HOUSE OF COMMONS LIBRARY

BRIEFING PAPER

Number 8025, 29 June 2017

The European Union (Approvals) Bill 2017-19

By Vaughne Miller, John Curtis and Antony Seely

Contents:

Contents

Contributing authors Fraser McIntosh

Summary

The European Union (Approvals) Bill (HC Bill 2) has two clauses. The first is on the approval of draft decisions under Article 352 of the Treaty on the Functioning of the European Union (TFEU), and the second sets out the extent, commencement and short title of the Bill.

The Bill deals with the parliamentary approval of:

- Draft decisions on the participation of the Republic of Albania and the Republic of Serbia as observers in the work of the European Union Agency for Fundamental Rights.

- Draft decisions on the signing and conclusion of an agreement between the European Union and the Government of Canada regarding the application of their competition laws

The purpose of the Bill is to fulfil a requirement in section 8 of the European Union Act 2011 which requires that EU legislative proposals made on the basis of the catch-all Article 352 TFEU are approved by an Act of Parliament before the UK Government can support them in the Council of the European Union (composed of government ministers from the EU Member States).

The Bill, if passed, will be the European Union (Approvals) Act 2017, and it will authorise the Government to agree to the adoption of the proposals in the Council.

1. Background

The Bill deals with the parliamentary approval of draft Council of the European Union decisions:

- Draft decisions on the participation of the Republic of Albania and the Republic of Serbia as observers in the work of the European Union Agency for Fundamental Rights (FRA). Albania has had EU candidate status since June 2014 and Serbia since March 2012, and the legislation which set up the Fundamental Rights Agency provides for candidate states to become observers.

- Draft decisions on the signing and conclusion of an agreement between the European Union and the Government of Canada regarding the application of their competition laws. The draft decisions will replace the existing EU-Canada competition enforcement cooperation arrangement with a new agreement which includes the exchange of information gathered by their respective competition authorities during antitrust and merger investigations.

The purpose of the Bill is to fulfil a requirement in section 8 of the European Union Act 2011 which requires that EU legislative proposals made fully or partially on the basis of Article 352 of the Treaty on the Functioning of the European Union (TFEU) are approved by an Act of Parliament before the UK Government can support them in the Council. The Council needs the unanimous approval of all 28 Member States and the consent of the European Parliament (EP) to adopt a proposal based on Article 352 TFEU.

The Bill was introduced to the House of Commons and given its First Reading on 22 June 2017. It will have a Second Reading on 4 July 2017.

The Act will extend to the whole of the UK.

Although the UK intends to leave the EU, it remains a Member State and subject to EU rights and obligations until Brexit takes effect. So Government ministers will continue to participate in Council business until then unless it is about the Brexit, and the UK will continue to adhere to and adopt EU law and Treaty obligations.

2. The EU's Agency for Fundamental Rights

The first draft decisions that are the subject of this Bill concern the participation of the Republic of Albania and the Republic of Serbia as observers in the work of the European Union Agency for Fundamental Rights (FRA).

This section considers the origin and role of the Agency, Albania's and Serbia's relations with the EU, and the possible effects of Brexit on future EU enlargement.

2.1 What the Agency does

The Regulation establishing the EU's Agency for Fundamental Rights was approved on 15 February 2007. It replaced the European Monitoring Centre on Racism and Xenophobia and began work on 1 March 2007. It is based in Vienna, Austria, and is headed by Michael O'Flaherty.

The Europa website sets out the Agency's main roles as follows:

> The Agency's goal is to provide relevant institutions and authorities of the Community and its Member States with assistance and expertise on fundamental rights when implementing community law, and to support them in taking measures and formulating appropriate courses of action.
>
> The Agency has the following main tasks:
>
> • Collect, analyse and disseminate objective, reliable and comparable information related to the situation of fundamental rights in the EU;
>
> • Develop comparability and reliability of data through new methods and standards;
>
> • Carry out and / or promote research and studies in the fundamental rights field;
>
> • Formulate and publish conclusions and opinions on specific topics, on its own initiative or at the request of the European Parliament, the Council or the Commission;
>
> • Promote dialogue with civil society in order to raise public awareness of fundamental rights.
>
> The Agency is NOT, however, empowered to examine individual complaints or to exercise regulatory decision-making powers.
>
> The Agency's thematic areas of work have been determined through a five-year Multiannual Framework (Decision (2008/203/EC), adopted by the Council after consultation with the European Parliament. The fight against racism, xenophobia and related intolerance remains included amongst the main priority areas of FRA.
>
> The Agency is working closely with other institutions and bodies, operating at both the national and European level, and is developing a fruitful cooperation with the Council of Europe and with civil society, for instance through the creation of a Fundamental Rights Platform.

The bodies of the Agency are:

- A Director responsible for the day-to-day management of the Agency, the appointment of its staff, and the preparation and implementation of the annual work programme;
- A Management Board responsible for ensuring that the Agency functions effectively and efficiently, as well as for establishing the draft budget and work programmes, and the monitoring of their subsequent implementation;
- An Executive Board providing assistance to the Management Board;
- A Scientific Committee responsible for guaranteeing the scientific quality of the Agency's work.

FRA covers the EU and its 28 Member States. In addition, candidate countries can participate in the work of the Agency as observers (Turkey, the FYROM – Former Yugoslav Republic of Macedonia), following a decision by the relevant Association Council determining the particular nature, extent and manner of their participation in FRA's work. The Council may also invite countries that have concluded a Stabilisation and Association Agreement with the EU to participate in FRA.

The Agency's latest Annual Activity Report (2016), gives information on the kind of work it has been involved in recently.

Under the 2007 Regulation which established the Agency, EU candidate countries may participate in it as observers.

2.2 Albania's status in relation to the EU

Albania was identified as a potential candidate for EU membership in June 2003. Albania submitted its formal application for EU membership in 2009. The EU Commission required Albania to comply further with the membership criteria, setting out 12 key priorities in its initial Opinion.

In October 2012, the Commission recommended that Albania be granted EU candidate status, subject to further progress in the areas of judicial and public administration reform, as well as revision of parliamentary rules of procedure.

Albania was awarded official candidate status by the EU in June 2014, having satisfied the Commission that it had made sufficient progress in these areas.

Since then, the Commission has issued annual Progress Reports in 2015 and 2016 on Albania's candidature. The European Parliament has continued to evaluate Albanian progress through its Committee on Foreign Affairs (AFET) and by way of its Delegation to the EU-Albania Stabilisation and Association Parliamentary Committee (D-AL).

EU accession negotiations have yet to commence, and the Commission has stated that further progress will depend on achievements in a few key areas such as the fight against corruption and organised crime,

reform of the judicial system and constructive and sustainable political dialogue between government and opposition.

An accession treaty will have to be ratified by all EU Member States.

2.3 Serbia's status in relation to the EU

Serbia was identified as a potential candidate for EU membership in 2003. In 2008 the EU and Serbia adopted a European partnership for Serbia, which set out priorities for the country's membership application. Serbia formally applied for membership in 2009.

Serbia was granted EU candidate status in March 2012. In September 2013 a Stabilisation and Association Agreement between the EU and Serbia entered into force.[1]

The European Council agreed in June 2013 to open accession negotiations with Serbia, and in December 2013 the Council adopted the negotiating framework. The Council agreed to hold the first Intergovernmental Conference with Serbia in January 2014, the formal start of Serbia's accession negotiations.

The EU has linked progress in the accession process for both Serbia and Kosovo to normalising relations between the two countries. An EU-brokered agreement between the two countries was signed in December 2015 .This process is complicated by the fact that currently five EU Member States do not formally recognise Kosovo's statehood.

Negotiations on the accession process are organised around 35 Chapters that correspond to the different areas of the acquis[2].Chapters include areas such as financial services, public procurement, and agriculture and rural development. Candidate countries are required to adapt their administrative and institutional infrastructures and to bring their national legislation into line with EU legislation in these areas. Ten negotiating Chapters have been opened between Serbia and the EU, and two, covering science and research and education and culture, have been provisionally closed.

2.4 The impact of Brexit

To date, the UK Government has been supportive of EU enlargement from Western Balkan countries subject to "firm but fair conditionality". It is not yet clear what impact, if any, Brexit will have on this stance. However, it is unlikely that the UK Government will be formally called upon to support the accession of any candidate countries, as Commission President Jean-Claude Juncker has said there will be no further EU enlargement before the end of his term in office on 1

1 The Stabilisation and Association Process (SAP) is the EU's policy towards the Western Balkans, established with the aim of eventual EU membership. It aims to build a partnership between the countries of the Western Balkans and the EU to stabilise the region and establish a free-trade area. All candidate countries from the region will be subject to bi-lateral Stabilisation and Association agreements.

2 The Acquis is the body of common rights and obligations that is binding on all the EU Member States.

November 2019 (seven months after the UK is scheduled to officially withdraw from the EU on 30 March 2019).

The accession process is a lengthy one, typically taking several years once the formal negotiations have opened. It is possible, should the UK and EU agree in the UK's exit negotiations a long transition period of several years, that new members could join the EU in this time. Such a long period is unlikely, however, as the European Parliament's resolution on Brexit called for the transition period to be no longer than three years, and the Commission's negotiating guidelines for Brexit talks state that any transition period must be "limited in time".

If the UK were to stay in the European Economic Area (EEA) during this period, it would be required to respect the freedom of movement rights of the citizens of new EU countries. However, restrictions on the free movement of workers, often referred to as 'transitional arrangements', can be applied to the citizens of new Member States by other EU States and EEA members for a transitional period of up to 7 years after they join the EU.

These transitional arrangements only apply to the movement of workers and cannot curb the general freedom to travel.

Currently, only Croatian citizens are eligible to have their movement curtailed, Croatia having joined the EU on 1 July 2013.

3. The participation of Albania and Serbia as observers in the work of the Fundamental Rights Agency

The draft decisions were deposited in Parliament on 9 March 2016. They are based on Articles 218(9) and 352 TFEU.

3.1 What the draft Council decisions do

Under the draft Council decision concerning Albania (COM/2016/0118) and the draft Council decision on Serbia (COM/2016/0119), that are subjects of the present Bill, Albania and Serbia would each appoint an observer and alternate observer to participate in the work of the Agency's Management Board on an equal footing with the members and alternate members appointed by EU Member States, but without a right to vote.

Albania and Serbia would also participate in initiatives undertaken by the Agency and make a financial contribution to it.

3.2 Government views on the proposals

There are two separate Government Explanatory Memorandums (EMs) – one on Albania and one on Serbia.

Albania

In an Explanatory Memorandum (EM) on 22 March 2016, Dominic Raab (Ministry of Justice) said the Government:

- is committed to engaging constructively with the EU and supports the enlargement of the EU to the Western Balkans, subject to "firm but fair conditionality";
- supports the participation of both Albania and Serbia in the activities of the FRA as this will assist them in adapting their legislation to EU legislation by "monitoring (and reporting on) fundamental rights issues arising from this process"; and
- therefore considers that participation in the FRA will assist both countries' accession to the EU.

The Minister confirmed that the proposals would only be taken forward "once all Member States have concluded their own constitutional requirements necessary for decisions of this nature". He acknowledged that as none of the exemptions in section 8 of the 2011 Act applied, an Act of Parliament would be required before the UK could vote in favour of the proposed Decisions in Council.

The EM outlined the Commission's estimate of the contributions Albania would make to the EU Budget in order to participate in the

Agency: €160,000 (£125,728) for the first year, €163,000 (£128,085) for the second year, and €166,000 (£130, 443) for the third year.

Serbia

The Government deposited a similar EM with regard to Serbia on 22 March 2016. This gave the Commission's estimate for Serbia's contribution to the Agency, which will be different from that of Albania: €183,000 (£143,801) in year 1, €186,000 (£146,159) in year 2, and €189,000 (£148,516) in year 3.

3.3 Parliamentary scrutiny

The European Scrutiny Committee reported on both proposals on 13 April 2016. The Committee judged them to be legally and politically important, but cleared them from scrutiny, asking the Government to inform it about the legislation needed to approve them and when the proposals are eventually adopted.

The House of Lords EU Committee cleared them on 12 April 2016.

4. EU-Canada cooperation in competition law enforcement

This section looks at the other subject of this Bill: an agreement between the EU and Canada regarding the application of their competition laws. It considers UK, EU and Canadian competition law, the proposed revisions and parliamentary scrutiny of the proposals.

4.1 UK competition law

Competition law seeks to curb practices that would undermine or restrict competition to the detriment of consumers: the abuse of a dominant market position by a firm, anti-competitive agreements between firms, and, mergers or takeovers which, if allowed, would result in a substantial lessening of competition.

In the UK the responsibility for enforcing competition law lies with the independent competition authority: the Competition & Markets Authority (CMA). The legislative framework for the UK regime is established by the *Competition Act 1998* and the *Enterprise Act 2002*, as amended by the *Enterprise and Regulatory Reform Act 2013*.[3]

4.2 EU competition law

The prohibition in UK competition law of the abuse of a dominant position and anti-competitive agreements is underpinned by equivalent provisions in EU law (specifically, Articles 101 & 102 of the Treaty). Similarly the national competition authorities of the Member States operate within the context of the EU-wide regime (established under EC Regulation 1/2003 for antitrust and EC Regulation 139/2004 for mergers), so where markets or mergers have an EC-wide dimension, the lead competition authority is the European Commission. Guidance on the scope of the Commission's responsibilities, and its ongoing work, is on its site.

As part of its work the Commission has agreed a series of bilateral agreements – 'dedicated agreements' – with competition authorities in countries outside the EU, such as the USA and Japan.[4]

4.3 EU-Canada agreement on competition law

In 1999 the Commission concluded an agreement with the Canadian authorities.[5] The current agreement provides for:

---

3 This statutory framework gives the Government very limited powers to intervene in either the assessment of mergers or the investigation of markets. For details see, *The UK competition regime*, Commons Briefing Paper CBP4814, 1 September 2016.

4 In other cases, competition provisions are included as part of wider general agreements such as free Trade Agreements, Partnership and Cooperation Agreements, Association Agreements, etc. A full list of these agreements is on the Commission's site.

5 *EU-Canada Agreement on the application of their competition laws* (OJ L 175, 10 July 1999).

- reciprocal notification of cases under investigation by either party, where they may affect the important interests of the other party;
- coordination of enforcement activities and the provision of assistance where both parties have an interest;
- the ability for one party to request that the other takes enforcement action if there is reason to believe that anti-competitive activities carried out in its territory are adversely affecting the other party's important interests; and
- the exchange of information (subject to confidentiality provisions and conditions of use), including on: current enforcement activities and priorities; economic sectors of common interest; policy changes which either party is considering; and other matters of mutual interest relating to the application of competition law.[6]

4.4 EU proposal to revise the agreement

In June 2016 the Commission published proposals for a revised agreement,[7] to allow the Commission and the Canadian Competition Bureau to exchange evidence which both sides had obtained in their investigations. The legal bases are Articles 103 and 352 TFEU. They are subjects of the current Bill.

In 2014 the Council had approved a comparable agreement between the EU and Switzerland which had provisions on the exchange of evidence,[8] and the Commission recommended that the agreement with Canada should follow suit.[9]

The new agreement would allow the exchange of this category of information, subject to certain legal requirements, including:

- Information provided by an individual or a company can be transmitted with its express written consent. Personal data may only be transferred if both of the competition authorities are investigating the same related conduct or transaction. Without such consent, information can only be transferred by one authority where a written request is made by the other authority, and where: the authority of which the request is made already has the information in its possession; and both authorities are investigating the same or related conduct or transaction to which the information pertains;
- Information may not be shared pursuant to certain procedural rights and privileges, including the right against self-incrimination and legal professional privilege;
- Information provided by a company under the cartel immunity or leniency programme (that offer companies involved in a cartel immunity from, or a reduction of, fines) or the settlement procedure (where a fine can be reduced if a company admits to its participation in a cartel) in the

6 "EU/Canada co-operation in competition law enforcement", European Scrutiny Committee, *Thirteenth report of Session*, 18 October 2016, HC 71-xi of 2016-17, para 2.8
7 COM(2016) 421 final and COM(2016) 423 final, 27 June 2016.
8 OJ L 347, 3 December 2014. See also, European Commission press notice, *European Union and Switzerland sign Cooperation Agreement in Competition Matters*, 17 May 2013.
9 COM(2016) 421 final & COM(2016) 423 final, 27 June 2016

> EU cannot be discussed or transmitted without the express written consent of the individual or company that provided the information;

- Confidentiality provisions;
- Information cannot be used to impose a custodial sanction on an individual; and
- Safeguards for the transfer of personal data.[10]

The Commission has stated that the absence of this facility has proved a "major impediment to effective co-operation",[11] and the Government has agreed that an amended agreement should "increase the ability of both organisations to conclude competition enforcements investigations efficiently." In its EM on the Commission's proposal, the Government has underlined that the new agreement will have no impact on UK law, and no financial implications.[12]

4.5 Parliamentary scrutiny and Brexit considerations

The European Scrutiny Committee considered the proposal in October 2016, and asked the Minister whether the UK would participate in this agreement following Brexit:

> We thank the Minister for his Explanatory Memorandum, which notes that the UK competition authority—the CMA—would no longer benefit from the proposed information exchange arrangements between the Commission and the Canadian Competition Bureau following the UK's formal withdrawal from the EU.
>
> This presumes that the UK Government will not seek to include competition enforcement cooperation between the UK and EU in any post-Brexit EU-UK deal and/or seek to participate in this Agreement (and other such competition enforcement agreements between the EU and third parties) post Brexit.
>
> We ask the Minister to confirm in due course whether the Government will seek to participate in this Agreement after the UK withdraws from the EU and, if so, how it may be possible to secure its continuing application.[13]

Margot James, then Minister for Small Business, wrote to the Committee later that month, stating it was "too early to say what exact form international cooperation will take":

> International cooperation is important for competition enforcement and the Government will ensure that the UK is in the strongest possible position to cooperate on competition matters with our international partners in Europe, Canada and elsewhere following the withdrawal of the UK from the EU.
>
> There are a number of options for securing the means for international cooperation. The UK could seek agreement to

---

10 European Scrutiny Committee, *Thirteenth report of Session*, 18 October 2016, HC 71-xi of 2016-17, para 2.9
11 COM(2016) 421 final (Explanatory Memorandum, p1)
12 Department for Business, Innovation and Skills, *Explanatory memorandum 3916 & 3917*, 12 August 2016 paras 29,22, 35
13 European Scrutiny Committee, *Thirteenth report of Session*, 18 October 2016, HC 71-xi of 2016-17, para 2.3-5

> extend current arrangements for cooperation for a period following withdrawal from the EU or it could seek new bespoke cooperation arrangements. The UK and Canada, for example, both have a criminal cartel offence. As no criminal cartel offence exists at EU-level, the Agreement between the EU and Canada does not allow information shared under it to be used to prosecute a criminal offence. It may be possible for the UK and Canada to establish closer cooperation in relation to the criminal cartel offence through a new bilateral agreement.
>
> As the form of any cooperation agreement will depend on our negotiation with the EU and negotiations with other countries such as Canada it is too early to say what exact form international cooperation will take.[14]

In turn the Committee thanked the Minister for this information, and cleared the proposal.[15]

The Explanatory Notes on the Bill point to implications for UK companies operating in the EU after Brexit:

> Following the UK's exit from the European Union, UK companies operating in the EU will still be subject to the jurisdiction of the European Commission in antitrust investigations and, where the thresholds are met, in merger investigations in the same way as for other non-EU companies operating in the EU. Information relating to UK companies based in the EU would therefore still be transferable under the new Agreement.

---

14 Letter from Margot James MP (Minister of Small Business) to Sir William Cash MP, Chair of European Scrutiny Committee, 24 October 2016

15 "EU/Canada co-operation in competition law enforcement", European Scrutiny Committee, *Twenty-fourth report of Session*, 20 December 2016, HC 71-xxii of 2016-17, para 5.5. See Explanatory Notes on the Bill for a full scrutiny history of the proposal.

5. The Requirements of the European Union Act 2011

5.1 Article 352 TFEU

Article 352 of the Treaty on the Functioning of the European Union[16] is as follows:

> If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.
>
> Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

This Article allows the EU to act where there is no specific applicable Treaty base, as long as this does not entail harmonisation or affect the Common Foreign and Security Policy. This Article, sometimes referred to as the "enabling clause", the "flexibility clause" and formerly "la petite revision", has been controversial in the past. It was the subject of a Commons European Scrutiny Committee report, Article 308 of the EC Treaty, 13 July 2007.

Draft proposals made under Article 352 TFEU require the unanimous approval of the 28 EU Member States and the consent of the European Parliament. The EP has no power of co-decision under this Article and cannot propose amendments to the draft Decision, but the Council cannot adopt it without the EP's consent.

5.2 Section 8 of the 2011 Act

In accordance with Section 8 of the *European Union Act 2011*, a Minister may only vote in favour of an Article 352 TFEU decision in the Council (composed of government ministers from the Member States) if the draft decision has been approved by an Act of Parliament. This was intended to give Parliament the power to veto any extension of EU competence ("competence creep") into areas not covered by the EU Treaties. But one of its consequences has been that an Act of Parliament is now needed for some fairly unimportant decisions for which there is no Treaty base, as well as for more significant ones.

The Section 8 requirement does not apply where urgent approval is required (section 8(4)) or where the draft decision relates to an exempt purpose (section 8(5)), as defined in section 8(6). Neither of these Sections in the 2011 Act applies to these proposals, so an Act of Parliament is needed before the UK Government may support their adoption in the Council.

---

16 Formerly Article 308 TEC.

Article 352 TFEU may be the basis for a proposal of considerable significance, with cost and sovereignty implications, or it may be used to approve largely unimportant or non-contentious proposals. In debates on previous such bills some MPs have questioned whether it is a good use of parliamentary time; others believe it offers a very good opportunity to scrutinise what is being done in the EU.[17]

Germany, like the UK, requires an Act of Parliament to adopt proposals made under Article 352 TFEU. Under Section 8 of the Responsibility for Integration Act, the German representative in the Council may approve a decision on the adoption of Article 352 measures or abstain from voting on such a decision only after a law to that effect as defined in Article 23(1) of the Basic Law has entered into force. In the absence of such a law, the German representative in the Council must reject the proposal for a decision.[18]

17 For example, the last time an EU (Approvals) Bill was debated in the Lords, in the short Second Reading debate on 6 July 2015, Baroness Ludford said "This almost makes a mockery of EU affairs and of the EU Act 2011". HL Deb 6 July 2015, c13.

18 *Bundestag* information, IPEX website.

BRIEFING PAPER
Number 8025
29 June 2017

About the Library

The House of Commons Library research service provides MPs and their staff with the impartial briefing and evidence base they need to do their work in scrutinising Government, proposing legislation, and supporting constituents.

As well as providing MPs with a confidential service we publish open briefing papers, which are available on the Parliament website.

Every effort is made to ensure that the information contained in these publicly available research briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

If you have any comments on our briefings please email papers@parliament.uk. Authors are available to discuss the content of this briefing only with Members and their staff.

If you have any general questions about the work of the House of Commons you can email hcenquiries@parliament.uk.

Disclaimer