.

12 See Article 3(ba) of the amended Regulation.

13 See the European Commission's press release of 24 July 2020 on the appointment of Mr Redonnet.

14 See the European Commission's Communication COM(2021) 66: Trade Policy Review—An Open, Sustainable and assertive Trade Policy.

Declaration by the European Commission, European Parliament and Council agreed alongside the amended Trade Enforcement Regulation underlines the need for an additional legal instrument to deter and counteract "coercive" trading practices by certain third countries. Legislative proposals to protect the EU from potential coercive actions and to address distortions in the EU Single Market caused by foreign subsidies are expected before the end of 2021.

The Government's position

2.6 We began our scrutiny of the proposed changes to the Trade Enforcement Regulation in March 2020 (for further details see our Third and Eighth Reports of Session 2019–21).[15] At the time the Government expected the changes to be agreed and take effect before the end of the post-exit transition period. It accepted that there was a case for the EU to enhance its ability to take unilateral action (trade countermeasures) if a trading partner obstructed a dispute settlement procedure and indicated that similar (though not identical) powers were available to the UK under section 15 of the Taxation (Cross-border Trade) Act 2018. We wrote to the Minister for Trade (Ranil Jayawardena MP) on 14 May 2020 asking him to provide a further update once the European Parliament and Council had agreed a final text.

2.7 As the amended Regulation entered into force after the end of the transition period, the changes it introduced do not form part of the retained EU law which is applicable in the UK under the European Union (Withdrawal) Act 2018. It does, however, apply in Northern Ireland under the Protocol on Ireland/Northern Ireland.[16] It also has wider implications for the UK as a third country which is both a member of the WTO and has its own bilateral Trade and Cooperation Agreement (TCA) with the EU which includes extensive (and complex) rules on dispute settlement. In our letter to the Minister, we asked him to include in his response information on the practical operation of the amended Regulation under the Northern Ireland Protocol in the event of a trade dispute involving the EU, the UK or the EU and the UK and an update on UK participation in the multi-party interim appeal arbitration arrangement established by the EU and other WTO member countries. We set out details of the Minister's response in the following paragraphs.[17]

The Northern Ireland Protocol

2.8 Article 4 of the Northern Ireland Protocol recognises that Northern Ireland is part of the UK's customs territory and that the UK may include Northern Ireland in its Goods Schedule (tariff commitments agreed within the WTO) and in the agreements it concludes with third countries, provided that these agreements do not prejudice the application of the Protocol. At the same time, Northern Ireland is bound (under Article 5(4) of the Protocol and Annex 2) by EU regulations on the application of trade defence and safeguard measures which allow the EU to take retaliatory action to counter unfair or unlawful trading practices. We questioned how these different elements of the Protocol

15 Third Report HC 229–i (2019–21), chapter 6 (26 March 2020) and Eighth Report HC 229–v (2019–21), chapter 2 (14 May 2020).

16 The 2014 Regulation is listed in Annex 2, Heading 6 on bilateral safeguards. Under Article 13(3) of the Northern Ireland Protocol, any amendments made by the EU to acts listed in Annex 2 apply automatically in Northern Ireland.

17 See the Minister's letter of 9 February 2021 to the Chair of the European Scrutiny Committee.

would work in practice in a trade dispute involving the EU, the UK, or the EU and the UK and asked the Government to clarify whether Northern Ireland would have to apply trade countermeasures authorised under UK domestic law or those required by EU law.[18]

2.9 In his response, the Minister refers to Decisions agreed by the Withdrawal Agreement Joint Committee in December 2020 concerning the implementation of the Northern Ireland Protocol and indicates that "this is more directly a matter for the Cabinet Office". While reiterating the Government's position that "Northern Ireland is part of the UK's customs territory and, as such, will benefit from the UK's trade policy", he adds that "the operation of the Joint Committee Decision on goods subject to EU measures is set out on Gov.UK with further guidance to follow in specific cases". He provides no analysis of the relevant Joint Committee Decisions or how they may affect the application of the amended EU Trade Enforcement Regulation in Northern Ireland.

2.10 Our analysis suggests that two of the December 2020 Joint Committee Decisions are relevant. Decision No 3/2020 on errors and omissions includes three "explanatory notes" covering various EU trade-related Regulations listed in Annex 2 of the Northern Ireland Protocol. The Government says that these explanations preserve and clarify Northern Ireland's place in the UK's international trade regime.[19] Their effect, nonetheless, is to make clear that trade countermeasures taken by the EU under the amended Trade Enforcement Regulation are applicable in (and must therefore be applied by) Northern Ireland.

2.11 Decision No 4/2020 on the determination of goods not at risk establishes whether goods brought into Northern Ireland from the UK or from a non-EU third country are considered to be at risk of entering the EU Single Market and, as such, are subject to EU customs duties/tariffs. It includes a specific provision on goods which are subject to EU trade defence measures—such goods must be considered at risk under the Protocol if the EU tariff applicable to the goods in question is greater than zero (for goods entering Northern Ireland from Great Britain) or greater than the UK tariff (for goods entering Northern Ireland from a non-EU third country). The treatment of these goods as "at risk" is intended to prevent goods which are destined for the EU from entering Northern Ireland at a more favourable UK tariff to circumvent the EU's trade defence measures. The specific provision on EU trade defence measures would also seem, however, to capture goods which remain in Northern Ireland—although they can still qualify as "not at risk" goods, this will only be the case (for goods moving from GB to NI) where there is a zero EU tariff or (for Rest of the World goods entering Northern Ireland from a non-EU third country) where the EU tariff is the same as or lower than the applicable UK tariff. Neither is likely if the goods are subject to EU countermeasures.

2.12 The Government says it is "confident that a significant majority of internal UK trade" will be able to move between Great Britain and Northern Ireland without being subject to EU tariffs. It also says it will establish a reimbursement scheme for goods that attract an EU tariff and can subsequently be shown to have remained in the UK customs territory and make full use of the tariff waiver provisions within the Protocol (subject in both cases to EU state aid rules). The Minister provides no detail on the application of the

18 See our letter of 26 March 2020 to the then Minister for Trade Policy (Rt Hon. Conor Burns MP).

19 See paragraph 63 of the Government's Command Paper on the Northern Ireland Protocol (CP346) published in December 2020 and the Explanatory Memorandum submitted by the Chancellor of the Duchy of Lancaster (Rt Hon. Michael Gove MP) on 8 January 2021 on Joint Committee Decision No 3/2020.

reimbursement scheme or the use of the tariff waiver provisions for goods subject to EU trade defence measures which enter the Northern Ireland market.[20] Nor does he indicate broadly what proportion of goods entering Northern Ireland from non-EU third countries will be subject to EU tariffs.

The Trade and Cooperation Agreement

2.13 The amended EU Trade Enforcement Regulation allows the EU to take unilateral trade countermeasures "if a third country is not taking the steps that are necessary for a dispute settlement procedure to function" under the terms of its trade agreement with the EU. The Trade and Cooperation Agreement governs the UK's post-transition trading relationship with the EU.[21] It includes a general dispute settlement procedure based on a process of "good faith" consultations and, ultimately, binding independent arbitration which applies to most, but not all, areas of cooperation. There are different or modified procedures for resolving disputes concerning some of the TCA's "level playing field" provisions, particularly those dealing with state aid/subsidy control, labour and social standards, and the environment and climate. These enable the EU or the UK to take swifter unilateral remedial measures (if a subsidy has a significant negative effect on trade or investment) or rebalancing measures (if a significant divergence in policies relating to labour and social standards, environment and climate protection, or subsidy control have a material impact on trade or investment).[22] According to the European Commission, unilateral remedial measures could include the reintroduction of tariffs or quotas. Unilateral rebalancing measures (though not defined) are intended to "rebalance the competitive advantage" resulting from regulatory divergence.[23]

2.14 While the TCA envisages that these dispute settlement procedures will apply to all disputes under the TCA, the EU or the UK may opt to use the WTO dispute settlement procedure instead if the dispute concerns the breach of an obligation under the TCA which is "substantially equivalent" to an obligation under WTO agreements (or under any other international agreement to which the EU and the UK are both parties).[24]

Dispute settlement within the WTO

2.15 The amended EU Trade Enforcement Regulation allows the EU to take unilateral trade counter-measures as soon as it has obtained a favourable WTO panel report if the WTO's Appellate Body is unable to function and the other party to the dispute does not agree to arbitration. The Minister confirms in his letter of 9 February 2021 that the UK still is not participating in the multi-party interim appeal arbitration arrangement set up by the EU and other WTO members in 2020 but adds that the Government continues to follow developments closely while reiterating the UK's commitment to securing a permanent solution to the impasse within the Appellate Body that commands the support of all WTO member countries.

20 See paragraph 27 of the Government's Command Paper on the Northern Ireland Protocol (CP346) and the Explanatory Memorandum submitted by the Chancellor of the Duchy of Lancaster (Rt Hon. Michael Gove MP) on 8 January 2021 on Joint Committee Decision No 4/2020.

21 The TCA has applied provisionally since 1 January 2021, pending formal ratification by the EU.

22 See Part Two, Heading One, Title XI of the TCA, Articles 3.12 on remedial measures and 9.4 on rebalancing. Rebalancing measures, in whatever form, must be "strictly necessary and proportionate".

23 See the European Commission's Questions and Answers on the Trade and Cooperation Agreement.

24 See Part Six, Title I, Articles INST.11 and 12 of the TCA.

Our analysis

2.16 Early in the scrutiny process the Government told us that it accepted the case for the EU to enhance its unilateral trade enforcement powers.[25] The strengthening of the EU Trade Enforcement Regulation has important implications for the UK as a third country which now has its own bilateral trade agreement with the EU and participates in its own right in the WTO. It means that the EU could, in the event of a trade dispute with the UK, introduce or increase customs duties/tariffs and quotas on UK goods, exclude UK suppliers of goods and services from bidding for public contracts in the EU or impose a price penalty, and restrict trade in services or the exercise and commercial exploitation of intellectual property rights within the EU. Action of this nature could arise from a dispute under the TCA if the EU determines that the UK is unduly delaying the agreement's dispute settlement procedures. It could also arise from a dispute brought under the WTO's dispute settlement procedures if the UK is unwilling to agree to binding arbitration (we note that it is open to the UK to join the multi-party interim appeal arbitration arrangement "at any time").

2.17 The TCA commits both parties to carry out the tasks that flow from it "in full mutual respect and good faith". It will clearly be in the interests of the EU and the UK to manage their new relationship with as little friction as possible and to avoid disruptive trade disputes. Equally, if a dispute does arise, we trust that neither party would wish to block its speedy resolution. The enhancement of the EU's powers to act unilaterally, the scope of the measures that it can take in retaliation, and the more muscular approach to enforcement set out in the EU's latest Trade Policy Review all, nonetheless, underline the need for vigilance in managing the UK's new and more complex trading relationship with the EU. Indeed, the Trade Policy Review makes a fleeting reference to a further Commission proposal for "a specific legislative act necessary for the enforcement of inter alia trade related provisions of the EU-UK Trade and Cooperation Agreement".[26] It will be important to monitor developments closely.

2.18 We have noted in our earlier Reports that the powers available to the Government under the Taxation (Cross-Border Trade) Act 2018 to take unilateral action in the event of a trade dispute are less extensive than the EU's, covering only duties payable on imported goods.[27] In earlier correspondence the Government indicated that it would "keep its trade enforcement regime under review to ensure it takes account of developments in the international trade arena, and to ensure it is fit for purpose". It also said that it had sought further powers in relation to the enforcement of rights under the Government Procurement Agreement and transitioned international trade agreements in the Trade Bill (which has yet to complete its passage through Parliament) and that no further decisions had been taken on whether further legislation would be needed to seek additional powers.[28] It therefore remains to be seen whether the Government will seek to strengthen its own powers to match those now available to the EU.

25 See the letter of 22 April 2020 from the then Minister of State for International Trade (Rt Hon. Conor Burns MP).
26 Page 20 of the Trade Policy Review.
27 See section 15 of the Act.
28 See the letter of 22 April 2020 from the then Minister of State for International Trade (Rt Hon. Conor Burns MP). For further details on the progress of the Bill, see https://services.parliament.uk/Bills/2019–21/trade.html

2.19 We note the reluctance on the part of the International Trade Minister to comment on the application of the EU Trade Enforcement Regulation in Northern Ireland. This is deeply regrettable given the complexity of the Northern Ireland Protocol and associated Joint Committee Decisions and the difficulty that those seeking to trade in and with Northern Ireland have experienced since the new trading arrangements between the EU and the UK took effect on 1 January 2021. Based on our understanding of the relevant instruments, we anticipate that EU tariffs are likely to be payable on most (if not all) goods which are subject to EU trade counter-measures because they will be considered "at risk" of onward movement to the EU, even if they remain in Northern Ireland. It will therefore be important for the Government to provide details of the reimbursement scheme it has said it will establish at the earliest opportunity and to clarify how the tariff waiver provisions envisaged in the Northern Ireland Protocol will operate.

2.20 Finally, our analysis of the Northern Ireland Protocol and Joint Committee Decision No 4/2020 on the determination of goods not at risk leads us to conclude that Northern Ireland may find itself in the awkward position of having to apply unilateral trade measures taken by the EU against the UK in the unlikely (we trust) circumstances that the UK is responsible for blocking the resolution of a trade dispute with the EU.

Action

2.21 We draw this chapter to the attention of the International Trade Committee and the Northern Ireland Affairs Committee.

3 WTO Airbus-Boeing dispute: application of EU retaliatory measures[29]

This Commission Implementing Regulation is legally and politically important because:

- it is relevant to the disentangling of EU and UK interests and representation in the World Trade Organisation (WTO) from 1 January 2021;
- it concerns the application of additional (retaliatory) EU tariffs on a range of US goods, as authorised by the WTO's Dispute Settlement Body last October in the long-running EU/US disputes on subsidies for the production of Airbus and Boeing aircraft;
- while the Government decided to suspend the application of these tariffs in the UK with effect from 1 January 2021, they continue to apply in Northern Ireland under the Northern Ireland Protocol and Withdrawal Agreement Joint Committee Decision determining which goods entering Northern Ireland are "at risk" of onward movement to the EU and subject to EU tariffs; and
- recent developments indicate that a settlement of the Airbus and Boeing disputes may be within grasp, following a decision by the EU and the US to suspend all retaliatory tariffs for a temporary four-month period.

Action

- We draw the Minister's response to our earlier Report and the latest developments in the Airbus and Boeing disputes to the attention of the International Trade Committee, the Northern Ireland Affairs Committee, and the Welsh Affairs Committee.

Overview

3.1 The Commission Implementing Regulation is the latest step in a 16-year dispute between the EU and the US on subsidies to support the production of Airbus and Boeing aircraft. It gives effect to a decision taken by the WTO Dispute Settlement Body last October authorising the EU to impose countermeasures—in this case retaliatory tariffs—on US goods traded with the EU up to a value of $4 billion annually.[30] The goods affected are large civil aircrafts and other products imported from the US (ranging from foodstuffs, alcohol and tobacco products to consumer goods and tractors). The European Commission

29 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.

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

says it has ensured that the measures it has taken "do not exceed the level authorised by the WTO Dispute Settlement Body" and are intended to "induce compliance and provide relief to EU economic operators".[31] They took effect on 10 November 2020.

3.2 The Secretary of State for International Trade (Rt Hon. Elizabeth Truss MP) announced in early December that the Government had decided to suspend the application of retaliatory tariffs, with effect from 1 January 2021, "in an effort to bring the US towards a reasonable settlement" and de-escalate trade tensions while also reserving the right to re-impose tariffs "at any point" if a settlement with the US proved elusive.[32] The timing of the suspension coincided with the expiry of the post-exit transition period provided for in the EU/UK Withdrawal Agreement. A Communication circulated to WTO members on 4 January 2021 set out what this would mean for the UK in relation to trade disputes:

> Until the expiry of the transition period, the United Kingdom was treated as a Member State of the European Union for the purpose of ongoing WTO disputes to which the European Union was a party. Following the end of the transition period, the United Kingdom will be able to launch and defend WTO disputes in its own right.[33]

3.3 On 30 December the US announced that it would impose additional tariffs (with effect from 12 January 2021) on aircraft manufacturing parts, non-sparkling wine, cognac and other grape brandies from France and Germany because it considered that the methodology used by the EU to calculate its own countermeasures under the Commission Implementing Regulation unfairly exceeded the amount of retaliation authorised by the WTO.[34] While there were no new or increased tariffs on UK exports to the US, the tariffs imposed by the US in October 2019 (including a 25% tariff on Single Malt Scotch Whisky exports) remained in place.

3.4 On 4 March, the UK and the US issued a Joint Statement signalling their commitment to negotiating "a balanced settlement" to the Airbus and Boeing disputes.[35] Following the UK's suspension of tariffs in the Boeing dispute on 1 January, the US announced a suspension of its retaliatory tariffs in the Airbus dispute with effect from 4 March for a four month period "to ease the burden on industry and take a bold, joint step towards resolving the longest running disputes at the World Trade Organization". A press release issued by the Department for International Trade explained that the temporary suspension would apply to "all retaliatory tariffs on direct exports from the UK to the US resulting from the Airbus dispute". It also said that the UK "reserves the right to re-impose tariffs at any point if satisfactory progress towards an agreeable settlement is not made".[36]

3.5 A day later, on 5 March, the EU and US issued a Joint Statement suspending all retaliatory tariffs on EU and US exports imposed in the Airbus and Boeing disputes for a four month period, to take effect "as soon as the internal procedures on both sides are completed".[37] The Statement expressed a joint commitment to reach "a comprehensive and

31 Recital (6) of the Commission Implementing Regulation.
32 See the DIT press release issued on 8 December 2020.
33 See the Communication from the UK on the End of the UK-EU Transition Period, 4 January 2021.
34 See the press release and notice issued by the Office of the US Trade Representative on 30 December 2020.
35 Joint US-UK Statement on suspension of large civilian aircraft tariffs, Office of the US Trade Representative, 4 March 2021.
36 Press release: US suspends tariffs on UK goods in trade dispute, 4 March 2021.
37 See the Joint EU-US statement on the Large Civil Aircraft WTO Disputes issued on 5 March 2021 and the European Commission's press release.

durable negotiated solution to the Aircraft disputes" which would include "disciplines on future support in this sector, outstanding support measures, monitoring and enforcement" while also addressing "the trade distortive practices of and challenges posed by new entrants to the sector from non-market economies, such as China". It also said that the suspension of retaliatory tariffs signalled a determination by both parties to "embark on a fresh start in the relationship".

Previous scrutiny of the Commission Implementing Regulation

3.6 We considered the Commission Implementing Regulation on the same day (9 December 2020) as the Government announced its intention to suspend retaliatory tariffs on US goods from 1 January 2021. In his Explanatory Memorandum of 24 November 2020, the Minister for International Trade (Rt Hon. Greg Hands MP) confirmed that the EU was entitled to take retaliatory action against the US and that the UK had to apply the additional tariffs until the end of the post-exit transition period (31 December 2020) whilst making clear that the Government's objective was to seek a negotiated settlement with the US.

3.7 We raised two broad concerns with the Minister. First, we sought further information on the legal basis and process for the UK to apply (or re-impose) retaliatory tariffs against the US from 1 January 2021, given that the decision of the WTO Dispute Settlement Body to authorise trade countermeasures in October 2020 was directed to the EU as the complainant in the dispute with the US, not the UK. Second, while the Commission Implementing Regulation ceased to apply in the UK at the end of the post-exit transition period, it continued to apply in Northern Ireland under the Protocol on Ireland/Northern Ireland.[38] We asked the Minister to explain how the "at risk" criteria in the Protocol, which determine whether EU customs duties/tariffs are payable on goods entering Northern Ireland from the UK or a non-EU third country, would affect the application of the EU's retaliatory tariffs in Northern Ireland. If the application of these criteria meant that the tariffs would continue to apply in Northern Ireland from 1 January 2021, but would be discontinued in Great Britain, we also asked:

- whether there were specific industries or supply chains operating in Northern Ireland that would be affected or placed at a competitive disadvantage; and
- what effect the suspension of retaliatory tariffs would have on the Broughton Airbus production line in North Wales and other UK-based Airbus supply chains.

3.8 Our Thirty-Second Report agreed on 9 December 2020 and letter of the same date provide further information on the Commission Implementing Regulation and the Government's position.[39]

38 The Commission Implementing Regulation is based on powers conferred by the EU's Trade Enforcement Regulation (2021/167 and 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 continue to apply in Northern Ireland (but not the rest of the UK) after the end of the post-exit transition period.

39 Thirty-Second Report HC 229–xxviii (2019–21), chapter 3 (9 December 2020) and letter from the Chair of the European Scrutiny Committee to the Minister for International Trade (Rt Hon Greg Hands MP).

The Government's response

3.9 In his letter of 9 February 2021, the Minister says the Government is clear that the UK is entitled to impose a share of the countermeasures awarded in the Boeing dispute "in a way that is compliant with our legal obligations under the WTO" because "UK industry has suffered harm from US subsidies awarded to Boeing in just the same way as the industry of the other Airbus nations that remain within the EU". He notes that the issue is "complex", while adding that:

- the UK continues to explore all options for settlement as a matter of priority, as "engaging in further tit for tat tariffs is counterproductive and ultimately in no-one's interest";
- the UK is now able to implement an independent trade policy and is entitled under WTO rules to impose its proper share of countermeasures in the Boeing dispute; and
- the Department for International Trade is working across Whitehall to consider all options for resolving the Airbus and Boeing disputes to achieve a settlement that secures the best outcome for the whole of the UK.

3.10 While the Government's decision to suspend retaliatory tariffs in the Boeing dispute "is a clear signal of our commitment to de-escalation as we engage with the new US administration", the Minister also underlines the UK's right under WTO rules to "impose its proper share of the authorised countermeasures if sufficient progress is not made in negotiations" and to ensure that "any measures are fit for the UK market and reflect the UK's strategic priorities".

3.11 Turning to the Northern Ireland Protocol, the Minister notes that the Withdrawal Agreement Joint Committee reached an agreement in December on the criteria for determining which goods entering Northern Ireland from Great Britain or from a non-EU third country are to be considered "not at risk" of onward movement from Northern Ireland to the EU (see Decision No 4/2020 on the determination of goods not at risk). The application of these criteria determines whether EU customs duties, including the retaliatory tariffs under the Commission Implementing Regulation, apply to US goods entering Northern Ireland which are covered by the EU's countermeasures.

3.12 The Minister reiterates the Government's position that "Northern Ireland is part of the United Kingdom's customs territory and, as such, will benefit from the United Kingdom's trade policy" and directs us to the gov.uk website for further details on the operation of the Joint Committee Decision. He (implicitly) confirms that the EU's retaliatory tariffs continue to apply in Northern Ireland post-transition by indicating that their removal is dependent on a settlement of the wider Airbus-Boeing dispute. He says that the Government is "engaging both the EU and US as a matter of priority" and looking to build momentum with the new Biden administration to ensure "expeditious progress" towards a settlement so that the UK can "focus on deepening trading ties with the US and move onto the next phase of our trading relationship".

3.13 The Minister does not respond directly to our question concerning the impact of the suspension of retaliatory tariffs on the Broughton Airbus production line in North Wales and other GB-based Airbus supply chains. Nor does he explain what impact the

continuation of the tariffs under the Northern Ireland Protocol has had (or may have) on specific industries or supply chains operating in Northern Ireland. Instead he reiterates the Government's commitment to resolving the dispute, adding:

> It is apparent that [the UK's] de-escalatory approach to suspending DS353 tariffs has had a positive impact, as the US did not increase tariffs or impose additional tariffs on UK exports on 12 January.
>
> We are now able to strike our own trade deals, set our own global tariff regime, represent ourselves independently at the WTO, and take direct control of this issue.

Our analysis

3.14 We welcome the early signs of progress in de-escalating these longstanding disputes and achieving "a swift negotiated settlement". The UK's ability to "re-impose tariffs at any point" is clearly an important factor in the Government's negotiating strategy.[40] That is why we have pressed the Government to explain whether it would be entitled to do so on the basis of the WTO Dispute Settlement Body's decision in October 2020 which authorised the EU to impose countermeasures on US goods and services trade up to a value of US $4 billion annually. We still do not have a clear answer to this question, or an explanation of the process that would be involved in re-imposing retaliatory tariffs and securing the UK's share of the countermeasures authorised by the WTO. Nor can we judge how likely it is that the other interested parties might contest any unilateral action taken by the UK.

3.15 The Minister recognises that a settlement of the linked Airbus and Boeing disputes will depend on close engagement with the EU as well as the new Biden administration, given that the EU and the US are the original parties to the disputes and the agreement of both will be needed to reach a negotiated settlement. EU involvement in reaching a settlement is necessary also to mitigate the operation of the Northern Ireland Protocol in relation to goods entering Northern Ireland from the rest of the UK or a non-EU third country which are subject to EU trade countermeasures. Based on our understanding of the relevant provisions of the Protocol and the Joint Committee Decision on the determination of goods not at risk, the retaliatory tariffs set out in the Commission Implementing Regulation will continue to apply to such goods, even though they no longer apply to the same goods brought into the rest of the UK, until the EU completes the necessary internal procedures to suspend them. We anticipate that the EU will act quickly as part of the wider "reset" it is seeking in its trading relationship with the US. The retaliatory tariffs will revive at the end of the four-month suspension period unless a final settlement or a further temporary suspension is agreed. We wish to make clear to the Minister that is not sufficient when responding to our questions to refer us to guidance on the gov.uk website. We expect the Government to be open and transparent in explaining how the Protocol is affecting the movement of goods into Northern Ireland and the tariffs that apply so that traders are better equipped to make any necessary adjustments.

40 See the Department for International Trade's Press release: US suspends tariffs on UK goods in trade dispute, 4 March 2021.

Action

3.16 Draw to the attention of the International Trade Committee, the Northern Ireland Affairs Committee, and the Welsh Affairs Committee.

4 Northern Ireland Protocol: implementation powers of the European Commission under the EU VAT Directive[41]

This EU document is legally and politically important because:

- it would give the European Commission the power to introduce legally-binding definitions for certain tax-related terms and concepts under the EU VAT Directive without the need for the approval of all 27 EU Member States, which could also have implications for the UK under the Protocol on Ireland/Northern Ireland.

Action

- Request further information from the Financial Secretary to the Treasury on the possible implications of the proposed changes for the VAT regime in Northern Ireland under the Protocol.
- Draw these developments to the attention of the Northern Ireland Affairs Committee.

Overview

4.1 In December 2020, the European Commission tabled draft EU legislation that would allow it to adopt legally binding definitions of certain tax-related concepts under the EU VAT Directive by means of so-called Implementing Acts (a type of EU Statutory Instrument). While this would not give the EU *new* powers to introduce such harmonised definitions, it would reduce the level of political support needed among the EU's 27 Member States to give them legal effect: rather than requiring unanimity as at present, giving each EU country a veto, a Qualified Majority would suffice. This, the Commission argues, would allow the EU to address issues such as double taxation and legal uncertainty, arising from existing, divergent interpretations of the Directive between EU countries, more "quickly and efficiently".

4.2 The proposal is still of relevance to the UK despite its withdrawal from the European Union, because EU VAT law 'concerning goods'—including future changes thereto—remain applicable in Northern Ireland until at least the end of 2026 under the Protocol on Ireland/Northern Ireland in the Withdrawal Agreement.[42] While the changes foreseen by the Commission would not in themselves alter EU VAT rules as they apply in Northern

41 Proposal for a COUNCIL DIRECTIVE amending Directive 2006/112/EC as regards conferral of implementing powers to the Commission to determine the meaning of the terms used in certain provisions of that Directive; Council document 14293/20, COM(20) 749; Legal base: Article 113 TFEU; special legislative procedure; unanimity; Department: HM Treasury; Devolved Administrations; ESC number: 41758.

42 The regulatory alignment provisions of the Protocol are subject to the periodic democratic consent of the members of the Northern Ireland Assembly. They are due to vote on whether to keep those provisions in effect for the first time before the end of 2024, and if they reject them that element of the Protocol will become inoperative after a two-year period, i.e. from the end of 2026.

Ireland, the legislation could—as is intended—alter the speed and substance of legally binding definitions that could require changes to the way transactions involving goods within, to or from Northern Ireland are treated for VAT purposes. Of particular concern would be any EU implementing measures that affect the VAT treatment of goods brought into Northern Ireland from the rest of the UK (which under the Protocol are subject to import VAT procedures), or which result in administrative obligations for traders in Northern Ireland that may affect their competitiveness within the UK's internal market if they diverge from the application of VAT rules in Great Britain (where EU law of course no longer applies).

4.3 The draft legislation to introduce Implementing Acts under the VAT Directive itself requires the unanimous agreement of all 27 Member States in the EU's Council of Ministers to take effect, and it is unclear whether there is broad political support for the general objective of the Commission proposal. The Financial Secretary to the Treasury (Rt Hon. Jesse Norman MP) submitted an Explanatory Memorandum on the Commission proposal in January 2021. While this acknowledged that "any future binding decisions relating to goods" made by the Commission using its putative new implementing powers "will apply to Northern Ireland", it contained no further information on the potential implications of the introduction of harmonised definitions under the VAT Directive for Northern Ireland under the Protocol.

4.4 We have assessed the substance of the Commission proposal, and its potential implications for the UK and Northern Ireland in particular, in more detail below.

Implementation of EU VAT law

4.5 Value Added Tax (VAT) is one of the few taxes for which the European Union has adopted extensive legislation harmonising how it is applied and levied by its 27 Member States, set out primarily in the 2006 VAT Directive and associated laws.[43] Because it concerns taxation, one of the few areas of EU legislative competence where new rules broadly speaking still require unanimity, each Member State also has a veto over new VAT legislation in the Council of Ministers.[44]

4.6 Typically, primary EU legislation like the VAT Directive—analogous to Acts of Parliament—confers powers on the European Commission to adopt "Implementing Acts". These are essentially an EU version of a statutory instrument, which aim to ensure "uniform conditions for implementation" of EU rules by the Member States. They are legally binding, but require the approval of a Qualified Majority Vote (QMV) of expert representatives of the Member States in a technical "Comitology" committee to take effect. Unusually however, the VAT Directive does not provide for any Implementing Acts at all. Instead, similar supplementary rules can only be adopted by the Council of Ministers by unanimity.[45] An EU Advisory Committee on VAT, composed of technical experts representing the Member States, can issue guidance on the application of the Directive with the support of at least 19 EU countries, but this is by definition non-binding.

43 Primarily Directive 2006/112/EC, as amended.

44 With respect to EU tax policy based on Articles 113 and 115 TFEU, the European Parliament only has a consultative role.

45 The legal basis for such measures is Article 397 of Directive 2006/112/EC. Implementing measures on the basis of this provision are set out in Regulation 282/2011, as amended. By contrast, EU legislation on excise duties and administrative cooperation in the field of VAT already confer the power to adopt Implementing Acts on the Commission.

4.7 The Commission has expressed misgivings about the effectiveness of this arrangement, as it gives every EU country a veto over potential implementing measures, while guidance on the interpretation of EU VAT law issued by the Advisory Committee is non-binding. Where such guidance is not followed, "this has led to inconsistencies in the interpretation of some elements of the VAT Directive". In particular, the Commission has identified divergent national approaches to elements of EU VAT law, for example with respect to the tax treatment of warehouses and call-off stock arrangements, services which takes place in "several Member States",[46] and supplies between the head office of a company established in one EU country and a branch in another. In these areas, the Advisory Committee has failed to endorse guidelines on the application of the VAT Directive unanimously.

4.8 These discrepancies in application of the VAT Directive, the Commission argues, "are likely to result in instances of double taxation and will entail legal uncertainty and additional costs for businesses" which "usually only come to an end, after a considerable time, with a ruling of the Court of Justice of the European Union" (CJEU),[47] or not even then, because the judgement is limited to a particular set of facts.[48]

The European Commission proposal for Implementing Acts under the VAT Directive

4.9 To address these perceived shortcomings, in its Taxation Action Plan of July 2020 the European Commission referred to an upcoming legislative proposal to give the aforementioned EU Advisory Committee on VAT the power to approve legally-binding Implementing Acts put forward by the Commission, relating to the "uniform application" of VAT Directive "to the benefit of taxable persons [with] economic activities in several Member States", making it—in EU terminology—a formal "Comitology" Committee.

4.10 The Commission published its formal legislative proposal to amend the VAT Directive to that effect in December 2020. More specifically, this draft legislation would allow the Commission to adopt Implementing Acts under the VAT Directive "in connection with a limited set of rules […] for which a common interpretation is required".[49] It would allow legally-binding definitions to be set for a number of concepts and terms used in the VAT Directive, for example "business assets", "tangible property" and "last customer". Although the UK historically was sceptical about harmonisation of tax policy at EU level except where strictly necessary, the fact the Commission tabled this proposal suggests that it was not solely the UK preventing unanimous agreement for definitions terms and

46 See also the Guidelines resulting from the 114th meeting of the EU Advisory Committee on VAT on 2 December 2019.

47 The Commission also notes that the CJEU may in such cases establish an interpretation of EU VAT law that "was not previously shared by the majority of Member States (such as for example on the application of 'cost sharing rules')" for independent groups of persons (IGPs) in case C-274/15.

48 As an example, the Commission has cited case C-7/13 on the VAT treatment of supplies between a head office and its branch, where—despite a CJEU ruling—"doubts remain about the VAT treatment of situations which do not exactly correspond to the facts of the case which was submitted to the CJEU".

49 The Commission notes that Article 291 TFEU provides, as a general rule, that "where uniform conditions for implementing legally binding [EU] acts are needed", those acts are to be set out in Implementing Acts. It adds that the EU Court of Justice "has consistently held that the notions and concepts used throughout the VAT Directive are, except in the very few cases in which their definition is expressly left in the Directive itself to Member States, Union Law notions and concepts, which require uniform interpretation and application" (e.g. the judgement in case C-497/01, paragraphs 34 to 36).

concepts under the VAT Directive in the advisory committee. After all, the Government stopped being represented in that Committee when the UK ceased to be a Member State on 31 January 2020, nearly a year before this draft legislation was published.

4.11 While this proposal does not itself contain concrete proposed definitions for these concepts, any implementing measures to that effect in the future would then only require the support of a Qualified Majority of EU countries within the VAT Committee (which would therefore no longer be purely 'advisory'). This would remove the veto of each Member State that applies to such measures at present and require a Qualified Majority instead, and shift the level of decision-making from ministerial (the Council) to official (the new Comitology Committee). The Commission notes that its proposal would not affect the ability of Member States to define concepts in the VAT Directive through national law where that legislation expressly refers to such national definitions.[50] For any future changes to the VAT Directive not covered by the empowerment for the Commission to adopt Implementing Acts, the requirement for unanimity among all Member States would remain in place by default.[51]

4.12 As an EU tax policy measure, the Commission proposal requires—as noted—the unanimous approval of all 27 Member States in the Council of Ministers. Officials representing the national governments began their scrutiny of the proposal on 5 February 2021. It is unclear whether there is broad political support for the general objective of the Commission proposal, and consequently there is no definitive timetable for agreement on the draft legislation at this stage. The Commission proposal could also be seen as a small step as part of its broader push to expand QMV for tax policy at EU-level, to make the legislative process for EU tax legislation quicker and more efficient, having asked the Member States in January 2019 to consider gradually relinquishing their national veto in this area.[52] However, there has been no political appetite among the EU's national governments for such a change to date, and no shift from unanimity to QMV in the field of EU tax policy has taken place.

Implications of the proposal for the UK

4.13 The UK of course left the European Union on 31 January 2020 and is no longer generally bound by EU VAT law since the end of the post-Brexit transition period on 31 December that year. As such, the proposal would not directly affect the UK's prerogatives: since it is no longer a Member State, it no longer has any formal input into the EU's policy-making procedures. It therefore has no representation in the EU Council of Ministers, nor—of particular relevance in this case—the EU Advisory Committee on VAT, whether or not it gains the power to approve Implementing Acts under the VAT Directive by Qualified Majority.

50 The text of the draft legislation states that the power to adopt implementing measures "shall not apply to the […] provisions that allow Member States to exercise an option, […] provisions containing express reference to terms to be defined by the Member States, […] provisions where conditions, procedures and rules are to be determined by the Member States, […] provisions on procedures for recognitions and authorisations to be granted by the Member States, [or] provisions on the tax reference number in Article 239" of the VAT Directive.

51 The Commission proposal notes that the Council of Ministers "shall retain its implementing powers insofar as they do not fall within the strictly defined scope of empowerment of the Commission and in particular on substantial matters especially sensitive for Member States".

52 The Commission suggested using the so-called 'passerelle' clause in Article 48 of the EU Treaty, which would allow the applicable legislative procedure for new EU tax rules to be changed from unanimity to Qualified Majority Voting (QMV) without the need for a formal amendment to the Treaties.

4.14 However, the UK still has an interest in how the EU sets VAT policy because, under the Protocol on Ireland/Northern Ireland, EU VAT law 'concerning goods' remain applicable in Northern Ireland from 1 January 2021 until at least the end of 2026.[53] That includes changes to such legislation agreed now the UK has already left, and the UK is also required to follow rulings of the EU Court of Justice interpreting the EU law which continues to apply under the Protocol. In practice, this arrangement means that the VAT treatment of transactions involving goods within Northern Ireland, and between Northern Ireland and the EU, are still carried out under the VAT Directive. In addition, that goods brought into Northern Ireland from Great Britain are subject to the EU's import VAT requirements that did not apply prior to 1 January. The Financial Secretary to the Treasury (Rt Hon. Jesse Norman MP) submitted an Explanatory Memorandum on the proposal on 13 January 2021, acknowledging that "under the Northern Ireland Protocol, any future binding decisions relating to goods" made by the Commission using its putative new implementing powers "will apply to Northern Ireland".

4.15 While the UK was a Member State, the Government wielded a veto over any changes to EU VAT law. Now, at most, it will need to be formally informed of relevant new EU legislation that will or may affect Northern Ireland via the Joint Consultative Working Group established under that Protocol, and seek to influence the direction of draft EU laws that may apply directly in part of the United Kingdom informally via that forum, or via the UK Mission to the EU in Brussels and the UK embassies in the 27 Member States.

4.16 When we first assessed the Commission's planned introduction of Implementing Acts under the VAT Directive in our Report of 1 October 2020, we concluded that "the implications of such a change for Northern Ireland under the Protocol would depend on the precise areas in which QMV would be used for measures to implement EU VAT rules, and in particular whether they are relevant under Article 8 of the Protocol, as well as the extent to which the removal of the unanimity requirement in those areas might affect the substance of those rules". However, the Minister's Memorandum makes no assessment, even cursorily, of the potential implications of the introduction of harmonised legal definitions of concepts under the VAT Directive for Northern Ireland under the Protocol in the areas identified by the Commission. It also states that "the Government has not engaged with the EU on this proposal".

4.17 We again emphasise that the Commission proposal does not create powers for the EU to introduce binding definitions to implement the VAT Directive that do not exist at present. It would only lower the threshold of political support needed among EU countries required for such definitions to be approved, from unanimity to a Qualified Majority. For the UK, the key issue is therefore to what extent this change would facilitate the approval of new EU VAT implementing measures that relate to goods (and therefore would apply in Northern Ireland under the Protocol), and to what extent any legally binding definitions under this new procedure might require a change in the application of VAT rules in Northern Ireland.

4.18 For example, that might be the case in areas where the Commission proposal foresees future binding Implementing Acts, and the UK's current application of the VAT Directive diverges from non-binding guidance issued by the EU's Advisory Committee.

53 This is part of a wider arrangement to avoid the need for any customs and regulatory infrastructure along the land border with Ireland, by keeping Northern Ireland bound by EU rules affecting the production, manufacture, trade and sale of goods.

Of particular concern would be any EU implementing measures that affect the VAT treatment of goods brought into Northern Ireland from the rest of the UK (which under the Protocol are subject to import VAT procedures), or which result in administrative obligations for traders in Northern Ireland that may affect their competitiveness within the UK's internal market if they diverge from the application of VAT rules in Great Britain (where EU law of course no longer applies).

4.19 The issues with the implementation of the VAT Directive that the Commission proposal seeks to resolve are highly technical. However, the draft legislation is not accompanied by an Impact Assessment, and assessing the difficulties caused by divergent interpretations of the same concept by different EU countries, which have led it to propose moving from unanimity to QMV for the adoption of legally binding definitions, are beyond the scope of this Report chapter. However, while VAT measures may be technical, that does not mean they are not necessarily economically significant for specific sectors or industries. Unfortunately, it cannot be readily deduced from the text of the proposal itself, nor from the Minister's Memorandum, whether any of the areas where the Commission has suggested the introduction of Implementing Acts to set harmonised definitions could have particular implications for Northern Ireland and the rest of the UK under the Protocol.

Conclusions and action

4.20 While the UK has now left the European Union, the way in which the latter legislates in a broad range of fields remains of direct importance to Northern Ireland because of the Protocol. The Commission proposal on the use of Implementing Acts under the VAT Directive is one of several pieces of draft EU legislation we have considered recently that are likely to apply directly in Northern Ireland under the Protocol.[54] Each such occasion underlines the unprecedented situation in which Northern Ireland finds itself, remaining bound by current and future EU legislation in a wide range of areas, but without any formal UK or Northern Irish representation in the EU institutions that formulate, agree and interpret changes to those rules.

4.21 With respect to the impact of the proposal described in this chapter under the Protocol, the potential implications for Northern Ireland and the UK are unclear. Hypothetically, under the current rules, only one EU country needs to oppose implementing measures to lay down binding definitions of elements of the VAT Directive to prevent them from taking effect. Any guidelines issued by the EU Advisory Committee on VAT—where the UK is also no longer represented—are non-binding, so they cannot oblige the UK to modify how it applies EU VAT law in Northern Ireland. If the Commission proposal is approved, it might—and indeed is intended to—lead to an increase in the use of legally binding interpretations, agreed without UK input, that would have to be applied in Northern Ireland the context of the Protocol.

4.22 Although we accept the Commission has not at this stage proposed any specific definitions should it be given the power to adopt Implementing Acts under the VAT Directive, it is unfortunate that the Minister's Explanatory Memorandum made no

54 Other recent examples of draft EU legislation with relevance under the Protocol which we have reported to the House include the application of EU rules of origin and tariff rate quotas to goods brought into Northern Ireland from outside the EU, the production of batteries for electric vehicles, and the revision of the EU State aid rulebook.

assessment at all of the potential implications under the Protocol. To ensure the UK can effectively represent its interests in this case in Brussels, the Government will need to monitor deliberations on the proposal within the EU Council of Ministers closely to ascertain in which specific areas the use of Implementing Acts might be introduced, and to assess whether those areas are of actual or potential relevance to the application of EU VAT law in Northern Ireland under the Protocol.

4.23 In light of this, we have written to the Financial Secretary to the Treasury to clarify the Government's current assessment of the implications of the Commission proposal under the Protocol on Ireland/Northern Ireland. A copy of that letter is annexed to this Report chapter. We also draw these developments to the attention of the Northern Ireland Affairs Committee.

Letter from the Chair to the Financial Secretary to the Treasury (Rt Hon. Jesse Norman MP)

Thank you for your Explanatory Memorandum of 13 January 2021 on the European Commission's recent proposal to introduce Implementing Acts under the VAT Directive, which allow for the adoption of harmonised definitions for various terms and concepts contained in that legislation by Qualified Majority among the remaining 27 Member States, rather than unanimity.[55] The key objective of the proposal is to allow the EU to introduce such binding definitions in those areas more "quickly and efficiently".

As your Memorandum acknowledged, the primary relevance of the proposal from the UK's perspective is the fact that EU VAT rules 'concerning goods' continue to apply in Northern Ireland under the Protocol on Ireland/Northern Ireland to the UK/EU Withdrawal Agreement. That would include any future Implementing Acts adopted using these new powers. The draft legislation of course requires the unanimous approval of all 27 Member States in the Council of Ministers. Even if agreed, the Commission would need to produce further draft legal acts actually containing any proposed harmonised definitions under the VAT Directive, requiring the support of a Qualified Majority of EU countries. As such, we accept that the implications of the draft legislation for the application of the VAT regime for goods in Northern Ireland are indirect and, at present, hypothetical.

However, in our view this does not mean there is no need for the Government to follow deliberations on the proposal closely. There may be a possibility that future Implementing Acts under the VAT Directive could require a change in the application of tax rules in Northern Ireland. This would be of particular concern if future EU Implementing Acts could affect the VAT treatment of goods brought into Northern Ireland from the rest of the UK, or result in administrative obligations for traders in Northern Ireland that may affect their competitiveness within the UK's internal market if they diverge from the application of VAT rules in Great Britain.

In light of this, we ask you to clarify:

- Whether the European Commission has drawn the proposal to the Government's attention via the Joint Consultative Working Group or otherwise, and whether it identified any specific issues of interest to the UK in respect of Northern Ireland under the Protocol; and

55 Document COM(2020) 749, 14293/20 (41758).

- Whether there are any significant divergences between existing guidance issued by the EU Advisory Committee on VAT and the UK's application of the VAT Directive in Northern Ireland (where therefore the potential risk of a future binding definition under an Implementing Act requiring a change in the application of the EU VAT Directive in Northern Ireland is greatest).

We also ask that you keep the Committee updated of any important developments in the Council of Minister's legislative deliberations, should it appear that the remaining Member States are amenable to the general objective of the Commission proposal. If so, Parliament will want to clarify in due course whether the Government has identified any specific issues that application of harmonised definitions under the VAT Directive could cause, in particular with respect to the VAT treatment of goods entering Northern Ireland from Great Britain or in terms of administrative obligations on Northern Irish firms that may place them at a competitive disadvantage within the UK's internal market.

We look forward to your response to our initial queries by the end of March.

5 Strengthening Europol's role in operational police cooperation[56]

The proposed Regulation is politically important because:

- Europol and its UK counterpart, the National Crime Agency, are important strategic partners in tackling serious cross-border crime and terrorism; and
- proposals to strengthen Europol's role as a central hub for the processing and analysis of criminal intelligence in the EU may affect the scope and depth of Europol's cooperation with UK law enforcement under the EU/UK Trade and Cooperation Agreement and the collective ability of the EU and the UK post-exit to manage common security threats.

Action

- Write to the Security Minister (Rt Hon. James Brokenshire MP) requesting further information and analysis on those parts of the proposed Regulation that may affect cooperation between Europol and UK law enforcement authorities under the Trade and Cooperation Agreement, in particular: the safeguards that will apply to the processing of personal data shared with Europol, the risk of false incrimination and apprehension based on "alerts" entered in the Schengen Information System, Europol support for EPPO investigations and prosecutions involving individuals and organisations based in the UK which are in receipt of EU funding, and the possibility of a UK contribution to Europol's budget.
- Draw to the attention of the Home Affairs Committee, the Justice Committee and the Joint Committee on Human Rights.

Overview

5.1 Europol—the EU Agency for Law Enforcement Cooperation—plays an important role in preventing and combating serious cross-border crime within the EU, operating as a central hub for the processing and analysis of information which may assist Member States in their criminal investigations. The strategic and operational analyses produced by Europol provide new insights into emerging forms of criminal activity and establish crucial links between criminals operating in different jurisdictions which can result in more effective and targeted interventions by Member States. Europol has established several specialised units to provide expertise and analysis on some of the most prevalent forms of serious cross-border crime, such as terrorism, cybercrime, online incitement to violent extremism, and the smuggling of migrants.[57]

56 Proposal for a Regulation amending Regulation (EU) 2016/794 as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role on research and innovation; COM(20) 796; Legal base—Article 88 TFEU, ordinary legislative procedure, QMV; Home Office; Devolved Administrations consulted; ESC number 41725.

57 Europol hosts the European Cybercrime Centre (2013), the EU Internet Referral Unit (2015), the European Counter-Terrorism Centre (2016), the European Migrant Smuggling Centre (2016), and the European Financial and Economic Crime Centre (2020).

5.2 Following its exit from the EU, the UK no longer participates in Europol but the Trade and Cooperation Agreement (TCA) concluded with the EU in December 2020 includes provisions on cooperation with Europol.[58] As a member of the EU, the UK made a significant contribution to the information held in Europol's databases and the intelligence products it produced.[59] The UK no longer has direct access to these databases but remains an important partner for the Europol, as is made clear in Europol's new External Strategy for 2021–23:

> One of the main goals of Europol's external relations will be to establish an excellent operational partnership with the United Kingdom following its exit from the European Union. Cooperation with the United Kingdom is essential for all the crime areas falling under Europol's mandate.[60]

The Trade and Cooperation Agreement

5.3 Europol's mandate determines what it can do. Changes to its mandate may therefore affect the scope and depth of the partnership it establishes with the UK as a third country outside the EU and the information and analysis it can share. Under the TCA, Europol can provide advice and support in individual criminal investigations and share information on criminal investigation procedures, crime prevention methods, and training activities, as well as the general situation reports, threat assessments and strategic analyses it produces on crimes within its mandate. The cooperation envisaged in the TCA includes the exchange of personal data for specific purposes, subject to the data protection safeguards set out in the agreement, while recognising that these exchanges cannot replicate the ease and pace of exchanges made when the UK was a member of the EU. The UK and Europol can each second liaison officers to facilitate the flow of information between them. The opportunities for the UK to exercise wider influence on policy and operational matters within Europol may depend on the detailed working and administrative arrangements which have yet to be agreed by Europol and the relevant UK authorities.[61]

Europol's current mandate

5.4 Europol's current mandate and core tasks are set out in the Regulation establishing Europol which was last updated in 2016. The rapid growth in cybercrime and cyber-enabled crimes has fuelled calls for a revision of Europol's mandate to enable it to receive and process data held by private parties, such as transport, communication, or banking service providers. This data may be crucial in detecting, investigating and prosecuting serious cross-border crimes. National law enforcement authorities increasingly depend on Europol's analytical expertise to help them process large volumes of data (so-called "big data"). In September 2020 the EU's data protection authority responsible for supervising Europol's compliance with data protection rules (the EDPS—European Data Protection Supervisor) formally admonished the Agency for its handling of these large datasets, highlighting the risk that personal data processed by Europol in this way might wrongfully

58 See Part Three, Title V of the Trade and Cooperation Agreement. The TCA currently applies on a provisional basis (with effect from 1 January 2021) pending ratification by the EU.

59 See the evidence given to the Home Affairs Committee by Europol's former Head, Sir Rob Wainwright, on 10 February 2021 (Q209).

60 See Europol's Programming Document 2021–23. The areas of crime which fall within Europol's mandate are listed in Annex Law-3 to the Trade and Cooperation Agreement.

61 See Article LAW.EUROPOL.59 in Title V of Part Three of the TCA on working and administrative arrangements.

link innocent individuals to criminal activity.[62] EU Home Affairs Ministers have since underlined the need for Europol to have "a strong legal basis for the handling of large datasets" to strengthen the EU's response to terrorism.[63]

Proposed changes to Europol's mandate

5.5 With this in mind, the European Commission proposed in December a set of amendments to the Europol Regulation. The purpose of these changes is to:

- **empower Europol to cooperate more effectively with private parties** by allowing Europol to (i) receive and analyse data voluntarily provided by private parties which may be relevant to a criminal investigation in order to establish which Member States have jurisdiction to carry out an investigation,[64] and (ii) exchange personal data with private parties (such as an IP address and URL to locate a specific webpage on the internet) to prevent the online dissemination of terrorist content or promotion of violent extremism during a real-time crisis, such as a terrorist attack;
- **clarify the rules which enable Europol to analyse large and complex datasets** to support criminal investigations undertaken by individual Member States or by the new European Public Prosecutor's Office (EPPO) once it is fully operational;[65]
- **make more information available to frontline law enforcement officers** by enabling Europol to enter in the Schengen Information System (SIS II) data which it has received from third (non-EU) countries or international organisations (such as Interpol) on the suspected involvement of a third country national in serious crime;
- **strengthen Europol's role in research and innovation** and in the development of new tools and technologies to take account of the cross-border dimension of many security threats;
- **ensure more effective screening of foreign direct investment** in the EU where it may affect technologies used (or being developed) by Europol or national law enforcement authorities to prevent and investigate crimes; and
- **enhance Europol's cooperation with third countries** by allowing its Executive Director to authorise categories of transfers of personal data on a case-by-case basis, while maintaining the prohibition on "systematic, massive or structural transfers" of such data.

5.6 The changes proposed would also adapt (and strengthen) the data protection rules applicable to Europol and the provisions on parliamentary oversight of its activities, while clarifying Europol's relationship with the EPPO and with the European Anti-Fraud Office

62 See the EDPS Decision of 17 September 2020 on Europol's big data challenge.
63 See the Joint Statement issued by EU Home Affairs Ministers on 13 November 2020.
64 Europol would not be able to require third parties to provide personal data in their possession but could ask Member States, via their Europol national units, to obtain the data in accordance with their national laws and share it with Europol, provided the personal data requested is strictly limited to what is necessary for Europol to perform its tasks.
65 The EPPO is expected to become operational in March 2021. It will investigate and prosecute crimes against the EU budget, such as fraud (including serious cross-border VAT fraud) and corruption.

(OLAF). To address the data protection concerns identified by the EDPS on the processing of big data, Europol would be required to carry out a "pre-analysis" of large datasets before processing them to establish that they relate only to the categories of personal data and data subjects that Europol is authorised to collect and process.[66]

The implications of the changes for the UK

5.7 While the changes to Europol's mandate primarily concern the legal framework which will govern its future cooperation with the UK under the TCA, they may also have practical and operational implications for UK law enforcement and for UK citizens. Examples include:

- **UK law enforcement access to personal data Europol has received from private parties in the UK:** Europol will be able to receive and process personal data provided by private parties based in the UK for two purposes: (i) to establish which country has jurisdiction for a criminal investigation and (ii) to prevent the dissemination of material on the internet related to terrorism or violent extremism in the event of a crisis (such as a real-time threat to life). In both cases Europol will be able (though not required) to share its analysis of the personal data it receives with the UK's national contact point (the National Crime Agency) if it is relevant to the UK;[67]

- **Better information sharing with private parties in the UK:** Europol may share personal data with private parties in the UK on a case-by-case basis where strictly necessary for the limited purposes set out in the Regulation;[68]

- **UK law enforcement access to Europol's analytical tools:** the UK may share with Europol personal data relating to a specific criminal investigation which is within Europol's mandate, provided it links to a wider criminal investigation in one or more Member States for which Europol is providing operational support. The EDPS must be informed to ensure that the processing of any large datasets shared with Europol is proportionate. However, data processed by Europol "shall be shared only within the Union";[69] and

- **UK data on criminal suspects accessible to front-line law enforcement officers across the EU:** Europol will be able to enter data it has received from the UK to create "alerts" in the Schengen Information System (SIS II) on UK and other third country nationals suspected of involvement in serious crime.[70]

5.8 Two further changes are worthy of note. Recognising that third countries may benefit from the services provided by Europol, a new provision would allow Europol to agree an appropriate financial contribution to its budget (based on a separate financial agreement).[71] The proposed Regulation also seeks to strengthen Europol's relationship with the EPPO and with OLAF. Under the TCA, OLAF has authority to carry out administrative investigations in the UK concerning irregularities, fraud and other criminal offences

66 These categories are set out in Article 18(5) and Annex II of the 2016 Europol Regulation.
67 See Article 26 as amended and new Article 26a.
68 See Article 26 as amended and new Article 26a.
69 See new Article 18a on information processing in support of a criminal investigation.
70 See amended Article 4(1)(r) and recital (8).
71 See Article 57(4) as amended and recital (41).

affecting the EU budget which are connected to continued UK participation in EU funded programmes, such as the Horizon Europe Framework Programme for Research and Innovation. The TCA also requires the UK to cooperate with the competent EU or national law enforcement authorities (as appropriate) responsible for investigating and prosecuting individuals or legal entities in the UK who are in receipt of EU funding and are suspected of involvement in criminal offences affecting the EU's financial interests.[72] The EPPO is a competent EU authority for the purpose of mutual assistance requests made in the course of a criminal investigation.[73] A new Article 20a would require Europol to conclude a working arrangement with the EPPO (Europol already has such an arrangement with OLAF) and provide active support for its investigations.

The Government's position

5.9 In his exceptionally brief Explanatory Memorandum of 7 January 2021, the Security Minister (the Rt Hon. James Brokenshire MP) says only that the proposed Regulation will have no legal, policy or financial implications for the UK following the end of the post-exit transition period on 31 December 2020. He makes no reference to cooperation between Europol and the UK under the TCA which has governed EU/UK relations (on a provisional basis) since 1 January 2021 and how it may be affected by the proposed changes to Europol's mandate.

Our assessment and proposed action

5.10 We do not share the Minister's view that the proposed Regulation will have no legal, policy or financial implications for the UK, given that the UK has agreed to establish "cooperative relations" with Europol under the TCA encompassing the exchange of information (including personal data) and the secondment of liaison officers to facilitate operational cooperation. The changes proposed raise a number of questions, not least the safeguards that will apply to the processing of personal data shared with Europol, the risk of false incrimination and apprehension based on "alerts" entered in the Schengen Information System, Europol support for EPPO investigations and prosecutions which could involve individuals and organisations based in the UK in receipt of EU funding, and the possibility of a UK contribution to Europol's budget.

5.11 As none of these questions are adequately addressed in the Minister's Explanatory Memorandum, we are writing to request a detailed response.

Letter to the Parliamentary Under Secretary of State (Kevin Foster MP), Home Office

Thank you for the Explanatory Memorandum of 7 January 2021 submitted by the Security Minister (Rt Hon. James Brokenshire MP) which states that a proposed Regulation to strengthen Europol's mandate—the rules determining what Europol can do—will have no legal, policy or financial implications for the UK. This assertion is difficult to reconcile with the commitment made in the EU/UK Trade and Cooperation Agreement (TCA) to establish "cooperative relations" with Europol encompassing the exchange of information

72 See Part Five, Article UNPRO.4.2 of the TCA: Fight against irregularities, fraud and other criminal offences affecting the EU's financial interests.

73 See the notifications made by the EU and published in the EU's Official Journal on 31 December 2020.

(including personal data) and operational cooperation in support of individual criminal investigations. Changes to Europol's mandate may well affect the scope and depth of the partnership it can establish with the UK as a third country outside the EU and the information and analysis it can share. We are disappointed that your Explanatory Memorandum does not examine the proposed changes to Europol's founding Regulation in this broader context, exploring both the opportunities and risks that a stronger mandate may entail for future cooperation between Europol and UK law enforcement authorities under the TCA. To inform our understanding, we ask you to provide further information on the matters outlined below.

Data protection

The proposed Regulation is intended to establish a more solid legal foundation for Europol to process and analyse large datasets to support criminal investigations undertaken by individual Member States or by the new European Public Prosecutor's Office (EPPO) once it is fully operational. The datasets may include personal data held in specific criminal investigation files which UK law enforcement authorities decide to share with Europol. The European Data Protection Supervisor has "admonished" Europol for its handling of large datasets, noting:

> The processing of data about individuals in an EU law enforcement database can have deep consequences on those involved. Without a proper implementation of the data minimisation principle and the specific safeguards contained in the Europol Regulation, data subjects run the risk of wrongfully being linked to a criminal activity across the EU, with all of the potential damage for their personal and family life, freedom of movement and occupation that this entails.[74]

Given these concerns, do you consider that the additional safeguards proposed by the European Commission adequately address the risk of false incrimination and are you satisfied that it would be appropriate for law enforcement authorities in the UK to share large datasets with Europol on a case-by-case basis? We note that data processed in this way "shall be shared only within the Union".[75] Does this limitation affect your assessment of the risks and benefits of sharing the details of an investigative case file with Europol?

SIS II alerts

The proposed Regulation would allow (but not require) Europol to create "alerts" in the Schengen Information System on third country (non-EU) criminal suspects based on information received from the UK (or other third countries) which would be immediately accessible to frontline law enforcement officers across the EU. What assessment has the Government made of the operational implications of this new provision? While it might increase the visibility in EU Member States of criminal suspects wanted in the UK (now that the UK no longer has direct access to SIS II and the ability to create its own alerts), it might also increase the risk that criminal suspects who are UK citizens will be apprehended and prosecuted abroad. Do you anticipate that alerts circulated in this way

74 EDPS Decision of 17 September 2020 relating to EDPS own inquiry on Europol's big data challenge.
75 Article 18a(4) of the proposed Regulation.

(based on information provided by the UK) which lead to an arrest would be followed by a request for extradition under Part Three, Title VII of the TCA on surrender so that the individuals concerned can be tried in UK courts?

Data sharing with private parties

Where Europol has received and processed personal data provided by private parties based in the UK, the proposed Regulation would allow (but not require) Europol to share its analysis with the UK's national contact point (the National Crime Agency) if it is relevant to the UK. Do you expect detailed arrangements for sharing relevant personal data and the results of Europol's processing and analysis to be set out in the working and administrative arrangements envisaged in the TCA?[76]

Europol support for EPPO investigations in the UK

The proposed Regulation would require Europol to "actively support" investigations and prosecutions carried out by the EPPO, allow the EPPO indirect access to its databases, and report to the EPPO any criminal conduct which falls within its areas of responsibility (currently, criminal offences affecting the EU's financial interests).[77] We ask you to clarify the practical implications of this provision, given that the EPPO is an EU "competent authority" for the purpose of implementing the mutual legal assistance provisions of the TCA and may therefore play a role in investigating any financial irregularities or fraud involving the beneficiaries of EU funding in the UK.

Working and administrative arrangements

The TCA envisages that Europol and the UK will conclude working and administrative arrangements to "complement and implement" the provisions in Part Three, Title V (cooperation with Europol). Does this mean that the conclusion of such arrangements is an essential pre-requisite for cooperation with Europol to take place? What progress has been made in agreeing these arrangements and is final agreement dependent on the UK securing a law enforcement adequacy decision? We anticipate that the arrangements (if agreed) will be published on Europol's website. Does the Government also intend to publish the details and inform Parliament of their content?

Financial contributions to Europol

The proposed Regulation would allow Europol to receive financial contributions from third countries with which it (or the EU) has an agreement.[78] What assessment has the Government made of this provision for future UK law enforcement access to Europol's data processing and analytical tools, as well as its products? As a matter of principle, do you consider it reasonable for Europol to charge for any "added value" that its services provide to UK law enforcement?

76 Part Three, Title V, Article LAW.EUROPOL.59.

77 Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO').

78 Article 57(4) of the proposed Regulation and recital (41).

Stakeholder consultation

Your Explanatory Memorandum does not state whether the Government has consulted external stakeholders—notably the National Crime Agency, the Information Commissioner and others with an interest in cross-border law enforcement—on the proposed changes to Europol's mandate and the implications for cooperation under the TCA. We ask you to confirm that you have consulted external stakeholders (or intend to do so) and to provide an overview of their responses.

We look forward to receiving your response by the end of March.

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

Department of Health and Social Care

(41618) — COM(2020) 687	Communication from the Commission to the European Parliament, the European Council and the Council on additional COVID-19 response measures.
(41694) — COM(2020) 786	Communication from the Commission to the European Parliament, the European Council and the Council Staying safe from COVID-19 during winter.

HM Revenue and Customs

(41782) — COM(21) 28	Proposal for a Council Regulation amending Council Regulation (EU) No 389/2012 on administrative cooperation in the field of excise duties as regards the content of electronic registers.

Department for Transport

(41722) 13898/20 +ADD1 COM(2020) 828	Proposal for a Regulation of the European Parliament and of the Council on certain aspects of aviation safety with regard to the end of the transition period mentioned in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.
(41723) 13903/20 COM(2020) 826	Proposal for a Regulation of the European Parliament and of the Council on common rules ensuring basic road freight and road passenger connectivity following the end of the transition period mentioned in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.
(41724) 13900/20 COM(2020) 827	Proposal for a Regulation of the European Parliament and of the Council on common rules ensuring basic air connectivity following the end of the transition period mentioned in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community.

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)

Environment, Food and Rural Affairs Committee: 2021 Fishing Opportunities [Proposed Regulation (SNC)]

Health and Social Care Committee: EU-UK Health Security Cooperation [(a)-(c) Proposed Regulations, (d) Commission Communication (SNC)]

Home Affairs Committee: Strengthening Europol's role in operational police cooperation [Proposed Regulation (SNC)]

Joint Committee on Human Rights: Strengthening Europol's role in operational police cooperation [Proposed Regulation (SNC)]

International Trade Committee: The EU Trade Enforcement Regulation: Brexit implications [Proposed Regulation (SC)]; WTO Airbus-Boeing dispute: application of EU retaliatory measures [Commission (SC)]

Justice Committee: Strengthening Europol's role in operational police cooperation [Proposed Regulation (SNC)]

Northern Ireland Affairs Committee: Northern Ireland Protocol: implementation powers of the European Commission under the EU VAT Directive [Proposed Directive (SNC)]; The EU Trade Enforcement Regulation: Brexit implications [Proposed Regulation (SC)]; EU-UK Health Security Cooperation [(a)-(c) Proposed Regulations, (d) Commission Communication (SNC)]; WTO Airbus-Boeing dispute: application of EU retaliatory measures [Commission (SC)]

Welsh Affairs Committee: WTO Airbus-Boeing dispute: application of EU retaliatory measures [Commission (SC)]

Formal Minutes

Wednesday 10 March 2021

Members present:

Sir William Cash, in the Chair

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

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 6 read and agreed to.

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

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

[Adjourned till Wednesday 17 March 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*)