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Notes

Numbering of documents

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

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

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

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

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

Abbreviations used in the headnotes and footnotes

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

Euros

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

Further information

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

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

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1 EU proposal for a standardised universal charger for smartphones and mobile devices[1]

This EU document is politically important because:

- it would introduce a mandatory, universal charging solution for mobile devices such as smartphones and tablets sold within the European Union, to enable all such devices to be charged rapidly with a standard USB-C cable from any brand; and
- the new requirements may also apply to devices sold in Northern Ireland under the terms of the Northern Ireland Protocol in the Brexit Agreement, potentially triggering divergence of product standards with the rest of the UK. The Government is yet to assess whether it will mandate a similar universal charging solution under UK law.

Action

- The Committee will continue to monitor for developments in adoption of the new EU legislation on chargers for mobile devices to consider whether there are any particular implications or concerns for Northern Ireland or the UK internal market more generally.
- Draw the EU's proposal for a universal charger to the attention of the Business, Energy and Industrial Strategy Committee, the Digital, Culture, Media and Sport Committee, and the Northern Ireland Affairs Committee.

Overview

1.1 In September 2021, the European Commission proposed draft legislation that would introduce a mandatory, standardised charging solution for all mobile devices—such as smartphones and tablets—sold within the European Union. The legislation as drafted would require all such devices to be able to be charged with a USB-C cable from any brand, and oblige manufacturers to avoid software protocols that reduce charging speed—or even prevent charging—when a cable from a different brand is used. Apple iPhones would be affected in particular, as they have a proprietary charging receptacle that is currently only usable with a USB-C cable with the aid of an adapter.[2] The proposal would also require manufacturers to give consumers the option of buying devices without a charging device ('unbundling'). The overall aim of the draft rules, which must still be considered and approved by the European Parliament and the EU's Member States in the Council of Ministers, is to improve consumer convenience and reduce volumes of electronic waste.

1 Proposal for a Directive amending Directive 2014/53/EU on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment; Council and COM number: 12183/21 + ADDs 1–4, COM(21) 547; Legal base: Article x TFEU; ordinary legislative procedure; QMV; Department: Business, Energy and Industrial Strategy; Devolved Administrations: Consulted; ESC number: 41920.

2 Apple is strongly opposed to the EU proposal. See for example BBC News, "EU rules to force USB-C changes for all phones" (23 September 2021).

1.2 The UK of course left the EU's Customs Union and Single Market on 31 December 2020. However, Northern Ireland must for the time being stay aligned to a long list of EU rules related to the production of goods until at least the end of 2026.[3] This is a legal obligation on the UK under the 'Protocol on Ireland/Northern Ireland' in the Withdrawal Agreement governing its exit from the EU. The Protocol lists the Radio Equipment Directive (RED), which the proposal on a universal charging solution for mobile devices would amend. Because the Protocol provides that references in it to EU rules "shall be read as referring to [them] as amended or replaced", the Government has confirmed that the proposed amendments to the RED in relation to the charger receptacles on mobile devices would automatically become applicable in Northern Ireland.[4] It follows that mobile devices that do not meet the new EU requirements could not be sold in Northern Ireland as and when the EU's new universal charger requirements are implemented there.

1.3 The Government in July 2021 proposed a renegotiation of the Protocol to reduce the extent to which Northern Ireland must align with EU rules such as the RED.[5] Ministers have also repeatedly suggested they may unilaterally suspend some of the UK's legal obligation to apply EU law in Northern Ireland under Article 16 of the Protocol, *if* no mutually satisfactory solution can be found with the EU. The outcome of the Government's engagement with the EU, and any potential changes to the legal provisions of the Protocol as a result, are not known at this point.

1.4 Should the EU's universal charging proposal become law in Northern Ireland, the Government says it has "not yet" made an assessment of "the effect of any period of regulatory divergence between GB and NI" in relation to the technical specifications for mobile devices contained in the EU proposal, nor "whether it would benefit the UK internal market and the consumer to put in place similar measures [to the EU proposal] in Great Britain".[6] Absence of action may create a risk of divergence in product standards between parts of the UK, although manufacturers could decide voluntarily to introduce the EU-mandated universal charging standard on their devices sold in Great Britain, to reduce supply chain complexity.[7] If they do not, businesses in Great Britain may avoid supplying the Northern Irish market if the particular version of the mobile devices they sell are not manufactured with the USB-C receptacle that the European Commission wants to make mandatory. A reconfiguration of supply chains of such devices for the Northern Irish market could result, if it is easier to source compliant products from the

3 The provisions of the Protocol that require Northern Ireland to remain aligned with EU law on goods are subject to the periodic democratic consent of the members of the Northern Ireland Assembly under Article 18 of the Protocol. They are due to vote on whether to keep those provisions in effect for the first time no later than the end of 2024, and if they reject them that element of the Protocol will become inoperative after a two-year period, i.e. from the end of 2026.

4 Article 13(3) of the Protocol.

5 More specifically, the Government in July 2021 proposed a "full dual regulatory regime" under which goods would "be able to circulate within Northern Ireland if they meet either UK or EU rules". Under this arrangement, the EU's universal charging solution would not extend to Northern Ireland: since UK rules continue to permit different charging points, these would be also be allowed for mobile devices sold there. Devices manufactured in, or brought into Northern Ireland, from outside the EU would only have to meet the new EU standards "if manufacturers wished to [...] access the EU as well as the NI market".

6 The Memorandum continues: "In due course the Government will liaise with manufacturers to understand their future plans in relation to the GB market to inform decisions on the best regulatory approach for the benefit of the UK internal market and the consumer".

7 UK law does not currently prescribe a particular type of charging interface on mobile devices. Whether manufacturers switch to the USB-C interface even in Great Britain would be their own decision, no doubt influenced as well by the commercial benefits of maintaining any proprietary charging interfaces or protocols that would remain permitted for the time being in England, Scotland and Wales.

EU rather than the rest of the UK.[8] Naturally, in any event, businesses in Great Britain exporting mobile devices to the EU would need to ensure their products comply with the proposed mandatory specifics of the charging receptacle and associated protocols.

1.5 Given the potential implications under the Northern Ireland Protocol, we have considered the context, substance and implications of the EU proposal for a universal charging solution for mobile devices in more detail below.

EU policy on universal chargers for mobile devices

1.6 The European Commission has for some time been seeking to limit the fragmentation of the EU's market for "charging interfaces" for mobile phones and similar devices, like tablets and e-readers. This 'interface' is the port or receptacle on the device into which a charging cable can be inserted to connect it to an external power supply.[9] The stated objective the Commission is pursuing by seeking to standardise the charging interface on such devices is, firstly, to minimise "consumer inconvenience"[10] and, secondly, to reduce the generation of unnecessary waste (both triggered, in essence, by the need for different charging cables for different devices or the fact that some charging cables are less efficient with particular devices).

1.7 As a first step, in June 2009 the Commission and major manufacturers of mobile telephones agreed a Memorandum of Understanding (MoU) on harmonising chargers for smart phones. The industry participants agreed to develop a common specification based on the USB 2.0 micro-B interface. While the Commission says the Memorandum was successful in reducing "market fragmentation" by triggering an "effective reduction in the number of charging solutions for mobile phones from 30 to only three", it remained a voluntary arrangement. In particular, the Memorandum did not rule out the use of proprietary charging interfaces (namely, vendor-specific connection means). In particular, iPhone manufacturer Apple—which has a significant market share in Europe—continues to use its own interface, meaning that its devices cannot be charged using cables made to the more common USB 2.0 or 3.0 standards without an additional adapter. In addition, even for devices that do have these standardised USB interfaces, some manufacturers use protocols—the programming rules for how the device communicates with a charger—that prevent non-proprietary chargers from operating with the devices at all, or only at reduced charging speed.

1.8 The 2009 industry Memorandum expired in 2014, since then the Commission has been trying to "foster the adoption of a new voluntary agreement" to ensure full

8 Under the Internal Market Act 2020 goods that are on the market in Northern Ireland can also easily, and in most cases lawfully, be sold into Great Britain without the need to demonstrate compliance with any different product standards applicable in England, Wales or Scotland. We have expressed our concern about this in areas where UK and EU product safety standards are diverging (for example in relation to machinery items and general consumer product safety), because UK safety standards could be circumvented by bringing in goods compliant only with different EU standards into GB via Northern Ireland. However, this particular proposal does not appear to raise any product safety concerns in relation to EU goods entering Great Britain via Northern Ireland, since it is concerned solely with mandating the use of a particular type of charging receptacle on mobile devices that is already in widespread use in the UK and does not pose safety concerns.

9 The EPS is the device that is typically plugged into the sockets at home, typically with a USB type A or USB type C interface so to allow cables to be connected to it, for the purposes of charging the devices.

10 The Commission has referred to four different types of "consumer inconvenience" resulting from divergent industry approaches to charging interfaces: the inability to charge certain devices (as fast) with certain chargers; too many chargers taking up space at home; the lack of access to a compatible charger; and confusion about which charger works with what device.

interoperability between all smartphones sold in the EU and standardised USB charging cables.[11] In March 2018, manufacturers including Samsung and Apple made a proposal for a new voluntary agreement on a common charging solution. However, the Commission did not consider this draft Memorandum to be satisfactory, as it would still allow mobile phones to use proprietary charging solutions. This it considered "no longer […] justified", in particular because of the "technical advantages provided by the introduction of the USB Type-C interface" for charging purposes (which has now largely replaced the earlier USB Type-B receptable on devices referred to in the 2009 Memorandum). In addition, the Commission concluded that further action was needed to address a number of related issues, namely: the need for harmonisation of charging solutions for devices similar to mobile phones (like tablets and e-readers) for the same reasons of consumer convenience and reducing waste; tackling unnecessary waste generated by the fact that most manufacturers do not offer the possibility of buying a mobile device without a charger (a practice known as 'bundling');[12] and ensuring that similar fragmentation of technical specifications does not occur in the future for wireless charging solutions.

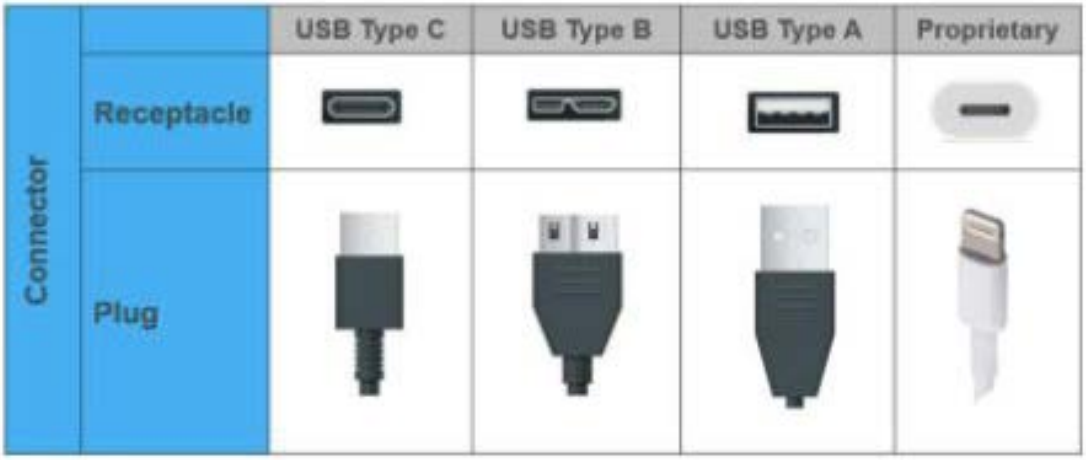

Figure 1: Different types of charging solutions (source: European Commission)

1.9 Having failed to agree a voluntary solution with manufacturers to address these issues, the European Commission in 2018 began to investigate the value of potential EU legislation to formally *oblige* manufacturers of mobile devices to implement 'a common solution for charging'. The resulting study concluded that consumers and the environment would benefit from a legal requirement for "a common charging interface and a common charging communication protocol"[13] for mobile devices like smartphones, tablets, cameras, and e-readers, especially where combined with 'unbundling' (where consumers can purchase the device without the charging equipment).[14] The Commission commissioned a further study into wireless charging of mobile devices specifically, to

11 According to the Commission, in 2019, an estimated 160 million mobile phones were sold in the EU, plus more than 260 million other portable devices. It is estimated that chargers represent 0.3% of the total e-waste, 11,000 tonnes of e-waste annually.

12 By extension, offering a mobile device without a charging device is known as 'unbundling'.

13 The study concluded that harmonising only the charging interface on the device would not achieve full interoperability of charge, because "various charging communication protocols exist and not all ensure the same charging performance if a charging device from another brand is used".

14 A study carried out for the European Commission in October 2020 found that manufacturers accounting for 30–40% of market share in the EU "had announced the removal of […] accessories from the retail box for certain new models", but "those manufacturers that have invested heavily in proprietary charging technology appear less keen" to do so. However, according to the Commission, manufacturers that have developed proprietary charging solutions "fail to demonstrate" that the efficiency of their proprietary solution was "not because their solution blocks or limits the efficiency of using other chargers".

allow it to decide on possible regulatory action "to ensure […] that e-waste reduction and user convenience are observed in the wireless charging market" for mobile devices as well, as part of an initiative on more traditional wired charging using a cable plugged into the device.[15]

The Commission proposal for a common charger for mobile devices

1.10 In September 2021, based on its studies, the Commission tabled a formal legislative proposal to amend the EU's Radio Equipment Directive (RED).[16] The RED is the legislation that governs the mandatory specifications of radio equipment within the European Union,[17] covering issues such as "safety, electromagnetic compatibility, use of the radio spectrum [and] access to emergency services". Broadly speaking, the Directive covers most electronic equipment that can use the radio spectrum for communication purposes, meaning all mobile phones as well as tablets and e-readers are within its scope.[18]

1.11 The Commission's 'common charger proposal' would make the following amendments to the Radio Equipment Directive:

- it would introduce specific new requirements for the charging interface that manufacturers must include not just on smartphones, but on all "hand-held mobile phones, tablets, digital cameras, headphones, headsets, handheld videogame consoles and portable speakers". In so far as these are "capable of being recharged via wired charging", they would *have* to be equipped with a receptacle for a USB Type-C charging cable. In addition, except for low-end devices, they must be compatible with the standardised "USB Power Delivery" charging communication protocol (to prevent proprietary protocols from reducing charging speed when cables from other brands are used);

- the Commission would be empowered to use "Delegated Acts" (a type of EU Statutory Instrument) to modify both the types of devices covered by these new requirements, as well as the technical specifications for the mandatory charging interface and protocol "in the light of technical progress". The same power would also allow the Commission to set harmonised standards in the future for wireless charging (for which no mandatory standards are included in the amending Directive itself);

- manufacturers of the categories of mobile devices covered by the proposal would be required to offer their products for sale without a charging device included, with the charging element sold separately (a so-called 'unbundling' obligation). The option of selling the mobile device *with* a charging device included will be permitted at the producers' own discretion; and

15 A harmonised charging interface at the radio equipment end (i.e. in the case of radio equipment charged via wired charging, this being the charging receptacle), minimum common interoperability of charging through a harmonised charging communication protocol, and the provision of information on charging requirements of their radio equipment are therefore preconditions for an impactful and meaningful unbundling.

16 Directive 2014/53/EU. The UK abstained in the EU Council of Ministers when the Directive was agreed in April 2014—as our predecessors explained in their Thirty-sixth Report of Session 2013–14 in February 2014.

17 Prior to the UK's withdrawal, it was transposed into UK law by means of the Radio Equipment Regulations 2017.

18 By contrast, charging cables themselves are covered by the EU's General Product Safety Directive—which is currently being renegotiated, as we discussed in our Report of 17 November 2021—whereas the external power supplies are covered by the Low Voltage Directive.

- finally, a new disclosure requirement is added for mobile devices covered by the new Directive, meaning that consumers would have to be given information on the packaging relating to power requirements for wired charging devices that can be used with the equipment (and in particular whether it supports the 'USB Power Delivery' fast charging protocol).

1.12 The proposal to introduce the common charging specification and related changes can only become EU law once it has been approved jointly by the European Parliament and by the EU Member States in the Council of Ministers. These institutions can make changes to the legal text before they formally adopt the Directive. Although MEPs have already expressed their support for the initiative,[19] manufacturers have been critical (saying mandating a particular technical standard for charging could "harm innovation"), and the position of the Member States is unclear. As such, the timetable for the legislative process, and by extension when the new common charger requirements might begin to apply to devices sold in the EU, is unclear at this stage. The Commission has proposed that the new requirements as described above would be binding for products sold within the EU two years after the legislation is formally approved. As such, it seems unlikely the new legislation will take effect before 2024. The new mandatory specifications will not apply to any devices placed on the market in the EU before that point.

1.13 In its legislative proposal, the European Commission also notes that the draft Directive on standardisation of charging interfaces on mobile devices is linked to a number of further EU policy initiatives currently under preparation. These will be taken forward separately. In particular, the Commission is preparing legislation to set mandatory specifications for a 'universal External Power Supply' that can be used with electronic or electrical goods.[20] This would complement the amendment to the Radio Equipment Directive described above, which only covers the charging receptacle on a mobile device itself and not the characteristics of the power supply to which it can be connected. Other related proposals under the Commission's Circular Electronics Initiative (CEI) relate to the 'ecodesign' and energy labelling of mobile devices, as well as a possible EU-wide 'take back scheme"' to return or sell back mobile devices to improve the collection of electronic waste. Finally, the Commission is examining the possibility of a 'product passport' under the EU's Sustainable Products Initiative (SPI) to give consumers better information about a product to facilitate repair, reuse, and recycling.

Implications of the EU universal charger proposal for the UK

1.14 The UK of course left the EU's Customs Union and Single Market on 31 December 2020. As such, generally speaking, EU law—including the Radio Equipment Directive—is no longer applicable in the UK (except insofar as it has been 'retained' in domestic law under the European Union (Withdrawal) Act 2018). Nevertheless, as in other product

19 MEPs passed a resolution in January 2020 that "emphasise[d] the need for a standard for a common charger for mobile radio equipment to be adopted as a matter of urgency".

20 The new specification requirements for EPS are scheduled to be established in 2022 by means of an Implementing Act, a type of EU Statutory Instrument, because the European Commission already has the power to set such standards under the Ecodesign Directive. Because of this, the Commission says that although the common charging proposal and the EPS proposal have different timetables, "the different procedures for adoption will make them applicable approximately at the same time".

areas, any British businesses exporting mobile devices covered by the RED to the EU need to comply with its provisions, including—if approved by EU lawmakers—the proposed mandatory specifics of the charging receptacle and associated protocols.

1.15 In addition, Northern Ireland is in a unique position when it comes to the application of EU law following Brexit. To avoid the need for any infrastructure on the land border on the island of Ireland, for example to undertake customs controls, the UK and EU agreed a special 'Protocol on Ireland/Northern Ireland' in the Withdrawal Agreement ('the Protocol').[21] Although the Government is seeking a substantive renegotiation of that arrangement (discussed further below), it currently requires Northern Ireland to remain aligned to a long list of EU rules related to the production of industrial and agricultural goods until at least the end of 2026.[22] The Radio Equipment Directive is listed in the Protocol, and as such remains in effect in Northern Ireland even though it no longer applies as a matter of EU law in the rest of the UK.

1.16 The Protocol also provides that references in it to EU rules "shall be read as referring to [them] as amended or replaced". This means, in this particular case, that the proposed amendments to the RED in relation to the charger receptacles on mobile devices would automatically become applicable in Northern Ireland if the Protocol's alignment provisions are still in operation when these new EU rules take effect.[23] The Minister for Small Business, Consumers and Labour Markets (Paul Scully MP) confirmed this in an Explanatory Memorandum setting out the Government's position on the draft legislation on 28 October 2021. It follows that mobile devices that do not meet the new EU requirements could not be sold in Northern Ireland if the EU's new universal charger requirements must be implemented there. This may create a risk that businesses in Great Britain supplying consumers or retailers in Northern Ireland with such products may avoid the Northern Irish market if the particular version of the devices they sell, such as iPhones, are not manufactured with the USB-C receptacle that the European Commission wants to make mandatory. A reconfiguration of supply chains of such devices for the Northern Irish market could result, if it is easier to source compliant products from the EU rather than the rest of the UK.[24]

1.17 The situation for Northern Ireland is complicated further by the Government's proposed renegotiation of the Protocol. The Government has argued that the current requirement for products to meet EU rules if they are to be placed on the market in

21 More generally, under the Protocol, goods on the market in Northern Ireland can be moved into Ireland—and, hence, the entire EU Single Market—without physical controls at the land border. Similarly, goods on the market in the EU—including in Ireland—can also be sold freely in Northern Ireland.

22 The provisions of the Protocol that require Northern Ireland to remain aligned with EU law on goods are subject to the periodic democratic consent of the members of the Northern Ireland Assembly under Article 18 of the Protocol. They are due to vote on whether to keep those provisions in effect for the first time no later than the end of 2024, and if they reject them that element of the Protocol will become inoperative after a two-year period, i.e. from the end of 2026.

23 Article 13(3) of the Protocol.

24 Under the Internal Market Act 2020 goods that are on the market in Northern Ireland can also easily, and in most cases lawfully, be sold into Great Britain without the need to demonstrate compliance with any different product standards applicable in England, Wales or Scotland. We have expressed our concern about this in areas where UK and EU product safety standards are diverging (for example in relation to machinery items and general consumer product safety), because UK safety standards could be circumvented by bringing in goods compliant only with different EU standards into GB via Northern Ireland. However, this particular proposal does not appear to raise any product safety concerns in relation to EU goods entering Great Britain via Northern Ireland, since it is concerned solely with mandating the use of a particular type of charging receptacle on mobile devices that is already in widespread use in the UK and does not pose safety concerns.

Northern Ireland could lead to "significant risks that many businesses in Great Britain simply give up trying to produce goods for the Northern Ireland market".[25] To address this, the Government in July 2021 proposed a "full dual regulatory regime" under which goods would "be able to circulate within Northern Ireland if they meet either UK or EU rules".[26] Under this arrangement, the Minister says in his Memorandum, the EU's universal charging solution would not extend to Northern Ireland: since UK rules continue to permit different charging points, these would be also allowed for mobile devices sold there. Devices manufactured in, or brought into Northern Ireland, from outside the EU would only have to meet the new EU standards "if manufacturers wished to [...] access the EU as well as the NI market".

1.18 If the negotiations with the EU do not lead to the desired changes to the Protocol, the Government has repeatedly suggested it may have recourse to the 'safeguard measures' set out in Article 16 of the Protocol. The outcome of the Government's engagement with the EU, and any potential changes to the legal provisions of the Protocol as a result, are not yet known at this point. As such, we are unable to assess the alternative implications of the EU's universal charger proposal for Northern Ireland under any potentially revised version of the Protocol.

1.19 Should the EU's universal charging proposal become law in Northern Ireland, the Minister's Memorandum states that the Government has "not yet" made an assessment of "the effect of any period of regulatory divergence between GB and NI" in relation to the technical specifications for mobile devices contained in the EU proposal, nor "whether it would benefit the UK internal market and the consumer to put in place similar measures [to the EU proposal] in Great Britain".[27] Even in the absence of the Government introducing a similar legal requirement, manufacturers that currently use proprietary charging receptacles or protocols could decide voluntarily to introduce the EU-mandated universal charging standard on their devices sold in Great Britain, to reduce supply chain complexity.[28] Whether they do so without a statutory obligation will be a decision for each relevant producer, no doubt influenced as well by the commercial benefits of maintaining any proprietary charging interfaces or protocols that would remain permitted for the time being in England, Scotland and Wales. To the extent that the universal charging standard could also be rolled out by manufacturers for the market in Great Britain voluntarily as a result of the EU's proposal, consumers there might also indirectly experience the intended benefits of the proposal by removing the need for different charging cables and reducing waste.

25 HM Government "Northern Ireland Protocol: the way forward" Command Paper 502, July 2021, Paragraph 58.

26 The EU's concerns about non-compliant goods entering Ireland (and therefore its Single Market) from Great Britain without border controls via Northern Ireland would be addressed through "stronger arrangements for enforcement, including clearer rules for product labelling, extensive reciprocal data-sharing arrangements with the EU and Ireland, enhanced forums for cooperating on market surveillance and calibrating it to specific levels of risk, and awareness work with traders", as well as legislation "to provide for penalties for UK traders seeking to place non-compliant goods on the EU market".

27 The Memorandum continues: "In due course the Government will liaise with manufacturers to understand their future plans in relation to the GB market to inform decisions on the best regulatory approach for the benefit of the UK internal market and the consumer".

28 UK law does not currently prescribe a particular type of charging interface on mobile devices.

Conclusions

1.20 We thank the Minister for his Explanatory Memorandum on the EU's universal charger proposal, and his confirmation that the legislation could apply to mobile devices sold in Northern Ireland due to the Protocol in the Withdrawal Agreement. We note that there is the potential for divergence in product standards between Northern Ireland and the rest of the UK, if a similar requirement is not mandated under British law and manufacturers continue to use charging solutions not permitted under the EU proposal for the market in Great Britain. How this could impact on the supply chains of mobile devices into Northern Ireland, and the UK internal market more generally, is unclear at this stage.

1.21 As with all proposals for substantive change to EU product standards that apply in Northern Ireland under the Protocol, we will continue to monitor for developments in the legislative process in Brussels (including, in this particular context, under the EU's forthcoming Sustainable Products and Circular Electronics Initiatives). We may seek further information from the Minister in due course if the draft legislation raises specific issues for Northern Ireland or the UK market for mobile devices more generally. In the meantime, we draw the EU proposal to the attention of the Business, Energy and Industrial Strategy Committee, the Digital, Culture, Media and Sport Committee and the Northern Ireland Affairs Committee.

2 Carbon Border Adjustment Mechanism[29]

This EU document is politically important because:

- the EU is likely to propose that its new Carbon Border Adjustment Mechanism—once adopted—applies to Northern Ireland;
- it has implications for trade between the EU and the UK, with a potential impact on the UK that is proportionate to the relevant industrial concentration within UK regions and nations; and
- it may spark a multilateral discussion on carbon pricing and measures to address carbon leakage.

Action

- Write to the Minister.
- Draw to the attention of the Business, Energy and Industrial Strategy Committee, the Environmental Audit Committee, the International Trade Committee, the Northern Ireland Affairs Committee, the Scottish Affairs Committee, the Treasury Committee and the Welsh Affairs Committee.

Overview

2.1 Speaking on the fringes of the recent UN Climate Change Conference ('COP26') in Glasgow, the President of the European Commission (Ursula von der Leyen) explained the proposed EU Carbon Border Adjustment Mechanism (CBAM) in the following terms:

> If you come with a dirty product to our market, you have to pay a price as if you were in the Emissions Trading System in the European Union.[30]

2.2 The European Union intends to deliver a minimum 55% greenhouse gas emissions reduction by 2030 compared to 1990 levels and with a view to achieving net zero emissions[31] by 2050. Despite the progress made in Glasgow, including a continued commitment to pursue efforts to limit the global temperature increase to 1.5 °C above pre-industrial levels,[32] ambition remains variable across the world. As such, the Commission has said, there is a risk of 'carbon leakage', either because production is transferred from the EU to other countries with lower ambition for emission reduction, or because EU products are replaced by more carbon-intensive imports. Its response was to propose its CBAM, under which certain high-carbon imports should face the same carbon price as those produced domestically.

29 Proposal for a Regulation establishing a carbon border adjustment mechanism; Council and COM number: 10871/21 + ADDs 1–6, COM(21) 564; Legal base: Article 192(1) TFEU, QMV, ordinary legislative procedure; Department: Business, Energy and Industrial Strategy; Devolved Administrations: Consulted; ESC number: 41916.

30 Speech by President von der Leyen at the high-level event on carbon pricing organised by the Carbon Pricing Leadership Coalition and Canada, Glasgow, 2 November 2021.

31 The amount of greenhouse gases emitted is balanced out by removal of an equivalent amount.

32 Glasgow Climate Pact, UN Framework Convention on Climate Change.

2.3 The EU's CBAM is relevant to the UK under all scenarios unless the whole of the UK is exempted from it. As drafted, imports from the UK into the EU would be subjected to the Mechanism, and the EU has also signalled its view that the Mechanism falls within the scope of the Protocol on Ireland and Northern Ireland ('NI Protocol') annexed to the UK/EU Withdrawal Agreement. If the EU and UK agreed to add the CBAM Regulation to the NI Protocol, imports from Great Britain (GB) into NI would also be subjected to the Mechanism. The proposal forms part of the Commission's wide-ranging set of proposals in July 2021 fleshing out its policies to deliver its emissions reduction goals. We have reported separately on other elements of the package.[33]

2.4 The EU is not isolated in wishing to address carbon leakage, but it was the first to propose a fully-developed CBAM. The UK Government does not have a clear position on the merits or otherwise of a CBAM, but the Secretary of State for Environment, Food and Rural Affairs said on 7 November 2021 that a 'carbon border tax' might be needed to take account of countries not "pulling their weight" on reducing carbon emissions and in the event that a multilateral system was not in place.[34] Any mechanism such as this must also be consistent with international trade law, as we explore further below.

Carbon Border Adjustment Mechanism (CBAM)

2.5 The CBAM effectively extends the EU's Emissions Trading System (ETS) to imports of selected steel, iron, cement, fertilisers, aluminium and electricity goods, thus applying the same carbon price to importers of those products as faced by domestic producers operating in those sectors. Following a three-year transition period, importers would—from 2026—have to purchase CBAM certificates priced according to the weekly cost borne by EU producers under the ETS, surrendering certificates at the end of the year equivalent to the amount of carbon embedded in their imported products within scope of CBAM and being re-imbursed for any excess certificates. Meanwhile, EU producers of those products will see their share of free emissions allowances diminish by 10 percentage points per year over a decade and eventually phased out in 2035. To comply with World Trade Organization (WTO) rules, it is important that the same carbon price applies to importers and to domestic producers.

2.6 The proposed CBAM will initially cover direct emissions from the production of affected goods. These are emissions that the producer has direct control over, including emissions from heating and cooling processes used during the production process. The Commission proposed that it prepare a report by 2026 assessing whether the CBAM's scope should be extended to indirect emissions. These are defined as the emissions from the production of electricity, heating and cooling, which is consumed during the production processes of a good.

2.7 Non-EU countries and territories may be excluded from the measure if they are either part of the ETS or linked to it, categories into which the UK does not currently fall. The only non-EU Member States listed in the draft legislation as being exempted from the CBAM in the current proposals are those within the European Economic Area, given their participation in the EU ETS (Norway, Liechtenstein, Iceland) together with Switzerland, which has an ETS linked to the EU's.

33 Eighth Report HC 121–viii (2021–22), chapter 3 (22 September 2021); Tenth Report HC 121–ix (2021–22), chapter 1 (20 October 2021).

34 Andrew Marr Show, BBC 1, 7 November 2021.

2.8 Despite the fact that the UK operates an ETS that is very similar in design and ambition to the EU ETS, the EU CBAM would therefore still apply to imports from the UK, requiring information about the amount of carbon embedded in the products and proof that a carbon price had already been paid. Importers of eligible goods from the UK would still need to purchase allowances, and would then be re-imbursed at the end of the year. It is estimated that the UK would be one of the countries most affected by the proposed CBAM as drafted, particularly exports of iron and steel. Other top exporters of CBAM-covered products to the EU are the Russian Federation, China and Turkey.[35] To mitigate the impact of CBAM on third countries, there is provision in the draft Regulation for the EU to conclude agreements with third countries to take account of carbon pricing mechanisms in those countries, but there is no further detail on this as yet.

2.9 The NI Protocol adds some complexity to UK-EU interaction on CBAM. Once a good has entered NI, it can flow freely into the EU. To maintain that open border on the island of Ireland, the Protocol requires NI to align with a list of EU single market legislation governing the trade in goods. This guarantees that goods placed on the market in NI meet the same standards as those placed on the rest of the Single Market.

2.10 New pieces of EU legislation may be added to that list if they are within the scope of the Protocol, but both the EU and UK must agree within the UK-EU Joint Committee governing the Withdrawal Agreement.[36] If the CBAM Regulation was added to the Protocol, it would then be applied to trade between GB and NI, unless an exclusion from the measure was negotiated for GB.

2.11 The Commission has indicated its intention (see below) to propose that the CBAM be applied on imports into NI to prevent importers using NI as a route into the single market, avoiding the CBAM. As noted above, the UK would need to agree that NI be included within CBAM. Even if it did, and even if imports from GB were excluded from the measure (as the UK has requested),[37] it would still be complex as—aside from electricity generation—NI is not part of the EU ETS and so the carbon price is not identical. To maintain the integrity of CBAM, as well as the integrity of the Protocol, prices could not be different within CBAM. How this policy dilemma might be resolved is unclear.

Government's position

2.12 The Minister of State for Energy, Clean Growth and Climate Change (Rt Hon. Greg Hands MP) indicates in his Explanatory Memorandum that, at the meeting of the UK-EU Joint Consultative Working Group[38] on 19 July, the EU informed the UK that its proposed Carbon Border Adjustment Mechanism was a new draft act that falls within the scope of the NI Protocol, but which neither amends nor replaces a Union act listed in the Annexes to the Protocol. The Minister notes that the EU would need to seek the UK's consent for the CBAM to apply in Northern Ireland.

35 "Which countries are most exposed to the EU's proposed carbon tariffs?" resourcetrade.earth (Chatham House), 20 August 2021.

36 If the UK and EU cannot reach agreement on the addition of new legislation to the list of applicable EU law, the EU may, subject to conditions set out in the Protocol, take remedial measures. Protocol on Ireland/Northern Ireland Art 13(4).

37 "EU carbon tariff exemptions for 'very limited' number of countries, Gentiloni says", mLex.com, 15 July 2021.

38 The Joint Consultative Working Group on the operation of the NI Protocol was established under the Withdrawal Agreement as a forum for the exchange of information and mutual consultation.

2.13 In his answer of 30 July 2021 to a written parliamentary question, Lord Frost noted that the addition of the CBAM Regulation to the Protocol was a matter for the Joint Committee. He said that the EU had informed the UK of its proposal, as required by the Protocol, and the UK would carefully consider its impact on Northern Ireland and the UK's internal market, ahead of future discussions in the Joint Committee. Lord Frost later said in his speech in Lisbon on 12 October 2021 that, while the UK and EU have comparable climate goals, "there is a discussion coming on the EU's plans on CBAMs".[39]

2.14 In his Explanatory Memorandum, the Minister notes that the impacts that this measure will have on the UK—including on Northern Ireland—will depend on the final design of the measure, which is likely to change as the EU's legislative procedure progresses. The Government will continue to track all elements of the CBAM design throughout this process to understand these impacts.

2.15 The Minister adds that, in addition to being referenced at the Joint Consultative Working Group on 15 July 2021, the EU presented the CBAM proposal to the UK at the Trade and Cooperation Agreement (TCA) Trade Specialised Committee on Goods on 4 October 2021. According to the Minutes of the meeting, published on 15 November 2021, "there was a productive exchange […] on the impact of the proposals on trade in goods, and the Parties noted that domestic decarbonising efforts of third countries would be taken into account by the EU CBAM". The EU and UK agreed to hold further informal technical discussions. The proposal was also discussed as part of a broader presentation on the EU's 'Fit for 55' package at the TCA Trade Specialised Committee on Level Playing Field for Open and Fair Competition and Sustainable Development on 8 October 2021.

2.16 Turning to some of the details of the proposal, the Minister draws attention to the planned Commission report assessing whether the CBAM's scope should be extended to indirect emissions, noting that the Government would need to monitor how any such proposals would impact Northern Ireland, including how indirect costs related to electricity are accounted for.

2.17 The Government also notes that any burden of additional administrative costs caused by the CBAM that would apply to UK businesses would be proportionate to the relevant industrial concentration within UK regions. The Welsh Government has indicated that this is of particular interest.

Our assessment

2.18 Our starting point in assessing this proposal is that any such mechanism is far from ideal but is becoming a consequence of the variable speed of climate mitigation measures across the globe, with the associated risk of carbon leakage. It can be avoided, or at least limited, if countries accelerate their measures and if they collaborate on carbon pricing. This has been recognised by the European Commission itself, with Vice-President Timmermans expressing his optimism following discussions in the margins of COP26 that CBAM's application may well ultimately be limited.[40] The Director General of the World Trade Organization also commented recently that there was a need to develop a

39 "Lord Frost speech: Observations on the present state of the nation, 12 October 2021", Gov.UK, 12 October 2021.

40 "European Parliament Side Event at COP26—Carbon pricing in the European Union: an invitation to the world", Keynote speech by Frans Timmermans, European Commissioner for the European Green Deal, Glasgow, 10 November 2021.

common approach to carbon pricing to, in part, avoid a fragmented approach to carbon pricing and tackling carbon leakage, which risks generating trade frictions.[41] Our first question to the Government, therefore, is the extent to which the Government agrees that a multilateral approach to avoiding, and where necessary tackling, carbon leakage is the most desirable one and, if so, what action the Government is taking to pursue that approach.

2.19 Accepting that any multilateral approach may take some time to agree, however, unilateral approaches in the meantime appear inevitable. The European Commission's draft Regulation is the first fully-developed model for any such unilateral approach, although it amounts only to a draft and will no doubt change during the course of deliberations in, and between, the European Parliament and the Council and may well be influenced by discussions with global partners. Our second area of inquiry, then, is to ascertain the nature of bilateral dialogue between the EU and the UK on this matter. We note that the issue has already been raised in Specialised Committees under the Trade and Cooperation Agreement. Minutes of those meetings were recently published, and it is clear that the UK engaged in discussion about the EU CBAM in the Trade Specialised Committee on Goods on 4 October and agreed to hold further informal technical discussions. We will ask the Government for more information on the timing and nature of those discussions and how the Government intends to communicate progress.

2.20 We would expect dialogue between the Commission and the UK to feature three different elements. The first is the extent to which the EU and UK could collaborate to pursue a multilateral approach, which we have explored to a degree above. The second concerns the impact of the draft Regulation on the UK, and ways in which that might be mitigated. Finally, we would expect—subject to the outcome of negotiations on the NI Protocol—some dialogue to take into account the possible addition of the adopted Regulation to the Protocol.

2.21 Concerning the potential impact of the measure across the UK, we are interested in the Government's assessment that its impact on UK businesses would be proportionate to the relevant industrial concentration within UK regions, and presumably nations. Studies suggest that the UK is one of the top exporters of CBAM-covered goods, with iron and steel particularly affected. We note the interest of the Welsh Government in this matter and will ask the Government to keep us updated on its assessment of EU CBAM's impact.

2.22 As to how the impact of the proposal on the UK might be mitigated, we see two clear avenues for progress. It is notable that the third countries excluded from the EU CBAM are either part of the EU ETS or have an arrangement linking to the EU ETS. The easiest way to mitigate the impact of EU CBAM on the UK would therefore be to agree to link the UK and EU Emissions Trading Systems. Given that the EU and UK agreed in the Trade and Cooperation Agreement to consider such an arrangement, we will seek clarity from the Government on what progress has been made to that end.

2.23 The second avenue to mitigate the impact on the UK would be for the UK and EU to explore the provision in the draft Regulation for the EU to conclude agreements with third countries to take account of carbon pricing mechanisms in these countries. Indeed, there may well be some flexibility while negotiations are ongoing for the final text to exclude countries with analogous carbon pricing mechanisms.

41 "Ngozi Okonjo-Iweala: Adopting a global carbon price is essential", Financial Times online, 14 October 2021.

2.24 We turn now to the possible addition of the adopted Regulation to the list of legislation with which Northern Ireland must align under the current terms of the NI Protocol. Clearly, the operation of the Protocol is under negotiation at the moment, although the EU has not said it is flexible on the fundamental principles underpinning the operation of the Protocol, including Northern Irish alignment with relevant EU law while Northern Ireland remains part of the internal market in order to avoid a hard border on the island of Ireland. Understandably, the Government has not clarified whether it agrees with the contention that the Regulation, once adopted, should be added. We would nevertheless expect the Government to be operating on the basis that the Regulation might be applied in Northern Ireland. We will therefore seek confirmation that the Government is undertaking analysis to understand the draft Regulation's implications for Northern Ireland—including trade with Great Britain—and to identify any issues of concern which might be raised with the Commission without prejudicing the final decision on adding the Regulation to the Protocol. On a purely operational note, we will clarify whether any further discussion on the proposal is expected within the Joint Consultative Working Group.

2.25 A specific issue, highlighted by Sam Lowe,[42] is that NI participation in the EU ETS is limited to electricity generators and so, for the most part, industrial activity is covered by the UK ETS. Given that the price of EU CBAM certificates will be tied to the EU ETS, some discussion would be required to avoid a disconnect between the carbon price in NI and the cost of CBAM certificates for carbon-intensive products imported into Northern Ireland. At the very least, any such disconnect would be problematic for trade law reasons.

2.26 Finally, we highlight the technical question of any measure's compatibility with international trade law and, in particular, that it should not discriminate between domestic and imported products. The Deputy Director General of the WTO was reported as telling the European Parliament's Trade Committee that the EU's CBAM was likely to be compliant with WTO rules.[43] The Commission does not clarify how it considers its proposal to be compliant with international trade law, but a recent study provided a helpful and thorough analysis, concluding that the CBAM's legality is highly dependent on how exactly it is finally designed and the manner in which it is applied.[44]

Action

2.27 We are reporting this document to the House as politically important and we have written to the Minister as set below.

2.28 We are drawing the document and our letter to the attention of the Business, Energy and Industrial Strategy Committee, the Environmental Audit Committee, the International Trade Committee, the Northern Ireland Affairs Committee, the Scottish Affairs Committee, the Treasury Committee and the Welsh Affairs Committee.

42 "CBAM: what might an EU carbon-border adjustment mechanism mean for the UK?" Sam Lowe, senior research fellow at the Centre for European Reform and visiting senior research fellow at The Policy Institute, King's College London, UK in a Changing Europe, 3 August 2021.

43 "Carbon border tax set to be line with WTO rules, says deputy director", Politico, 9 November 2021.

44 Markkanen, S., Viñuales, J., Pollitt, H., Lee-Makiyama, H., Kiss-Dobronyi, B., Vaishnav, A. et al. (2021). "On the Borderline: the EU CBAM and its place in the world of trade", Cambridge, UK: Cambridge Institute for Sustainability Leadership, University of Cambridge.

Letter from the Chair to the Minister of State for Energy, Clean Growth and Climate Change (Rt Hon. Greg Hands MP)

We considered your Explanatory Memorandum on the above proposal at our meeting of 1 December 2021.

We take note of comments by European Commissioners, the WTO Director General and a UK Government Minister that, ideally, a global system of carbon pricing would be developed rather than a series of unilateral carbon border adjustment measures. Would you agree that a multilateral approach to avoiding, and where necessary tackling, carbon leakage is the most desirable one and, if so, what action is the Government taking to pursue that approach?

Being mindful that a multilateral approach could nevertheless take some time to develop, unilateral approaches appear inevitable. Now that the EU has proposed the first fully-developed carbon border adjustment mechanism, with potentially significant implications for the UK, it is welcome that the UK has engaged in bilateral dialogue on the proposal through some of the specialised meetings convened under the UK-EU Trade and Cooperation Agreement as well as the Joint Consultative Working Group established under the Withdrawal Agreement. We note from the Minutes of the 4 October Trade Specialised Committee on Goods that the UK and EU agreed to hold further informal technical discussions on EU CBAM. Please could you provide us with more detail on the timing and nature of those discussions and how you intend to communicate progress given the informal nature of the dialogue?

It is notable that the third countries excluded from the EU CBAM are either part of the EU ETS or have an arrangement linking to the EU ETS. The easiest way to mitigate the impact of EU CBAM on the UK would therefore be to agree to link the UK and EU Emissions Trading Systems. Given that the EU and UK agreed in the Trade and Cooperation Agreement to consider linking their respective emissions trading systems, could you tell us what progress has been made to that end?

A second avenue to mitigate the impact on the UK would be for the UK and EU to explore the provision in the draft Regulation for the EU to conclude agreements with third countries to take account of carbon pricing mechanisms in these countries. From the Minutes of the Trade Specialised Committee on Goods, we note the EU's commitment that domestic decarbonising efforts of third countries would be taken into account by the EU CBAM. Has the Government had any discussions with the Commission yet about any agreement on how CBAM's operation could take into account the UK ETS?

At the heart of the potential impact of CBAM on the UK is the possible addition of the adopted Regulation to the list of legislation with which Northern Ireland must align under the current terms of the Northern Ireland Protocol. Clearly, the operation of the Protocol is under negotiation at the moment and the Government has understandably not clarified whether it agrees with the contention that the Regulation, once adopted, should be added to the Protocol. We would nevertheless expect the Government to be operating for the moment on the basis that the Regulation might be applied in Northern Ireland. Are you undertaking analysis to understand the draft Regulation's implications for Northern Ireland—including trade with Great Britain—and to identify any issues of concern which

might be raised with the Commission without prejudicing the final decision on adding the Regulation to the Protocol? Is any further discussion on the proposal expected within the Joint Consultative Working Group?

We noted with interest the Government's assessment that EU CBAM's impact on UK businesses would be proportionate to the relevant industrial concentration within UK regions, and presumably nations and that this was of particular interest to the Welsh Government. We ask that you keep us updated on your assessment of EU CBAM's impact.

We have taken note of the technical issues concerning the EU CBAM's compliance with international trade law, as well as the potential difficulties of how any NI alignment with EU CBAM would practically interact with NI's participation in the UK ETS rather than the EU ETS (aside from electricity generation). We will monitor these issues as discussions progress within the EU institutions on the design of the Mechanisms.

We look forward to a response within ten working days.

3 EU proposals for Decisions of the UK/EU Joint Committee: update of the list of independent arbitrators and amendments to the provisions on social security coordination[45]

These EU documents are politically important because:

- they set out the EU's position on certain matters under the Withdrawal Agreement. This includes the appointment of a new arbitrator to the EU's list of arbitrators who can be called upon to form a panel under the Agreement's dispute resolution procedures (simply to replace an existing arbitrator). While the EU proposal is not in itself legally significant, the role of such arbitrators could become important if the Government were to follow through on its suggestion of dis-applying parts of the Northern Ireland Protocol in the Withdrawal Agreement using its Article 16, as this may lead the EU to formally trigger the dispute resolution process. It is also noteworthy in that respect that the UK and EU have to date failed to establish the list of eligible arbitrators under the separate Trade and Cooperation Agreement, despite having previously agreed a deadline of 30 June 2021 for doing so; and
- in addition, the EU has also proposed a number of amendments to the provisions of the Withdrawal Agreement dealing with social security coordination. While highly technical in nature, these changes seek to ensure the smooth functioning of the Citizens' Rights section of the Agreement and as such are clearly important for UK and EU nationals who derive legal rights from the Withdrawal Agreement.

Action

- Write to the Minister with responsibility for UK-EU relations (Rt Hon. Lord Frost CMG) to seek further information on the delays in establishing the list of eligible members of arbitration tribunals under the UK/EU Trade and Cooperation Agreement.

45 (a) Proposal for a Council Decision establishing the position to be adopted on behalf of the European Union in the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community as regards the adoption of a decision to amend the Agreement; Council and COM number: 12271/21 + ADD 1, COM(21) 593; Legal base: Article 50(2) TEU, in conjunction with Article 218(9) TFEU; Department: Foreign, Commonwealth and Development Office; Devolved Administrations: Consulted; ESC number: 41911.
(b) Proposal for a Council Decision on the position to be taken on behalf of the European Union within the Joint Committee established by the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community as regards the amendment of the decision establishing a list of 25 persons who are willing and able to serve as members of an arbitration panel under the Agreement; Council and COM number: 12277/21 + ADD 1, COM(21) 594; Legal base: Article 50(2) TEU, in conjunction with Article 218(9) TFEU; Department: Cabinet Office; Devolved Administrations: Consulted; ESC number: 41912.

Overview

3.1 The UK left the European Union on 31 January 2020. The terms of its departure are set out in a Withdrawal Agreement with the EU that contains, among other things, certain rights for UK and EU nationals already resident in the other's territory prior to Brexit. The Agreement also contains the Protocol that aims to keep the land border on the island of Ireland free from customs infrastructure by keeping Northern Ireland aligned with EU trade rules relating to goods. Discussions on the implementation and interpretation of the Withdrawal Agreement are held within a 'Joint Committee' where the EU and the UK Government are represented at Ministerial level.[46] Notably, this Committee has the power to amend the Agreement in certain instances (for example, to correct errors and omissions, and to adopt measures to ensure that it operates effectively). Such formal Decisions of the Joint Committee can only be made with both parties' consent, giving the Government and the EU a veto.

3.2 The Joint Committee has, to date, adopted seven formal Decisions amending or supplementing the Withdrawal Agreement.[47] Four of these have related to the operation of the aforementioned Protocol on Northern Ireland. In September 2021, the European Commission published proposals for two further Decisions of the Joint Committee. The first would appoint a new individual to the EU's list of eligible members of arbitration panels under the Withdrawal Agreement, which can be empanelled to resolve a formal dispute between the UK and the EU on the interpretation and implementation of the treaty. The second would update the list of technical rules on social security that govern coordination between the EU and UK authorities when determining benefit entitlements for people in scope of the Citizens' Rights section of the Withdrawal Agreement (principally in relation to individuals who moved from the UK to the EU or vice versa prior to the end of 2020).

3.3 As noted, these EU proposals for Decisions of the Joint Committee require the consent of the UK Government within that Committee to take effect. We have considered the substance of, and context to, both draft Decisions in more detail below. At this stage, it is unclear when the Decisions may be formally adopted, although the Committee is scheduled to meet before the end of the year.

Appointment of an eligible arbitrator under the Withdrawal Agreement

3.4 The Withdrawal Agreement contains a formal system of dispute resolution where either the UK or EU considers that the other party is not correctly implementing the treaty.[48] In the first instance, this requires the two sides to seek to resolve any disputes politically through consultations in the Joint Committee. However, if a resolution is not reached in this way, either party can request the establishment of an arbitration panel to consider the dispute (for example to determine whether one side has not fulfilled its legal

46 The Joint Committee is co-chaired by the UK and EU. The UK's co-chair was initially the Rt Hon. Michael Gove MP. However, on 1 March 2021, Lord Frost replaced Mr Gove. The EU's co-chair is European Commission Vice-President Maroš Šefčovič.

47 We considered some of the previous Decisions of the Joint Committee in more detail in our Report of 24 March 2021.

48 Articles 167–169 of the Withdrawal Agreement.

obligations under the Agreement). The panel's ruling is binding on both sides. This system will also involve the Court of Justice of the EU (CJEU) where EU law issues are involved in any dispute.[49]

3.5 In practical terms, any arbitration panel will comprise four regular members and one chairperson. By means of a formal Joint Committee Decision in December 2020, the Government and the EU established the initial list of 25 potential members of any such arbitration panel: five potential chairpersons, and ten regular panel members proposed by the UK and the EU each.[50] If an arbitration panel is established in the future, the UK and EU each appoint two of the regular members of the panel from their pre-established list, while the chairperson is to be chosen subsequently by consensus by those four individuals from among the five candidates listed in the Joint Committee Decision.[51] The panel members must endeavour to make their rulings by consensus, but can do so by majority vote where necessary.

3.6 In September 2021, the European Commission published a proposal for an amendment to the previous Decision that settled the list of 25 individuals that can be called upon to form an arbitration panel under the Withdrawal Agreement. The amendment is necessary for the EU to replace one of its ten nominees, Ms Tamara Ćapeta, because she has been appointed an Advocate General to the EU Court of Justice and therefore no longer able to fulfil the independence requirements set out in the Agreement. The proposal would remove her name and introduce a replacement: Mr Ezio Perillo, a former judge at the EU's General Court.[52] The EU's Member States in the Council of Ministers endorsed Mr Perillo's placement on the list of arbitrators on 15 October, and a corresponding Joint Committee Decision to do so now awaits formal adoption by the UK and the EU. The Minister of State in the Cabinet Office (Lord Frost) submitted an Explanatory Memorandum on the matter on 12 October, stating there are "no substantial policy implications arising from the proposed Decision".

3.7 We agree that the proposed addition of this new arbitrator to the EU's list, in itself, is not of particular political or legal importance, particularly as it only represents a substitution of one individual for another. However, it is a reminder of the important role accorded to arbitrators, not only within the Withdrawal Agreement but also the Trade and Cooperation Agreement.

3.8 For example, in the case of the Withdrawal Agreement, the Government and the European Commission have been engaged in protracted talks about the implementation of the Northern Ireland Protocol in the Withdrawal Agreement, and the extent to which there should be—as the current wording of the Protocol requires—the imposition of

49 Article 174 WA.

50 The EU and the UK jointly agreed five persons to act as chairperson of an arbitration panel: Ms Corinna Wissels, Ms Angelika Helene Anna Nussberger, Mr Jan Klucka, Sir Daniel Bethlehem and Ms Gabrielle Kaufmann-Kohler. The UK's list of regular panel members comprises Sir Gerald Barling, Sir Christopher Bellamy, Mr Zachary Douglas, Sir Patrick Elias, Dame Elizabeth Gloster, Sir Peter Gross, Mr Toby Landau QC, Mr Dan Sarooshi QC, Ms Jemima Stratford QC and Sir Michael Wood. In the case of EU, it comprises Mr Hubert Legal, Ms Helena Jäderblom, Ms Ursula Kriebaum, Mr Jan Wouters, Mr Christoph Walter Hermann, Mr Javier Diez-Hochleitner, Ms Alice Guimaraes-Purokoski, Mr Barry Doherty, Ms Tamara Capeta—now to be replaced—and Mr Nico Schrijver.

51 If the members of the panel are unable to agree on the selection of the chairperson within the 15 days, the EU or the UK can request the Secretary-General of the Permanent Court of Arbitration "to select the chairperson by lot from among the persons jointly proposed by the Union and the United Kingdom to act as chairperson".

52 Mr. Perillo's name was drawn from the EU's reserve list of arbitrators, which was published as an annex to the original Decision.

border controls on goods shipped from Great Britain to Northern Ireland. Since July 2021 the Government has repeatedly suggested that it may unilaterally dis-apply certain—unspecified—elements of the Protocol using the 'safeguard measures' foreseen in its Article 16, if the EU does not agree to substantive changes to how the Protocol works put forward by the UK. In particular, Ministers are looking to reduce the extent to which Northern Ireland must apply certain EU rules relating to customs, VAT and State aid. The EU has, to date, resisted such changes, having instead proposed a number of technical measures that would change the operational impact of the Protocol for goods sent to Northern Ireland from the rest of the UK, but not its fundamental legal structure.

3.9 Should the Government have recourse to Article 16, and depending on the scope of its safeguard measures, one of the options potentially open to the EU would be to trigger the Withdrawal Agreement's dispute resolution process as described above (in a bid to secure a ruling by an arbitration tribunal that the UK had breached its obligations under the Protocol). The Commission previously alluded to the possibility of going down that route in March 2021 when the Government unilaterally extended certain grace periods that dis-apply EU law that is otherwise applicable in Northern Ireland under the Protocol, but it has not formally proceeded to the consultations that must be held before an arbitration panel can be established. As such, the dispute resolution process remains untested. An analysis of the background to the on-going controversy around the Protocol, and the potential outcome of any formal dispute this may give rise to, is beyond the scope of this Report chapter. However, *it is clear that if* a panel is established in the future, in those circumstances, the functioning of the dispute resolution system under the Withdrawal Agreement, including the role played by the members of the arbitration panel and their eventual ruling, is likely to become of significant political and legal interest.

3.10 We also note in this respect that, if the Government suspends all or part of the Northern Ireland Protocol under Article 16, the EU has suggested it may impose retaliatory measures on the UK under the separate Trade and Cooperation Agreement (for example by imposing tariffs on goods imported from Great Britain by suspending its obligation under the TCA to allow such imports tariff-free).[53] The exact legal route by which the EU could do so has not been specified, as multiple options are open to it under the TCA itself and under the Withdrawal Agreement.[54] If such retaliatory measures are taken using a legal basis under the TCA, they could be subject to that treaty's own dispute resolution processes.[55] Those, although similar, are legally distinct from those in the Withdrawal Agreement. More specifically, disputes under the TCA can, as a last resort, be referred to 'arbitration tribunals' that function in much the same way as 'arbitration panels' under the earlier Agreement. Should the EU seek to suspend its obligations vis-à-vis the UK under the TCA in response to Government action of the Northern Ireland Protocol, it may be open to the Government to challenge the EU's actions before a tribunal empanelled under the trade deal.

3.11 It is clear that for any arbitration tribunals under the TCA to function, for example if the Government wanted to challenge any future EU retaliatory measures, there must

53 Provided the applicable Rules of Origin are met.

54 On 12 November 2021, Politico reported that the EU is looking at the possibility of imposing retaliatory tariffs on the UK in the case of its invocation of Article 16 of the Northern Ireland Protocol using Article 16 itself (which provides for "proportionate rebalancing measures"), as well as Articles 521, 773 or 779 TCA; or following an initial arbitration panel against the UK for alleged breaches of the Withdrawal Agreement, which could allow for cross-sectoral retaliation.

55 The scope of the dispute resolution procedures under the TCA are complex and vary between policy areas.

be arbitrators formally eligible to serve on such bodies. Individuals nominated for membership of arbitration panels under the Withdrawal Agreement cannot automatically fulfil that role: rather, the UK and the EU must establish the list of eligible individuals for arbitration tribunals under the TCA separately. This is the responsibility of the UK/EU Partnership Council, the main governance body for the trade deal (and analogous to the Joint Committee under the Withdrawal Agreement).[56]

3.12 Article 752 of the TCA states that the "Partnership Council shall, no later than 180 days after the date of entry into force of this Agreement, establish a list of individuals […] willing and able to serve as members of an arbitration tribunal". However, that deadline expired on 30 June 2021 without a formal Decision establishing such a list. In fact, while the European Commission did open a call for applications for the EU's arbitrators under the TCA in December 2020, it has not yet made a formal proposal to the EU's Council of Ministers to nominate them within the Partnership Council (a procedural prerequisite for the EU to be able to formally agree to the establishment of the list of arbitrators). The Government has also invited expressions of interest for the UK list on three occasions this year, most recently in August 2021. In the absence of an agreed list, the TCA provides that "the arbitrators shall be selected by lot from the individuals who have been formally proposed" by the UK or the EU in accordance with Annex 48 of the Agreement. However, no such formal 'proposals' appear to have been made public either. To our knowledge the Government has not commented publicly on the timetable for the establishment of the list of approved arbitrators under the Trade and Cooperation Agreement, or the reasons for the original deadline in June 2021 having been missed.

Amendments to the provisions of the Withdrawal Agreement on social security coordination

3.13 As part of the free movement of people, the EU has put in place a system for the coordination of social security benefits for people who move between its Member States. This system determines, for example, which national government is responsible for the payment of benefits such as State pension or unemployment benefits to such individuals. It is set out primarily in Regulation 883/2004, known as the Social Security Coordination Regulation. That legislation also confers specific responsibilities on an "Administrative Commission for the Coordination of Social Security Systems" (ACCSSS), where each EU country is represented, to deal with "all administrative questions or questions of interpretation" and with "promoting further cooperation". This Commission can adopt highly technical decisions and recommendations that govern how Member States cooperate when dealing with benefit claims and exchange of information relating to individuals covered by the Regulation.

3.14 The UK was part of this arrangement while it was an EU Member State, applying the Regulation and the associated acts of the Administrative Commission. However, it automatically left these systems at the end of the post-Brexit transition period on 31 December 2020 (when free movement of people between the UK and the EU ceased to apply). However, under Part Two of the Withdrawal Agreement, which governs the legal status of people who moved between the UK and the EU before the end of 2020, the EU's rules on social security coordination continue to have legal force in the UK to some

56 See Article 752 TCA.

extent.[57] In particular, broadly speaking, EU nationals that worked or lived in the UK before the end of 2020 (and vice versa) can rely on them to access certain benefits, in cash or in kind. It means, for example, that UK pensioners already resident in Spain and France prior to Brexit remain able to access healthcare locally without needing to purchase private health insurance, and have their costs reimbursed by the British Government.[58] In addition, Article 31 of the Agreement requires the UK and the EU Administrative Commission for the Coordination of Social Security Systems to "take due account of the Decisions and Recommendations of the Administrative Commission" listed in an annex to the Agreement. The Government continues to send representatives to the Commission in an observational capacity.

3.15 The second proposal for a Decision of the Joint Committee put forward by the European Commission in September 2021 relates to the acts of the Administrative Commission of which the UK and the EU must take "due account" when implementing this aspect of the Withdrawal Agreement. In particular, an existing decision and recommendation of the Administrative Commission dating to 2017 were not listed in the Withdrawal Agreement "by oversight" prior to its ratification.[59] In addition, the Commission adopted four further decisions and one recommendation between the UK's formal departure from the EU on 31 January 2020 and the end of the post-Brexit transition in December that year.[60] The purpose of the proposed Joint Committee Decision is to add these acts to the Withdrawal Agreement, so that they must also be taken into account by the UK and the EU when dealing with social security claims under the treaty.[61] The Member States endorsed the Commission proposal in October 2021.

3.16 The acts of the ACCSSS that would be added to the Agreement are highly technical in nature, covering for example "determination of when an electronic message is considered legally delivered in the Electronic Exchange of Social Security Information (EESSI) system" and processing of data exchanged between Member States. In an Explanatory Memorandum submitted by the Minister for Europe and Americas (Wendy Morton MP) on 19 October 2021, she describes the changes as "technical adjustments to ensure

57 The EEA EFTA Separation Agreement and the Swiss Citizens' Rights Agreement extend the citizens' rights provisions of the Withdrawal Agreement to nationals of Norway, Switzerland, Iceland and Liechtenstein and UK nationals who have moved between the UK and these states before the end of the transition period.

58 People who move between the UK and the EU only after the end of the transition period broadly speaking enjoy similar rights on the basis of the Social Security Coordination provisions of the Trade and Cooperation Agreement, but on the basis of international rather than EU law.

59 These are Recommendation No A1 of 18 October 2017 concerning the issuance of the attestation referred to in Article 19(2) of Regulation (EC) No 987/2009, and Decision No E6 of 19 October 2017 concerning the determination of when an electronic message is considered legally delivered in the Electronic Exchange of Social Security Information (EESSI) system.

60 The five acts adopted by the Commission during the post-Brexit transition period are Decision No H9 regarding the postponement of deadlines mentioned in Articles 67 and 70 of Regulation (EC) No 987/2009 and in Decision No S9 due to the Covid-19 Pandemic; Decision No H10 concerning the methods of operation and the composition of the Technical Commission for Data Processing of the Administrative Commission for the Coordination of Social Security Systems; Decision No H11 of the Administrative Commission for the Coordination of Social Security Systems regarding the postponement of deadlines mentioned in Articles 67 and 70 of Regulation (EC) No 987/2009 as well as in Decision No S9 due to the Covid-19 Pandemic; Recommendation No H2 concerning the inclusion of authentication features to Portable Documents issued by the institution of a Member State and showing the position of a person for the purpose of the application of Regulations (EC) No 883/2004 and (EC) No 987/2009; and Decision No S11 concerning refund procedures for the implementation of Articles 35 and 41 of Regulation (EC) No 883/2004. The proposal would also remove two decisions which have been replaced by the new decisions.

61 The legal basis for the draft Decision is Article 164 of the Withdrawal Agreement, which empowers the Joint Committee to adopt decisions amending that Agreement where "necessary to correct errors, to address omissions or other deficiencies".

the proper functioning of the Social Security Coordination rules" and adds that "the Government agrees with the proposal". We therefore do not propose to explore the substance of the Administrative Commission's Recommendations and Decisions that would be added to the Withdrawal Agreement further. In the broader context, we would note that discussions are on-going at EU-level about substantive changes to the Social Security Coordination Regulation which—as we explored in our Report of 3 April 2019—may also have implications for the UK. We will return to that matter as and when there are any relevant developments in Brussels.[62]

Conclusions and action

3.17 The substance itself of the two proposals for Decisions of the UK/EU Joint Committee put forward by the European Commission in September, as described above, is not controversial, and we are content to now complete our scrutiny of them. Given that the Government has indicated neither proposal raises any particular policy concerns, we ask the Minister to inform us when the Joint Committee has formally adopted them with the UK's consent.

3.18 However, even if the draft Decisions themselves raise no matters of concern, the role of arbitrators in both the Withdrawal Agreement and Trade and Cooperation Agreements is clearly relevant in the wider political context of the UK-EU relationship. Given the Government's repeated suggestion that it will have recourse to the safeguard measures provided for in Article 16 of the Northern Ireland Protocol to dis-apply certain elements of that Protocol, the EU could seek the establishment of an independent panel if subsequent consultations with the UK within the Joint Committee do not lead to a mutually satisfactory resolution. The role of these arbitrators could become highly politically salient in such a scenario, given they may have a decisive role in defining the UK and EU's legal obligations under that Protocol and the scope of Article 16.

3.19 In addition, the draft Decision to amend the list of the EU's candidates for arbitration panels under the Withdrawal Agreement also serves to emphasise the lack of progress in appointing potential arbitrators under the Trade and Cooperation Agreement. Should the EU impose retaliatory measures on the UK under that Agreement in response to any Government action under Article 16 of the Northern Ireland Protocol, it may be in the UK's interest that an arbitrational tribunal can be established without delay if the Government wishes to challenge the EU's actions. However, as things stand, it does not appear there any eligible arbitrators that could be appointed to such tribunals because the Partnership Council has not formally established a list of such individuals, and nor have the UK or EU made formal proposals for their respective list of proposed arbitrators. Given the potential urgency with which a tribunal may be considered necessary if the discussions around the Northern Ireland Protocol escalate to a formal dispute under the TCA, we have therefore written to Lord Frost to seek further information on the state of play in the appointment of the arbitrators foreseen. A copy of that letter is annexed to this chapter.

62 Sixty-second Report HC 301–lx (2017–19), chapter 11 (3 April 2019).

Letter from the Chair to the Rt Hon. Lord Frost CMG

Thank you for your Explanatory Memorandum of 12 October on the EU's proposal setting out their position on a future Decision of the UK/EU Joint Committee to update the list of potential members of any arbitration panel established under the Withdrawal Agreement to adjudicate on disputes relating to that treaty's interpretation.

While we agree with your assessment that the appointment of a new individual to the EU's list of potential arbitrators under the Withdrawal Agreement is not in itself significant, it has served to emphasise the fact that the UK/EU Partnership Council under the Trade and Cooperation Agreement has yet to establish a similar list of eligible arbitrators for tribunals that may be established to rule on disputes under that treaty. We note that the deadline set in Article 752 of the TCA for the establishment of such a list expired on 30 June, without the UK and EU having jointly agreed on one in the Partnership Council.

Given the uncertainties that lie ahead in the broader UK-EU relationship (in particular, the possibility that the EU may take retaliatory measures under the TCA in response to any UK invocation of safeguard measures under Article 16 of the Northern Ireland Protocol), it may be in the UK's interest in the near or medium-term that an arbitration tribunal can be established under the TCA to adjudicate on any counter-actions taken by the EU that disrupt trade with Great Britain. That would, by definition, require arbitrators to be available under the terms set out in the Agreement. The TCA envisages that, in the absence of an agreed list, arbitrators are to be "selected by lot from the individuals who have been formally proposed" by the UK or the EU in accordance with Annex 48 of the Agreement. However, no such formal 'proposals' appear to have been made either by the Government or the European Commission, at least publicly.

In light of this, we would be grateful if you could write to us before the Christmas recess confirming the Government's expectations with respect to the timetable for the establishment of the list of eligible arbitrators under Article 752 of the TCA; the reasons for the delays in doing so to date; and what the process is for 'formally proposing' eligible individuals by the EU and UK respectively, so that a tribunal could be established if necessary before any list is established by the Partnership Council.

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

Department for Environment, Food and Rural Affairs

(41922) — C(21) 6673	Commission Delegated Regulation (EU) …/... of 17.9.2021 supplementing Regulation (EU) 2017/625 of the European Parliament and of the Council by establishing the European Union reference laboratory for Rift Valley fever.
(41934) 12143/21 + ADD 1 C(21) 6723	Commission Delegated Regulation (EU) …/... of 21.9.2021 amending Delegated Regulation (EU) 2019/2122 as regards certain categories of goods posing low risk, goods that form part of passengers' personal luggage and pet animals exempted from official controls at border control posts and amending that Delegated Regulation and Delegated Regulation (EU) 2019/2074 as regards references to certain repealed legislation.

Department of Health and Social Care

(41932) 12884/21 COM(21) 627	Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2017/746 as regards transitional provisions for certain in vitro diagnostic medical devices and deferred application of requirements for in-house devices.

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: Standardised universal charger for smartphones and mobile devices [Proposed Directive][SNC]

Digital, Culture, Media and Sport Committee: Standardised universal charger for smartphones and mobile devices [Proposed Directive][SNC]

Environmental Audit Committee: Carbon Border Adjustment Mechanism [Proposed Regulation][SNC]

International Trade Committee: Carbon Border Adjustment Mechanism [Proposed Regulation][SNC]

Northern Ireland Affairs Committee: Carbon Border Adjustment Mechanism [Proposed Regulation]; Standardised universal charger for smartphones and mobile devices [Proposed Directive][SNC]

Scottish Affairs Committee: Carbon Border Adjustment Mechanism [Proposed Regulation][SNC]

Treasury Committee: Carbon Border Adjustment Mechanism [Proposed Regulation] [SNC]

Welsh Affairs Committee: Carbon Border Adjustment Mechanism [Proposed Regulation] [SNC]

Formal Minutes

Wednesday 1 December 2021

Members present:

Sir William Cash, in the Chair

Jon Cruddas

Richard Drax

Margaret Ferrier

Mr Marcus Fysh

Mr David Jones

Marco Longhi

Greg Smith

Document scrutiny

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 4 agreed to.

Resolved, That the Report be the Thirteenth Report of the Committee to the House.

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

Adjournment

Adjourned till Wednesday 8 December 2021 at 1.45 pm

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*)

Dame Margaret Hodge MP (*Labour, Barking*)

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*)

Greg Smith MP (*Conservative, Buckingham*)