House of Commons

European Scrutiny Committee

Forty-fourth Report of Session 2019–21

Documents considered by the Committee on 21 April 2021

Report, together with formal minutes

Ordered by The House of Commons
to be printed 21 April 2021

HC 229-xxxviii
Published on 27 April 2021
by authority of the House of Commons

Notes

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 and International Law), Alistair Dillon and Leigh Gibson (Senior Committee Specialists), Nat Ireton and Apostolos Kostoulas (Committee Operations Officers), Daniel Moeller (Committee Operations Manager), Foeke Noppert (Senior Committee Specialist), Indira Rao MBE (Counsel for European and International Law), Paula Saunderson (Committee Operations Assistant), Emily Unwin (Deputy Counsel for European and International Law), Dr George Wilson (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 EU Climate Policy[1]

These EU documents are politically important because:

- they relate to future UK and EU cooperation in the area of climate policy in line with the commitments made in the Trade and Cooperation Agreement; and
- the Minister signals particular interest in emerging EU policy concerning climate ambition, emissions trading and a possible carbon border adjustment mechanism.

Action

- Report to the House.
- Draw to the attention of the Business, Energy and Industrial Strategy Committee and the International Trade Committee.

Overview

1.1 The European Union has provisionally agreed[2] its 'European Climate Law', which will increase the EU's climate ambition by reducing greenhouse gas (GHG) emissions EU-wide by at least 55% by 2030.

1.2 The original draft law (document (a)) was accompanied by a Communication (document (b)) detailing a set of policies across all sectors of the economy required to achieve the target, committing to a review of these and, ultimately, to detailed legislative proposals by June 2021. These include broadening the scope of the EU Emissions Trading System to include international aviation and maritime emissions and introducing a Carbon Border Adjustment Mechanism to mitigate the risk of carbon leakage.[3]

1.3 We wrote to the Minister for Climate Change and Corporate Responsibility (Lord Callanan) on 20 January 2021 inviting him to update his original analysis of the documents in the light of the EU-UK Trade and Cooperation Agreement (TCA), which included important provisions on climate change. We explored the relevant parts of the TCA, as well as the Commission's documents and the Government's initial position, in our Report of 20 January 2021.[4]

1.4 In his response, the Minister observes that the EU and UK have a shared ambition to tackle climate change and will therefore remain close partners in this area, not least by working together for success at COP26.

1 (a) Commission Communication: Stepping up Europe's 2030 climate ambition—Investing in a climate-neutral future for the benefit of our people (b) Amended Proposal for a Regulation establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law); (a) 10865/20 + ADDs 1–4, COM(20) 562 (b) COM(20) 563; Legal base: (a)—(b) Article 192(1) TFEU, Ordinary legislative procedure, QMV; Department: Business, Energy and Industrial Strategy; Devolved Administrations: Consulted; ESC numbers: (a) 41521 (b) 41523.

2 "European climate law: Council and Parliament reach provisional agreement", Council of the EU, Press Release, 21 April 2021.

3 Where industrial activity might be outsourced outside of the EU to reduce the EU's own emissions but leading to an increase in carbon intensive imports from countries with less ambitious climate regulation.

4 Thirty-fourth Report HC 229–xxx (2019–21), chapter 1 (20 January 2021).

1.5 The Minister draws attention to the introduction of the UK Emissions Trading Scheme (UK ETS), to replace the EU Emissions Trading System (EU ETS) at the end of the Transition Period. The UK, he says, recognises the importance of international co-operation on carbon pricing, and with there being more than 20 emissions trading systems globally, the UK remains open to linking the UK ETS internationally.

1.6 The UK ETS, explains the Minister, will be the world's first net zero carbon cap and trade market[5] and is more ambitious than the EU system it replaces, with the cap already set at 5% below the UK's expected notional share of the EU ETS cap for its current phase. Later this year, the Government will review the cap to align it with the net zero ambition.

1.7 On the matter of the EU's suggested Carbon Border Adjustment Mechanism (CBAM), the Minister says that the European Commission has yet to make a concrete proposal. Nonetheless, the UK is following the broader debate on possible designs with interest. The UK recognises the importance of ensuring that its policy interventions to cut domestic emissions do not lead to increased emissions elsewhere and work is ongoing across Government to better understand this potential issue, known as carbon leakage. As set out in the Interim Report[6] of the Net Zero Review, a range of approaches could potentially help to address this, of which carbon border adjustments are one, and the UK continues to engage on the issue.

1.8 The Minister notes that the conclusion of the European Climate Law, legislative proposals for reform to the EU ETS and introduction of an EU CBAM all relate indirectly to ongoing UK policy development and, as such, will necessitate the UK's engagement as an independent country with a legally binding domestic commitment to achieve net zero emissions by 2050.

Action

1.9 The Minister has recognised the indirect relevance for the UK of the EU's various initiatives. We have no outstanding issues to raise at this stage.

1.10 We report the Minister's letter to the House and draw it to the particular attention of the Business, Energy and Industrial Strategy Committee and the International Trade Committee as future UK Government work on tackling carbon leakage, possibly through a carbon border adjustment mechanism, is of interest to those Committees.

5 A carbon "cap and trade" market sets an overall cap of emission allowances equating to the amount of pollution that is permitted. Emission allowances are then traded so that those emitting are able to buy allowances or, alternatively, sell them if they choose instead to take actions to cut emissions. To reduce emissions overall, the cap must be lowered.

6 Net Zero Review: Interim Report, HM Treasury, December 2020.

2 Northern Ireland Protocol: EU import licensing scheme for cultural goods[7]

This EU document is politically important because:

- it establishes new customs formalities under EU law to identify cultural goods, like archaeological artefacts and older works of art, at risk of being smuggled into the EU from non-EU countries (including the UK). The Regulation will fully take effect from 2025; and
- these new customs formalities, because of the Protocol on Ireland/Northern Ireland in the Withdrawal Agreement, will not only apply in due course to works of art and antiquities traded from Great Britain into the EU, but also those entering Northern Ireland from the rest of the UK.

Action

- Keep the implementation of the new EU import licensing scheme for cultural goods under review in light of its potential implications for the UK's art market and for Northern Ireland in particular, and draw these developments to the attention of the Digital, Media, Culture and Sport Committee and the Northern Ireland Affairs Committee.

Overview

2.1 Under a new EU Cultural Goods Regulation (CGR) agreed in 2019, the EU is establishing new customs controls when certain types of cultural property—such as Egyptian archaeological artefacts or ancient coins from Turkey—are brought into the European Union, to prevent trafficking and black market sales. These customs formalities are only due to take effect fully in 2025, to give the European Commission and the Member States time to develop a dedicated new IT system for the storage and exchange of information submitted by traders in relation to cultural goods. They will not apply to artefacts being moved directly from one EU country to another, nor cultural goods created or discovered inside the EU itself.[8]

2.2 The UK Government has been sceptical about the effectiveness of this approach to stopping smuggling of arts of work and antiquities, and now it has left the EU the Government has decided not to apply the import licensing system to cultural goods entering Britain.[9] However, as the UK is outside the EU Customs Union and Single Market, British exports of cultural items within the scope of the Regulation to the EU will be subject to the new formalities from 2025. This could make the UK less attractive as a place for EU-based customers to purchase works covered by the new customs formalities. Moreover, in December 2020 the Government approved the inclusion of the Cultural Goods Regulation in the Protocol on Ireland/Northern Ireland in the Withdrawal Agreement governing the

7 Regulation (EU) 2019/880 on the introduction and the import of cultural goods; Council and COM number: 11272/17, COM(17)375; Legal base: Article 207(2) TFEU; ordinary legislative procedure; QMV; Department: Digital, Media, Culture and Sport; Devolved Administrations: Consulted; ESC number: 41443.

8 This means, for example, that the new import rules would not apply—for example—to a painting by Rembrandt or to the Elgin Marbles.

9 The draft Introduction and the Import of Cultural Goods (Revocation) Regulations 2021.

UK's exit from the EU.[10] This means that the new customs formalities for cultural goods as set out in the CGR will also need to be applied to such goods entering Northern Ireland from outside the EU, *including from the rest of the UK*.

2.3 The Government provided no meaningful opportunity for Parliament to probe the implications of including the CGR in the Protocol before it was consented to. In an Explanatory Memorandum submitted to Parliament on 8 January 2021—nearly a month after the Regulation was added to the Protocol—the Chancellor of the Duchy of Lancaster (Rt Hon. Michael Gove MP) stated that:

> "[T]he policy implications of this Regulation being included… are, in practice, minimal, given that there are very few imports of cultural goods from the rest of the world into Northern Ireland, and those imports from non-EU countries that do take place are likely to be covered by exemptions within the Regulation."

2.4 However, while we accept that the overall trade flows between Northern Ireland and Great Britain likely to be affected by these new formalities is small, the impact in individual cases where someone wants to bring artefacts into Northern Ireland could be significant. The UK Government will also need to use a new EU IT system for operation of the licensing scheme in whose development it is not involved. More generally, it is another instance of an EU legal requirement under the Protocol that complicates the ability for goods to move freely between the different parts of the UK. We therefore believe it is important that Parliament continues to keep the implementation of the EU's import licensing scheme for cultural goods under review, and makes a further assessment of the implications of the CGR for the UK's art market—and for trade in cultural property between Great Britain and Northern Ireland under the Protocol—where necessary in the future.

2.5 The background to the Regulation, and further consideration of its implications for the UK, are set out below.

The Regulation on imports of cultural goods

2.6 The EU has had legislation in place to prevent the unlawful export of cultural goods—archaeological artefacts, works of art and manuscripts—from a Member State to a non-EU country since 1992.[11] By contrast, comprehensive EU legislation to regulate the *import* of such goods into the European Union has only been in place since 2019.[12] That year, the Member States in the Council and the European Parliament agreed a new Regulation on Import of Cultural Goods (the CGR) on the basis of draft legislation first proposed by the European Commission in 2017.[13] It aims to create more oversight of cultural goods brought into the EU, like artefacts from Egypt, Syria or Iraq.

2.7 The CGR, which builds on the 1970 UNESCO Convention against Illicit Trafficking of Cultural Property, requires the border authorities of all EU countries to prevent the entry

10 UK/EU Joint Committee Decision 3/2020.

11 Currently Council Regulation 116/2009 on the export of cultural goods, which replaced Council Regulation (EEC) No 3911/92 of 9 December 1992.

12 However, the EU has had specific import restrictions on archaeological objects from Syria and Iraq that are considered at particular risk of being trafficked because of the political volatility in those countries.

13 The UK, then still a Member State of the EU, voted in favour of the Regulation as recorded in Council document 8375/19.

into the EU's Customs Union of certain categories of cultural goods, if they were "removed from the territory of the country where they were created or discovered in breach of the laws and regulations of that country". The aim is both to disrupt trafficking of cultural goods generally, and disrupt the alleged ability of terrorist organisations and criminal groups to raise funds from such activities.[14] This Committee reported the discussions in Brussels on the Regulation on four occasions, most recently in early 2019.[15]

2.8 Broadly speaking, the Regulation creates the following new customs formalities for at the EU's external border for trade with non-EU countries:[16]

- All cultural goods created or discovered outside the EU, regardless of age and value, are subject to an EU-wide import ban if they have been unlawfully exported from the country where they were created or discovered. This prohibition is implemented by customs authorities "on a risk- and intelligence-led basis", and came into effect in December 2020.

- From 2025, cultural property considered most at risk—namely archaeological artefacts from non-EU countries that are more than 250 years old—[17] will require an import licence, to be issued by the customs authorities of the relevant EU Member State, certifying the lawful export of the good from its country of origin or discovery. This licence will be based on documentary evidence supplied by the importer, and must normally be issued before the artefact can enter the EU customs territory.

- Also from 2025, imports of other types of cultural goods more than 200 years old, including sculptures, paintings and coins,[18] will be subject to a less onerous self-certification system known as the "importer statement", under which the importer would have to self-certify the legal exportation of the good from its country of origin or discovery before it could enter the EU.

2.9 In cases where that country of origin or discovery of the goods cannot be reliably determined, or where they were taken out of that country before 24 April 1972 (when the aforementioned 1970 UNESCO Convention came into force), importers may be able to meet the new requirements instead by providing evidence or a declaration of legal export from the last country in which the goods were located for at least 5 years.[19] The new formalities will not apply to cultural goods brought into the EU on a temporary basis for a variety of scientific purposes, including for display at museum exhibitions or for restoration. Similarly, archaeological works which are brought into the EU for display

14 The European Commission has noted that the so-called Islamic State makes money in two ways from antiquities: through selling looted artefacts and taxing traffickers moving items through ISIL-held territory. The UK Government, however, has expressed doubt about the extent to which smuggling of cultural goods is used as a method of fund-raising by such organisations (see in particular a letter from the then-Minister for Arts and Heritage, Michael Ellis MP, to this Committee dated 1 February 2018).

15 See (38915), 11272/17 + ADDs 1–3, COM(17) 375: Second Report HC 301–iii (2017–19), chapter 3 (1 December 2017); Sixteenth Report HC 301–xvi (2017–19), chapter 4 (5 March 2018); Forty-fourth Report HC 301–xliii (2017–19), chapter 3 (20 November 2018); and Fifty-third Report HC 301–lii (2017–19), chapter 10 (5 February 2019).

16 Customs formalities have been completely abolished between EU Member States as part of the Single Market, so the new Regulation does not apply to trade in cultural goods between EU countries.

17 As listed in Part B of the Annex to the Regulation.

18 As listed in Part C of the Annex to the Regulation.

19 This exception does not apply if, during that 5-year period, the cultural property was in a country other than where it was created or discovered "for [...] temporary use, transit, export or transhipment", e.g. held in a warehouse or free-port.

at commercial art fairs, and which would otherwise be subject to the import licensing obligation, will only require an importer statement. However, if they are subsequently sold and remain within the EU customs territory they will require a retrospective import licence.

2.10 As noted, the requirement to comply with the new import licensing and import statement—depending on the nature and age of the cultural goods involved—will only take effect in 2025. That is when a new European IT system for the "storage and the exchange of information" between EU Member States on such licences and statements is meant to become operational. Until then, EU countries are only subject to the more general requirement to prevent entry of cultural goods that were removed from their country of origin or discovery unlawfully. In July 2020, the Commission published a report on progress made in establishing that IT system. This sets out its project plan for its development, and also links it to the EU's new proposed "Single Customs Window" (a proposed digital platform where traders would be able to fulfil various customs formalities to bring goods into the EU in a single application).

2.11 The European Commission is planning to publish a formal Implementing Act—a type of EU Statutory Instrument—in the second half of 2021 to flesh out some of the provisions of the CRG. This relates, in particular, to the applicable customs procedures for cultural goods brought into the EU for safekeeping (for example because they were at risk of destruction in a conflict zone), the format of the import licence and importer statement, and the operation of the IT system under the Cultural Goods Regulation. It launched a consultation on a draft of the Implementing Act on 24 March 2021.

Implications of the Cultural Goods Regulation for the UK

2.12 The UK Government's view of the need for the new EU customs formalities for cultural property introduced by the CGR has been consistently sceptical, both with respect to its effectiveness in detecting smuggled artefacts (especially where traders can submit self-certified statements that goods have not been trafficked) and the presumed impact on disrupting fund-raising activities of terrorist groups and organised crime.[20] The British Art Market Federation (BAMF) also expressed "strong concern" that the regime—if it had to be implemented at the UK border—could "create an unfortunate perception that the UK is a more complicated place for art sales and potentially hinder our global competitiveness".[21] Other stakeholders have also warned that the new Regulation is likely to complicate cross-border movements of cultural goods, especially for items—like old books—where the 'country of origin' is not easily identified.

2.13 Nevertheless, in April 2019—less than a year before the UK exited the EU—the Government voted in favour of the Regulation in the EU's Council of Ministers on the grounds that "there [was] little to be gained from opposing the Regulation […], and that

20 The Government also expressed concerns that the self-certification regime for cultural goods deemed at lower risk of trafficking could facilitate, rather than hinder, illicit trade in such goods. It also said that the convoluted approach to archaeological works brought into the EU for display at art fairs—which could require retrospective import licences—"may be unworkable".

21 Based on developments in the legislative process in Brussels, and the information supplied by the Government, our predecessors on the European Scrutiny Committee considered the implications of the Regulation for the UK on four occasions from 2017 to 2019. See for more information the Committee's Reports of 1 December 2017, 5 March 2018, 20 November 2018 and 5 February 2019,

to do so could help to sustain the mistaken and unfair view in some quarters that the UK is more interested in protecting the art market than in tackling the illicit trade in cultural objects".

2.14 The UK's withdrawal from the European Union has, to some extent, assuaged any concerns about the impact of the Regulation on the British art market. The UK is now formally outside the EU Customs Union and Single Market. The Government has announced that, while it will maintain the general intelligence-led prohibition on entry of trafficked cultural goods (as also required under the EU's CGR), it will not be implementing the more detailed, and convoluted, import licence and importer statement system that the EU is putting in place for 2025. This is set out in the draft Introduction and the Import of Cultural Goods (Revocation) Regulations 2021, which are currently awaiting parliamentary approval.[22]

2.15 However, that does not mean the EU Cultural Goods Regulation will not have an impact on the UK.

2.16 First, from 2025, British businesses bringing cultural goods within the scope of the Regulation into the EU will need to comply with the obligations relating to import licences and importer statements. The impact of this new EU customs regime may be particularly significant for the UK, precisely because of its large art market and extensive trade links with the European Union. As the BAMF has noted, the "British art market is unusual for being a global *entrepot* market place, and is therefore particularly active in cross-border trade", including with EU countries.

2.17 The new entry requirements relating to cultural goods specifically will need to be applied to cultural goods moved from Great Britain into the EU which are in scope of the Regulation, adding a new layer of bureaucracy that will not apply to similar trade between EU countries, or between the EU and Northern Ireland (see below). This may make the UK less attractive as a place for EU-based customers to purchase art or artefacts that are subject to the new formalities.[23] However, the effect is limited by the fact that works of art originating within the EU itself—for example Dutch, French or Flemish paintings, or ancient Greek artefacts—are not subject to the new rules. Even if the Government had decided to maintain the new import licensing system under domestic law, this would not have had the effect of obviating the new formalities on UK-EU trade in cultural goods, as the UK system would be separate.

2.18 Secondly, as noted, Northern Ireland is in a different situation in this respect from the rest of the country. Under the Protocol on Ireland/Northern Ireland in the Withdrawal Agreement, the UK is required to continue applying a wide range of EU legislation on goods in and to Northern Ireland. More specifically, to avoid the need for any customs infrastructure on the land border on the island of Ireland following the UK's withdrawal from the EU, the Government will instead enforce a range of EU customs formalities on goods entering the North from outside the EU, *including from Great Britain*. The Cultural Goods Regulation was not listed in the Protocol as originally agreed between the UK and

22 On 16 March 2021, the European Statutory Instruments Committee (ESIC) recommended that the regulations be made by affirmative procedure, rather than the negative procedure initially proposed by the Government.

23 The new specific formalities relating to cultural goods will come in addition to the other barriers to trade in goods more broadly that apply now that the UK has left the EU's Single Market and Customs Union, for example relating to general customs formalities—such as import declarations and safety & security certificates—and import VAT.

the EU in January 2020. However, our predecessor Committee had already noted in early 2019 that "it [was] likely the EU would seek the UK's approval to add the […] Regulation" to the list of EU laws that would continue to apply under the Protocol, "creating an additional customs barrier between Northern Ireland and Great Britain". This proved to be correct. In spring 2020, the European Commission tabled a formal proposal for consideration by the UK to add various pieces of EU legislation to the Protocol, and the CGR was among the proposed additions.

2.19 As set out in more detail in this Committee's Reports of 24 June 2020 and 9 April 2021, the Government provided no meaningful opportunity for Parliament to scrutinise the implications of the proposed amendments to the Protocol. In July 2020, the Cabinet Office said that it would "not […] disclose UK positions publicly ahead of any negotiations or Withdrawal Agreement implementation discussions". In the event, the Government eventually agreed to most of the Commission's proposed additions—including the CGR—in December 2020, by means of Decision 3/2020 of the UK/EU Joint Committee, as part of a broader suite of agreements relating to the functioning of the Northern Ireland Protocol. It did not seek Parliament's views in any way before giving its agreement to the expansion of the range of EU laws that apply in Northern Ireland under the Protocol.[24] In its initial summary of the decision, the Government did not even explicitly refer to the Cultural Goods Regulation, saying only that "these targeted amendments do not occasion any significant new burdens, and indeed ensure that we are able to fully protect Northern Ireland's place in the UK's internal market".

2.20 We have made a more general assessment of the various amendments made to the Protocol by Joint Committee Decision 3/2020 in our Report of 9 April 2021.

2.21 However, with respect to the CGR specifically, the Protocol means that there will be no need for import licences or importer statements where cultural goods are brought into the EU from Northern Ireland, or vice versa, even when the Regulation fully takes effect in 2025. Instead, the inclusion of the legislation in the Protocol means the Government will be under an obligation to prevent entry into Northern Ireland of cultural goods from Great Britain (and other non-EU jurisdictions) if they are in scope of the Regulation and "were removed from the territory of the country where they were created or discovered in breach of the laws and regulations of that country". That may affect intra-UK movements of, for example, coin collections or, paradoxically, paintings by British masters (which are in scope of the CGR, whereas old paintings from the EU itself are not). Moreover, from 2025, that would mean such goods being brought into Northern Ireland may require import licences or importer statements, managed by the UK in respect of Northern Ireland via the new computer system being set up by the EU.[25]

2.22 In an Explanatory Memorandum on Joint Committee Decision 3/2020 submitted to Parliament on 8 January 2021—nearly a month after the Regulation was added to the Protocol—the Chancellor of the Duchy of Lancaster (Rt Hon. Michael Gove MP) stated that:

24 Under Article 166(2) of the Withdrawal Agreement, as implemented by section 7a of the European Union (Withdrawal Agreement) Act 2020, the amendment to the Protocol took effect automatically within the UK's domestic legal order.

25 Under the Protocol, the aforementioned Implementing Act put forward by the European Commission to supplement various elements of the Cultural Goods Regulation will also apply to the UK in respect of Northern Ireland when it takes effect in 2025.

> "[T]he policy implications of this Regulation being included… are, in practice, minimal, given that there are very few imports of cultural goods from the rest of the world into Northern Ireland, and those imports from non-EU countries that do take place are likely to be covered by exemptions within the Regulation."

2.23 Even if the Government had decided to maintain the effects of the CRG in full in domestic UK law, this would not have obviated the applicability of these new EU customs formalities on movements in cultural goods from Great Britain to Northern Ireland, because the UK—being outside the Customs Union—would have operated those arrangements separately. Similarly, the new UK/EU Trade and Cooperation Agreement (TCA) does not contain any provisions that would waive the need for cultural goods brought into the EU or Northern Ireland from Great Britain to comply with the requirements of the Cultural Goods Regulation, including—from 2025—the import licence and importer statement formalities.[26] The Department for Digital, Media, Culture and Sport has told us that "the Government will consider what measures are required to implement the Regulation for Northern Ireland and will discuss with the EU, as appropriate". It is not clear what the outcome of that process, or any discussions with the EU, have been.

Conclusions and action

2.24 Doubts persist about the effectiveness of the EU's new customs formalities for cultural goods to reduce the risks of them being trafficked, but its impact will only become clearer after the scheme's full entry into force in 2025. As the UK is now outside the EU Customs Union and Single Market, traders in the British art market will undoubtedly learn to adapt to these new formalities for trade with the EU in due course, although it may reduce the attractiveness of the UK as a place for EU buyers to purchase art compared to purchases made within the EU, where these formalities will not apply.

2.25 In our view, the more important consequence of the Cultural Goods Regulation relates to the Government's decision in December 2020 to agree to the EU's proposal for its inclusion in the Protocol on Northern Ireland.

2.26 The decision to amend the Protocol was taken without the opportunity for effective parliamentary scrutiny of the implications of the amendments, because the Government failed to provide any information on its position—or the impact of the changes for Northern Ireland's position within the UK internal market—until after it had already approved the Joint Committee Decision. It demonstrates the broader shortcomings in the Government's approach to scrutiny of the activities and decisions of the UK/EU Joint Committee, which may also affect Parliament's ability to hold the Government to account for the work of the separate UK/EU Partnership Council (and its supporting bodies) under the new Trade and Cooperation Agreement with the EU.

2.27 In this specific instance we accept, as the Government has argued, that the practical impact of the CGR on trade in cultural goods between Northern Ireland and Great Britain under the Protocol is likely to be small, especially because the more onerous import licence requirement only applies to a narrow sub-set of archaeological artefacts

26 Article GOODS.21 of the UK/EU Trade and Cooperation Agreement does contain a mechanism for cooperation "in facilitating the return of cultural property illicitly removed from the territory" of either the UK or the EU after 1 January 1993, but this does not obviate the need for any customs formalities.

which realistically are not moved between Great Britain and Northern Ireland frequently. However, the Regulation is nevertheless another potential barrier to the free flow of trade between the different parts of the UK because it imposes a new, specific customs formality on certain goods moved from Great Britain into Northern Ireland. In individual cases, the impact of the Regulation could therefore be significant. The Government will also in due course be required to use an IT system in whose establishment it is no longer formally involved. In addition, the Regulation may hinder trade in cultural goods between the art markets of Great Britain and customers based in the EU, because the new formalities will also apply to such trade.

2.28 We therefore consider that Parliament should keep the implementation of the EU's new import licensing scheme for cultural goods under review, and make a further assessment of its implications for the UK—and for Northern Ireland in particular—in the future, where necessary.

2.29 In the meantime, we draw these developments to the attention of the Digital, Culture, Media and Sports Committee and, given the particular implications of the EU Cultural Goods Regulation under the Protocol, the Northern Ireland Affairs Committee. We trust that this Report chapter will be of use to Members participating in the forthcoming Delegated Legislation Committee on the draft Introduction and the Import of Cultural Goods (Revocation) Regulations, which aim to remove the import licence and importer statement requirements from UK law except with respect to Northern Ireland.

3 The EU Digital Services and Digital Markets Acts[27]

These EU documents are politically important because:

- they aim to establish harmonised, EU-wide regulatory standards for both the removal of illegal content online and the curbing of the market power of the largest "Big Tech" companies that dominate the global digital economy. The EU's actions may present both risks and opportunities for the UK's own approach to regulating such matters via the upcoming Online Safety Bill and Digital Markets Unit.

Action

- Write to the Minister for Digital and Culture (Caroline Dinenage MP) to seek further information on the Government's approach to engagement with the EU on regulation of the digital economy.
- Draw these proposals to the attention of the Home Affairs Committee, the Digital, Culture, Media and Sport Committee, the Business, Energy and Industrial Strategy Committee, the Science and Technology Committee and the Treasury Committee.

Overview

3.1 Given the growing importance of the digital sphere for both economic and social purposes, the European Commission in December 2020 published two important legislative proposals to set EU-wide regulatory standards for companies operating in that sector.

3.2 The first of these, called the Digital Services Act (DSA), would create new content moderation requirements for internet hosting services and platforms, primarily to ensure that illegal content—such as child sex abuse materials or the sale of counterfeit goods—is taken down expeditiously. It covers similar ground to the Government's upcoming Online Safety Bill. The second proposal, for a Digital Markets Act (DMA), is meant to address the market failures arising from the enormous power wielded by certain large online platforms—like Amazon and Facebook—in connecting businesses to consumers and in shaping public discourse. The Commission has proposed to do so by designating the largest digital companies as "gatekeepers", who would be subject to expansive new regulatory requirements relating, for example, to how they deal with their business users

27 (a) Proposal for a Regulation on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC; COM(20) 825; Legal base: Article 114 TFEU; ordinary legislative procedure; QMV; Department: Digital, Culture, Media and Sport; Devolved Administrations: Not consulted; ESC number: 41744.
(b) Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act); COM(20) 842; Legal base: Article 114 TFEU; ordinary legislative procedure; QMV; Department: Digital, Culture, Media and Sport and Business, Energy and Industrial Strategy; Devolved Administrations: not consulted; ESC number: 41745.

and consumers (including a blacklist of banned unfair practices). The DMA's objectives are broadly similar to those of the Government's planned Digital Markets Unit, which will oversee the enforcement of a new UK competition regime for large online platforms.

3.3 The Commission's proposals are for draft legislation: they must still be agreed jointly by the 27 EU Member States in the Council of Ministers and by the European Parliament before they become EU law. Given the scope, complexity and impact of the proposals, these legislative deliberations are likely to take well over a year (although the Commission has expressed the hope the new rules could take effect by 2023). Companies in the affected sectors, not least giants like Google, Amazon and Apple, are also expected to continue lobbying EU decision-makers heavily as those negotiations continue, given the size of the market that would be regulated differently if the proposals become law.

3.4 The DSA and DMA, as and when they become EU law, will not be directly applicable in the UK as it has now left the European Union and Single Market. However, they may still have implications for UK businesses with operations in the relevant sectors within the EU, and the EU's chosen approach could also influence the direction of international standards for the digital economy that the Government recently identified as a key objective of its "regulatory diplomacy". Both Ofcom and the Competition and Markets Authority have identified a coherent approach between the UK and EU with respect to oversight of the digital sector as important to ensure effectiveness and avoid regulatory arbitrage. However, the extent to which the Government itself is seeking to engage with EU policy-makers as they shape their Digital Services and Markets Acts is unclear.

3.5 In light of this, we have considered the DSA and DMA proposals in more detail below, including their possible implications for the UK.

EU regulation of the digital economy

3.6 The use and reach of digital services have expanded rapidly over the last two decades. The internet now offers the opportunity to access a vast range of goods, services and content digitally. However, this growth has also raised a number of concerns from a public policy perspective, for example around protection of consumer rights, freedom of expression and fair competition.

3.7 Within the EU's Single Market, the key legal framework for the provision of digital services is currently set out in the 2000 E-Commerce Directive. This legislation established rules on information to consumers relating to online purchases and on the service providers' legal liability for hosting of illegal materials, as well as basic transparency measures related to online advertising. There is also a host of other European rules with a bearing on the digital economy agreed more recently in response to specific risks or issues, including notably in relation to data protection, copyright of online content, consumer rights for goods bought on the internet, streaming services for audiovisual content and Value Added Tax. Most recently, the EU agreed new rules on the removal of online content linked to terrorism, which we discuss separately in chapter six of this Report.

3.8 However, policy-makers in the EU—like those elsewhere[28]—have not considered existing regulation to be sufficient given the rapid pace of development in the digital economy and online public spaces. In 2019, the new President of the European Commission, Ursula von der Leyen, identified making the EU "fit for the digital age" as one of her key political priorities.[29] More specifically, the Commission has warned that internet users are "exposed to increasing […] harms online" in areas like online safety, the shaping of public opinion and discourse, and the sale of dangerous or counterfeit goods. In addition, the Commission is concerned by the dominant position of companies like Amazon, Apple, Google and Facebook within the European—and global—digital services economy, which it says permits them to pursue unfair business practices and creates market failures, putting at risk good outcomes for EU consumers "in terms of prices, quality, choice, and innovation".

3.9 The Commission launched a public consultation in June 2020 on both aspects of the regulatory gaps it had identified, and formally tabled two draft Regulations—referred to as the Digital Services Act and Digital Markets Act respectively—on 15 December 2020. The first relates to the monitoring and removal of harmful online content, whereas the second aims to address unfair business practices of "Big Tech" companies in the market for digital services. The Commission proposals are not yet law: they still require the approval—with amendments if necessary—of the European Parliament and of a Qualified Majority of EU Member States in the Council of Ministers.

3.10 We have considered the substance of the two draft Acts an in more detail below, followed by an assessment of their potential implications for the UK's own regulatory approach to digital services and for British businesses and consumers.

The proposal for an EU Digital Services Act

3.11 The proposed Digital Services Act would create new EU-wide rules on how online platforms like YouTube, eBay and Tiktok must monitor and, where appropriate, remove illegal or harmful content uploaded and disseminated via their services.

3.12 The DSA would update and supplement the EU's current regulatory regime for the provision of digital services as set out in the 2000 E-Commerce Directive. Of particular relevance is that, under that legislation, digital services providers are exempt from any legal liability for hosting or transmitting illegal content where they act only as an "intermediary".[30] As interpreted by the EU Court of Justice, this "safe harbour" exemption is available only where the intermediary "does not have actual knowledge of illegal activity or information and […] is not aware of facts or circumstances from which the

28 Regulation of digital services has been discussed at the United Nations, the Council of Europe, the WTO, and OECD, and is regularly on the agenda of G7/G20 meetings. In the UK, explored further elsewhere in this chapter, the Government is preparing an Online Safety Bill to regulate online content, and is separately also seeking to establish a statutory Digital Markets Unit within the Competition and Markets Authority.

29 One of the specific proposals envisaged in von der Leyen's political 'mission statement' in late 2019 was "a new Digital Services Act" to "upgrade [EU] liability and safety rules for digital platforms, services and products" with the aim of protecting both individual consumers and business users. In February 2020, fleshing out its preferred approach to updated regulation of online platforms in a policy paper, the Commission also referred to the possibility of regulatory intervention to "ensure that markets characterised by large platforms" remain "fair" and contestable for innovators, businesses, and new market entrants". By May that year, it had committed to tabling draft EU legislation on such competition rules for large digital platforms by the end of 2020.

30 This applies where the company provides "mere conduit", "caching" or "hosting" services, where information is transmitted or stored automatically.

illegal activity or information is apparent". The Court's case-law has, in particular, drawn a distinction here between "passive" and "active" hosting services, where only the former exempts them from liability. By contrast, "active" hosting—which occurs, for example, where eBay promotes counterfeit goods offered for sale by a third party—can give rise to liability on the part of the hosting service and thus exposes them to the risk of (financial) penalties.[31]

3.13 However, determining in practice whether a digital intermediary has liability for content they host or transmit is notoriously difficult, not least because different EU Member States continue to interpret the liability rules differently.[32] More generally, a recent Commission evaluation found the current EU regulatory regime for digital services was not sufficient to address the "serious societal and economic risks" arising from online access to illegal or dangerous goods,[33] services[34] or content,[35] such as counterfeit goods, terrorist propaganda, or Covid-19-related misinformation. Noting that large online platforms in particular have become "de facto public spaces" that play a "systemic role for millions of citizens and businesses", the Commission concluded that EU rules do not ensure adequate "accountability for the content which these providers distribute on their platforms". The divergence in national approaches to regulation of platforms taken by individual Member States in recent years has also complicated the overall legal picture within the EU's Single Market, favouring larger companies with the ability to ensure compliance across jurisdictions.

3.14 In practice, this situation has meant that digital services providers can take different approaches to moderating the same content in different Member States of the EU.[36] Overall, illegal goods and content have continued to proliferate: the Commission evaluation notes for example that imports of counterfeit goods into the EU are estimated to have amounted to €121 billion in 2016 alone, primarily bought by individual consumers online, while reports of child sex abuse materials available online have also increased significantly in recent years. The Commission therefore concluded that a revision of EU law in this field is necessary to counter illegal activities online and protect internet users. It also noted that countering legal fragmentation would be economically beneficial more widely, by removing a barrier to the "scaling up" by smaller companies and allowing them to compete with their large, incumbent competitors more effectively (an issue explored further in paragraphs 19 to 26 below on the Digital Markets Act).

31 Where online platforms are liable jointly for harmful or illegal content alongside the entity from which such content originated, digital services providers can face significant financial penalties.

32 In particular, the notion of a "passive and neutral role" for hosting services under the E-Commerce Directive is interpreted differently by different EU countries, despite extensive caselaw by the EU Court of Justice on this matter. The Commission also notes that the incentive created by the Directive for online platforms to intervene to take down (potentially) illegal content could also mean they are taking an "active role" in the content they host, meaning they would no longer qualify for the exemption from liability.

33 Such as the sale of unlicensed pharmaceutical products or counterfeit goods. According to the European Commission's impact assessment, annual imports into the EU of counterfeit goods alone were estimated to be worth €121bn (£104bn) in 2016.

34 These may include, for example, platforms offering rental services that do not comply with applicable housing legislation.

35 Such content includes, notably, child sexual abuse material, terrorist content, hate speech and 'pirated' audiovisual material that infringes intellectual property rights.

36 A European Commission impact assessment notes, for example, that the current interpretation of the liability regime under the E-Commerce Directive means that "the very large online platforms generally have in place a system for notifying content, goods or services they intermediate, but the actions triggered are not always consistent", whereas "small, emerging service providers" adopt "a risk-avoidance behaviour […] [which] decreases the quality of their service".

3.15 To revise the EU's approach to the regulation of online content, the EU Digital Services Act (DSA) aims to "set out uniform rules for a safe, predictable and trusted online environment". Ultimately, the Act's objective is to define "clear responsibilities and accountability for providers of intermediary services, and in particular online platforms, such as social media and marketplaces" to ensure that illegal content[37] is removed or rendered inaccessible. To achieve this, it would establish EU-wide legal obligations for digital services providers to act against the dissemination of illegal content while protecting "freedom of expression and [access to] information". The precise range of those obligations would vary depending on the intermediary involved, but the scope of the Act would extend to internet service providers and hosting services, including online platforms like eBay or Amazon and app stores.

3.16 The Commission proposal includes the following requirements:[38]

- All hosting service providers operating in the EU would need to implement "notice and action" mechanisms allowing third parties[39] to flag illegal content which must then be investigated and action taken, where appropriate.[40] The proposal also foresees the creation of a formal "trusted flagger" status, for example a trade association representing copyright owners, whose notices of potential illegal content would have to be treated with priority. Potentially harmful but legal content, like "fake news" or pornography, would remain unregulated, although platforms would have to publish terms and conditions on how they define, and deal with, such materials.[41]

- Additional requirements would apply to online platforms, defined as a sub-set of hosting services that not only host digital content but also "disseminate that information to the public" (like Facebook). In particular, there would be new transparency requirements around online advertising: platforms would have to enable users to see on whose behalf ads are displayed and how they are being

37 The proposed definition of what constitutes "illegal content" is very wide, referring to "any information, including the sale of products or provision of services" which is "not in compliance with [EU] law or the law of [any] Member State". However, the DSA itself would not harmonise what is deemed 'illegal' in this context. It would also not override existing provisions of EU law that require digital services providers to take specific action in relation to illegal content relating, for example, to terrorism or copyright infringement. The Regulation would, however, override any incompatible existing legislation at Member State level dealing with the same subject matter, such as "notice and action" procedures for the removal of unlawful content.

38 According to recital 14 of the draft legislation, the DSA would not apply to emails or private messaging services.

39 The draft Act also provides that public authorities of the 27 EU Member States would be empowered to serve digital services providers with an order to act against a "specific item" of content which is illegal under EU or national law, requiring it to be removed or access to it be disabled (Article 8). It appears that such action would only affect those accessing the service from the country that requested the removal under its national law, unless the content was illegal under EU-wide rules. Authorities could also request information from providers, including for example identifying information about anonymous service users (Article 9).

40 If the digital services provider takes action to remove content flagged as illegal, this must be communicated in a "statement of reasons" to the user who uploaded the content.

41 More specifically, the proposal would not oblige digital services providers to take action against content which is harmful but not illegal, but they would be required to publish terms and conditions which set out how they intend to deal with such content and publish annual reports on content removal. Online platforms would also be required to maintain an internal complaint-handling system in relation to how they handle content that is either illegal or incompatible with their own terms and conditions (Article 17), which must ultimately subject to out-of-court dispute settlement (Article 18).

targeted.[42] The largest online platforms would have to make information on ads they display publicly accessible in a repository for a year after it was last displayed.

- Moreover, platforms that facilitate the sale of goods and services between third party traders and their customers (such as eBay or Amazon), would have to apply new traceability requirements to their business users, to help identify sellers of dangerous or counterfeit goods.

- The largest market players, referred to formally as "very large online platforms" (VLOPs),[43] would be subject to a further set of requirements because of their role in "facilitating public debate, economic transactions and the dissemination of information, opinions and ideas and in influencing how recipients obtain and communicate information online". To reflect this, they would have to carry out risk assessments and audits relating to their role in the dissemination of illegal content in the EU, as well as "intentional manipulation" of their service, such as the spreading of disinformation, "with an actual or foreseeable negative effect on the protection of public health, minors, civic discourse, or actual or foreseeable effects related to electoral processes and public security".[44]

3.17 Complementing the content moderation measures, the proposed DSA also contains exemptions for intermediaries from legal liability—and therefore from financial penalties—for illegal content which they host or transmit. The proposal broadly speaking maintains the liability rules as already contained in the 2000 e-Commerce Directive as described in paragraph 12 above.[45] While making some clarifications around the applicability of the exemption,[46] the Commission proposal would not extend it to "active" hosting services as set out in the case-law of the Court of Justice. As a result, the precise interaction between the new content moderation requirements—which aim to incentivise intermediaries to

42 Article 24 DSA. Very large online platforms, as defined in the Regulation, would have to make information on ads they display publicly accessible in a repository for a year after it was last displayed.

43 In the draft Digital Services Act, VLOPs are defined as those platforms which have 45 million more active users in the EU.

44 VLOPs would also have to publish terms and conditions for any "recommender" systems they operate; they would be subject to more extensive annual reporting obligations, for example with respect to the risk assessments carried out to establish the role they play in dissemination of illegal content; and be under an obligation to share data with public authorities in the EU where "necessary to monitor and assess compliance with this Regulation".

45 In other words, intermediaries would remain exempt from liability if they do "not have actual knowledge of illegal activity or information" and are "not aware of facts or circumstances from which the illegal activity or information is apparent"

46 For example, the Commission has proposed to codify that any own-initiative investigations undertaken by digital services providers into potential illegal content do not necessarily "lead to the unavailability of the exemptions from liability", but recital 22 of the DSA does state that "The provider can obtain [...] actual knowledge or awareness" that triggers liability "through, in particular, its own-initiative investigations". Similarly, if a hosting services provider is alerted to potential illegal content by a third party under the new statutory "notice and action" mechanism, the DSA states that this can in certain cases "be considered to give rise to actual knowledge or awareness" and therefore remove any exemption from liability in relation to that specific piece of content (Article 14(3) DSA).

actively monitor content uploaded to their systems for illegal activity, for example on the basis of "notice and action" reports—and the liability exemption is not clear from the text of the Regulation, and a lack of legal clarity could persist in this area.[47]

3.18 The draft Act stipulates that penalties for digital services providers that breach the proposed new content moderation requirements must be "effective, proportionate and dissuasive", with any fines to be generally capped at 6% of the company's global turnover.[48] Given the cross-border nature of the digital services economy, and the dominance of American companies in this market in particular (as discussed further below), the DSA would require non-EU digital services providers with operations within the European Union to appoint a legal representative in one of its Member States. These would have separate legal responsibility for the company's compliance with the Regulation, in addition to the liability of the provider itself.

The proposal for a Digital Markets Act

3.19 The second element of the Commission's digital economy package would establish a EU Digital Markets Act (DMA). Its aim is to set EU-wide rules to reduce the market power wielded by certain large companies (primarily American companies like Amazon, Apple, Google and Facebook) within the EU's digital economy.

3.20 More specifically, by dominating the market for "core platform services" (such as search engines functionality, social networking and app stores), these companies "intermediate a significant portion of transactions between consumers and businesses". As a result, the Commission describes these companies as "gatekeepers": they often have control over the extent to which other businesses, such as retailers, can connect with actual and potential customers online, allowing them to act as private rule-makers and facing accusations of unfair practices for their own commercial benefit at the expense of businesses users that are reliant on them.[49] Moreover, there is "weak contestability": it is difficult for new platforms to chip away at the incumbents' gatekeeper status, because of

47 Joan Barata, of the Cyber Policy Centre at Stanford University in the US, has referred to the proposal as "reproduc[ing] a central confusion" already contained in the E-Commerce Directive, namely the fact that "a lack of knowledge or awareness of illegality remains a precondition to enjoy liability exemptions, [while] the DSA encourages platforms proactive investigation of hosted content, which might trigger aforementioned knowledge or awareness" (and therefore liability and a risk of penalties). Continued lack of clarity over whether they are exempt from liability or not could lead to platforms either reducing their content moderation activities to limit potential liability or, conversely, act over-zealously in their application of content moderation rules, removing content that is not in fact illegal. While a full legal analysis of the Commission proposal is beyond the scope of this Report chapter, it does appear the EU Digital Services Act as drafted will not address this existing 'grey area' in European law, and it is likely to be a particular point of contention in the legislative negotiations in Brussels.

48 Responsibility for enforcement of the DSA would lie primarily with the relevant authorities of the 27 Member States, although the Commission has proposed to give itself direct supervisory powers for the largest online platforms operating in the EU in some cases.

49 As specific examples of such unfair practices, the Commission cites 'locking in' businesses and consumer use of their services by making the cost of switching to another platform prohibitively high, or by using commercially confidential data generated by the sales of their business customers to compete with them by offering similar goods or services (a common complaint against Amazon).

the higher barriers to market entry in the digital economy.[50] This problem is exacerbated by the legal complexity around platform liability also identified as one of the drivers of the ineffective regulation of online content in the EU (see above).[51]

3.21 Overall, the Commission says, these circumstances increase the likelihood that the market for digital services "do[es] not function well—or may soon fail to function well—and thus do not deliver the best outcome for consumers in terms of prices, quality, choice, and innovation". Despite having launched various anti-trust procedures against "Big Tech" companies including Google in the past, which aim to prevent these companies from abusing their dominant position in a given market, the Commission has concluded that the "identified market failures" for these large providers of core platform services would, "absent regulatory intervention […] effectively remain un-addressed", notably because existing EU competition rules "cannot conceptually deal with market failures resulting from the behaviour of gatekeepers".[52] While individual countries within the EU have begun to adopt national measures to "deal with [such] competition problems", the Commission is concerned that this may be "insufficiently effective" because of the cross-border nature of the digital economy and increase legal complexity that impedes start-ups from "growing into challengers of established players in the digital sector".[53]

3.22 To put in place a solution to prevent what it describes as "longer-term societal losses in terms of higher prices and less product variety for consumers, and less dynamic innovation", the Digital Markets Act would make large platforms formally identified as "gatekeepers" subject to a new set of regulatory requirements in respect of specific core

50 Among the barriers to entry listed by the Commission in its impact assessment for the Digital Markets Act are "extreme economies of scale and scope, high start-up costs, high fixed operating costs, high degree of vertical integration, single-homing, switching costs, multi-sidedness, network effects, zero-pricing markets, information asymmetry, data dependency, access to data, and behavioural bias are important or very important sources for market failures in digital markets". For example, many "Big Tech" companies like Google offer their services at zero cost to final users—instead monetising their services through advertising, reducing opportunities for new competitors to gain a foothold with aggressive pricing practices.

51 For new online platforms, the potential liability risks and costs of compliance across national jurisdictions in the EU may be prohibitive whereas well-established platforms have the means to operate across several jurisdictions more easily.

52 In particular, Article 102 TFEU prohibits firms that hold a dominant position on a given market to abuse that position, for example by charging unfair prices, by limiting production, or by refusing to innovate to the prejudice of consumers .However, its application to online "gatekeepers" is difficult because such a company "may not necessarily be a dominant player" in a strict legal sense, and its practices may not be captured by EU competition law "if there is no demonstrable effect on competition within clearly defined relevant markets".

"While certain forms of unfair business practices can be abusive under Article 102(a) TFEU, finding such an abuse not only requires a dominant undertaking but generally also an effect on competition. If an undertaking imposes on its trading partners or obtains from them terms and conditions that are unjustified, disproportionate or without consideration but without affecting competition on the market, competition law generally does not apply (See recital 9 of Regulation (EC) No 1/2003. Some national competition laws also prohibit the abuse of economic dependence). Such behaviour resulting from

53 The EU has already sought to address some of these issues through its so-called Platform-to-Business ("P2B") Regulation, which took effect in July 2020. This introduced new legal obligations for online platforms and search engines that connect businesses with consumers, for example by imposing certain transparency requirements for and restrictions on the terms and conditions applied to the services they offer to their business users. However, the Commission says the P2B Regulation is a "general safety net" that applies to more than 10,000 platforms and "does not address issues deriving from the concentration of economic power and unfair business practices of a limited number of very large gatekeeper platforms".

platform services[54] they offer, consisting of a list of mandatory features of these core services, and a blacklist of banned practices. These would be "ex-ante", namely with an intended preventative effect, rather than only applying if issues at a specific company have been identified. Broadly speaking, these requirements either aim to reduce users' dependence on gatekeeper platforms or increase the contestability of the markets in which they are powerful. For example, the Commission proposal seeks to:

- prevent gatekeepers from preferentially ranking their own goods and services higher in search results compared to their business users or other competitors;
- ban them from using data generated by their business users to compete with them by targeting offers of similar goods and services (a common complaint against Amazon in particular); and
- mandate gatekeepers to allow consumers to remove pre-installed software from electronic devices, for example from iPhones and Android phones.[55]

3.23 The Commission proposal divides the requirements for gatekeepers set out in the draft Digital Markets Act into two categories: "self-executing obligations" and "obligations that are susceptible to specification". The former would apply without further as set out in the DMA, whereas for the latter the Commission could establish binding, company-specific measures specifying how they would need to be implemented in practice.[56] The European Commission has described the proposed regulatory requirements for gatekeepers in the digital economy in more detail on its website.[57]

3.24 Because these new obligations would apply only to "very large online platforms with a gatekeeping role" in the EU's digital economy, the draft Regulation sets out how such companies would be identified. This process would be based on a company's "impact on the [EU's] internal market" as demonstrated by its turnover or capitalisation, the number of users in the EU for one of the "core platform services" listed in the Act, and whether this user base gives it an "entrenched and durable position". If a platform meets certain qualitative thresholds for these three criteria, it would normally be designated a gatekeeper unless the company can provide "sufficiently substantiated arguments" that it is not.[58] In addition, underlining the purpose of the draft legislation in preventing *future*

54 The DMA as proposed identifies the following as "core platform services": online intermediation services like digital market places or app stores; search engines; social networking services; video-sharing platform services; number independent interpersonal communication services like WhatsApp; operating systems like iOS or Android; cloud computing services; and advertising services provided by a provider of any of the other core platform services. In addition, the Commission would have the power to undertake market investigations to identify future services to be added to that list. However, expanding the scope of the DMA to new services would require a formal legislative proposal to that effect.

55 Similarly, gatekeepers would have to allow the installation of third-party apps on their devices, and permit such software of third parties to properly function and interoperate with their own services.

56 The proposal for a Regulation does not contain much detail about how the Commission would intend to use this power in practice.

57 Under its proposal, the Commission could expand the list of requirements in the future by means of Delegated Acts, a type of EU statutory instrument (Article 10 DMA).

58 Under the DMA as proposed, the qualitative thresholds for designation as a gatekeeper would be an annual turnover within the EEA exceeding €6.5 billion or market capitalisation above €65 billion, and having 45 million monthly active end users established or located in the EU and more than 10 000 yearly active business users established in the EU for three consecutive years. The European Commission could in the future use delegated acts—a type of EU statutory instrument—"to specify the methodology for determining whether the quantitative thresholds […] are met, and to regularly adjust it to market and technological developments where necessary".

market failures, the Commission would also be able to conduct a market investigation to designate a specific company as such even if it does not meet all the qualitative thresholds. However, such 'potential' gatekeepers would only be subject to a narrower range of the regulatory requirements described above.[59]

3.25 Where designated gatekeepers breach their obligations under the Regulation, the Commission has proposed that it could fine the company in question an amount capped at 10% of its annual worldwide turnover. In addition, if it had found "systematic non-compliance" by a particular gatekeeper—described as three incidents of non-compliance in the last five years—the EU would have the ability to impose behavioural or structural remedies. These are concepts under EU competition law, where the Commission can already legally require companies to alter their conduct or divest certain parts of their business.[60]

3.26 The precise interaction of the Digital Markets Act with EU anti-trust law, which can be used against companies that abuse their dominant position in a given market, is not clear. Similarly, the Digital Markets Acts does not cover the controversial issue of taxation of the digital economy, which is being discussed in an international setting within the Organisation for Economic Co-operation and Development (OECD) on the basis of proposals recently put forward by the new American administration.

The EU legislative process

3.27 The European Commission's proposals for both the Digital Services Act and the Digital Markets Act are draft versions of the legislation only: they are now being considered by the European Parliament and the EU's Council of Ministers (where the 27 Member States are represented). These two institutions must jointly agree on the legal texts before the rules can become EU law and binding on the Member States and on digital services providers operating within them. This legislative process is unlikely to be straightforward, as there are already significant divergences between the Member States and within the Parliament on the way forward.

3.28 A full examination of the range of issues likely to be discussed as the Parliament and Member States grapple with the proposals is beyond the scope of this Report chapter. However, they are likely to be wide-ranging. For example, with respect to the DSA, there have been debates about whether the scope for mandatory action by hosting services should also cover "misinformation" which is harmful but not illegal. Similarly, the need for the new competition tool to break up the dominance of 'Big Tech' in the form of the Digital Markets Act is controversial and all aspects of the Commission's chosen approach

59 Article 15(4) DMA. Similarly, gatekeepers will be required to inform the Commission of any acquisitions they make of businesses in the "digital sector" (which could, separately, be subject to EU merger rules).

60 The European Commission has dropped its proposal for a broader "New Competition Tool", which would have created a new EU market investigation tool "aimed at addressing structural competition problems across markets" (including in particular in the digital economy).

remain up for debate.[61] The legislative deliberations in Brussels are likely to touch on not only the manner of designating gatekeepers, but also the specific regulatory requirements to which they would be subject.[62]

3.29 The proposed allocation of new supervisory powers to the European Commission within the digital economy under both proposals is also likely to be controversial with Member States who may wish to keep such powers for their national regulatory authorities.

3.30 Given the proposals are aimed primarily at the operations of American companies in one of their most important overseas markets, there is also a clear strategic and geopolitical angle to the proposals. The US Government and the "Big Tech" companies themselves are expected to lobby both the European Parliament and Member States heavily to influence the substance of the legislation, since they would shape the regulatory environment in what is one of the world's largest markets.[63] This lobbying effort has been underway since long before the formal proposals and is likely to continue in the coming years.[64]

3.31 In light of the above, the legislative deliberations on both the Digital Services and Digital Markets Acts are unlikely to be speedy. Both the Member States and the European Parliament, as well as external interested parties, will seek substantial changes during the law-making process, and the timetable for formal approval of the legislation—and consequently when it may take effect—is not yet clear. The Commission has expressed the hope that the new rules could take effect from 2023, but at present that seems optimistic. Given the complexity, reach and scope of the draft legislation, the legislative process in Brussels is likely to take well over a year.

Implications of the EU Digital Services and Market Acts for the UK

3.32 The EU DMA and DSA proposals, as and when they are agreed, will not apply directly to and in the UK, given that EU law ceased to apply at the end of the post-Brexit transition period on 1 January 2021.[65] The new UK/EU Trade & Cooperation Agreement (TCA) also does not require the UK to remain aligned with EU rules in this sector or otherwise

61 Indeed, the Commission's chosen approach as set out in the draft DMA has been controversial. When it consulted its independent Regulatory Scrutiny Board in November 2020, the "outcome was a negative opinion" because the impact assessment accompanying the draft legislation "did not sufficiently justify the restriction of its scope to digital markets", "the selection of platform services within the digital sector", or "the concept of gatekeeper platforms". This necessitated a "substantial rethinking" of the draft legislation.

62 An early draft of the Digital Markets Act leaked to Politico hinted at several provisions which are absent from the formal proposal published by the Commission in December 2020, notably with respect to interoperability.

63 Recognising the potential difficulties the proposals pose for the EU-US relationship, the European Commission recently called for a 'reset' with Washington following Joe Biden's election as President which, among other things, will include discussions on "digital governance" and "a joint EU-US tech agenda".

64 The Commission's public consultation in June 2020, ahead of formal publication of the draft legislation in December last year, received 110 responses. Reflecting the potential international ramifications of the proposals, many of the consultation responses were submitted by American companies—including Apple, Facebook, and Google, as well as from trade associations representing the interests of sectors with concerns about online access to goods and content that have intellectual property protections, digital rights organisations and consumer protection bodies.

65 While EU law continues to apply in the UK to some extent under the Protocol on Ireland/Northern Ireland in the Withdrawal Agreement, this arrangement only covers EU rules relating to trade in goods and not trade in services.

substantively constrain either side's regulatory approach, although the Agreement does provide for a "Specialised Committee on Services, Investment and Digital Trade", where the Government and the EU could discuss policy developments in this sector.[66]

3.33 However, we consider that the UK, even as a non-EU Member State, has a clear economic and political interest in both the EU Digital Services and Markets Acts. The two European Commission proposals each overlap with similar policy developments in the UK: the Government has announced that it intends to legislate for a "Digital Markets Unit" within the Competition and Markets Authority (CMA) that would "oversee a new regulatory regime for the most powerful digital firms", covering the same ground as the DMA. Similarly, it is preparing an Online Safety Bill which, like the Digital Services Act, will aim to "tackle illegal activity taking place online". For a number of reasons, it seems prudent for the Government to take a close interest in the development of the EU's proposals.

3.34 First, as and when the Digital Services and Markets Acts become EU legislation and take effect, they will apply to any UK digital services providers with operations in the EU. Indeed, the Commission's digital economy proposals are explicitly intended to apply also to non-EU companies with operations within the European Union.[67] It is difficult to put an exact figure on the value of the export of such services from the UK into the EU, not least because of the substantial change in the trading environment that occurred when the UK left the EU's Single Market on 31 December 2020, but figures from the Department for Digital, Culture, Media and Sport suggest that the UK exported £51.9 billion worth of digital services in 2019, 40% of which was to the EU. The potential economic implications of more stringent regulation of digital services exported to the EU by UK businesses are therefore significant.

3.35 Secondly, voluntary cooperation on a coherent regulatory approach is likely to be mutually beneficial. There are potential downsides to significant areas of divergence between the UK and EU as independent, significant markets for digital services. Where companies in the digital sector have operations in both the UK and the EU, divergent legislative approaches between the two could face additional compliance costs, legal complexity and—potentially—conflicting regulatory requirements that could hinder cross-border trade flows. Conversely, as the Government itself has emphasised, different regulatory practices could offer companies in the digital sector opportunities to "switch between different jurisdictions at low cost while retaining a global customer base". Cooperation may also be more effective in countering any US opposition to legislation that

66 Article DIGIT.16 of the TCA, within the chapter on digital trade, commits the UK and the EU to "exchange information on regulatory matters in the context of digital trade" including "the protection of consumers" and "any other matter relevant for the development of digital trade, including emerging technologies". However, it is Government policy not to agree to meetings of any of the joint UK/EU bodies under the TCA until the EU has formally concluded the Agreement. At present, until at least 30 April 2021, it only applies provisionally pending the consent of the European Parliament.

67 The draft Digital Markets Act is aimed at the largest firms in the digital sector, although the primary targets are based in the US. As noted, the draft Digital Services Act would even require non-EU digital services providers to appoint a legal representative in one of the Member States, who would share full legal responsibility for compliance with the new online content moderation requirements.

affects the interests of some of America's largest companies. As there could be significant differences between the EU's proposals and the UK approach, on which the Government may wish to engage with the EU to minimise the negative effects described above.[68]

3.36 Thirdly, the way the EU proceeds to legislate in terms of both online content moderation and the competitiveness of the digital economy could have important implications for international regulatory cooperation and, by extension, the UK's own policy in this area. The EU as a Single Market is the world's largest economy, which means any harmonised regulatory approach—as set out in the Digital Services and Markets Acts—is likely to have a significant impact on the targeted companies within the digital sector. The EU may pursue formal standard-setting that conforms to its chosen regulatory approach within international bodies like the World Trade Organization and the OECD.[69] There may also be a less formal "Brussels effect", where companies voluntary adopt EU regulatory requirements for their global operations to streamline their internal processes across jurisdictions and consequently lobby other countries, for example the UK, to adopt similar rules.[70] To what extent such an effect will occur in relation to the Digital Services Act and Digital Markets Act is, of course, unclear at this stage.

3.37 All these issues make it clear there the UK has an interest in seeking to influence the final shape of the EU's Digital Services and Market Acts.[71] It is therefore to be welcomed that the Government itself recognises the need for international cooperation in the area of digital regulation. In a 2019 policy paper, Ministers emphasised the need for "co-ordination between administrations" in order to "ensure the effectiveness of regulation" in the digital economy. Similarly, the government's recent Integrated Review of security, defence, development and foreign policy wants to place the UK "at the forefront of global regulation on technology, cyber, digital and data" through "regulatory diplomacy to influence the rules, norms and standards governing technology and the digital economy". The Department for Business, Energy and Industrial Strategy is also currently preparing a " whole-of-government international regulatory cooperation strategy".

68 A full comparative analysis of the EU and UK approaches is beyond the scope of this Report. However, by way of example, the EU's draft Digital Markets Act has different criteria for "gatekeeper" status compared to what would be considered firms with "significant market power" by the Digital Markets Unit. The scope of the regulatory requirements applicable to such firms, and the remedies that could be imposed to diminish market power, are also different. With respect to the Digital Services Act, the there may be differences in the scope of companies covered (with the Government's Bill expected to cover, for example, search engines and private messaging services, which the EU Digital Services Act does not).

69 Indeed, in the proposal for a Digital Services Act, the Commission is explicit about this: Indeed, the Commission proposal on online content moderation refers to the possibility for the EU to "act as a standard-setter for measures to combat illegal content online globally" because of the "interest of companies outside the EU to continue providing its services within the Digital Single Market" as a large economic bloc. It has also referred to "supporting Europe's digital agenda" as a "priority for EU trade policy" by "ensur[ing] a leading position for the EU in digital trade and in the area of technology" and "lead[ing] the way in digital standards and regulatory approaches". Similarly, in its recent Trade Policy Review, the Commission said it will "seek the rapid conclusion of an ambitious and comprehensive WTO agreement on digital trade", with the EU's negotiating position likely to be based substantially on the draft DSA and DMA as they develop.

70 See for more information: Anu Bradford, "The Brussels Effect" (Oxford University Press, 2020), in particular pp 142–145. The author notes that "whether the Brussels effect occurs therefore often comes down to the question of non-divisibility of the products and services across global users", adding that digital companies often "streamline their global data management systems to reduce their compliance costs with multiple regulatory regimes", but are also "able to, and find it in their interest to, introduce divisibility and limit their policy changes to a jurisdiction imposing the demand".

71 The UK's role in the EU policy process is naturally much reduced compared to when it was a Member State, reflecting the fact that any resulting legislation will not be directly applicable in the UK anymore.

3.38 As such, the logic of the Government's position on digital regulation would seem to require it to engage with the EU as it deliberates its Digital Services and Markets Acts so that the EU and UK, to the extent possible, pursue the same objectives in a coherent manner. Indeed, both Ofcom[72] and the CMA[73] have already emphasised the value of coordinated regulatory action and supervision of the digital sector, post-Brexit, directly to the European Commission. In particular, despite the likely differences between the UK and EU will choose to regulate different elements of the digital sector, the CMA has argued for a "coherent approach across jurisdictions" to avoid "Big Tech" shifting between countries for regulatory reasons.

3.39 However, the Government itself does not yet appear to have a coherent cross-departmental approach to engagement with the EU on the DSA and DMA proposals. For example, in an Explanatory Memorandum submitted by DCMS on the EU Digital Services Act, the Minister for Digital and Culture (Caroline Dinenage MP) explicitly states that the Government "will look to engage with the EU as these proposals develop to understand any implications for UK businesses". Similarly, the Home Office has told us that the DSA has been the subject of discussions with the EU in light of the Government's own work on an Online Safety Bill (as explored in more detail in chapter six of this Report). However, in the Government's separate Memorandum on the Digital Markets Act, that commitment to engagement is absent.[74] Similarly, by its own admission, the Government did not respond to the Commission's consultation on its digital economy package in the summer of 2020 "as it occurred during the transition period". The relevance of the post-Brexit transition period is not immediately clear, given the EU's regulatory approach in this area is of continued interest to the UK even beyond Brexit (as demonstrated not least by the Government's own focus on "regulatory diplomacy" for the digital sector, but also by the fact Ofcom and the CMA did engage with the EU consultation).

Conclusions and action

3.40 While the EU's Digital Services and Markets Acts will not apply in the UK directly as a matter of law, we consider that their substance may have an impact on both UK businesses and the Government's own regulatory approach.

3.41 However, while Ministers have emphasised the value of international regulatory cooperation and diplomacy, especially when it comes to the cross-border digital economy, the Explanatory Memoranda submitted by the Department for Digital, Culture, Media and Sport do not place these significant EU proposals in the context of the Government's

72 For example, OFCOM is on the record as emphasising to the EU Commission the need for "institutional cooperation between regulatory authorities […] internationally" on online content moderation, arguing that "national/regional initiatives [should] not emerge in a vacuum, minimising unwarranted divergences in regulatory approach, mitigating the risk of forum-shopping and the creation of regulatory safe-havens, managing the regulatory burden on stakeholders, and facilitating regulatory cooperation for cross-border enforcement".

73 The CMA told the Commission with respect to new regulatory requirements for gatekeepers in the digital economy that "it is desirable for there to be a coherent approach across jurisdictions to governing the way that gatekeeper platforms can act, so as to provide clarity for businesses, investors and consumers and ensure effective ex-ante control. […] The international nature of these 'borderless markets' means that it is essential for competition authorities to work with each other and with governments as we look to support innovation, whilst enabling fair competition and protecting consumer interests".

74 The Government submitted Explanatory Memoranda setting out its position on both the Digital Services Act and Digital Markets Act, as a legacy of the EU scrutiny arrangements operated by Parliament prior to the end of the post-Brexit transition period, because the Commission proposals were published before 31 December 2020.

professed approach. We also find it puzzling that the Government, having recently insisted on the value of regulatory diplomacy for the digital sector in particular, failed to make representations to the European Commission during its public consultation in 2020 when Ofcom and the Competition & Markets Authority did see the value in doing so (and the Government is now engaging with the EU, at least in respect of the synergies between the Digital Services Act and the Online Safety Bill).

3.42 In light of this, we have written to the Minister for Digital and Culture to ask her to set out the Government's plans for engagement with the EU on these proposals, and whether it has identified any risks arising from the EU proposals to the UK's own approach to the regulation of the digital sector. More generally, we consider that is in Parliament's interest to monitor the legislative deliberations in Brussels on the Digital Services and Markets Acts—and their potential impact on similar policy developments in the UK—closely. In anticipation of the Minister's reply to our questions, we draw these developments to the attention of the Business, Energy and Industrial Strategy Committee, the Digital, Culture, Media and Sport Committee, the Home Affairs Committee, the Science and Technology Committee and the Treasury Committee.

Letter from the Chair to the Minister for Digital and Culture (Caroline Dinenage MP)

Thank you for your Explanatory Memoranda of 14 January 2021 on the European Commission's recent proposals for an EU Digital Services Act and Digital Markets Act,[75] which overlap to a large extent with the Government's own work on the Online Safety Bill and the Digital Markets Unit with respect to illegal online content and the market power exercised by the largest digital companies respectively.

We note that, with respect to the Digital Services Act, your Memorandum recognised the value of engagement with the EU to "build consensus around shared approaches to tackling online harms". However, in relation to the Digital Markets Act you did not articulate such a commitment, although the Competition and Markets Authority has stated that it would be "desirable for there to be a coherent approach" between the UK and EU on "gatekeeper platforms" to avoid regulatory arbitrage and strengthen the effectiveness of new competition rules.[76] The Government itself has also identified influencing the standards governing technology and the digital economy through "regulatory diplomacy" as a key UK objective in the recent Integrated Review. The EU could have a significant impact on such standards in international fora, and its position is likely to develop in tandem with its Digital Services and Markets Acts.

We consider that it would therefore be prudent for the Government to monitor the development of the two Commission proposals in the Brussels legislative process closely and, where appropriate, engage with the EU where convergence of the UK/EU approach may be desirable or, conversely, divergence could pose risks to the effectiveness to the regulatory regimes foreseen under the Online Harms Bill and Digital Markets Unit.

In light of this, we would be grateful if you could write to us to set out how the Commission's proposals for the EU's Digital Services and Markets Acts fit into the Government's

75 European Commission documents COM(20) 825 and COM(20) 842.

76 Competition & Markets Authority, "The CMA's response to the European Commission's consultations in relation to the Digital Services Act package and New Competition Tool" (14 September 2020).

approach to regulatory diplomacy for the digital sector as outlined in the Integrated Review. We are particularly interested in any risks the Government has identified should the UK and EU approach divergence in substance, such as regulatory arbitrage; the opportunities for voluntary cooperation to mutually reinforce the effectiveness of the UK and EU's independent legal approach to the areas covered by the above proposals; and in which areas these risks and opportunities are most prominent.

We would be content to receive your reply by the end of May.

4 2021 Fishing Opportunities[77]

These EU documents are politically important because:

- they relate to UK fishing opportunities during 2021 and beyond; and
- they demonstrate an emerging gap in the level of public information provided by the European Commission on the one hand and the UK Government on the other.

Action

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

Overview

4.1 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).

4.2 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.

4.3 Responding to our letter of 10 March 2021, the Minister for Farming, Fisheries and Food (Victoria Prentis MP) has written to us, updating us on the progress of negotiations with the EU and other coastal states. Her response is summarised below.

Trilateral agreement with Norway, the EU and the UK on shared stocks

4.4 The Minister explains that the UK has now reached agreement with Norway and the EU on TACs for the six trilaterally-managed fish stocks in the North Sea for 2021. This agreement promotes the sustainable management and long-term viability of the relevant stocks, and the Parties established several working groups to this end. For example, a working group to review the management of North Sea herring.

4.5 Five of the six TACs have been set in line with or lower than the catch levels advised by scientists, or more conservatively in the case of North Sea haddock. This results in reduced catch limits for North Sea cod (-10%), plaice (-2%), saithe (-25%) and herring (-7.4%) compared with 2020, but increases in haddock (+20%) and whiting (+19%), providing opportunities worth over £184 million to the UK fleet for 2021.

77 (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.

4.6 North Sea cod will be subject to a 10% reduction compared to 2020. Whilst this represents a smaller reduction than that recommended by scientists, this catch limit is predicted to achieve recovery of the stock biomass at a similar pace to that set out in the scientific advice, whilst supporting the UK's industry and reducing choke risk[78] in the North Sea mixed fishery. This, explains the Minister, is supported by the UK's cod avoidance plan, establishing a variety of technical and spatial measures to support recovery of the stock in UK waters.

No agreement with the Faroe Islands

4.7 It has not proved possible to conclude any access and quota exchange arrangements for 2021 with the Faroe Islands. The Minister considers that this was because it was challenging for the Faroes to move beyond the previous EU arrangements which were heavily imbalanced in the Faroes' favour. The UK continues to work constructively with the Faroes in various fora including consultations on a renewed mackerel sharing arrangement.

Bilateral negotiations with the Norway and the EU

4.8 The Minister reports that bilateral negotiations with Norway and the EU are continuing. The UK remains committed to reaching a negotiated outcome with both Norway and the EU as soon as possible and will be working constructively, positively and co-operatively to this end.

4.9 In the meantime, the Government extended provisional unilateral 2021 fishing opportunities until 14 April. Since the Minister wrote—and in line with her letter—the Government proceeded on 14 April to set provisional TACs for the remainder of 2021.[79] The provisional TACs reflect the progress made to date in negotiations with the EU and, if an agreement is subsequently reached, then provisional TACs will be updated with the agreed TACs. The Minister indicates that she will write further to provide details of any negotiated deal or provisional TACs set. In the absence of a full negotiated outcome this will include an analysis of the declared catch limits in relation to scientific advice.

4.10 Turning to arrangements for next year, as we raised in our letter, the Minister explains that the timetable for 2022 consultations will be recorded in the final written record of this year's annual consultations. The Government will be working to develop a UK approach to annual fisheries consultations for 2022 as early as possible once scientific advice is received in order to inform an early discussion with the EU as envisaged under the TCA. As usual, this will be informed by extensive engagement with stakeholders. We will continue to provide regular updates to Parliament on progress in these and subsequent annual negotiations, including on plans for 2022 discussions.

78 The risk that accidental capture of a species with a low quota causes a vessel to stop fishing even if they still have quota for other species in the same waters.

79 Government sets provisional catch limits for 2021, Department for Environment, Food and Rural Affairs, 14 April 2021.

Information from the European Commission

4.11 On 13 April 2021, a senior European Commission official held a public 90-minute exchange of views with the European Parliament's Fisheries Committee,[80] revealing helpful information on the progress of these negotiations. His appearance was part of a commitment to appear before the Committee on a monthly basis to update the Committee on the progress of the EU-UK fisheries relationship.

4.12 The Commission explained that negotiations had intensified since early March and gave the impression that agreement was likely but that it could still take a few weeks and may need political intervention in order to be completed. He estimated that around 90% of the 70–90 TACs had been agreed but noted that outstanding issues included:

- TAC-related conditions, such as deductions from TACs of the quota portions that are derived from exemptions to the landing obligation (the "discard ban") and special conditions on the use of fishing opportunities—specifically, remedial measures in the Celtic Sea;
- management of sea bass (a matter that was already contentious when the UK was an EU Member State);
- inter-area flexibility—the transfer of opportunities between fishing areas—to which both sides are sympathetic, but there must be scientific under-pinning; and
- management of non-quota species (such as scallops and crabs).

4.13 A quota is not set for non-quota species, but the TCA requires that the EU and UK allow reciprocal access to fish such species "at a level that at least equates to the average tonnage fished by that Party in the waters of the other Party during the period 2012–16". The EU and UK are working together on what data to use to establish the track record. The EU has pushed back against a UK proposal to agree a maximum ceiling per species for non-quota species, observing that such an approach is not in line with the TCA. Rather, argues the Commission, management of non-quota species should be discussed in the Specialised Committee once it is up and running, possibly with a view to a multi-annual approach.

4.14 In the meantime, the EU took the decision to propose a new set of provisional TACs for a period of four months from 31 March (until end of July) based on the scientific advice and in line with the arrangements set out in the TCA. Four months was chosen, said the Commission, to send a clear message to UK that the EU was serious about continuing negotiations.

4.15 The Commission also highlighted that the exchange of fishing opportunities between the UK and EU—an important way of managing shortfalls and excesses of quota—cannot take place until an annual TAC agreement is in place.

4.16 The exchange of views extended to other issues salient to implementation of the fisheries chapter, including the Specialised Committee on Fisheries. Both parties had nominated Co-Chairs and the Secretariat but had agreed that establishment should await

80 Video recording of European Parliament Fisheries Committee, 13 April 2021, 14.45–16.15.

conclusion of the annual consultations. The Commission considered that the Specialised Committee was likely to be a forum that would facilitate future agreement not only on the annual fishing opportunities but also on developing common approaches to management of the shared resource.

Our assessment

4.17 The information that we acquired from the Commission's appearance at the European Parliament Fisheries Committee stands in stark contrast to the minimal level of information provided by the Minister. We return to this information gap below.

4.18 In responding to the Minister, we will put to her a number of points made by the Commission in that session to clarify if they accord with the Government's interpretation of the negotiation and to seek any further information on the Government's position.

4.19 The Minister's letter is helpful in summarising the wider set of negotiations with coastal states, but we will seek information on the sticking points encountered in the bilateral negotiations with Norway and will seek clarity on the implications of failure to reach agreement with the Faroes.

4.20 Concerning arrangements for 2022, the Minister makes a broad commitment in her letter to engaging with stakeholders and to informing Parliament on progress but she makes no commitment to allowing timely scrutiny by Parliament. Her tone in that regard is extremely disappointing as Parliament expects not only to be informed but also to be actively consulted at an early enough stage in the process to be meaningful.

4.21 In terms of regular updates, we will draw attention to the updates provided by the Commission to the European Parliament and ask if the UK Government is willing to provide a similar degree of update to its Parliament and, if not, why not. In the meantime, we will have no other option than to rely on those updates from the European Commission to the European Parliament. Now that the UK has left the European Union, though, we do not think that we should be reliant on the European institutions for information on matters directly relevant to the United Kingdom. This information gap is one of great concern to us and we hope that it is one that the Minister recognises and will take immediate steps to remedy.

Action

4.22 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.

4.23 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, the Northern Ireland Affairs Committee, the Scottish Affairs Committee and the Welsh Affairs Committee.

Letter from the Chair to the Minister for Farming, Fisheries and Food (Victoria Prentis MP)

We considered your letter of 8 April 2021 on documents relating to the negotiation of fishing opportunities for 2021 at our meeting of 21 April.

Since you wrote, we note that the Government has proceeded to set fishing opportunities for the remainder of 2021. We look forward to further information from you on those opportunities and the implications for sustainable fisheries. We wish to be clear that you have set fishing opportunities in line with scientific advice and that you will make any relevant adjustments in the light of opportunities set by other coastal states to ensure that the aggregate opportunities continue to be in line with the advice.

We listened with interest to the exchange of views between the Commission and the European Parliament's Fisheries Committee on 13 April. Helpfully, the Commission provided substantially more information that day than you have done in your correspondence with us. The tone of the Commission's presentation was positive, suggesting that agreement was likely in the coming weeks but that political intervention might be required to conclude the negotiations. The Commission identified the following sticking points:

- TAC-related conditions, such as remedial measures in the Celtic Sea and other conditions pertaining specifically to implementation of the landing obligation;
- sea bass management, which is an issue that we recall as already challenging when the UK was an EU Member State;
- inter-area flexibility; and
- management of non-quota species.

Do you agree with the Commission that the above matters are the key sticking points? It would be helpful if you could expand on the difficulties encountered and the position being taken by the Government. We noted from the Commission that there are some particular technical challenges around agreement on the management of non-quota species and that the EU had resisted the UK's suggestion that ceilings be placed on individual species.

On wider matters relating to implementation of the TCA's fisheries chapter, the Commission explained that both parties had agreed that establishment of the Specialised Committee should await the conclusion of the annual consultations, although co-chairs and the secretariat have been appointed. The Commission expressed hope that the Specialised Committee would support future agreement on fishing opportunities and on common approaches to management of the shared resource. Is that a hope that you share?

On the wider set of negotiations with coastal states, we would welcome information on the sticking points encountered in the bilateral negotiations with Norway and we also ask you to set out the implications for the UK of the failure to reach agreement with the Faroes.

Turning to arrangements for 2022, including parliamentary scrutiny, we were disappointed that you aspire only to inform Parliament of relevant developments rather than engage with Parliament at a meaningful stage in the process. Your approach stands in marked contrast to that of the European Commission, which has agreed to appear before the European

Parliament's Fisheries Committee at monthly intervals to exchange views on the evolution of the EU-UK fisheries relationship. We hope you agree that it is undesirable that the UK Parliament must largely rely on information given by the European Commission to the European Parliament rather than receiving information from the UK Government concerning matters of direct relevance to the UK. Is the UK Government content to provide a similar level of information to the UK Parliament on EU-UK fisheries matters as the European Commission is providing to the European Parliament? We trust that you will take immediate steps to plug the information gap that has developed.

We ask for a response within ten working days.

5 Fisheries discards[81]

These EU documents are politically important because:

- they relate to future UK-EU cooperation on fisheries management measures, including the management of discards, under the UK-EU Trade and Cooperation Agreement.

Action

- Report to the House.
- Draw to the attention of the Environment, Food and Rural Affairs Committee.

Overview

5.1 As part of the reform of the Common Fisheries Policy in 2013, the EU agreed that all captured fish should be landed. This is the landing obligation, known as the "discard ban". It was accompanied by provisions allowing for exemptions for a small "de minimis" volume of discards and for "highly survivable" species (those species with a high chance of surviving if returned to the sea after capture).

5.2 Late last year, the Commission published new discard plans for demersal and pelagic fisheries in the North Sea 2021–23 (document (a)) and for certain fisheries in the Western Waters (document (b)). Notably, they fixed exemptions from the discard ban.

5.3 While the two plans do not apply to UK waters, the EU and UK agreed in the Trade and Cooperation Agreement (TCA) to cooperate on the management of shared fish stocks, notably through a Specialised Committee on Fisheries.

5.4 In her letter of 2 February 2021, replying to our letter of 20 January, the Parliamentary Under-Secretary of State at the Department for Environment, Food and Rural Affairs (Victoria Prentis MP) commented first on the discard exemptions. She noted that most of the exemptions in force in UK and EU waters are the same subject to several operability changes. The UK, for example, has removed a "high survivability" exemption for North Sea nephrops (scampi) due to a lack of supporting scientific data and replaced it with a new "de minimis" exemption for undersized North Sea nephrops caught by bottom trawls of mesh size 80–99mm. The EU has removed a "high survivability" exemption for plaice in North Western Waters, but the UK has retained it. There is one example of an identical change being made by the EU and UK, where both have amended the exemption for plaice in the North Sea so that it also covers mesh sizes of 100–119 mm.

5.5 Turning to the Specialised Committee on Fisheries foreseen under the TCA, the Minister summarised its functions and composition as set out in the TCA but did not address our queries concerning:

81 (a) Commission Delegated Regulation (EU) …/… of 21.8.2020 specifying details of implementation of the landing obligation for certain fisheries in the North Sea for the period 2021–2023, (b) Commission Delegated Regulation (EU) …/… of 21.8.2020 specifying details of the implementation of the landing obligation for certain fisheries in Western Waters for the period 2021–2023; Council and Commission numbers: (a) 10229/20, C(2020) 5640, (b) 10231/20, C(2020) 5645; Legal base: (a) Regulation (EU) 2018/973, (b) Regulation (EU) 2019/472; Department: Environment, Food and Rural Affairs; Devolved Administrations: Consulted; ESC number: (a) 41518, (b) 41519.

i) her expectations in general terms for the work of the Specialised Committee on Fisheries, including its initial priorities;

ii) the process for setting the agenda of meetings of the Specialised Committee on Fisheries; and

iii) the expected composition of the UK's delegation.

5.6 Concerning parliamentary scrutiny of the work of the Specialised Committee on Fisheries, the Minister offered no information aside from reiterating the arrangements set out in the Rules of Procedure, annexed to the TCA, stating that meeting agendas for the Specialised Committees should be made public before meetings take place and that meeting minutes, once agreed by both parties, should be made public afterwards, subject to any confidentiality requirements.

Our assessment

5.7 The Minister did not engage with our questions concerning the work, and scrutiny, of the Specialised Committee on Fisheries. While this is disappointing, the Minister's approach no doubt reflects wider uncertainty about how these Committees will operate and when they will even begin to meet.

5.8 We look forward in due course to monitoring the establishment of the Specialised Committee on Fisheries and observing the degree to which issues such as discard exemptions are discussed in that forum.

Action

5.9 We have no outstanding queries. We report the Minister's reply to the House and draw it to the attention of the Environment, Food and Rural Affairs Committee.

6 Preventing the dissemination of terrorist propaganda online[82]

The proposed Regulation is legally and politically important because:

- it concerns an area of policy—the provision of digital services—which is "inherently cross-border in nature";
- once it becomes EU law, it will apply to UK tech companies offering services in the EU which could be used to disseminate terrorist material; and
- it illustrates different EU and UK approaches to addressing terrorist use of the internet which may be mirrored in wider EU regulation on digital services and in the Government's own plans to legislate on "online harms" later this year.

Action

- No further action, following the agreement reached by the Council and European Parliament on a compromise text.
- Draw to the attention of the Home Affairs Committee, the Justice Committee, the Digital, Culture, Media and Sport Committee and the Joint Committee on Human Rights, given the possibility of important synergies with the Government's Online Safety Bill.

Overview

6.1 The use of the internet to incite or glorify acts of terrorism and to radicalise and recruit terrorists has become a major concern for law enforcement. In September 2018, the European Commission published a proposal for a Regulation to prevent the dissemination of terrorist content online. It would empower national authorities to order the swift removal of terrorist material found on the web and require companies hosting online platforms to take active steps to prevent them from being used to spread terrorist propaganda. Applying a uniform set of rules would, the European Commission believes, be far less burdensome for companies operating within the EU's Digital Single Market than the current patchwork of national rules. The Council agreed its general approach on the proposal in December 2018, with the European Parliament deciding on its negotiating position in April 2019.[83]

6.2 Since we last considered the proposed Regulation in November 2020:

- the Council and the European Parliament have agreed a compromise text;[84]

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

83 See our predecessor Committee's Seventy-third Report HC 301–lxxi (2017–19), chapter 6 (4 September 2019) for further details on the European Parliament's position. Also see Forty-sixth Report HC 301–xlv (2017–19), chapter 16 (28 November 2018), Fiftieth Report HC 301–xlix (2017–19), chapter 5 (9 January 2019) and Thirtieth Report HC 229–xxvi (2019–21) chapter 6 (25 November 2020).

84 The compromise text is expected to be based on the Council's "first reading" position.

- the European Commission has published further proposals on digital services in the EU—a Digital Services Act and a Digital Markets Act—which are intended to create a safer online environment. We consider these proposals in chapter three of this Report; and

- the Government has published its response to the Online Harms White Paper and expects its Online Safety Bill to be ready later this year.

6.3 When we wrote to the Government last November,[85] we highlighted the potential for important synergies in the EU and UK approaches to the regulation of digital services, recalling that the Government had previously made clear (in relation to the EU's proposal on online terrorist content) that it would "want to ensure alignment of UK and EU law, particularly in an area which is inherently cross-border in nature".[86] We requested an update on the outcome of negotiations on the proposed Regulation. We also underlined the need to monitor wider EU developments in the digital sphere to help inform the regulatory choices available to the UK when introducing its own legislation to tackle online harms, to understand how the EU's regulatory framework may affect businesses, consumers and other online users in the UK, and to manage the consequences of regulatory divergence.

6.4 In her letter of 20 January 2021, the Minister for Countering Extremism (Baroness Williams) updates us on developments on the proposed Regulation on terrorist content online, the European Commission's new digital services package, and the interaction between these EU initiatives and the Government's own proposals to tackle online harms.

Political agreement on the proposed Regulation

6.5 The Minister describes the key features of the agreement reached by the Council and the European Parliament. We have supplemented some of the information as the final compromise text was published after the Minister wrote to us.

- One-hour removal orders: internet companies (called "hosting service providers") will be required to remove terrorist content within one hour of receiving a removal order. The Minister notes that "this is not removal within one hour of upload, which would if practicable be much more effective, though would in fact have been much more challenging for companies to implement".

- Cross-border enforcement of removal orders: a national authority in one Member State can issue a removal order to a hosting service provider in another Member State without first seeking the approval of the Member State authority in which the service provider is based. There is an appeal process involving the authority of the Member State in which the service provider is based and that authority (rather than the one issuing the removal order) has the final say. The threshold for overturning a removal order is high—it must "seriously or manifestly" be contrary to the Regulation itself or infringe the EU Charter of Fundamental Rights. Where an appeal is made, the offending content must still be removed within the one-hour limit while the content is reviewed.

85 See our letter of 25 November 2020 to the Minister for Security (Rt Hon. James Brokenshire MP).
86 See the letter of 24 July 2019 from the then Minister for Security and Economic Crime (Rt Hon. Ben Wallace MP).

- An obligation on internet companies to take proactive measures: all hosting service providers are subject to "reasonable and proportionate duties of care" to prevent their services being used to disseminate terrorist content to the public. Where there are objective reasons to indicate that hosting service providers may be used for this purpose, they must take "specific measures" to counter this risk. While the choice of measures is left to the hosting service provider, they must be effective, targeted and proportionate, non-discriminatory and respectful of fundamental rights. National authorities may instruct repeat offenders to take additional measures, such as the creation of a mechanism for users to flag problematic content, but cannot require them to use automated tools. The Regulation does not create a general obligation for hosting service providers to monitor the information they transmit or store, or actively to seek facts or circumstances indicating illegal activity.

- A definition of terrorist content: the Minister notes that the proposed Regulation will include, for the first time, a definition of terrorist content which is in line with the EU Directive on combating terrorism[87] and covers acts inciting the commission of terrorist offences (this includes glorifying terrorist acts), soliciting the commission of terrorist offences or participation in a terrorist group, and instructing on methods and techniques to commit terrorist offences. She adds that the definition is intended to be "threat agnostic", capturing a range of content across the spectrum including right wing and Salafi-Jihadist terrorism. Material disseminated for educational, journalistic, artistic or research purposes will not be considered terrorist content.

6.6 To illustrate how the proposed Regulation will work in practice, the Minister provides the following example which we have adapted to reflect the final compromise text agreed by the Council and European Parliament. The example concerns a national authority in one Member State (France) issuing a removal order to a hosting service provider (Facebook) based in a second Member State (Ireland): the French authorities identify a piece of terrorist content on Facebook. The French authorities issue a removal order to Facebook, giving Facebook one hour to act.[88] Facebook disputes the removal order, so appeals to the Irish authorities to review it. Facebook must remove the offending piece of content within one hour; the Irish authorities must review the offending piece of content within 72 hours; if the appeal is successful, the removal order ceases to have legal effect and Facebook must reinstate the content (or enable access to it) immediately.[89]

6.7 The Minister underlines the important role played by the German Presidency in securing agreement on a compromise text before the end of its term in December 2020. While certain elements of the European Commission's original proposal were removed, notably the possibility to mandate the use of automated tools to restrict the uploading of terrorist content, the Minister notes that many key features have been retained and describes the outcome as "a highly positive step". The final compromise text still has to

87 Directive (EU) 2017/541 on combating terrorism.

88 Facebook would have to remove the content specified in the order within one hour of receiving it. It would have 48 hours to decide whether to appeal its removal. The authorities in Ireland would also be able to call in and scrutinise the removal order, acting on their own initiative. They would have 72 hours to decide whether to carry out their own scrutiny and reach a decision. If they act on an appeal made by Facebook, the 72 hours to reach a decision on the appeal would run from when they receive details of the appeal.

89 We have changed the deadlines to reflect those included in the final compromise text.

be formally approved by the Council and the European Parliament. Once the Regulation is published in the EU's Official Journal, Member States will have 12 months in which to prepare for its provisions taking effect. It is therefore likely to apply in the first half of 2022.

Other EU initiatives on digital services

6.8 The Minister explains that the proposed Regulation on terrorist content focusses on the removal of terrorist content once it has been made accessible to the public whereas the EU's proposed Digital Services Act takes a more preventative approach, seeking to ensure that platforms are designed with safety in mind and that companies have effective processes in place to prevent users being subjected to a broader range of harmful material when using their services. There is nonetheless some degree of overlap. The Minister highlights the following elements which are relevant to the regulation of terrorist content online:

- obligations for platforms to flag illegal content, as well as an obligation to provide effective safeguards for users to ensure effective content moderation;
- improved transparency measures for online platforms, including on the algorithms used to recommend content to users;
- specific obligations for the largest platforms (those reaching more than 10% of the EU's population) to prevent abuse of their services by taking risk-based action, including independent audits of their systems; and
- fines of up to 6% of a company's global turnover for non-compliance (this compares with a fine of up to 4% of global turnover if there is a systematic or persistent failure to comply with removal orders under the proposed Regulation on terrorist content online).

6.9 The Minister notes that the French Government is keen to reach an agreement on the proposed Digital Services Act during its EU Presidency in the first half of 2022, though anticipates that this timetable will be challenging. In any event, the Act is unlikely to take effect until 2023 at the earliest.

Implications for the UK's Online Safety Bill

6.10 The Minister confirms that the Full Government Response ("FGR") to the Online Harms White Paper forms the basis for the Government's Online Safety Bill. She says that officials in the Home Office, the Department for Digital, Culture, Media and Sport, and the UK Mission to the EU have been in touch with the European Commission to discuss the Government's plans and the EU's recent legislative developments.

6.11 The Minister explains that the Government's Response is broader in scope than the EU Regulation on terrorist content but bears some similarity to the EU's proposed Digital Services Act ("DSA") as both focus on protecting users from a range of illegal or harmful content and activity on online. She continues:

> The DSA and the FGR both note the importance of the largest tech companies (classed as 'Category 1' services in the FGR) taking additional, rigorous measures due to their significant reach—in UK, Category 1

> services must take additional measures to tackle legal-but-harmful content, and publish transparency reports; in the EU, the DSA specifies that the largest platforms must conduct independent audits of their ability to tackle abuse of their services, for example.

6.12 The Minister explains how the approaches taken by the EU and the UK to terrorist content online differ:

> In terms of legislation to specifically tackle terrorist use of the internet, you will notice that, in the TCO Regulation, the EU has taken a different approach to the UK, by specifying a clear set of procedures and prescribed expectations that companies will follow to permit the take-down of terrorist content within one hour of receiving a removal order. The UK has deliberately chosen not to go down the one-hour removal route: whilst we recognise that there are strong benefits to securing the expeditious removal of terrorist content before it can be viewed and shared, we believe that by ensuring companies have adequate systems and processes in place, rather than focussing on removing specific pieces of content, our legislation will have a positive impact on behaviours and expectations, and will reduce the amount of terrorist content of platforms in the first place. This approach will allow Ofcom as the Online Safety Regulator to take a flexible approach rather than setting specific targets in legislation which could have unintended consequences, such as impacts on freedom of expression if content is removed in an overly precautionary way.

6.13 The Government has published a voluntary and non-binding Interim Code of Practice on Terrorist Content and Activity Online to help tech companies understand how to mitigate the range of risks arising from online terrorist content and protect their users and the general public from harm.[90] It will be replaced by a statutory code of practice to be drawn up by Ofcom once it has been established as the independent regulator for online harms under the UK's Online Safety legislation. The Government says that the interim code of practice takes into account how the UK's future online harms regulatory framework is likely to work and is intended to ensure that, by taking early action to protect their users from terrorist content, companies will be better prepared when the online harms legislation comes into force.

6.14 The Minister recognises that "tech companies are experiencing several significant changes in the international regulatory environment". Ministers and officials have intensified their engagement with these companies to help them to adapt to the changes that the UK's new regulatory framework on online safety will require. She believes that the EU and UK approaches are "broadly complementary" and that "when considered in the round, internet users across the UK and EU will enjoy significantly increased protections against terrorist content online, and other online harms, thanks to these developments". The Government will "continue to engage tech companies on a range of issues, including terrorist content online, going forward, to monitor the effectiveness of the legislation".

90 It is one of two interim codes of practice that the Government is publishing ahead of its Online Safety Bill. The second is on online child sexual exploitation.

Our assessment

6.15 We welcome the Minister's comprehensive response, her recognition of the broader regulatory framework in which the Government is developing its own domestic legislation on online harms, and the Government's active engagement with the EU through the UK Mission to the EU.

6.16 While the Minister views the political agreement reached on the proposed Regulation on terrorist content online as "a highly positive step", it is striking that the Government has chosen to take a different approach. Once it becomes EU law, the Regulation will create a legally binding obligation enforceable against any internet company offering services in the EU to remove terrorist content (or disable access to it) at the behest of a national authority in any EU Member State. By contrast, the UK's interim code of practice on terrorist content and activity online sets out guidance on best practice which companies may apply to prevent their platforms being exploited by terrorists. As it is a voluntary code, it encourages but cannot compel companies to comply with removal requests made by UK law enforcement bodies such as the Metropolitan Police's Counter Terrorism Internet Referral Unit.

6.17 The EU and UK approaches both seek to reconcile, in different ways, the public interest in preventing terrorist use of the internet and in protecting freedom of expression and the right to receive and impart information.[91] The efficacy of each approach in limiting or eliminating the use of the internet to encourage terrorism and violent extremism will depend on the wider regulatory environment of which each form parts and which is still very much in the process of being constructed.

6.18 As the Minister recognises, the immediate concern for UK or UK-based tech companies will be to understand how differences in the international regulatory environment affect their businesses. As regards EU-level regulation, these companies will first need to establish whether their activities are within the scope of the proposed Regulation on terrorist content online. This will be the case if they offer services within the EU which involve the dissemination of information to the public and they have a "substantial connection" to one or more Member States.[92] These companies will need to designate a contact point and a legal representative in the EU if they are not headquartered there to receive and process removal orders and ensure they are complied with. They will also need to set out their policies on tackling online terrorist content in their terms and conditions, establish an effective complaints mechanism for content providers who may wish to challenge a removal order, and publish an annual transparency report if they have taken action themselves to remove terrorist content or been required to do so. These are legal obligations which, if breached, may result in fines.

6.19 While UK tech companies may well fall within the scope of the proposed Regulation if they provide services within the EU, regulatory or law enforcement authorities in the UK will not have the same powers as their EU counterparts to issue removal orders against tech companies based in the EU which offer services in the UK unless a specific provision

91 Freedom of expression is protected under the European Convention on Human Rights (Article 1) and the EU Charter of Fundamental Rights (Article 11). The EU Charter also recognises the freedom to conduct a business "in accordance with Union law and national laws and practices" (Article 16).

92 A company which has its head office or registered office in a Member State will have a substantial connection. So too will a company which is not based in the EU but has a significant number of users of its services in one or more Member States or which targets its activities to one or more Member States.

to this effect is included in the UK's domestic laws. Even then, the lack of a cross-border enforcement mechanism may well make the orders too difficult to enforce in practice, creating the potential for a law enforcement capability gap.

Action

6.20 For the reasons we have set out in this chapter, it is too soon to tell whether EU and UK approaches to the regulation of terrorist content and other online harms will lead to significant divergences in law and policy or to assess what this might mean for companies operating across multiple jurisdictions as well as the implications for public safety and security. Much will depend on the wider frameworks on online harms and digital services which are currently being developed by the EU and the UK. We trust that the Government will continue to engage actively with EU and other international partners, not least because the threats posed by online harms are "inherently cross-border in nature"[93] and likely to be magnified by inadvertent regulatory gaps.

6.21 While the political agreement reached on the proposed Regulation on terrorist content online brings our scrutiny of the proposal to an end, we recall the important synergies between developments at EU level and the Government's own domestic agenda to legislate on a broader range of online harms and draw this chapter to the attention of the Home Affairs Committee, Justice Committee, Digital, Culture, Media and Sport Committee, Business, Energy and Industrial Strategy Committee, and the Joint Committee on Human Rights.

93 See the letter of 24 July 2019 from the then Minister for Security and Economic Crime (Rt Hon. Ben Wallace MP) to the Chair of the European Scrutiny Committee (Sir William Cash MP).

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

Foreign, Commonwealth and Development Office

(41812) — COM(21) 115	Proposal for a Regulation of the European Parliament and of the Council implementing the Kimberley Process certification scheme for the international trade in rough diamonds (recast).

HM Revenue and Customs

(41674) 13263/20 C(20) 8072	Commission Delegated Regulation (EU) .../... of 20.11.2020 amending Delegated Regulation (EU) 2015/2446 as regards the time-limits for lodging entry summary declarations and pre-departure declarations in case of transport by sea from and to the United Kingdom of Great Britain and Northern Ireland, the Channel Islands and the Isle of Man.

Home Office

(41715) — COM(20) 795	Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions—A Counter-Terrorism Agenda for the EU: Anticipate, Prevent, Protect, Respond.
(41735) 13165/20 +ADD1 COM(20) 743	Recommendation for a Council Decision authorising the opening of negotiations for Agreements between the European Union and Algeria, Armenia, Bosnia and Herzegovina, Egypt, Israel, Jordan, Lebanon, Morocco, Tunisia and Turkey on cooperation between the European Union Agency for Criminal Justice Cooperation (Eurojust) and the competent authorities for judicial cooperation in criminal matters of those third States.
(41736) — COM(20) 779	Report from the Commission to the Council and the European Parliament on the Functioning of the Schengen Evaluation and Monitoring Mechanism pursuant to Article 22 of Council Regulation (EU) No 1053/2013 First Multiannual Evaluation Programme (2015–2019).

Annex

Documents drawn to the attention of select committees:

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

Business, Energy and Industrial Strategy Committee: The EU Digital Services and Digital Markets Acts [Proposed Regulations (SNC)]; EU Climate Policy [(a) Commission Communication, (b) Proposed Regulation (SC)]

Digital, Culture, Media and Sport Committee: Northern Ireland Protocol: EU import licensing scheme for cultural goods [Proposed Regulation (SC)]; The EU Digital Services and Digital Markets Acts [Proposed Regulations (SNC)]; Preventing the dissemination of terrorist propaganda online [Proposed Regulation (SC)]

Environment, Food and Rural Affairs Committee: Fisheries discards [Commission Delegated Regulations (SC)]; 2021 Fishing Opportunities [(a) Proposed Regulation, (b) Commission Communication (SNC)]

Home Affairs Committee: The EU Digital Services and Digital Markets Acts [Proposed Regulations (SNC)]; Preventing the dissemination of terrorist propaganda online [Proposed Regulation (SC)]

Joint Committee on Human Rights: Preventing the dissemination of terrorist propaganda online [Proposed Regulation (SC)]

International Trade Committee: EU Climate Policy [(a) Commission Communication, (b) Proposed Regulation (SC)]

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

Northern Ireland Affairs Committee: Northern Ireland Protocol: EU import licensing scheme for cultural goods [Proposed Regulation (SC)]; 2021 Fishing Opportunities [(a) Proposed Regulation, (b) Commission Communication (SNC)]

Science and Technology Committee: The EU Digital Services and Digital Markets Acts [Proposed Regulations (SNC)]

Scottish Affairs Committee: 2021 Fishing Opportunities [(a) Proposed Regulation, (b) Commission Communication (SNC)]

Treasury Committee: The EU Digital Services and Digital Markets Acts [Proposed Regulations (SNC)]

Welsh Affairs Committee: 2021 Fishing Opportunities [(a) Proposed Regulation, (b) Commission Communication (SNC)]

Formal Minutes

Wednesday 21 April 2021

Members present:

Sir William Cash, in the Chair

Jon Cruddas	Marco Longhi
Allan Dorans	Craig Mackinlay
Margaret Ferrier	Anne Marie Morris
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 7 read and agreed to.

Resolved, That the Report be the Forty-fourth Report of the Committee to the House.

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

[Adjourned till Wednesday 12 May 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*)