House of Commons

European Scrutiny Committee

Thirty-first Report of 2016–17

Documents considered by the Committee on 8 February 2017 including the following recommendations for debate:

Financial management: external audit

Report, together with formal minutes

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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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Meeting Summary

The Committee looks at the significance of EU proposals and decides whether to clear the document from scrutiny or withhold clearance and ask questions of the Government. The Committee also has the power to recommend documents for debate.

Brexit related issues

The Committee is now looking at documents in the light of the UK decision to withdraw from the EU. Issues are explored in greater detail in report chapters and, where appropriate, in the summaries below, but the Committee notes that in the current week the following issues and questions have arisen in documents or in correspondence with Minsters:

Portability of online content

The Government provides a detailed account of the implications of Brexit for the EU's proposal to mandate cross-border portability of online content. Key points include that:

- the Regulation will come into force while the UK remains an EU Member State, during which time consumers will benefit from portable content services;
- the Regulation will continue to have implications for the offerings provided by British content creators and service providers post-Brexit;
- the cross-border nature of the issue means that, when the UK leaves the EU, it will not be possible to retain portable content arrangements solely through domestic legislation; and
- some businesses could continue to offer portable content after the UK leaves the EU, although this will involve navigating certain difficulties inherent in cross-border copyright licensing which have, to date, largely prevented service providers from doing so.

Digital Single Market: Wholesale roaming charges

The Committee re-iterates its request for responses to various as yet unanswered questions about the implications of Brexit for UK-EU roaming services, including:

- the Minister's view of Commissioner Oettinger's assessment that WTO rules mean that continued UK-EU surcharge-free roaming arrangements could only be concluded in the context of a comprehensive Free Trade Agreement;
- whether the Minister is persuaded that the UK will not be able to participate in surcharge-free roaming arrangements post-Brexit; and
- an assessment of the implications of non-participation in the EU-wide abolition of roaming surcharges for different groups of UK stakeholders.

Coordination of Social Security

Under EU law, UK citizens resident in the EU can in certain circumstances continue to claim UK benefits. This is the case for many of the 190,000 UK pensioners who live in southern Europe: they are eligible for the UK State Pension and can have the costs of their healthcare reimbursed by the UK Government. How will the Government support those British nationals resident in the EU who are currently entitled to receive UK social security, and those EU national resident here who currently benefit from Regulation 883/2004.

Proposed Regulation on Data Protection and the EU Institutions

The Committee questions whether protections for UK citizens when their data is handled by EU institutions could be even more important after Brexit if, as third country nationals, they have to submit more data in order to live, work or provide services in the EU.

Proposed Regulation on privacy and e-communications (ePrivacy)

The Committee asks about the Brexit implications of reform of EU law on protecting sensitive information in e-communications and metadata.

Security of gas supply

The Committee asks about the impact on UK gas price and gas security of failing to reach an agreement on energy cooperation with the EU post-Brexit and the possible models of cooperating with the EU on gas supply security post-Brexit, including membership of the Energy Community.

Summary

Resumption of transfers of asylum seekers to Greece under the Dublin rules

Transfers of asylum seekers back to Greece were suspended in 2011 following judgments by the Strasbourg Human Rights Court and the Luxembourg Court of Justice that there were systemic deficiencies in Greece's asylum system. This is the fourth in a series of non-binding Recommendations in which the Commission sets out the steps to be taken by Greece to enable Member States to send back asylum seekers who first entered the EU through Greece (so-called "Dublin transfers"). The decision whether or not to reinstate Dublin transfers to Greece rests with each Member State, subject to oversight by both Courts.

The Commission recommends a gradual resumption of Dublin transfers from mid-March, based on individual assurances given by Greece concerning the treatment of each asylum applicant. Given the still "precarious" treatment of unaccompanied minors, the Commission says that vulnerable asylum applicants (including unaccompanied minors) should not be transferred to Greece for the time being. The Government supports the measures set out in the Commission Recommendation but is unwilling to speculate on "whether and to what extent transfers will be possible in practice" since this will depend on action yet to be taken by the Greek authorities. The Committee welcomes the

Government's caution, urging the Government to consult international organisations and NGOs operating on the ground in Greece before reinstating Dublin transfers from the UK to Greece.

Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee and the Joint Committee on Human Rights.

Criminal law measures to counter money laundering

The proposed Directive would establish minimum rules on the definition of money laundering offences and on sanctions and is intended to make it easier to carry out cross-border investigations and prosecutions. It largely replicates international standards which already apply to the UK. It is subject to the UK's justice and home affairs opt-in. The Government "strongly supports international cooperation to tackle money laundering" and considers the proposal to be "broadly in line with existing UK legislation and practice on money laundering" but identifies two provisions (on aggravating circumstances and on corporate liability) which might necessitate changes to UK law if the UK were to opt in. The previous Coalition Government made clear that it was "not for Europe to impose minimum standards on our police and criminal justice system". The Government is asked whether it agrees or whether different considerations apply in this case. It is also asked to elaborate on its concerns in relation to the provisions on aggravating circumstances and on corporate liability.

Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee.

Establishing a European Travel Information and Authorisation System

This proposal would establish a European Travel Information and Authorisation System (ETIAS) which is expected to be operational from 2020. The immigration status of UK nationals wishing to travel to the Schengen area post-Brexit is one of the issues to be resolved during Article 50 negotiations. In answer to previous Committee questions, the Government sets out the main differences between the ETIAS model and the current Schengen visa regime, but provides no details of the outcome the Government intends to seek in Article 50 negotiations. Nor does the Government answer the Committee's questions on third country access to ETIAS data, saying only that "how the UK shares data with the EU from the point of exit will be an issue for discussions during the negotiations". The Committee invites the Government to share details of the various options the Government is considering "as to how EU migration might work once we have left the EU" and to explain how they will influence its negotiating position on the proposed Regulation; explain how the Government intends to influence negotiations on the provisions dealing with third country access to ETIAS data with a view to achieving a better outcome on data sharing in Article 50 exit negotiations; engage fully in discussions on the personal information to be included in an ETIAS application and the screening rules which may lead to the refusal of a travel authorisation, given their potential impact on British nationals once the UK leaves the EU; and clarify whether the proposal would apply to rail carriers.

Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee.

Coordination of Social Security

For EU citizens who exercise their freedom of movement to move between Member States, the EU has adopted legislation to establish which country is responsible for paying social security such as the state pension, unemployment benefit or maternity leave. The European Commission is proposing to amend this legislation, primarily to restrict the rights of unemployed people to access benefits if they move to a different country. This reflects the UK's interpretation of the law, which it successfully defended before the EU Court of Justice.

The Department for Work & Pensions has not provided any assessment of the impact Brexit will have on UK citizens who live elsewhere in the EU. While the Prime Minister has said she wants an early deal on the rights of UK citizens in the EU and EU citizens in the UK, there is no information on what type of agreement the Government will seek. The Committee asks how the Government is planning to support both those British nationals resident in the EU, who are currently entitled to receive UK social security, and those EU nationals resident here who currently benefit from Regulation 883/2004.

Not cleared from scrutiny; further information requested; drawn to the attention of the Work and Pensions Committee.

Cross-border portability of on-line content

In December 2015, the Commission proposed a draft Regulation intended to enable EU consumers who have purchased or legitimately subscribed to online content services in their home Member State access to that service when 'temporarily present' in another Member State. The Minister of State for Universities, Science, Research and Innovation (Joseph Johnson) updates the Committee on progress in trilogue negotiations, reporting that the Maltese Presidency has produced a compromise text that "represents a sensible middle ground between the Council and Parliament texts". The Minister notes that: the Regulation will come into force while the UK remains an EU Member State, during which time consumers will benefit from portable content services; that, post-Brexit, it will not be possible to retain portable content arrangements solely through domestic legislation; but that businesses could potentially continue to provide portable content after the UK leaves the EU.

Not cleared from scrutiny; further information requested; but scrutiny waiver granted; drawn to the attention of the Business, Energy and Industrial Strategy Committee and the Exiting the European Union Committee.

Digital Single Market: Wholesale roaming charges

In order to ensure that the EU's commitment to abolishing retail roaming surcharges for consumers by 15 June 2017 is commercially sustainable for mobile operators, the Commission proposed to further reduce existing caps on 'wholesale roaming'—the prices that operators charge each other for use of their networks when their customers roam on the 'visited' operators' networks. The Minister of State for Digital and Culture (Matthew Hancock) writes to inform the Committee that trilogue negotiations concluded on 31 January 2017, with the European Parliament succeeding in securing lower wholesale data roaming caps than those proposed by the Council. The outcome is beneficial to UK

mobile operators as they experience a net outflow of roaming services, meaning that lower wholesale caps reduce their costs. The Committee repeats its earlier Brexit related questions (see section above).

Cleared from scrutiny; further information requested; drawn to the attention of the Committee for Exiting the European Union, the Culture, Media and Sport Committee, and the Business, Energy and Industrial Strategy Committee.

Cooperation on enforcement of consumer protection laws

This proposal will replace the existing Regulation and aims to provide for mutual assistance and surveillance mechanisms and coordinated and common enforcement action in relation to widespread cross-border infringements. In particular, the proposal aims to tackle abuses which could undermine consumer confidence in online trade, such as scam websites, geo-blocking and unlawful after-sales conditions and to therefore to support the Digital Single Market.

The Government has been generally supportive of the proposal. The Committee grants the Government a scrutiny waiver in advance of a General Approach being agreed at the Competitiveness Council on 20 February, on the condition that any text supported by the Government should leave the door open for the UK to continue to cooperate as a third country should that be part of the UK's future relationship with the UK after Brexit.

Not cleared; drawn to the attention of the Business, Energy and Industrial Strategy Committee; conditional scrutiny waiver granted; further information requested.

Proposed Regulation on Data Protection and the EU Institutions

This proposal simply aims to adapt the rules of the new General Data Protection Regulation (GDPR) adopted last year to the EU institutions and agencies. It is likely to be directly applicable to the UK in May 2018 before Brexit but will have few immediate implications for the UK as requirements largely apply to data controllers/processors of EU bodies. However, we probe the Government as to whether, depending on the nature of the UK's future relationship with the EU, handling by the EU institutions of the personal data of UK citizens might assume an even greater significance after Brexit. This might be the case if more data will need to be submitted to EU bodies than at present by "third country" UK citizens wanting to travel to, work or provide services in the EU.

Not cleared; further information requested; drawn to the attention of the Culture, Media and Sport Committee; conditional scrutiny waiver granted.

Proposed Regulation on privacy and e-communications (ePrivacy)

Like the General Data Protection Regulation "GDPR" agreed last year, this is a significant proposal. It is likely to apply to the UK at the same time as the GDPR in May 2018 and before Brexit. It aims to protect sensitive personal or commercial information contained in e-comms or revealed in related metadata (e.g. indicating websites visited or location and timing of phone calls). It also aligns the existing ePrivacy Directive with the new GDPR, updating it in the light of technological developments. For example, it seeks to

regulate Over The Top (OTT) service providers who deliver e-comms service via apps without traditional telecoms support, such as WhatsApp, Skype and Facetime and also ancillary services such as online chat for gaming apps such as Xbox 360.

The Government provides a comprehensive EM on current policy implications but is asked to consider the impact of Brexit. Irrespective of the precise nature of the UK's future relationship with the EU, it is clear the proposal has extraterritorial reach and will catch UK providers of ecomms services outside the EU to EU end- users. We push the Government to give its view on the CJEU's recent ruling on the UK's Data Retention and Investigatory Powers Act 2014 (DRIPA) in Watson v Home Secretary, as this clearly has relevance for its successor, the Investigatory Powers Act 2016. It is also asked to provide more information on impacts on UK business and regulators as the proposal may only apply for a short time before Brexit.

Not cleared; further information requested; drawn to the attention of the Culture Media and Sport Committee and the Joint Committee on Human Rights.

Security of gas supply

Due to continuing gas supply vulnerabilities, the Commission proposed last year that the existing rules on security of supply should be replaced, with a focus on mandatory regional cooperation. The Government reports that Member States have reached an agreement including: national risk assessments to be supplemented, rather than replaced, by regional risk assessments; and Member States' retention of control over how solidarity measures are applied in emergency situations.

This was the first time the Committee had considered this document since the EU Referendum. The Committee was disappointed that the Government's letter made no reference to Brexit and therefore put a number of questions to the Government about security of gas supply post-Brexit. The Committee decided not to accede to the Minister's request that the document be cleared from scrutiny following new information suggesting that agreement is not imminent.

Not cleared; further information requested; drawn to the attention of the Business, Energy and Industrial Strategy Committee.

Vehicle type approval

In order to focus on better enforcement of the existing vehicle type approval standards the Commission has proposed, partly in response to the Volkswagen scandal, a Regulation to replace the existing EU framework legislation which governs type approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles. We have now heard that the Government has been exploring, with stakeholders, the impacts, costs and benefits of the proposal, that progress in Council working group consideration of the proposed Regulation has so far been very slow, but that the Maltese Presidency intends to continue these discussions. The Government, noting the apparent desire of some Member States to maintain the current system as far as possible, says that it intends to support the majority of the measures included in the draft text, with some refinements. We have asked the Government, when it next reports, to tell us of its assessment of how much weight the UK will carry post-

Brexit in adoption of international vehicle type approval standards by the United Nations Economic Commission for Europe, which would be applicable in the EU in accordance with the proposed Regulation.

Not cleared; further information requested.

Documents drawn to the attention of select committees:

('NC' indicates document is 'not cleared' from scrutiny; 'C' indicates document is 'cleared')

Business Energy and Industrial Strategy Committee: European Pillar of Social Rights [Commission Communication (C)]; Digital Single Market: Cross-border portability of online content [Proposed Regulation (NC)]; Cooperation on enforcement of consumer protection laws [Proposed Regulation (NC)]; Security of gas supply [Proposed Regulation (NC)]; Digital Single Market: Wholesale roaming charges [(a) Commission Report, (b) Proposed Regulation (C)]

Culture Media and Sport Committee: Data Protection and the EU institutions [Proposed Regulation (NC)]; ePrivacy [Proposed Regulation (NC)]; Digital Single Market: Wholesale roaming charges [(a) Commission Report, (b) Proposed Regulation (C)]

Education Committee: European Pillar of Social Rights [Commission Communication (C)]

Exiting the European Union Committee: Digital Single Market: Cross-border portability of online content [Proposed Regulation (NC)]; Establishing a European Travel Information and Authorisation System [Proposed Regulation (NC)]; Digital Single Market: Wholesale roaming charges [(a) Commission Report, (b) Proposed Regulation (C)]

Foreign Affairs Committee: Resumption of Generalised Trade Preferences to Sri Lanka [Commission Delegated Regulation (C)]

Health Committee: European Pillar of Social Rights [Commission Communication (C)]

Home Affairs Committee: Criminal law measures to counter money laundering [Proposed Directive (NC)]; Establishing a European Travel Information and Authorisation System [Proposed Regulation (NC)]; The Resumption of transfers of asylum seekers to Greece under the Dublin rules [Commission Recommendation (NC)]

Joint Committee on Human Rights: The Resumption of transfers of asylum seekers to Greece under the Dublin rules [Commission Recommendation (NC)]; Resumption of Generalised Trade Preferences to Sri Lanka [Commission Delegated Regulation (C)]; ePrivacy [Proposed Regulation (NC)]

Women and Equalities Committee: European Pillar of Social Rights [Commission Communication (C)]

Work and Pensions Committee: European Pillar of Social Rights [Commission Communication (C)]; Coordination of social security systems [Proposed Regulation (NC)]

1 Financial management: external audit

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; recommended for debate in European Committee B, together with the 2014 Fight against fraud report (decision reported 14 September 2016)
Document details	Court of Auditors' Reports: (a) on the 2015 EU General Budget; (b) on the activities of the 8th, 9th, 10th and 11th European Development Funds in 2015
Legal base	—
Department	(a) HM Treasury, (b) International Development
Document Number	(a) (38213), —; (b) (38415),—

Summary and Committee's conclusions

1.1 The European Court of Auditors is responsible for the external audit of the EU's public finances. It publishes its main Annual Reports, about 12 months after the end of the year to which they refer.

1.2 These documents are the Court's Reports on activity carried out under both the General Budget and the European Development Funds in 2015. As is regrettably normal the Reports show why the Court has again issued qualified Statements of Assurance.

1.3 We have already considered the Report on the European Development Funds in relation to Brexit issues it raises.

1.4 **Because the European Court of Auditors' annual audit reports have for many years revealed serious inadequacies in implementation of EU expenditure it has become customary each year for these reports to be debated, together with the Commission's annual anti-fraud report, which we have already recommended for debate.[1] Although the present Reports affirm the reliability of the accounts, the Statements of Assurance are qualified. So we have no hesitation in recommending that these documents be debated in European Committee B along with the Commission's anti-fraud report.**

1.5 **In that debate Members may wish to focus on:**

- **the Government's efforts to improve EU financial management;**
- **the Court's comments about the ineffectiveness of some of the UK's management of EU funds; and**
- **any Government response to those comments.**

1 (37971) 11335/16 + ADDs 1–7: see Eleventh Report HC 71-ix (2016–17), chapter 1 (14 September 2016).

1.6 **We understand that the February 2017 ECOFIN Council will be considering its recommendation to the European Parliament for the discharge of the 2015 General Budget. We remind the Government that it is important that the debate we recommend should take place, if not before the ECOFIN Council meeting, at least before the European Parliament makes its discharge decision.**

1.7 **We remind the Government also that we await a prompt response to our Brexit questions in relation to the European Development Funds.**

Full details of the documents

(a) Annual Report of the Court of Auditors on the implementation of the budget concerning the financial year 2015, together with the institutions' replies: (38213), —; (b) Annual Report of the Court of Auditors on the activities funded by the 8th, 9th, 10th and 11th European Development Funds (EDFs) concerning the financial year 2015, together with the Commission's replies: (38415), —.

Background

1.8 The European Court of Auditors (ECA) is responsible for the external audit of the EU's public finances. It examines the legality, regularity and soundness of the management of all the EU's revenue and expenditure, and the revenue and expenditure of the bodies (agencies etc) created by the EU. The ECA publishes its main Annual Reports, on activity carried out under the General Budget and the European Development Funds (EDFs), on a particular financial year about 12 months after the end of that year. In addition to these Annual Reports, the ECA also publishes annually Audit Reports on agencies etc and, throughout the year, Special Reports on its audits of particular areas of revenue or expenditure or on its management audits. We regularly, but not always, report on the Special Reports.

1.9 The main Annual Reports include the ECA's Statements of Assurance[2] for the financial year in question. They have assessments of the fairness and accuracy of the EU budget accounts and the legality regularity of the underlying transactions. They also contain the ECA's targeted recommendations to address identified errors and weaknesses and the Commission's responses to those recommendations.

1.10 The Annual Reports and Statements of Assurance allow the EU's Budgetary Authority (the Council and the European Parliament) to consider the quality of EU budget implementation and whether the budgetary processes for the year should be closed by the European Parliament granting, on the recommendation of the Council, a "discharge" to the Commission. The discharge releases the Commission of its responsibility for management of the EU budget that year. The Commission is required to act on any comments made by the Council and the European Parliament in granting the discharge and, if requested, to report back on the actions it has taken in response.

1.11 There is an important distinction between irregularities and fraud, relevant to audit reports. An irregularity occurs when a beneficiary is not in compliance with the EU rules and requirements linked to the spending of EU funds and these are usually the result of

2 The Statement of Assurance is often referred to as the DAS, from the French *déclaration d'assurance*.

genuine errors. Fraud is a deliberately committed irregularity, which constitutes a criminal offence. While the ECA's Annual Reports contain some material relating to fraud and irregularities, they are not primarily concerned with fraud against the EU's resources.

The documents

The 2015 General Budget

1.12 In the first chapter of the ECA's audit report for the EU's 2015 General Budget, it discusses the Statement of Assurance and supporting information. The Court concludes that the accounts are reliable and fairly represent the financial position of the EU, the results of its operations and its cash flows for the year. It also finds that revenue underlying the accounts was legal and regular in all material respects. However, the Court finds that payments in 2015 were materially affected by error and consequently gives an adverse opinion on the legality and regularity of payments underlying the accounts.

1.13 The Court explains its adverse opinion thus:

- based on the transactions assessed, the estimated error rate for the 2015 Budget is 3.8%;[3]
- this is a significant reduction on the 4.4% error rate for the 2014 Budget but remains above the acceptable threshold of 2%;
- the level of the error rate was driven up by spending on a reimbursement basis—for reimbursement expenditure the estimated level of error was 5.2% compared to 5.5% in 2014; and
- this compares to entitlement expenditure, where the level of error was immaterial at 1.9%.

1.14 In the Report's second chapter the Court gives an overview of key budgetary and financial management issues arising in 2015. These include overall levels of spending and commitments made, the relationship between budgetary and financial accounts, financial instruments and the relationship between the budget and the Multiannual Financial Framework (MFF). The Court recommends that the Commission should:

- act to reduce outstanding commitments by rapid closure of 2007–2013 programmes, wider use of net corrections in cohesion projects, reducing cash held by fiduciaries and compilation of payment plans and forecasts in areas where outstanding commitments are high;
- publish an annual cash flow forecast spanning 7–10 years, covering budgetary ceilings, payment needs, capacity constraints and potential decommitments;
- consider capacity constraints in Member States;
- recover unused cash balances in financial instruments from previous MFFs; and

3 The ECA's 'most likely error rate' indicates the estimated level of non-compliant expenditure within the EU budget, based on its sample of audits. The ECA considers an error rate higher than 2% to indicate material errors and weaknesses.

- re-evaluate the Connect Europe Facility debt instrument and other related programmes and financial instruments in light of the creation of the European Fund for Strategic Investments.

1.15 In the third chapter the Court considers, under the rubric "Getting results from the EU budget", the performance of the EU Budget, and the framework for monitoring and reporting on progress towards the objectives of the Europe 2020 Strategy,[4] focusing in particular on Horizon 2020 (the EU's research and innovation programme).[5] The Court:

- notes that Horizon 2020's high-level indicators are linked to Europe 2020 Strategy indicators, but that these are of limited use in tracking Horizon 2020's progress towards the Strategy goals;
- concludes that weaknesses in the design of the monitoring and reporting system for Horizon 2020 mean that the Commission is limited in its ability to monitor and report on the performance of the programme; and
- notes that, for the four Directorates-General referred to as the "natural resources" family, many objectives laid out in programme documents were too high level for management purposes.

1.16 The Court recommends that the Commission should:

- translate the Horizon 2020 legislation high-level objectives into operational objectives at work programme level, so that, by assessing the performance of work programmes and calls, they can effectively be used as drivers for performance;
- clarify the links between the Europe 2020 Strategy, the MFF and the Commission's ten political priorities[6] through, for instance, the strategic planning and reporting process, in order to enable effective reporting on the contribution of the EU Budget to the Strategy; and
- use the terms input, output, result and impact consistently and in line with its better regulation guidelines.

1.17 In the fourth chapter of the Report, about own resources and other revenue, the Court concludes that examined systems for Traditional Own Resources and Gross National Income and VAT-based own resources are effective, and says that no errors were found in the transactions tested. It recommends that the Commission should:

- take necessary steps to ensure that economic operators receive a similar treatment in all Member States with respect to some aspects of customs notification;
- provide Member States with guidance to improve their management of the items recorded in the B accounts (where disputed payments are held);

4 The Europe 2020 strategy aims to ensure the EU achieves growth that is smart, sustainable and inclusive: see http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:em0028.

5 See https://ec.europa.eu/programmes/horizon2020/en/what-horizon-2020.

6 These priorities, as outlined by the President of the Commission on 12 November 2014 are 'Jobs, growth and investment', 'Digital single market', 'Energy union and climate', 'Internal market', 'A deeper and fairer economic and monetary union', 'A balanced EU-US free trade agreement', 'Justice and fundamental rights', 'Migration', 'A stronger global actor', and 'Democratic change'.

- ensure that Member States correctly declare and make available the amounts collected from the B accounts;
- facilitate the recovery of customs debts by the Member States, where the debtors are not based in a Member State; and
- improve the checks on the calculations of the EEA/EFTA contributions and correction mechanisms.

1.18 In its next chapter, about competitiveness for jobs and growth, the Court:

- notes that research and innovation accounts for 62% of spending, through the Seventh Framework Programme for Research and Development (FP7) covering the previous MFF and Horizon 2020 in the current MFF;
- says that almost 90% of spending is in the form of grants to private and public beneficiaries, who are reimbursed based on costs declared;
- reports that the estimated error rate for this area of expenditure is 4.4%, a significant decrease on 5.6% for the 2014 Budget;
- notes that the same type of errors were found in this area as detected throughout the course of its audit of FP7, for example, incorrectly calculated personnel costs, other ineligible direct costs such as travel or equipment, and ineligible indirect costs;
- comments that while the regulatory framework of Horizon 2020 has been simplified to bring down error rates, there are some areas of increased risk such as when researchers receive additional remuneration or where participants make use of large research infrastructure; and
- finds that compliance with procurement rules improved significantly on the previous year, although some errors were identified.

1.19 The Court recommends that the Commission should:

- use all the relevant information available to prevent, or detect and correct errors before reimbursement;
- issue guidance to beneficiaries on the differences between Horizon 2020 and FP7;
- issue common guidelines to the implementing bodies to ensure consistent recovery of ineligible costs; and
- closely monitor the implementation of extrapolated corrections under FP7.

1.20 The Court's sixth chapter, entitled "Economic, social and territorial cohesion", covers regional and social policy, implemented through the European Regional Development Fund and the Cohesion Fund, accounting for 80% of expenditure in this area; and the European Social Fund, which covers the remaining 20%. The Court first notes that:

- these Funds are governed by common rules, subject to certain exceptions;
- management of the Funds is shared between the Commission and Member States and involves the co-financing of projects within approved spending programmes;
- eligibility rules for the reimbursement of costs are set out at national or regional level and may vary from one Member State to another; and
- the Commission has initiated, in July 2015, a High Level Group on simplification to assess the uptake and implementation of simplification opportunities for European Strategic Investment Fund moneys and to identify good practice.

1.21 The Court:

- reports that the overall estimated error rate is 5.2%, a decrease from 5.7% for 2014;
- highlights that the main source of error was the inclusion of ineligible expenditure in the beneficiaries' cost declarations, and the selection of ineligible projects, followed by infringements of EU public procurement and state aid rules;
- significantly, found no evidence of error in the use of Simplified Cost Options (that is, lump-sum and flat rate payments and standard scales of unit cost);
- says that some serious failures in public procurement were identified, such as unjustified direct award of contracts or unlawful exclusion of bidders;
- notes that many of the errors could have been prevented or corrected by Member State authorities before reimbursement using the information available—if action had been taken in these cases, the error rate would have been reduced by 2.4%;
- reports that by the end of 2015, the average disbursement rate of financial instruments to final recipients was 57%, with Member States having set up 1025 financial instruments;
- concludes that audits since 2009 have shown that the level of error is significantly lower for the 2007–2013 programming period than for the 2000–2006 programming period;
- says that, having assessed whether projects had achieved objectives and targets set for performance indicators, 68% of the completed projects assessed had fully achieved their objectives, whilst 28% had partially achieved them and 3% had not achieved them; and
- adds that 38% of the projects did not, however, define results indicators, instead focusing on output indicators.

1.22 The Court recommends that the Commission should:

- fundamentally reconsider the design and delivery mechanism for European Strategic Investment Fund moneys when making its proposals for the next MFF, taking into account the proposals of the High Level Group on simplification;
- provide guidance to Member States on how to simplify and avoid unnecessarily complex and burdensome rules that do not add value;
- submit amendments to extend the eligibility period for financial instruments under shared management;
- clarify to Member States the notion of recoverable VAT; and
- ensure that expenditure related to financial instruments is included sufficiently early in closure declarations to allow time for audit.

1.23 In its seventh chapter on natural resources the Court, covering the Common Agricultural Policy, the Common Fisheries Policy and environmental measures, reports that:

- the overall error rate for this area of expenditure is estimated to stand at 2.9%, a significant decrease from the 3.6% of the 2014 Budget;
- this comprises an error rate of 2.2% for market and direct support, and 5.3% for rural development, environment, climate action and fisheries;
- errors varied significantly between the European Agricultural Guarantee Fund (EAGF), consisting largely of direct payments to farmers, and the other spending areas;
- errors in the EAGF related largely to inaccurate or ineligible claims, often based on over declaration of agricultural land surface or ineligible parcels of land;
- it has stressed the importance of having an up-to-date Land Parcel Identification System (LPIS) in place;
- for rural development projects, the main reasons for errors were ineligible activity, beneficiary or project, non-compliance with public procurement rules and non-compliance with agri-environment commitments; and
- in relation to the performance of rural development programmes, it found that 95% of projects had been carried out as planned, but that there was insufficient evidence that costs were reasonable, and deficiencies in targeting measures and selecting projects, including weak links to Europe 2020 Strategy objectives.

1.24 The Court recommends that the Commission should:

- continue to follow up cases where national legislation is not compliant with EU legislation;
- monitor results and remedial action taken on LPIS in all Member States;

- ensure that Member States take effective action to address errors in public procurement in rural development programmes;
- monitor and support certification bodies in improving their reporting to allow the Commission to better estimate the error rate; and
- update the Directorate-General for Agriculture and Rural Development's audit manual and improve the compliance of Directorate-General for Maritime Affairs and Fisheries' audits with international standards.

1.25 The Court's next chapter, on Global Europe, covers expenditure in the fields of foreign policy, support to EU candidate and potential candidate countries, and development and humanitarian assistance to developing countries. The Court notes that expenditure is dispersed throughout more than 150 countries, using a broad range of cooperation instruments and delivery methods and that spending is implemented directly by Commission Directorates-General, either from their headquarters in Brussels, by EU delegations in recipient countries, or jointly with international organisations. The Court:

- estimates the error rate for this area of expenditure as 2.8%, which is a small increase on 2.7% for the 2014 budget;
- says that, in some cases, the Commission had sufficient information to prevent, or detect and correct errors and that if this information had been used, the level of error would have been one percentage point lower;
- does not make any new recommendations in this area, but notes the Commission's efforts so far to implement previous recommendations, and commits to assessing the outcomes of these in future years;
- addresses expenditure in the area of security and citizenship, where the common objective is to create an area of freedom, justice and security without internal frontiers—this expenditure is focused on three main policies: migration and security, Food and Feed and Creative Europe; and
- reports that it reviewed the Directorate-General for Migration and Home Affairs' spending and did not find any major weaknesses.

1.26 In its final chapter the Court covers the administrative expenditure of EU institutions and other bodies, that is, the Commission, the European Parliament, the European External Action Service (EEAS), the European Council and the Council, the Court of Justice of the European Union, the European Court of Auditors itself, the European Economic and Social Committee, the Committee of Regions, the European Ombudsman and the European Data Protection Supervisor. It also includes payments to the European Schools. Audits of EU agencies and decentralised bodies are reported separately by the ECA in specific annual reports. The Court reports that spending on human resources accounts for about 60% of the total, with the remainder spent on buildings, equipment, energy, communications and information technology, that the estimated error rate for this area of expenditure is 0.6%, a 0.1 percentage point increase on the 2014 Budget and that the examined systems were not found to have any significant weaknesses. The Court recommends that:

- the European Parliament reviews the controls on spending allocated to political groups;
- the Commission improves its monitoring systems on the personal situation of staff members which may affect the calculation of family allowances;
- the EEAS ensures that all steps in recruiting local agents are properly documented; and
- the EEAS improves its guidance on the design and execution of procurement procedures for contracts worth less than €60,000 (£51, 400).

The European Development Funds

1.27 The ECA audit report on EDF activities, assesses the financial activities and expenditure of the EDF in 2015. The EDFs are the EU's main development co-operation instrument, which underpins the Cotonou Agreement and provides funding to 78 African, Caribbean and Pacific states. The 2015 EDF expenditure includes EDF 11 (running from 2014–2020) and also outstanding expenditure from EDFs 8, 9 and 10. When we considered this report last month we noted that the Court finds that payments suffered from a material level of error at 3.8%. Consequently, while the Court finds that the accounts present fairly the financial position, the results of operations and cash flows for the year, it only finds the revenue underlying the accounts to be legal and regular—issuing an adverse opinion on the legality and regularity of payments.

UK Member of the European Court of Auditors

1.28 When, on 13 October 2016, these ECA reports were published, Mr Phil Wynn Owen, the UK Member of the Court, wrote to us drawing our attention to them and their structure and main points. He also helpfully enclosed an annex listing references to the UK in the EU General Budget Report, some of which concern perceived failings in the UK. We annex that list.

The Government's view of the Report on the EU General Budget

1.29 In his Explanatory Memorandum of 9 November 2016 the Chief Secretary to the Treasury (Mr David Gauke) having reiterated, in the context of the outcome of the EU referendum, the Government's incantation that until the UK exits the EU it will continue to negotiate, implement and apply EU legislation, says that:

- the Government takes financial management of the EU Budget very seriously;
- EU taxpayers need to have confidence that their funds are being effectively managed and implemented at an EU level, and that every effort is being made to improve standards;
- the ECA Report shows an encouraging reduction in the amount of payments at risk of being non-compliant with EU regulation, however this is still above the ECA's acceptable threshold of a 2% error rate; and

- while the UK remains a Member State the Government continues to argue for effective financial management and the best possible value for money for UK and other EU taxpayers from EU spending.

Previous Committee Reports

Twenty-sixth Report HC 71-xxiv (2016–17), chapter 4 (18 January 2017).

Annex: Mr Wynn Owen's list

References to the United Kingdom in the Court's Annual Report 2015

Chapter 1 of the Annual Report presents the **statement of assurance and supporting information**. As part of the introduction, Figure 1.1 shows EU spending in each Member State as a share of total general public spending of each Member State, including the UK, in the calendar year 2015;

- The second table of Annex 1.3 shows the frequency of detected errors in audit sampling for the year 2015 under MFF headings lb and 2. The table shows that of the 27 transactions in the UK in the 2015 year which the ECA audited, 17 were affected by error.

Chapter 2 of the Annual Report deals with **budgetary and financial management** in 2015. There are references to the UK in:

- Figure 2.6, which shows the absorption rates and totals of the European Structural & Investment (ESI) funds for the 2007–13 MFF period;
- Figure 2.7, showing outstanding commitments of ESI funds as of December 2015 by Member State;
- Figure 2.8, showing outstanding commitments of ESI funds 2007–2013 and outstanding prefinancing 2014–2020 as of December 2015 by Member State; and
- Paragraph 2.31, footnote 38, which identifies the UK as one of the Member States included in the sample of unutilised amounts in financial instruments.

Chapter 4 covers **revenue**. There is a reference to the UK in:

- Annex 4.3, where the ECA sets out the Member States' GNI reservations and traditional own resources open points, as of 31st December 2015.

Chapter 6 deals with **economic, social, and territorial cohesion**. There are references to the UK in:

- Paragraph 6.9(a), footnote 8, which identifies the UK as one of the Member States sampled in the examination of 223 transactions for the European Regional Development Fund, Cohesion Fund and European Social Fund;
- Paragraph 6.9(b), footnote 9, which identifies the UK as one of the Member States included as part of the ECA's examination of ERDF financial instruments;

- Paragraph 6.9(c), footnote 10, which lists the UK as one of the Member States included as part of the ECA's assessment of the Commission's supervisory activities of audit authorities;
- Figure 6.3, where the UK is referred to as an example of ineligible costs being declared;
- Figure 6.5, which provides an example of 'serious failures to comply with public procurement rules'. The UK is mentioned as one of three Member States in which errors relating to 'additional works awarded without proper public procurement' were detected in the ECA's audit in the year;
- Paragraph 6.24, footnote 21, which lists the UK as one of eight Member States which have implemented all three new directives aimed at simplifying public procurement procedures and making them more flexible;
- Paragraph 6.28, footnote 26, which shows the ECA identified 7 ERDF/CF projects in 5 Member states that infringed the EU state aid rules, including the UK;
- Figure 6.6, which provides an example of a 'project infringing state aid rules'. The UK is mentioned as one of three Member States in which errors were detected in the ECA's audit in the year relating to aid intensity limits being exceeded; and
- Figure 6.8, which shows the disbursement rates for financial instruments financed by 'economic, social and territorial cohesion' as of 31st December 2014 by Member State.

Chapter 7 deals with **natural resources**. There are references to the UK in:

- Paragraph 7.8(a), footnote 9, which identifies the UK as one of the Member States included in the sample of European Agricultural Guarantee Fund (EAGF) transactions;
- Paragraph 7.8(a), footnote 10, which identifies the UK as one of the Member States included in the sample of transactions for rural development, environment, climate action, and fisheries;
- Paragraph 7.8(b), footnote 11, which lists the UK as one of the Member States for which the ECA reperformed Commission audit covering the EAGF and the European Agricultural Fund for Rural Development;
- Figure 7.4 where the UK is referred to in an example of irregular payment due to incorrect data in the Land Parcel Identification System (LPIS);
- Paragraph 7.32, footnote 31, which lists the UK as one of the Member States for which the ECA reperformed 6 desk reviews out of 24 conformity audits reported by the Directorate-General for Agriculture and Rural Development in 2015;
- Figure 7.9, where the UK is referred to in an example of the weaknesses found concerning the LPIS; and
- Paragraph 7.47, where the UK is referred to for incorrect inclusion of sanctions in the control statistics regarding cross-compliance checks.

Chapter 8 deals with **global Europe** and **security and citizenship**. There is a reference to the UK in:

- Paragraph 8.42, footnote 30, where the ECA examines a sample of ten systems audits of the Commission's assessment of Member State systems for managing Solidarity and Management of Migration Flows funds, including the European Return Fund for the UK and the European Refugee Fund for the UK.

2 Digital Single Market: Cross-border portability of online content

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; but scrutiny waiver granted; drawn to the attention of the Business, Energy and Industrial Strategy Committee and the Exiting the European Union Committee
Document details	Proposal for a Regulation on ensuring the cross-border portability of online content services in the internal market
Legal base	114 TFEU; ordinary legislative procedure; QMV
Department	Business, Energy and Industrial Strategy
Document Number	(37394), 15302/15 + ADDs 1–2, COM(15) 627

Summary and Committee's conclusions

2.1 People are increasingly accessing online content services through portable devices (such as tablets and smartphones). As a result, demand for access to content on the move, including cross-border, is rapidly growing.

2.2 At present, subscribers to online content may find that their access to such services is effectively blocked when travelling abroad due to copyright or licence restrictions. In December 2015, the Commission proposed a draft Regulation (hereafter 'the Regulation') intended to enable EU consumers who have purchased or legitimately subscribed to online content services in their home Member State access to that service when 'temporarily present' in another Member State. It is one of a series of legislative proposals aimed at implementing the Commission's wider Digital Single Market Strategy to increase cross-border e-commerce.

2.3 Following the agreement of a General Approach in Council and the first reading position adopted by the European Parliament's Legal Affairs Committee (JURI), the Minister of State for Universities, Science, Research and Innovation (Joseph Johnson) now writes to update the Committee on progress in trilogues.

2.4 The Maltese Presidency has produced a compromise text that seeks to bring together the Council and Parliament texts. The Minister states that the compromise text addresses the core issues raised in previous correspondence. The definitions of 'residence' and 'temporary presence' have been tightened in order to ensure that portability is "a targeted, temporary service" as originally intended. The text also clarifies the mechanisms by which service providers can verify a user's Members State of residence to the Minister's satisfaction.

2.5 The Minister concludes that the compromise text "represents a sensible middle ground between the Council and Parliament texts". While there may be some final clarifications to the text, he states that it "is likely that it will form the basis of an agreement" and requests scrutiny clearance of the Portability Regulation "in order that it can be adopted in trilogue in early February".

2.6 **Regarding Brexit, the Minister does not add to his predecessor's analysis, merely noting that "**my officials will ensure that these issues are considered alongside other similar issues, such as the recent agreement on mobile roaming charges, as negotiations on the UK's departure from the EU progress". In light of the Prime Minister's recent speech on the government's negotiating objectives for leaving the EU, which indicated the Government's preference for a comprehensive Free Trade Agreement as the basis of future UK-EU trade in services, the Committee requests further information concerning these implications.

2.7 **We thank the Minister for his summary of progress in trilogues regarding the Portability Regulation. We note the Minister's view that the compromise text produced by the Presidency "represents an appropriate compromise between the Council and Parliament texts" and will "meet the needs of copyright owners, online service providers and consumers, in line with the Government's negotiating objectives".**

2.8 **On the basis that the final text agreed in trilogues does not deviate in substance from that of the compromise text that has been shared with us, we are willing to grant the Minister a scrutiny waiver to vote for the Regulation at the relevant meeting of Council. However, we will not clear the document from scrutiny until we have received further clarification of the implications of the UK leaving the EU for this issue.**

Brexit implications

2.9 **On Brexit, we note the Minister's observations that:**

- **the Portability Regulation will enter into force six months after it is formally adopted and will therefore (notwithstanding unforeseen delays) apply to the UK before it leaves the EU;**
- **during this period UK consumers will be able to access online content services when engaging in temporary travel within the EEA, and UK businesses will have to comply with the Regulation by making their services and content portable;**
- **the cross-border nature of this issue means that, when the UK leaves the EU, it will not be able to ensure through domestic legislation alone that these services remain portable for UK consumers post-Brexit ("the UK would not be able to legislate in an extraterritorial fashion to mimic these provisions");**
- **after the UK leaves the EU "it would be for rights holders and service providers to provide licensing solutions to allow their content to be used in each Member state of the EU in a portable fashion" and that this would require them to "adopt commercial practices that allow for portability, even where it is not provided for in legislation"; and**

- **when the UK leaves the EU, "the Regulation will continue to have implications for the offerings provided by British content creators and service providers", which "would very much depend on the shape of the UK's future relationship with the EU".**

Further Brexit questions

2.10 **Following the Prime Minister's speech indicating that the UK envisages a comprehensive Free Trade Agreement as the basis of future services trade between the UK and the EU, we request further clarification on a number of Brexit-related points:**[7]

- **Given that the Government cannot ensure that content services are portable through domestic legislation, will the Government seek the inclusion of portability arrangements in a comprehensive Free Trade Agreement (or other bilateral arrangement) with the EU?**

- **After the UK leaves the EU—assuming it does not secure portability provisions in any agreement with the EU—under what circumstances and how would the offerings provided by British content creators and service providers continue to be affected by the Regulation?**

- **We note the Minister's assessment that when the UK leaves the EU rights holders and service providers could "adopt commercial practices that allow for portability, even where it is not provided for in legislation", however we also observe that, to date, consumers have overwhelmingly not been offered portable services because of the difficulty of navigating the complexities of cross-border copyright licensing, and that the provisions in the Regulation designed to circumvent these difficulties will cease to apply to UK businesses post-Brexit.**[8] **Has the Government, during its stakeholder consultations concerning Brexit, asked any UK-based content creators or service providers how practical it will be for them to continue to deliver portable content in the absence of the Regulation and whether they intend to do so? If so, what were their views?**

2.11 **We would be grateful for a response to the above questions by the 15 March, as well as a short update on the conclusion of the legislative process in relation to this document, including any significant changes to the compromise text. In the meantime, we retain this proposal under scrutiny and draw the Minister's letter and our conclusions to the attention of the Business, Energy and Industrial Strategy Committee and the Exiting the European Union Committee.**

Full details of the documents

Proposal for a Regulation on ensuring the cross-border portability of online content services in the internal market: (37394), 15302/15 + ADDs 1–2, COM(15) 627.

7 HM GOV, "The government's negotiating objectives for exiting the EU: PM speech" (17 January 2017).

8 In addition to mandating portability, the Regulation removes these specific obstacles to portability by (i) rendering unenforcable any provisions in contracts contrary to this obligation and (ii) introducing a 'legal fiction' or country-of-origin principle which states that the provision, access to and use of online content in another Member State, including copyright and related rights, are deemed to occur in the subscriber's home State.

Background

2.12 The detail of the draft Regulation, the Government's position on it and correspondence with the Committee can be found in the Committee's previous reports on this subject, which are listed at the end of this chapter.

The Minister's letter of 31 January 2017

2.13 The Minister of State for Universities, Science, Research and Innovation (Joseph Johnson) writes to update the Committee on progress in informal trilogues and seeks final scrutiny clearance for the Portability Regulation.

2.14 The Minister states that the Maltese Presidency has produced a compromise text that seeks to bring together the Council and Parliamentary texts. The legal text is marked as *limité*, and its contents cannot be made public; however, the Minister provides a broad-brush account of its main provisions, which, in his view, address the issues raised by Baroness Neville Rolfe in her previous letter:

- *Definitions of 'residence' and 'temporary presence'*—The Minister writes that these key definitions "have been tightened to ensure that portability is a targeted, temporary service". He elaborates: "The Member State of residence is now defined as 'actual and stable', and temporary presence has been clarified by using the words 'limited period of time'". The Regulation's recitals clarify that the phrase "limited period of time" means "for purposes such as leisure, travel, business trips or study".

- *Verification of a user's Member State of residence*—The Minister suggests that "the compromise text on verification "represents a sensible middle ground between the Council and Parliament texts" that will assure both rightsholders and service providers. He states that the Parliament's preference for the verification requirements to be specified in the form of a closed list has been retained (as opposed to the 'semi-open' list preferred by the Council); however, he adds that a number of its requirements have been modified in line with the Council text. For example, the compromise text allows IP address checks to be periodical rather than random, and also includes an opt-out clause, "which allows verification to be bypassed if agreed by both the rightsholder and the service provider". The Minister believes this provision will reduce the burden of the Regulation on businesses.

2.15 The Minister concludes that, overall, the compromise text "represents an appropriate compromise between the Council and Parliament texts". While there "may be some final clarifications to the text" the Minister considers it likely that it will form the basis of an agreement and requests that the Committee clear the Regulation from scrutiny "in order that it can be adopted in trilogue in early February".

2.16 On Brexit, the Minister does not add to the detailed analysis provided in his predecessor's letter of 27 September 2016, only noting that "my officials will ensure that these issues are considered alongside other similar issues, such as the recent agreement on mobile roaming charges, as negotiations on the UK's departure from the EU progress".

Given the Prime Minister's recent announcement of the Government's negotiating objectives it may be appropriate to ask for further information regarding the implications of Brexit for this file.[9]

The Minister's letter of 21 December 2016

2.17 The Minister of State for Energy and Intellectual Property (Baroness Neville Rolfe) wrote to update the Committee on progress on the passage of the Portability Regulation. On 30 November the European Parliament's Legal Affairs Committee (JURI) adopted its first reading position on the Regulation and indicated that informal trilogue discussions had commenced between the institutions and would continue into 2017.

2.18 The Minister noted that the Legal Affairs Committee's text was an improvement on the Commission proposal, but added that there were "a number of areas where the Parliament's approach differs from the Council text". Key differences highlighted by the Minister included:

- *Definitions of 'residence' and 'temporary presence'*—The Minister stated that the Parliament had taken a different approach to the definitions of 'Member State of residence' and 'temporary presence' than the Council's approach. Where the Council text approached both definitions "with mind to the character of intended portable services—i.e. access for short periods when away from a Member State of residence", the Minister said that the Parliament's "definition of 'Member State of residence' introduces descriptors adopted from EU case law; and the definition of 'temporary presence' is slightly broader". However, the Minister concluded that the two approaches were "not incompatible" and that a compromise solution was possible.

- *Verification of a user's Member State of residence*—The Minister noted that for verification purposes the Council had adopted a "semi-open list" (a "tightly defined list of criteria that could be relied upon by service providers, with the possibility of flexibility in method, or whether to verify at all, where agreed between rights holders and service providers") the Parliament had opted for a closed list, "with some flexibility as to the types of verification method used", and had also proposed "a review mechanism and order making power" that would allow the addition of verification criteria over time, should new technologies develop. The Minister was confident that a common approach could be found on this point.

The Minister's letter of 27 September 2016

2.19 The Minister (Baroness Neville-Rolfe) wrote to update the Committee on the progress of the file in the European Parliament, where the Regulation remained in Committee stage. The Minister noted that a draft report led by JURI (Legal Affairs Committee) was released to MEPs in August, and was largely positive about the shape of the Regulation, and that CULT (Culture and Education Committee) and IMCO (Internal Market Committee) had also submitted reports on the Regulation.

9 HM GOV, "The government's negotiating objectives for exiting the EU: PM speech" (17 January 2017).

2.20 Summarising these reports, the Minister noted that MEPs continued to debate "the level of protection that should be mandated by the verification requirements" and whether the proposed list was adequate. She reported that the Government felt that the Council text provided adequate protection in this respect, but that there had subsequently "been a push from rightholders to ensure that a combination of criteria are used in order to ensure robust protection of content." The Minister added that there had also been discussion around ensuring that the language of the Regulation "unambiguously notes the importance of the principle of territoriality in copyright markets". The Minister said that these aspects of the proposals were likely to be debated in trilogues.

Brexit implications

2.21 The Minister responded to a number the Committee's questions regarding the implications of Brexit for the dossier, making the following points:

2.22 The Regulation will apply to the UK before it leaves the EU—The Regulation will come into force six months after it is adopted, which means that the UK is "likely to be subject to its regulations for a period", before it leaves the EU. This means that UK consumers will, for a period, be able to access audiovisual media subscriptions when travelling within the EU.

2.23 The Regulation will continue to impact UK businesses post-Brexit—The Minister noted that, even after the UK has left the EU, "the Regulation will continue to have implications for the offerings provided by British content creators and service providers". The Minister concludes that it "remains crucial that the final Regulation is both workable for UK businesses and of value to consumers".

2.24 Post-Brexit, the UK will not be able to deliver portability through domestic legislation alone—The Minister explains that "the legal nature of the Regulation, and its cross-border effect" means that "it would not be possible for the UK to domestically legislate for portable services, as the Regulation unifies the legal basis in each Member State which allows portability to be provided". As such, "the UK would not be able to legislate in an extraterritorial fashion to mimic these provisions". The Minister concludes that the Regulation's "continued operation would very much depend on the shape of the UK's future relationship with the EU".

2.25 The private sector may in some cases be able to achieve the same outcomes—The Minister states that "in the absence of the Regulation, it would be for rights holders and service providers to provide licensing solutions to allow their content to be used in each Member State of the EU in a portable fashion". She adds, "As the Portability Regulation becomes 'business as usual' throughout the UK and the EU, and as consumers increasingly expect it as a feature of a service, it may well be that increasing numbers of businesses around the world adopt commercial practices that allow for portability, even where it is not provided for in legislation".

2.26 With regard to negotiations between the UK and the EU, the Minister stated that "the Government will be taking into account the above considerations during the course of the portability negotiations, and during the forthcoming negotiations on [the] UK's exit from the EU".

Previous Committee Reports

Sixth Report HC 71-vi (2016–17), chapter 3 (13 July 2016); First Report HC 71-i (2016–17), chapter 1 (19 May 2016); Twenty-ninth Report HC 342-xxviii (2015–16), chapter 1 (20 April 2016); Twenty-fifth Report HC 342-xxiv (2015–16), chapter 2 (9 March 2016); Eighteenth Report 342-xvii (2015–16), chapter 3 (13 January 2016).

3 Security of gas supply

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Business, Energy and Industrial Strategy Committee
Document details	Proposal for a Regulation to safeguard the security of gas supply and to repeal Regulation (EU) No. 994/2010
Legal base	Article 194 TFEU; Ordinary Legislative Procedure; QMV
Department	Business, Energy and Industrial Strategy
Document Number	(37531), 6225/16 + ADDs 1–3, COM(16) 52

Summary and Committee's conclusions

3.1 In view of the importance of natural gas in the EU's energy mix, its internal market has for some time been regulated, including measures to establish a common framework within which Member States can safeguard security of supply.

3.2 Due to continuing supply vulnerabilities, the Commission proposed in February 2016 that the existing rules should be replaced by a new Regulation, where the main focus would be on: mandatory regional co-operation, involving better cooperation and coordination; ensuring the availability of the necessary infrastructure; improved risk assessment and prevention; increased supervision of the supply obligation for protected consumers; and the incorporation of a new solidarity principle.

3.3 In our last Report (11 May 2016), we noted that the proposal did not appear to raise any major concerns, but that we would retain it under scrutiny as there were still a number of points which needed to be clarified during negotiations.

3.4 The Minister for Energy and Industry, (Jesse Norman), now writes to set out developments. He explains that the Maltese Presidency is seeking to finalise a Council position in the Committee of Permanent Representatives (COREPER) before commencing trilogue discussions with the European Parliament. Since receipt of the Minister's letter on 1 February, we understand that COREPER agreed a mandate on 1 February and that the first informal trilogue discussion took place on 6 February. There is some uncertainty over the likely speed of negotiations.

3.5 Details of the Council's position are set out below. In summary, the Minister is content with the compromise, which includes:

- national risk assessments and plans will continue and will be supplemented, rather than replaced, by regional risk assessments;
- Member States will retain control over how solidarity measures are applied in emergency supply situations—the Minister judges that the UK is highly unlikely to be called to support directly connected neighbours; and

- more proportionate requirements to increase the transparency of significant long term gas supply contracts.

3.6 Our earlier scrutiny of this proposal was undertaken prior to the UK's referendum on membership of the EU. We have not therefore had an opportunity to consider the Brexit-related implications of this proposal. While the Minister's letter is silent on the matter, the White Paper on the "United Kingdom's exit from and new partnership with the European Union" states:

> "coordinated energy trading arrangements help to ensure lower prices and improved security of supply for both the UK and EU Member States by improving the efficiency and reliability of interconnector flows".[10]

3.7 Further information on the Government's position can be gleaned from its response to the Energy and Climate Change Committee's final Report:[11]

> "The UK has a wide range of gas supplies and sources. This includes significant levels of domestic gas production, access via pipelines to Norwegian gas production, interconnection with the continent and some of the largest and most modern LNG infrastructure in Europe.
>
> "In particular, the GB market has two gas interconnectors with continental Europe (one with Belgium and one with the Netherlands). Interconnectors allow gas to flow where it is needed at the best price, offering an important flexible source of gas supply. This means that day-to-day, the percentage of GB gas demand being met through interconnection can be positive or negative depending on price. In 2015 interconnectors provided 8% of GB imports (6% of winter demand) and were an important source of gas during the highest demand days in winter.
>
> "GB also has import pipelines from Norway. Norway is the UK's single largest source of imported natural gas: in 2015 it supplied around 37.8% of demand, 61% of total imports. The remaining 30% of GB imports in 2015 came from LNG; there is capacity to increase the amount of gas imported through LNG terminals."
>
> "Whilst we cannot predict the exact nature of regional co-operation with mainland Europe in the future, the operation of open and price efficient trading markets is in everyone's interest".[12]

3.8 **The Minister's response is helpful in updating us on the details of the Council's position, but it is regrettable that the information that he provided on next steps has subsequently proven to be erroneous. On 1 February he told us COREPER was to consider this "later this month"; the very day the matter was agreed by COREPER. On 27 January a publically available Council document made clear trilogues were due to start on 6 February. The failure to disclose this information to Parliament is another example of the inconsistent quality of information provided across Departments to support Parliament in its scrutiny of EU legislation.**

10 The United Kingdom exit from and partnership with the EU.
11 "The energy revolution and future challenges for UK energy and climate change policy", Third Report HC 705 (2016–17)
12 Government Response (19 December 2016).

3.9 **It is still more disappointing that the Minister makes no reference to the UK's departure from the European Union given the significance of this legislation for the EU's relationship with third countries. This is particularly so as we note that the provisions in the text governing cooperation with third countries—including with the Energy Community[13]—have been strengthened compared to the original Commission proposal. Given that the UK will soon be a third country, it is surprising that the Minister makes no reference to those changes. We ask why the Government chose not to draw them to our attention.**

3.10 **While we do not ask the Government to divulge any information which may prejudice the outcome of the wider Brexit negotiations, we ask for responses to the following points which we consider are of a factual nature:**

- **Whether—since the Referendum—the Government has approached the negotiations on this proposal from the perspective of both an EU Member State and a third country;**
- **How the agreed Regulation would affect the UK as a third country, assuming the UK did not participate by virtue of acceding to the Energy Community;**
- **Whether the UK could continue to enjoy its current level of energy interconnection with EU Member States by virtue of acceding to the Energy Community in its own right rather than by virtue of its status as an EU Member State;**
- **What the implications of Energy Community membership would be, including the right to influence EU energy legislation and the right to refrain from applying applicable EU legislation; and**
- **What assessment the Government has undertaken as to the impact on UK gas price and gas security of failing to reach an agreement on energy cooperation with the EU post-Brexit.**

3.11 **Given the stage that has been reached in the negotiations and the fact that the Regulation will enter into force very soon after its adoption, we assume that it will—if only briefly—apply to the UK as an EU Member State. In that context, it would be helpful if the Minister could set out what he considers to be the benefits to the UK of the legislation as amended.**

3.12 **The Minister asks that we release the proposal from scrutiny. Given that we now have a number of Brexit-related questions and there are some new uncertainties over the timing and progress of discussions, we do not accede to his request. We ask the Minister to update us as soon as possible on the progress made in negotiations. If timing dictates the need for an urgent response, we would be content for interim**

13 The Energy Community is an international organisation which brings together the European Union and its neighbours to create an integrated pan-European energy market. The organisation was founded by the Treaty establishing the Energy Community signed in October 2005. It has nine members: the European Union and eight Contracting Parties—Albania, Bosnia and Herzegovina, Kosovo, former Yugoslav Republic of Macedonia, Moldova, Montenegro, Serbia and Ukraine. In addition, Georgia, Armenia, Norway and Turkey participate as Observers.

correspondence, with a response to our Brexit–related questions to follow subsequently. We retain the proposal under scrutiny and draw the matter to the attention of the Business, Energy and Industrial Strategy Committee.

Full details of the documents

Proposal for a Regulation to safeguard the security of gas supply and to repeal Regulation (EU) No. 994/2010: (37531), 6225/16 + ADDs 1–3, COM(16) 52.

Background

3.13 Details on the current rules in place (Regulation (EU) No. 994/2010) were set out in our Reports of 13 April and 11 May. Despite the application of those rules, the Commission observed that security of gas supply remains a highly topical issue, given the continuing tensions between Russia and Ukraine and that there are continuing supply vulnerabilities. It therefore tabled proposals for new rules, where the main focus would be on mandatory regional co-operation. Further information on the proposal is also set out in our earlier Reports.

3.14 In our Report of 13 April 2016, we noted that, although the Government had broadly welcomed the proposals, and regarded them as being largely proportionate and in accordance with the principle of subsidiarity, it would be examining them in detail. In view of this, we said that we would await the outcome with interest, whilst in the meantime drawing the proposal to the attention of the House, and to that of the Energy and Climate Change Committee.

3.15 We subsequently received the promised Impact Assessment, which suggested that the proposal should not give rise to any significant points of concern so far as the UK is concerned. As the Government indicated that it would be pursuing a number of detailed points during the course of the negotiations, we decided at our meeting of 11 May 2016 to continue to hold the document under scrutiny pending further developments.

Minister's letter of 1 February 2017

3.16 The Minister has now written seeking scrutiny clearance for the proposed Regulation. He explains that, at the December Energy Council, Ministers reached broad agreement on the terms for a Council position on three outstanding issues:

- the composition and scope of regional groups, including the framework for regional risk assessment and planning;
- whether solidarity measures should be fully harmonised or be sufficiently flexible to take into account Member States' specific national situations; and
- the extent to which information in significant supplier contracts (in effect those with third countries) should be shared with regulators and the Commission.

3.17 The Minister goes on to explain that, after further consideration in the Council working party, the Maltese Presidency is now seeking to finalise a Council position before commencing trilogue discussions with the European Parliament (EP) in early February.

3.18 On the regional groups, the Minister reports:

> "There has been a range of views on the scope, basis and membership of regional groups. It is now proposed that these will be 'risk-based' i.e. groups of Member States sharing a common supply route alongside those that might provide an alternative supply route in the event of significant disruption. The groups are largely based on the stress test results carried out by Member States in 2014 and the latest assessment by the European Transmission System Operators' association (ENTSO-G)."

3.19 He expresses confidence that, while the exact composition of the groups is still being finalised,

> "the UK will be a member of just two North Sea gas supply sub-groups centred on Norwegian and UK supply likely to involve 11 and five Member States respectively (although the numbers involved may be reduced). A dozen other groups cover supply routes including from Ukraine, Belarus, the Southern Gas corridor and Algeria. We are broadly content with the configuration of these groups. In particular I am satisfied this will not impact on our long-standing arrangements with Ireland which will simply be referenced in our national plan and the relevant regional chapter."

3.20 Regarding regional plans and risk assessments, the Minister reports that there is now agreement that national risk assessments and national preventive and emergency plans will continue. He adds:

> "There will be an additional common risk assessment for each group; and regional chapters will be included within the national plans, reflecting group discussions and exchange of data. Where Member States cannot agree on how to cooperate the Commission may propose an approach that Member States are bound to take into the 'utmost account'; this should provide a sufficient incentive to engage."

3.21 He judges that this arrangement will improve transparency, consistency and coordination of Member States' planning and serve to strengthen the emphasis on market-based responses to any supply problems. Whilst he considers that there will be some increased administrative burden to prepare regional risk assessments and take account of regional cooperation in national plans, the frequency for producing these is reduced from two to every four years. He notes that the UK already has experience of carrying out such joint assessments with Ireland.

3.22 On solidarity, the Minister says:

> "While Member States accepted the principle of directly connected Member States showing solidarity in emergency supply situations, the Commission's proposal did not give sufficient flexibility to take account of national circumstances. It is now clear that Member States will retain control over how solidarity measures are applied in practice. Arrangements (legal, financial and technical) will need to be agreed between the parties in advance and any action to restrict supply (to customers other than households, essential services and district heating) in the Member State

> coming to the aid of another must not impact on the safety of the network and will only to be 'to the extent necessary'. The Commission will produce non-binding guidelines on best practice which is expected to be of most use to less mature markets where flows are not determined by market price signals or are heavily dependent on a single supply source such as Russia."

3.23 In terms of the impact of the solidarity provisions on the UK, he says:

> "our North West European gas market is highly liberalised and commercially driven. It would take the complete breakdown of gas markets for any Member State to require assistance through government intervention. I judge the UK being called to support directly connected neighbours as highly unlikely to occur, and would anyway be constrained both by the physical flow limitations of the interconnectors and network safety issues, protecting SMEs which are supplied on the same networks. We do not envisage having to make any changes in existing arrangements for managing UK gas demand and supply."

3.24 As regards information exchange, the Minister says:

> "It is now proposed that significant long-term contracts providing around 40% of national supply should only be notified for assessment of the impact on a Member State (including possible knock-on effects to others) to the national competent authority or regulator concerned. Only if there were doubts about whether a contract might put gas security of supply at risk would they then be notified to the Commission. In addition, the national competent authority and the Commission will be able to request information relevant to security of supply (price information is excluded) from any contract in duly justified circumstances. We and Ofgem are satisfied that this is now a proportionate response to the need for improved exchange of information on contracts, particularly in relation to third country suppliers."

3.25 The Minister concludes by setting out the next steps:

> "The Presidency intends to seek agreement in COREPER later this month to enable it to launch the trilogue discussions with the EP. We understand the EP is unlikely to have major difficulties with the changes now proposed by Council. That being the case, COREPER could be the last time this file is discussed substantively in Council. I should be grateful for scrutiny clearance so the UK can play a full and effective part in that discussion."

Previous Committee Reports

Thirty-third Report HC 342-xxxii (2015–16), chapter 5 (11 May 2016); Twenty-eighth Report HC 342-xxvii (2015–16), chapter 8 (13 April 2016).

4 Cooperation on enforcement of consumer protection laws

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; conditional scrutiny waiver granted; drawn to the attention of the Business, Energy and Industrial Strategy Committee
Document details	Proposal for a Regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws (the CPC Regulation); drawn to the attention of the Business, Energy and Industry Strategy Committee
Legal base	Article 114 TFEU, ordinary legislative procedure, QMV
Department	Business, Energy and Industrial Strategy
Document Number	(37814), 9565/16, COM(16) 283

Summary and Committee's conclusions

4.1 The proposed Regulation is part of the e-commerce package launched by the Commission to enable consumers and companies to buy and sell products and services online across the EU more easily and confidently.

4.2 The current Regulation[14] makes available to national enforcement authorities—mainly the Competition and Markets Authority[15] (CMA) for the UK—a number of minimum powers and procedures to tackle cross-border infringements of EU consumer legislation[16] and to coordinate market surveillance and enforcement activities.

4.3 Although there have been notable successes achieved under the current regime, such as tackling techniques encouraging "in-app" purchases by children without explicit consent and improving business practices concerning short-term car-hire, the current proposal builds on that existing Regulation, by providing:

- a number of minimum powers for national authorities to enforce specified EU consumer laws, including checking whether websites geo-block[17] consumers or offer after-sales conditions not respecting EU rules (e.g. on withdrawal rights), ordering the immediate take-down of scam websites and requiring domain registrars and banks to provide information to help identify rogue traders;
- two types of mutual assistance mechanisms enabling one national authority to ask another for information and/or to take enforcement measures;

14 Regulation (EC) No 2006/2014.
15 The CMA, formerly the Office of Fair Trading, is responsible for enforcing consumer protection legislation in the UK.
16 It currently covers some 20 Directives and Regulations concerning existing EU consumer and marketing law.
17 Geo-blocking occurs when companies and online retailers apply barriers and impose restrictions to consumers on the basis of their nationality or place of residence.

- coordinated actions on "widespread infringements"[18] and common actions on "widespread infringements with an EU dimension"[19] coordinated by the Commission;

- a new surveillance mechanism to be operated by the Commission, so Member States can exchange information on infringements and raise alerts;

- limits on the use to which information or enforcement may be put, while allowing the creation of a database and system for exchanging infringement information; and

- more EU consumer-related law to be brought within the proposal's scope including the Services Directive and the current geo-blocking proposal once adopted.

4.4 The Government continues to confirm that it is likely that the proposal could come into force before Brexit.[20] It has been generally supportive of the proposal, subject to some concerns including:

- resources and implications of any enforcement powers for cross-border enforcement which may exceed those available to UK enforcers[21] for domestic enforcement; and

- the scope of the Commission's powers for adopting implementing acts.

4.5 In addition, during our scrutiny we have urged a proportionate approach to the proposal particularly in relation to minimum enforcement powers and the thresholds for Commission coordination of common actions.

4.6 In the light of Brexit, we now also highlight in the conclusions of this Report, the importance of keeping the door open to any cooperation between the UK as a third country and the EU in this field. We note that the proposal Article 40 (1) of the proposal on "international cooperation" provides for possibility of cooperation agreements with third countries[22] but observe that information exchange resulting from such agreements is to be subject to the confidentiality and data protection requirements set out in the proposed Regulation, the agreements themselves and EU data protection law in general.

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18 A widespread infringement is defined as "any act or omission contrary to the laws that protect consumers' interests that harmed, harms, or is likely to harm the collective interests of consumers residing in at least two Member States other than the Member State where the act or omission originated or took place, or where the trader responsible for the act or omission is established, or where evidence or assets pertaining to the act or omission are to be found".

19 A widespread infringement with a Union dimension is an infringement of EU consumer law which "harmed, harms or is likely to harm consumers in at least three quarters of the Member States accounting together for at least three quarters of the population of the Union".

20 The Government told us on 10 October that if the Council and EP agree their initial positions by Spring 2017 or before, it would then enter trilogue and a new text could be agreed by mid-2017. As provided by Article 53, the new Regulation would apply to Member States a year after it enters into force (i.e. mid 2018). It confirms that position now in the Minister's letter of 1 February.

21 Such as Trading Standards and CMA.

22 Article The Union shall cooperate with third countries and with the competent international organisations in the areas covered by this Regulation in order to protect consumers' interests. The arrangements for cooperation, including the establishment of mutual assistance arrangements, the exchange of confidential information and exchange of staff programmes, may be subject to agreements between the Union and the third countries concerned.

4.7 The Government now responds to our Report of 2 November, updating us on the progress of the negotiations and requesting us to clear the proposal from scrutiny in advance of the possible agreement of a General Approach at the Competitiveness Council on 20 February.

4.8 **We thank the Minister for Small Business, Consumers and Corporate Responsibility (Margot James) for writing sufficiently in advance of the Competitiveness Council and the February recess to enable us to consider properly her request for scrutiny clearance of the proposal. We commend her for specifically addressing concerns we have raised and for making an attempt to factor UK withdrawal from the EU into her request, albeit superficially.**

4.9 **We are mindful that the proposal is likely to apply to the UK before Brexit and that the Government may want to keep the door open to some kind of cooperation as a third country with EU on enforcement of consumer protection law as part of the "comprehensive, bold and ambitious" free trade agreement that the Prime Minister now seeks.[23] We consider that it is premature to clear the proposal but are prepared to grant the Government a scrutiny waiver to enable it to support a General Approach at the Competitiveness Council on 20 February, but on the following conditions. Namely that the Government:**

a) **is content that the General Approach text meets the UK's negotiating objective of a proportionate approach to the cooperation of national authorities on the enforcement of consumer law as conveyed by the Minister's letter of 1 February;**

b) **is satisfied that there is nothing in the proposed General Approach that might prevent the UK after Brexit from being able to cooperate, as a third country, with the EU on consumer law enforcement as a part of a future trading relationship including any access to the Digital Single Market; and**

c) **reports to us on the outcome of the Council as soon and as fully as possible.**

4.10 **We highlight the importance of EU data protection and confidentiality requirements in relation to this proposal, given as the Minister observes herself, it entails access by "competent authorities" to data, including communications data, in the course of investigation of infringements. We therefore also recognise its relevance to any possible third country cooperation between the UK and the EU (see Article 40 of the proposal). We note that the question of whether UK law may need to align with EU data protection law after Brexit to facilitate a future trading or wider relationship with the EU is increasingly a focus for our scrutiny of EU proposals following the Referendum.**

4.11 **We retain this document under scrutiny pending the Minister's response. In so doing, we draw it and this chapter to the attention of the Business, Energy and Industry Strategy Committee.**

23 The Prime Minister's Lancaster House Speech, 17 January 2017.

Full details of the documents

Proposal for a Regulation of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws: (37814), 9565/16, COM(16) 283.

The Minister's letter of 1 February 2017

4.12 The Minister for Small Business, Consumers and Corporate Responsibility (Margot James) writes to update us on the Government's position and to ask the Committee to clear the proposal from scrutiny. This is because the Slovak and Maltese Presidencies have made rapid progress on the proposal in working groups, and so the Maltese Presidency aims to reach a General Approach at the Competiveness Council on 20 February. Clearance would enable the UK to participate fully in the discussions at Council and the Government would continue to update us on developments.

4.13 Rehearsing the Government's standard statement about its position as a continuing Member State until exit from the EU,[24] she says that the UK has played an active a role in negotiations on this proposal in the interests of UK consumers and traders. She adds:

> "We would not wish to prejudge the outcome of EU exit negotiations. How these provisions will be reflected in domestic law will depend on the nature of our new relationship with the EU after our exit. It is possible that a text will be agreed in trilogue by mid-2017; depending on the final agreed length of the entry into force provision (Article 53), the Regulation may apply before the UK withdraws from the EU."

4.14 She then addresses the concerns that we have raised in our previous Reports, relating to the proportionality of the proposal, in particular relating to the impact of the minimum powers proposed on the UK's enforcers of consumer law (CMA, Trading Standards, for example) and the threshold for Commission coordination of "widespread" cross-border infringements. She also comments on the extent of the Commission's implementing act powers. In so doing, she reiterates the Government's view, which we share, that there are currently no subsidiarity concerns, particularly as there is no proposed role for the Commission on direct enforcement and "Member States are able to decide which actions they join and how they exercise enforcement powers".

Proportionality

The Minister says that the Government has:

- monitored proportionality throughout negotiations;
- striven for a sensible balance between a mechanism which improves the efficiency and effectiveness of coordination and the risk of placing disproportionate burdens on consumer protection authorities;

24 It continues to be the case that, until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of membership remain in force.

- believes that the proposed set of powers is proportionate to improve consumer protection and confidence in the digital environment, and has not opposed any of them; and
- has nevertheless supported wording in Article 9 which clarifies that exercise of the powers must be proportionate and in accordance with national law, and applicable procedural safeguards and principles of fundamental rights.

4.15 The Minister adds that the UK:

> "(We) have also supported drafting which allows Member States the responsibility to decide which competent authorities have access to which powers, while nevertheless ensuring that every power can be exercised by a relevant consumer authority, if deemed appropriate, for any consumer infringement covered by the Regulation. We see this as a proportionate and flexible approach, particularly for those Member States who have a range of specialist authorities responsible for only a small number of consumer laws. We are confident that all these issues will be addressed in the Council text."

Threshold for coordinated and common actions

4.16 The Minister explains the UK position on coordinated and common actions:

> "We continue to support the threshold level (currently set at cases involving 75% of Member States accounting together for at least 75% of the Union population) above which the Commission (rather than Member States) would automatically coordinate a case. We see this as a reasonable level which adequately distinguishes those cases which are a significant threat to consumers and both widespread and serious enough to justify the Commission's role. If the threshold were to be lowered significantly, we would be concerned that the Commission may not have adequate resources to handle the additional caseload. We defended the threshold in Council and we are confident that it will be maintained.
>
> "The majority of Member States favour a collaborative procedure for coordinated action, where the Commission recommends that Member States conduct investigations, and coordinates an action on the basis of their findings. Member States whose consumers have not been significantly impacted by the infringement can therefore choose not to take part in the coordinated action. This approach allows effective use of competent authority resources and is likely to be maintained in the Council text."

4.17 She adds on common actions:

> "This issue is also relevant to the procedure for joint actions (Chapter IV). Consistent with the aims of the Regulation, we do not want the grounds for opting out of actions to be too wide, but we have supported text allowing competent authorities to opt out if they have already agreed commitments with a trader to cease infringing activity, thereby requiring no further enforcement measures. This also appears likely to be maintained."

New and updated minimum powers (Articles 8—9)

4.18 The Minister is content with the proposed powers for consumer enforcement authorities, but highlights the issues of civil fining, compensation and the handling of data.

Civil fining

4.19 The Minister notes that UK authorities already have access to the proposed enforcement powers, with the exception of civil fining. She comments:

> "On balance, and in line with our objectives, we support this power remaining in the Regulation, and it is likely that the final Council text will include this. I accept that, if the power remains in the Council text, this would represent an area in which enforcers would have a greater power for intra-EU infringements than they do currently for purely domestic ones. There was a call for evidence in March 2016 on whether the domestic consumer law enforcement regime required strengthening, including whether the introduction of new civil fining powers would be appropriate. The Government is currently considering the responses and whether there is a sufficient case to take it forward."

Compensation

4.20 She explains that UK authorities already have the power to order consumer redress or compensation, but that this element of the original proposal has been strongly opposed by a number of Member States. She comments:

> "We have supported this in line with the overall objective of creating a consistent set of minimum powers fit for the digital age. It appears unlikely at this stage that this will be in the final Council text, but we are aware that the European Parliament may support it. We do not however believe that the absence of compensation powers would fundamentally undermine the wider benefit afforded by the Regulation."

Data handling

4.21 The Minister highlights that her department has consulted the CMA and the Home Office to ensure that data relied on as part of enforcement activity undertaken on the basis of the proposed Regulation is handled lawfully:

> "There is a proposed power to allow competent authorities access to information held by public authorities or companies which may be necessary for investigating a consumer infringement. In respect of cases in which this may relate to communications data, we have worked closely with the Competition and Markets Authority (CMA) and the Home Office and we are satisfied that the current text (in particular Article 9) ensures that this can be done only under the requirements of the Investigatory Powers Act 2016."

Commission's implementing act powers

4.22 The Minister says that the Government is content with how the Commission's implementing act powers are defined in the text:

> "It is our position to ensure that the Implementing Act powers conferred on the Commission are defined as tightly as possible, reflecting concerns raised by your Committee. From the outcome of recent working groups, I am optimistic that this will be achieved and that the Implementing Act powers will be used only for technical issues such as the nature of standard forms used in the CPC database".

Other parties involved, directly or indirectly, in the negotiations

4.23 The Minister also updates us on the European Parliament's involvement. She says:

> "In the European Parliament, the proposal is being dealt with by the Internal Market and Consumer Protection Committee (IMCO). The Committee held its first exchange of views in October, broadly supporting the proposal. They are planning a final vote in Committee in March, with a plenary vote later in the year."

4.24 On the UK's consultation of stakeholders, she informs us:

> "We have engaged regularly with stakeholders throughout the course of negotiations on both general and specific points, including competent authorities and consumer and trader associations. We continue to consult Northern Ireland, where consumer protection is devolved, Gibraltar, where CPC also applies, and Scotland and Wales, where consumer protection is reserved. Our priority has been to ensure that the Regulation works effectively in practice while achieving its overall aims."

Previous Committee Reports

Seventeenth Report HC 71-xv (2016–17), chapter 3 (2 November 2016); Seventh Report HC 71-v (2015–16), chapter 4 (6 July 2016).

5 Data Protection and the EU institutions

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Culture, Media and Sport Committee
Document details	Proposed Regulation on data protection rules applicable to EU institutions, bodies, offices and agencies repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC
Legal base	Article 16(2) TFEU; ordinary legislative procedure; QMV
Department	Culture, Media and Sport
Document Number	(38446), 5034/17, COM(17) 8

Summary and Committee's conclusions

5.1 The recently adopted General Data Protection Regulation (GDPR)[25] applies rules on the processing and free movement of personal data to Member States and data controllers/processors within the EU[26] and is intended to be extended to the EEA. It will be directly applicable in Member States from 25 May 2018. It is an important piece of EU legislation, required to facilitate the Digital Single Market, to update the 1995 rules in line with technological developments, to strengthen online privacy rights and to address divergent implementation by Member States. The Government has committed to ensuring that UK law complies with the GDPR by the May deadline.[27]

5.2 EU data protection rules are likely to remain relevant and significant for the UK after Brexit. This is because any future trading with the EU will probably involve the cross-border exchange of personal data from the UK as a third country to the EU. We address this issue both in our conclusions and at paragraphs 5.21–5.22 of this chapter.

5.3 The purpose of this proposed Regulation is to adapt the new GDPR rules to EU institutions, agencies and other bodies and also anticipates the proposed reform of the current e-Privacy Directive[28] (see chapter 6 of this Report). The proposal is a recast of the current Regulation (EC) 45/2001 applicable to the EC/EU institutions, agencies and other

25 Regulation 2016/679 of the EP and Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). On 4 May 2016, the official text of the Regulation was published in the EU Official. While the Regulation entered into force in 4 May 2016, it shall apply from 25 May 2018.

26 Note though that the GDPR also catches data controllers and processors outside the EU whose processing activities relate to the offering of goods or services (even if for free) to, or monitoring the behaviour (within the EU) of EU data subjects. This means in practice that a company outside the EU which is targeting consumers in the EU will be subject to the GDPR.

27 For example, when the Minister gave evidence to the Internal Market Sub-Committee of the Lords' European Union Committee on 19 January 2017, see Q67.

28 Proposed Regulation of the European Parliament and the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on privacy and electronic communications): (38455), 5358/17 + ADDs 1–6, COM(17) 10.

bodies which is based on the rules in the 1995 Data Protection Directive.[29] It is likely to be directly applicable in the UK before Brexit, coming into effect at the same time as the GDPR.

5.4 As the obligations in this proposal are imposed on data controllers and processors in EU bodies, the Government broadly assesses the impact on the UK to be minimal (excluding UK-based external processors used by the EU). However, it is seeking to ensure that, where possible, the same obligations and protections are applied to EU institutions as under the GDPR. It does not comment on any possible Brexit implications but we pursue these in our conclusions below.

5.5 **We thank the Minister of State for Digital and Culture (Matthew Hancock) for his Explanatory Memorandum, which is particularly helpful in highlighting areas where the present proposal diverges from the General Data Protection Regulation (GDPR) adopted last year.**

5.6 **We note that the Commission intends the proposal, once adopted, to apply from 25 May 2018, at the same time as the new GDPR. We agree with the Minister that on the expected timings of the Brexit negotiations,[30] it is likely that this proposal will apply to the UK before Brexit. However, as the Minister observes, the obligations envisaged by this proposal are not for Member States and the "impact will mostly fall on the data controllers in EU institutions", except for any UK-based "external" data processors used by them. So although at present this proposal seems to have little impact for the UK, we welcome the Minister's vigilance in seeking to ensure consistency between this proposal and the GDPR. It is important that UK and other EU citizens and businesses should enjoy the same level of protection when their data is being processed by EU bodies as under the GDPR in the case of the Member States and other data controllers/processors.**

5.7 **However, we wonder whether the handling of the personal data of UK citizens by EU institutions could possibly assume more significance after Brexit. Subject to any specific agreement reached as part of the UK's future relationship with the EU,[31] "third country" UK citizens might have to submit even more data than at present to EU bodies and centralised EU databases to acquire authorisation respectively to travel, work or provide services in the EU. It is therefore disappointing that the Minister has not commented from a Brexit viewpoint on Chapter V of the proposal which addresses the transfer of personal data to "third countries and international organisations". In this respect, we also await the Minister's Explanatory Memorandum on a Commission Communication,[32] which we have requested for deposit, on the issue of international transfers of data entitled "Exchanging and Protection Personal Data in a Globalised World". Even putting Brexit to one side, the Court ruling in Schrems[33] on the EU-US Privacy Shield alone highlights this as an area on which the Minister should comment.**

29 95/46/EC.

30 We understand that the Government is aiming for the European Union (Notification of Withdrawal Bill) to be approved, following the Lords' Third Reading on 7 March. See HL Deb, 30 January, col 977.

31 Whether as part of "bold and comprehensive Free Trade Agreement" aspired to by the PM in her Lancaster House Speech or otherwise.

32 Council document 5191/17: Communication from the Commission to the European Parliament and Council: "Exchanging Exchanging and Protecting Personal Data in a Globalised World".

33 Case C-362–14 Schrems v Data Protection Commissioner.

5.8 **It would be very helpful, when the Minister next writes, if he could explain how obligations under this proposal tie in with discrete obligations in relation to the handling of data relating to EU centralised databases, many of them having a law enforcement purpose. We note that the Government is already considering the relationship between this proposal and the ePrivacy proposal and we look forward to hearing more from the Government on this in due course.**

5.9 **As we expect negotiations to move quickly on this proposal, we ask the Minister to keep us informed of developments on the document but retain it under scrutiny in the meantime. We draw this chapter and document to the attention of the Culture, Media and Sport Committee.**

Full details of the documents

Proposed Regulation on the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies and on the free movement of such data and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC: (38446), 5034/17 , COM(17) 8.

The proposed Regulation

5.10 Article 2(3) of the GDPR requires Regulation 45/2001 to be updated so as to create a coherent data protection framework. The Commission's evaluation of the existing rules also concluded that in particular, a risk management approach, i.e. data protection impact assessments, and a sanctions regime should be adopted.

5.11 Accordingly, the key changes proposed include:

- **Stricter conditions for when consent is being used as a legal base for processing personal data:** The data subject's consent must be explicitly given for it to be valid. If consent is to be in a written declaration, the request must be clear and distinguishable from other matters;
- **Restrictions on the validity of a child's consent when information society services are being offered:** Consent will only be valid if the child is at least 13 years old;
- **Further obligations on data controllers:** Including the requirements to conduct an impact assessment and notify the European Data Protection Supervisor (EDPS) of a personal data breach within 72 hours in certain circumstances. The proposals maintain the GDPR's risk based approach to these obligations;
- **An expanded right to erasure (or "right to be forgotten"):** This includes an obligation for any controller who has made the personal data public to take reasonable steps to inform other controllers that any links to the data and replications of it should also be erased;
- **A new right to data portability**: This requires the controller in certain circumstances to allow data subjects to receive their personal data in a structured, commonly used, machine-readable format;

- **An expanded right to object to processing for scientific or historical research or statistical purposes**: Unless the processing is necessary for a task in the public interest;
- **Limitation of the period in office for the EDPS**: To a maximum of two terms of five years; and
- **A tier-based sanctions regime for breaches:** The maximum fine is €50,000 (£42,468)[34] for certain breaches, with an annual cap of €500,000 (£424,680).[35]

The Government's view

5.12 In an Explanatory Memorandum of 31 January 2017, the Minister of State for Digital and Culture (Matthew Hancock) first rehearses the Government's standard statement on the UK's position in the EU as a Member State following the Referendum outcome.[36] He clarifies that if the Commission succeeds in its aim of having the proposal come into force in May 2018 with the GDPR, and exit negotiations are still ongoing, then the proposed Regulation will be directly applicable in the UK.

5.13 However, he does not expect the proposal to have any direct impact on the UK or entail any significant financial implications, given that the obligations it imposes are on data controllers and processors in the EU institutions, agencies and other bodies.

Policy implications

5.14 He then explains the Government's assessment of the policy implications of the proposed Regulation. He says that the Government:

- favours a proportionate approach, striking the balance between the protection of personal data and promoting the free flow of data that is necessary;
- considers that as the proposed Regulation applies to the processing of personal data by the EU institutions, agencies, and bodies, it has little direct impact on the UK;
- maintains that despite the lack of UK impact, consistency between regimes is important both for data subjects' rights and for the sharing of personal data between public authorities; and
- believes that the proposals should mirror the provisions of the GDPR in all areas where it is appropriate.

34 Applying an exchange rate of €1= £0.84935.

35 Applying the same exchange rate.

36 On 23 June, the EU referendum took place, and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period, the Government will continue to negotiate, implement, and apply EU legislation. The outcome of the exit negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.

Need for greater alignment with the GDPR

5.15 The Minister notes that some differences are due to the smaller range of processing done by the EU institutions, so for example, there is no right to object to processing for direct marketing purposes, as this processing is not done by the EU institutions.

5.16 However, he adds that the Government believes that the justification for other differences is less clear and will therefore consider whether there should be greater alignment with the GDPR, in particular in the following cases:

- **Data subject's complaint:** a clarification that if a complaint is not handled or responded to by the EDPS within three months, then it should be presumed to have been rejected;
- **Greater derogations for international transfers:** If a public authority under the GDPR wishes to make an international transfer as part of its public powers, it is not allowed to rely on the derogations for when the data subject has consented to the transfer, or the derogations involving the performance of a contract with the data subject. However, the text appears to permit Union institutions, bodies, and agencies to rely on these derogations;
- **Different scope for derogations to the GDPR:** The draft Regulation expands the purposes for which derogations can be made so that they can include processing for the purpose of protecting the internal security of Union institutions and bodies including their electronic communications networks. However, the range of rights the derogations may be applied to has been narrowed: Union institutions and bodies may not derogate from their obligations in relation to the data subject's right to object and the right not to be subjected to decisions based on automatic processing; and
- **A different regime for sanctions**: There is a two tiered system for fines, unlike the GDPR's three tiered system.[37] Infringements of the first tier include breaches of the requirements for a data protection officer, and security breaches. These incur a fine of up to €25,000 (£21,234)[38] per infringement. The second tier covers infringements of the data protection principles, the obligation for lawful processing, the conditions for consent, conditions for processing sensitive data, the rights of the data subject, and the provisions for international transfers. These incur a maximum fine of €50,000 (£42,468)[39] per infringement. There are certain elements of the text that do not appear to fall into either tier. These include breaches of the conditions for processing compatibility, the safeguards for processing personal data for research purposes including archiving, and the obligations imported from the draft ePrivacy Regulation.

37 The GDPR establishes a tiered approach to penalties for breach which enables the DPAs to impose fines for some infringements of up to the higher of 4% of annual worldwide turnover and EUR20 million (eg breach of requirements relating to international transfers or the basic principles for processing, such as conditions for consent). Other specified infringements would attract a fine of up to the higher of 2% of annual worldwide turnover and EUR10m.

38 Applying an exchange rate of €1= £0.84935.

39 Applying the same exchange rate.

Alignment with the proposed ePrivacy Regulation

5.17 In terms of aligning the existing Regulation with the proposed ePrivacy Regulation,[40] the Minister highlights that the proposals import the obligation to protect the confidentiality of electronic communications, and to protect information related to users' terminal equipment when users access the EU's public websites and applications. He says that Government will be considering in detail the relationship between the two proposals.

Impact on UK "external processors" used by the institutions

5.18 Despite the fact that the proposal applies to data controllers in the institutions, the Minister says that the Government will be assessing the potential impact of the proposal on UK "external processors" employed by them and identifying overlap between their obligations in this proposal and the GDPR and any uncertainty in the scope of the proposals which make it unclear which law applies to them.

Recognition and enforcement of third country judgments

5.19 Article 50 deals with recognition and enforcement of judgments or administrative decisions by third countries in circumstances where there is a mutual legal assistance treaty in force between the third country and the EU. The Minister explains that this replicates Article 48 of the GDPR in which Government says it does not participate.[41]

Timetable for negotiations

5.20 Negotiations are expected to start early during the term of the Maltese Presidency given that the Commission intends for the Regulation to apply from 25 May 2018 in order to ensure consistency with the GDPR.

Data exchange between the EU institutions and third countries

5.21 The Minister does not comment on data exchange between the EU institutions and third countries from a Brexit point of view.[42] Chapter V of this proposed Regulation "Transfer of data to third countries or international organisations" appears to be modelled on provisions for data exchange with third countries under the GDPR. So, for example, Article 48 of the proposed Regulation on "adequacy decisions" references Article 45 of the GDPR. Transfers of data by EU institutions to a third country, a territory or one or more specific sectors in the third country, or an international organisation can only take place if the EU has decided that they ensure an adequate level of data protection for EU citizens.[43]

40 See footnote 4.

41 For the Written Ministerial Statement on this purported opt-in decision, made in the absence of a Title V AFSJ legal base: HC Deb, 4 February 2016 col 511WS.

42 Note that the EM does highlight disparities between derogations not available to public authorities in relation to international transfers under the GDRP that the EU institutions are able to rely on under the proposal.

43 Or failing that, by way of a number of other specified mechanisms such as binding corporate rules or contractual clauses (see Article 46 of the GDPR).

5.22 We therefore suggest that, as such, adequacy decisions under the proposed Regulation would be subject to the same CJEU rulings as those under the GDPR. The CJEU's decision in Schrems[44] has set the bar for how those decisions need to comply with Charter of Fundamental Rights provisions, namely Article 7 (right to respect for private and family life) and Article 8 (protection of personal data).

Previous Committee Reports

None, but see (33649), 5853/12: Twenty-fifth Report HC 342-xxiv (2015–16), chapter 15 (9 March 2016); Twenty-second Report HC 342-xxi, chapter 3 (3 February 2016); Sixteenth Report HC 342-xv (2015–16), chapter 1 (6 January 2016); Fifteenth Report HC 342-xiv (2015–16), chapter 1 (16 December 2015); Eleventh Report HC 342-xi (2015–16), chapter 2 (2 December 2015); Seventh Report HC 342-vii (2015–16), chapter 5 (28 October 2015); Fifth Report HC 342-v (2015–16), chapter 5 (14 October 2015); First Report HC 342-i (2015–16), chapter 41 (21 July 2015); Thirty-six Report HC 219-xxxv (2014–15), chapter 11 (11 March 2015); Thirty-first Report HC 219-xxx (2014–15), chapter 5 (28 January 2015); Twenty-second Report HC 219-xxi (2014–15), chapter 9 (26 November 2014); Twelfth Report HC 219-ii (2014–15), chapter 8 (10 September 2014); Forty-seventh Report HC 83-xlii (2013–14), chapter 14 (30 April 2014); Thirteenth Report HC 83-xiii (2013–14), chapter 24 (4 September 2013); Eighth Report HC 83-viii (2013–14), chapter 11 (3 July 2013); Third Report HC 83-iii (2013–14), chapter 15 (21 May 2013); Thirty-first Report HC 86-xxxi (2012–13), chapter 7 (6 February 2013); Twenty-sixth Report HC 86-xxvi (2012–13), chapter 11 (9 January 2013); Eighth Report HC 86-viii (2012–13), chapter 5 (11 July 2012); Fifty-ninth Report HC 428-liv (2010–12), chapters 7 and 8 (14 March 2012).

44 Case C-362–14 Schrems v Data Protection Commissioner.

6 ePrivacy

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Culture, Media and Sport Committee and the Joint Committee on Human Rights
Document details	Proposed Regulation on Privacy and Electronic Communications repealing Directive 2002/58/EC
Legal base	Articles 16 and 114 TFEU; ordinary legislative procedure; QMV
Department	Culture, Media and Sport
Document Number	(38455), 5358/17 + ADDs 1–6 , COM(17) 10

Summary and Committee's conclusions

6.1 The content of electronic communications (e-comms) may reveal sensitive information about the individuals involved in the communication, from personal experience to medical conditions, sexual preferences, religious and political views. Disclosure could result in personal and social harm, even economic loss. The same applies to metadata derived from e-comms, including numbers called, websites visited, geographical location, time, date and durations of calls. This allows inferences to be drawn about private lives of the persons concerned. E-comms data may also reveal commercially sensitive information concerning business.

6.2 The proposed Regulation aims to update the existing ePrivacy Directive[45] which was adopted in 2002. The Directive supplemented the 1995 Data Protection Directive[46] by providing more specific privacy rules for the e-comms sector. These included rules on itemised billing and on unsolicited marketing calls and emails. Later amendments of the Directive have added new provisions about information being stored on and accessed from the user's computer (such as cookies),[47] and requirements about reporting data breaches.[48] The Directive was transposed into UK law through the Privacy and Electronic Communications Regulations (PECR),[49] which were last updated in 2016.[50]

6.3 The proposal is linked to the new General Data Protection Regulation (GDPR) and therefore also has some relevance to the other data protection proposal addressed in chapter 5 of this Report, adapting GDPR rules for EU institutions, agencies and bodies.[51]

45 2002/58/EC.
46 95/46/EC.
47 Cookies are small pieces of data that a browser can be asked to save/store when a user visits a website. Cookies will then allow the website to recognise the device when a user visits again and so to gain a better idea of his/her preferences over time and to use the information for targeted advertising. There are many types of cookies, classified according to their lifespan or to which domain is hosting the cookies.
48 By a 2009 Directive (2009/136/EC) and Commission Regulation (611/2013).
49 SI 2003/2426.
50 SI 2016/524.
51 Proposed Regulation on the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies and on the free movement of such data and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC: (38446), 5034/17, COM(17) 8.

6.4 The main changes under the new proposal include:

- Removing unfair competitive advantage for providers of "Over the Top" (OTT) services (delivering comms and ancillary services via apps e.g. WhatsApp, Facetime, Skype, Xbox 360 without the direct involvement of traditional telecoms providers)[52] by bringing them within the scope of ePrivacy Regulation[53] just like traditional telecoms providers;[54]

- Updating the existing framework to encompass new technologies and processing situations, amending cookie consent requirements, further restricting direct marketing calls, imposing stricter conditions on confidentiality of communications, imposing fines and harmonised enforcement, achieving greater harmonisation through the use of a Regulation instead of a Directive; and

- Expanding territorial scope to apply to providers outside the EU if they offer e-comms to EU end users, in the same way as does the GDPR.

6.5 The Government provides us with an initial but comprehensive view of the proposal. However, it does not provide an impact checklist, nor address Brexit implications and only mentions in passing the recent CJEU ruling in Watson[55] which concerned the current ePrivacy Directive.

6.6 **We thank the Minister for Digital and Culture (Matthew Hancock) his comprehensive Explanatory Memorandum on this important proposal.**

6.7 **The Government has said that the UK will comply with the new data protection Regulation by 25 May 2018,[56] before Brexit. This is the date when the Commission also intends this proposal to apply, once adopted. In the light of this we would be grateful if the Minister could confirm whether the Government:**

- **also intends to comply with this proposal on ePrivacy before Brexit;**

- **plans to keep UK law aligned with EU data protection law after Brexit, including this proposal once adopted; and**

- **considers that any provisions in the proposal as currently drafted are problematic in any way to the UK as a third country after Brexit.**

6.8 **The Minister recalls in his account of the Commission's review of the existing ePrivacy Directive:**

> **"In addition, the evaluation also found potential overlaps with the GDPR, such as the provisions for data security and data breach notifications. The**

52 In other words, without having to pay them.

53 They fall outside of the definition of "electronic communications services "under the current ePrivacy Directive.

54 These have become popular substitutes for traditional telecoms services, e.g. online chat applications instead of mobile SMS, and Voice over IP technology (VoIP) instead of telephone calls.

55 C-203/15 and C-698/15 Joined Cases: *Tele 2 Sverige AB v Post- och telestyrelsen; Watson and Others v Secretary of State for the Home Department.*

56 For example, when the Minister gave evidence to the Internal Market Sub-Committee of the Lords' European Union Committee on 19 January 2017, see Q67.

> **reform thus aims to remove contradictions and duplications between the instruments, reduce discretion for member states, as well as clarify the application of certain provisions."**

However, the respective scopes of the new GDPR and the proposed Regulation are not entirely clear to us and, by extension, may not be clear to duty-holders and data subjects. We are concerned about legal uncertainty which may become even more important after Brexit when the UK will have to consider what, if any, EU data protection law it wishes to retain in the longer term as UK law. So when the Minister next writes, please could he clarify, using practical examples where possible, when data relating to "electronic communications", including metadata would fall to be considered:

- **exclusively under the proposed Regulation;**
- **exclusively under the GDPR; and**
- **under both.**

We would also be very interested to learn in due course whether there are any adverse consequences that might flow from scenarios (a)-(c), in terms of the level of legal protections provided to UK citizens or burdens imposed on UK business.

6.9 **We note that the Minister questions whether it would have been better for the Commission to have chosen a Directive instead of a Regulation as the legal instrument for this new proposal. Given the proposal's close links with the GDPR, we consider that adopting a different legislative form to the GDPR would create unhelpful enforcement and other consistencies for Data Protection Authorities like the Information Commissioner's Office.**

6.10 **The Minister states at paragraph 46 of his EM:**

> **"The government will fully consider the impact of the proposal on stakeholders and the Information Commissioner's Office."**

There are also various statements made by the Minister in his EM about the Government assessing further whether the proposal is adding value or imposing disproportionate burdens in various areas. We therefore request the Minister to provide us with a copy of the Government's Impact Checklist as soon as possible. It is clearly important that the UK is not burdened with having to comply with EU legislation that imposes unnecessary burdens for UK business, public authorities or regulators for what might only be a short period before Brexit.

6.11 **In his Explanatory Memorandum, the Minister welcomes consultation with interested parties, but we would be interested to learn what formal and structured consultation the Government has undertaken with stakeholders so far. Did stakeholders feed into any Government submission to the Commission's REFIT consultation? If possible, it would be helpful for us to see a copy of any submission.**

6.12 **We note that, just like the GDPR, the proposal will apply to providers outside the EU if they offer electronic communications services to EU end users. We observe that this extraterritoriality has the potential to affect the UK after Brexit, regardless of the specifics of the future UK-EU relationship.**

6.13 **We draw the Minister's attention to paragraphs 6.22–6.26 of this Report where we analyse the CJEU's preliminary ruling in the case of *Watson v Secretary of State* for the Home Department.[57] This is clearly relevant to Article 15 of the current ePrivacy Directive and the drafting of Article 11 of the proposed Regulation (together with corresponding Recital 26). Could the Minister confirm that the proposed Article 11 strikes the right balance between the need to protect the fundamental rights of EU citizens to the standard of the EU Charter[58] and the needs of Member States to retain data for national security and law enforcement purposes? We ask this particularly because, as the Minister himself highlights, there is no specific derogation in the proposal relating to data retention. This is striking considering the legal gap created when the Data Retention Directive was invalidated by the CJEU in the Digital Rights Ireland judgment.[59]**

6.14 **In the meantime we ask the Minister to keep us informed of developments in the negotiations of this proposal.**

6.15 **We retain this document under scrutiny but draw it and this chapter to the attention of the Culture, Media and Sport Committee and the Joint Committee on Human Rights.**

Full details of the documents

Proposal for a Regulation of the European Parliament and Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications): (38455), 5358/17 + ADDs 1–6, COM(17) 10.

Background

6.16 Two developments form the background to the proposed Regulation: the Commission's REFIT review and the recent CJEU rulings in the data protection case of *Watson and others v Home Secretary.*[60]

Commission's consultation and REFIT review

6.17 As part of preparation for the reform of the ePrivacy Directive, the Commission launched a public consultation on reform from 12 April 2016 until 5 July 2016. It also undertook an evaluation of the Directive, its purpose, and functioning, under the Regulatory Fitness and Performance Programme (REFIT). The Commission concluded from its evaluation that the ePrivacy Directive provided added value to the existing data protection framework through its specific emphasis on confidentiality of electronic communications and protection for legal persons.

6.18 However, it also identified various areas that merited reform due to being out of step with commercial, market, technological, and legal developments. In particular, the

57 C-203/15 and C-698/15 Joined Cases: *Tele 2 Sverige AB v Post- och telestyrelsen; Watson and Others v Secretary of State for the Home Department.*

58 Charter of Fundamental Rights of the European Union.

59 Joined cases C-293/12 and C-594/12.

60 C-203/15 and C-698/15 Joined Cases: *Tele 2 Sverige AB v Post- och telestyrelsen; Watson and Others v Secretary of State for the Home Department.*

evaluation identified the rise and growth of "OTT" services and applications as being a key issue. The Commission therefore earmarked regulation of OTT services within the new proposal as a way of tackling the competitive advantage they are currently enjoying over electronic communications providers under the current Directive.

6.19 The evaluation also highlighted the development of technologies such as the Internet of Things, device fingerprinting, and mobile device Wifi tracking since the Directive was implemented. The Commission observes that although the GDPR would cover processing by these technologies if it involved personal data, it is unclear to what extent they are captured by the ePrivacy Directive. The reform thus aims to clarify how obligations apply to the new forms of processing and simplify and remove any outdated areas.

6.20 The Commission also assessed the legal framework for the ePrivacy Directive, including its implementation, enforcement, and relation to the GDPR. It held that the current rules, in particular the "cookie" provisions, had been applied in different ways by Member States, and that a split of supervision responsibilities between data protection authorities and telecoms regulators caused issues for enforcement. This had led to a fragmentation of standards across the EU.

6.21 Lastly, the Commission identified difficulties with how the existing rules worked in practice, in particular the provisions for consenting to cookies and the restrictions on unsolicited marketing calls. Since the "cookie law" amendment in 2009, many websites had put up banners on their website either asking users to consent to cookies or informing them about it. The Commission's evaluation indicated that the current rules were somewhat inflexible towards cookies that posed a low risk to the user's privacy and may also lead to "consent fatigue" on the part of users. For the provisions on unsolicited marketing calls, the evaluation identified that they were not fully succeeding in protecting individuals from unwanted marketing calls. The reform thus aims to enhance protection from such calls as well as simplifying the existing provisions for consenting to cookies.

Relevance of the CJEU ruling in Watson v Home Secretary

The ruling

6.22 On 21 December the CJEU gave its ruling in Watson and others v Secretary of State for the Home Department.[61] This was in response to a request for a preliminary reference made by the UK Court of Appeal in the course of the judicial review (JR) challenging the UK's Data Retention and Investigatory Powers Act 2014 (DRIPA). The UK reference was joined with a Swedish reference, the Tele2 Sverige proceedings, which raised similar questions.

6.23 DRIPA was introduced in the UK, as an emergency measure, following the CJEU's invalidation of the Data Retention Directive (DRD)[62] in the Digital Rights Ireland case.[63] It authorises the Home Secretary to require public telecommunications operators to retain all communications data (but not its content) for a maximum period of 12 months.

61 C-203/15 and C-698/15 Joined Cases: *Tele 2 Sverige AB v Post- och telestyrelsen; Watson and Others v Secretary of State for the Home Department.*

62 2006/24/EC.

63 C293/12 and C594/12 *Digital Rights Ireland and Others.*

6.24 The subsequent JR and the preliminary ruling concerned whether this general obligation is compatible with EU law, in particular the current ePrivacy Directive 2002/58/EC)[64] and Articles 7 and 8 of the Charter (rights to private and family life and data protection respectively).

6.25 The CJEU ruled that general retention obligations are prohibited by EU law and only targeted retention can be required for the purpose of fighting serious crime and subject to further strict conditions: retention had to be limited to what was strictly necessary as reflected in the categories of data to be retained, the means of communication affected, the persons concerned and the retention period adopted. Additionally, the Court commented that review of the 2002 Directive can only take into account the provisions of the Charter and as such, Article 52(3) of the Charter does not prevent EU law from providing more extensive protection than the ECHR.

6.26 The judgment has direct implications for the Investigatory Powers Act 2016 (IPA)[65] while the UK remains a Member State and could also affect the important data protection elements of any Brexit agreements

Relevance to proposed ePrivacy Regulation

6.27 Article 15(1) of the Directive entitled "Application of certain provisions of Directive 95/46/EC" currently provides for exceptions to the confidentiality of e-comms:

> "Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1), (2), (3) and (4), and Article 9 of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system....To this end, Member States may, inter alia, adopt legislative measures providing for the retention of data for a limited period justified on the grounds laid down in this paragraph (our underlining). All the measures referred to in this paragraph shall be in accordance with the general principles of Community law, including those referred to in Article 6(1) and (2) of the Treaty on European Union."

64 Article 15 of the Directive provided for exceptions to the confidentiality of e-communications. However, as Member States took diverging approaches to Article 15, the Data Retention Directive ("DRD" 2006/24) was enacted. Once the CJEU ruled that the DRD was invalid for being incompatible with the EU Charter of Fundamental Rights, this left question as to what Member States could require as part of national regimes for data retention under Article 15, in the light of the Charter.

65 DRIPA was subject to a sunset clause providing for the Act to be repealed on 31 December 2016. During its passage, the Government committed to bringing forward new legislation to provide an updated framework for the use by the security and intelligence agencies, law enforcement and other public authorities of investigatory powers to obtain communications data. The new IPA legislation received Royal Assent on 29 November. It followed a review by the Independent Reviewer of Terrorism Legislation, David Anderson QC, into the existing laws relating to investigatory powers. IPA contains powers covering the interception of communications, the retention and acquisition of communications data, and equipment interference for obtaining communications and other data. It also makes provision relating to the security and intelligence agencies' retention and examination of bulk personal datasets. Many of IPA's provisions are now in force, including those in Part 4 relating to the retention of communications data.

6.28 New Article 11(1) of the proposal (and its corresponding Recital) appears to have been drafted to take into consideration the CJEU'S Watson judgment on DRIPA and Digital Rights Ireland judgment on the Data Retention Directive, adding a specific reference to needing to respect "the essence of the fundamental rights and freedom" in a democratic society. However, as the Minister highlights in his Explanatory Memorandum, there is no specific derogation for data retention, which seems to us striking given the invalidation of the DRD in Digital Rights Ireland. Article 11(1) states:

> "Union or Member State law may restrict by way of a legislative measure the scope of the obligations and rights provided for in Articles 5 to 8 where such a restriction respects the essence of the fundamental rights and freedoms and is a necessary, appropriate and proportionate measure in a democratic society to safeguard one or more of the general public interests referred to in Article 23(1)(a) to (e) of Regulation (EU) 2016/679 [the GDPR] or a monitoring, inspection or regulatory function connected to the exercise of official authority for such interests."

6.29 Recital 26 explains this provision more fully:

> "....this Regulation should not affect the ability of Member States to carry out lawful interception of electronic communications or take other measures, if necessary and proportionate to safeguard the public interests mentioned above, in accordance with the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the Court of Justice of the European Union and of the European Court of Human Rights."

Relevance to UK after Brexit

6.30 The ruling[66] highlights the following possible post-Brexit implications for the UK in the field of data protection and ePrivacy:

- In addition to the proposed extraterritorial scope of the ePrivacy proposal and the GDPR, UK subsidiaries based in the EU after Brexit would still have to comply with EU data protection and ePrivacy law in order to operate in the EU;
- In terms of a future trading relationship with the EU, the UK may need to align its domestic law with EU data protection/ePrivacy law as continuously interpreted by the Court of Justice in the light of the (possibly more protective) Charter rather than the remaining human rights instrument applicable to the UK after Brexit, the ECHR. This is particularly the case if the UK is to access the Digital Single Market to any significant extent; and
- Specifically, compliance with EU data protection/ePrivacy legislation is likely to be required for any EU-UK agreement for the use and transfer of EU citizens' data to the UK as a third country.

66 Together with Schrems and Digital Rights Ireland.

The proposed Regulation

6.31 Reflecting the Commission's REFIT conclusions, the key changes in the proposal include:

- **Extension of the material scope to encompass OTT providers**: This will make them subject to obligations to protect e-comms data as traditional telecoms operators are. The reform clarifies that this also includes providers who offer communications services ancillary to their main service;
- **Extension of the material scope to encompass new technologies and processing situations**: The proposals would apply to machine to machine data transfers, which are common for Internet of Things technologies. They would also apply to wifi tracking systems and device fingerprinting;
- **Amendments to the cookie consent requirements:** Providers of internet browsers and similar software would need to offer users the choice to prevent cookies being placed on their devices. The software must prompt users to select a setting upon installation or update. If a user has chosen browser settings that consent to receiving cookies, then this may be sufficient to count as valid consent for the cookie being placed and accessed. Consent would also no longer be required for first party[67] web analytical cookies, as these are less privacy intrusive;
- **Further restrictions on direct marketing calls:** The proposals place an obligation on telemarketers to use a number with a special prefix so that users can recognize an incoming marketing call. In addition, telecoms providers must offer users the ability to block calls from certain numbers free of charge;
- **Stricter provisions on the confidentiality of communications**: including obligations to consult the supervisory authority in certain circumstances where content data is being processed;
- **High fines and harmonised enforcement:** The proposal seeks to replicate the GDPR's tier-based system with a maximum fine of 4% of global annual turnover or €20 000 000,[68] depending on which is higher. The proposal also mandates data protection authorities to be the regulator for the measure rather than telecoms regulators. The "one stop shop" enforcement mechanism from the GDPR will apply for solving cross-border disputes;
- **Less flexibility for Member States:** The Commission has chosen to replace the Directive with a directly applicable Regulation in order to achieve greater harmonisation of the rules; and
- **Expansion of the territorial scope:** In keeping with the GDPR, the reform will also apply to providers outside the EU if they offer e-comms services to EU users.

67 See footnote 23.

68 £16,987,000, based on an exchange rate of € 1= £ 0.84935.

The Government's view

6.32 In an Explanatory Memorandum of 31 January 2017, the Minister of State for Digital and Culture (Matthew Hancock) first gives an account of the Commission's review of the current Directive (paragraphs 6.17–6.21) and identifies the key changes in the proposal (paragraph 6.31).

6.33 He then rehearses the Government's standard statement on the UK's position in the EU as a Member State following the Referendum outcome.[69] He clarifies that if the Commission succeeds in its aim of having the proposal come into force in May 2018 with the GDPR, and exit negotiations are still ongoing, then the proposed Regulation will be directly applicable in the UK before Brexit.

Policy implications

6.34 The Minister sets out the policy implications for the UK of the proposal under the following headings.

Extension of the material scope to encompass OTT providers, new forms of processing, including ancillary communication services

6.35 The proposal aims to level the playing field as between OTT providers and e-comms providers by:

- placing confidentiality obligations on OTT providers and clarifying the application to new forms of processing, including machine to machine communications for Internet of Things devices, such as a smart fridge sending an electronic communication to a supermarket website about when a new delivery of groceries will be needed; and
- targeting the technique of device fingerprinting, which sometimes features as an alternative to cookies as it allows website owners to identify a particular user based on unique characteristics of their operating systems (and applying the same rules to them as cookies) in line with a recently published opinion of the Article 29 Working Party.[70]

6.36 The Minister adds that the Government:

- wants to ensure the proposal is fit for purpose and adaptable to new commercial and technological developments;
- supports making legislation clearer and more understandable to consumers and industry;

69 On 23 June, the EU referendum took place, and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period, the Government will continue to negotiate, implement, and apply EU legislation. The outcome of the exit negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.

70 This is composed of representatives of the national data protection authorities (DPA), the EDPS and the European Commission.

- believes, however that reforms should only be proposed on a clear evidence base that demonstrates that new legislation is both necessary and proportionate and will carefully consider whether these criteria are met;
- will assess whether extending the scope of the proposal to include OTT providers is justified in terms of EU competition law since consumer concerns are already covered by the GDPR and consumer protection legislation; and
- will consider whether the full inclusion of providers of ancillary communication services, such as online gaming services that allow players to chat to each other, is proportionate and offers sufficient added value in terms of privacy.

Amendments to the cookie consent requirements

6.37 The Commission proposals aim to reduce the amount of cookie consent pop-ups and banners by simplifying the existing rules. The Minister says that the Government:

- agrees that practices that create consent fatigue may be inefficient and fail to enhance privacy, particularly if users find the information about cookies confusing and are unclear about what they are consenting to;
- will scrutinise carefully the Commission's proposals to reform the cookie provisions, looking at the extent to which it is technologically feasible for browser providers to block all types of cookies from being placed on a user's terminal equipment and whether they should be subject to heavy fines for any failure;
- will consider the extent to which it is compatible with informed consumer choice for the browser provider to offer the user a choice of different privacy settings for first and third party cookies[71] where the recitals prohibit the provider from dissuading the consumer to select higher settings;
- welcomes the intention to find a simplified, user-friendly method of providing consent by obviating the need for pop up cookies but providing that consent via browser setting is adequate, but that it will need to assess whether this would be compatible for conditions for valid consent under the GDPR; and
- equally welcomes the intention to simplify the rules for cookies but notes that the benefits of removing the need for consent to first party web analytical cookies may be limited since many website owners rely on third party cookies, rather than their own, to track how many visitors their sites receive.

71 Our understanding is that first party cookies are those placed by the visited website and essentially aim at improving efficiency and the user's experience. Third party cookies are those hosted by a domain that is not the same as the visited page's domain and are used by advertising networks to monitor behaviour and target advertising.

Unsolicited marketing communications

6.38 The Commission proposal aims to tackle nuisance calls and other unsolicited marketing communication such as email spam. The Minister comments that:

- nuisance calls may cause significant distress to elderly and vulnerable people;
- the Government has been clear that it will not stand for this continued harassment, and it has recently introduced a number of measures to reduce the number of these calls;
- it will assess the compatibility of the Commission's proposals with the recent amendments to PECR;
- it observes that the Commission has chosen to retain the existing system of allowing Member States to decide whether to adopt an opt-in regime, or an opt-out one such as the UK's Telephone Preference Service;
- the draft Regulation proposes to extend the current restrictions on unsolicited marketing communications so that the requirement for consent covers all forms of direct market electronic communications;
- this means that spam messages sent to a user's inbox on a social network will fall under the same requirements as spam messages sent via traditional email;
- the Government notes that the proposal has retained the exemption for when a company has already sold a similar product or service to its customer; and
- it will consider the proposals, and in particular how they may apply to direct marketing aimed at businesses.

Confidentiality of communications

6.39 The proposal requires specific legal bases for processing electronic communications data, which must be erased immediately after the communication is complete, unless a further justification for retaining it remains.

6.40 The Minister explains that the term "electronic communications data" replaces the previous definitions of traffic data and location data, which were found to confuse users and industry according to the Commission's evaluation. The new definition is itself broken up into two categories: metadata and content data. The proposal permits processing without consent if it is to maintain security of the service or to detect errors after the communication has been sent. However, it places restrictions on "content scanning", including services that scan email messages to remove certain material. The Government wants to consider these proposals further. It will look particularly at whether an unwarranted burden is placed on providers by the requirement to consult the supervisory authority for scanning services that the user has already consented to.

Sanctions and enforcement

6.41 The Minister explains that the current rules permit Member States to set their own administrative fine levels. The proposal limits the types of fines for which Member States have discretion, and it establishes a tiered system for other infringements. The Government will review the proposed tier-based fine sanction to ensure that it is comprehensible, and that the suggested sanctions match the gravity of the infringement.

6.42 The proposal also requires data protection authorities to be the sole regulator in Member States, and for the GDPR's one stop shop system, including the European Data Protection Board (EDPB) to be used for cross-border disputes. While the Information Commissioner's Office currently regulates PECR, the Government will consider carefully any further burden that the proposals may place on it, and on the workload of the EDPB.

Derogations

6.43 The Minister describes how the proposal sets out a list of purposes for which Member States may legislate derogations or restrictions of various articles in the measure. He observes that the list of restrictions or derogations is not completely aligned with those of the GDPR. Derogations missing from the proposal but allowed by the GDPR include processing for the protection of the data subject or the rights and freedoms of others, as well as processing to prevent breaches of ethics for regulated professions.

6.44 The Commission proposal notes that it has maintained the substance of the derogations in the ePrivacy Directive as well as bringing them up to date with the GDPR.

6.45 The Minister says that the proposal's explanatory memorandum highlights these derogations in the context of there being no specific provisions for data retention. It observes that the derogations permit Member States to have national data retention frameworks, provided that these comply with relevant obligations, including case-law of the Court of Justice of the European Union, such as Joined Cases C-293/12 and C-594/12 Digital Rights Ireland and Seitlinger and Others; and Joined Cases C-203/15 and C-698/15 Tele2 Sverige AB and Secretary of State for the Home Department.

6.46 He adds that the Government will carefully scrutinise the proposed list of derogations and assess whether it may need to cover more processing situations, such as those envisaged under the GDPR derogations.

Choice of instrument

6.47 The Minister explains that the Commission has chosen to replace the Directive with a directly applicable Regulation in order to achieve greater harmonisation of the rules and avoid legal confusion with the GDPR. He highlights that the Government is not convinced that a Regulation is required to achieve the proposal's goals. It will also scrutinise areas of overlap with the GDPR to see if further simplification can be made.

Expansion of the territorial scope

6.48 The Minister states that the proposals will apply to providers outside the EU if they offer e-comms services to EU users. This aligns the proposal with the GDPR and also

ensures that more OTT providers, who are often located in third countries, are covered. He says that the Government will carefully review the extraterritorial extension of the scope.

Impact Assessment

6.49 The Minister now comments on the Commission's Impact Assessment. He says:

- this examined five different policy options: non-legislative measures; simplification and limited reinforcement; measured reinforcement of the rules; far-reaching reinforcement of the rules, and full repeal of Directive 2002/58/EC;
- it drew heavily on the evaluation of the ePrivacy Directive under the REFIT programme, identifying three objectives: to ensure effective confidentiality of electronic communications; ensure effective protection against unsolicited commercial communications; simplifying the legal framework, bringing it up to date, and increasing harmonisation of the rules;
- the assessment concludes that neither repeal, non-legislative measures, nor limited reinforcement of the existing Directive would fully succeed in meeting those objectives. It considered far-reaching reinforcement of the rules, including proposals to ban the practice of refusing a user access to a website if cookies are refused, but thought they would involve excessive compliance and costs;
- instead the Commission preferred a proportionate reinforcement and simplification of the rules, making the existing rules more efficient and reducing compliance costs. For example, it estimated that to use browser or software settings to simplify the provision of consent could mean savings of up to 70% of costs compared to the current Directive;
- however, the Commission recognised there would be significant costs incurred by providers of internet browsers and related software in order to develop the required consent feature;
- also, the extension of the scope to OTT providers meant compliance costs for those providers which would need to review their internal processes;
- the Commission also anticipated a negative impact on the online behaviour advertising or internet marketing sector but did not expect this to be disruptive or significant. Overall negative impact could be reduced through the flexibility and simplification of the reform; and
- the Commission considered the impact on regulatory authorities would be minor, including administrative costs to transfer competence to Data Protection Authorities (DPAs) in Member States where other regulators are currently the enforcers. Implementation costs of cooperation and consistency procedures in the GDPR would be minor as DPAs already had to be established under that Regulation.

Financial implications

6.50 The Minister reassures us that the Government will assess the potential financial impact of the proposal, including any further costs for the Information Commissioner's Office.

Consultation

6.51 The Minister says that the Government will welcome the views of interested parties to inform its approach to the proposed reform.

Previous Committee Reports

None but see (30145), 15422/08: Sixteenth Report HC 19-xiv, chapter 1 (22 April 2009); (21561), 10961/00: Seventh Report HC 152-vii (2001–02), chapter 18 (21 November 2001), First Report HC 152-i, chapter 18 (18 July 2001).

7 Vehicle type approval

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested
Document details	Proposed Regulation concerning vehicle type approval.
Legal base	Article 114 TFEU, ordinary legislative procedure, QMV
Department	Transport
Document Number	(37497), 5712/16 + ADDs 1–4, COM(16) 31

Summary and Committee's conclusions

7.1 The Commission has proposed a Regulation to replace the existing EU framework legislation which governs type approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles. Changes proposed focus on better enforcement of the existing standards.

7.2 When we considered this proposal early in 2016 we noted the Government's generally positive response to the proposal, particularly in the wake of the Volkswagen emissions scandal. We recognised the case for better enforcement of the existing type approval standards and asked for more information from the Government about its fuller analysis of the implications of the proposed Regulation, about the outcome of the consultations it was undertaking and about its consequent negotiating aims.

7.3 The Government now tells us about its efforts to establish, with stakeholders the impacts, costs and benefits of the proposal. It also says that significant progress in Council working group consideration of the proposed Regulation has so far been very slow, but that the Maltese Presidency intends to continue these discussions. The Government, noting the apparent desire of some Member States to maintain the current system as far as possible, says that it intends to support the majority of the measures included in the draft text, with some refinements. It points particularly to ensuring that powers proposed for the Commission are sufficiently defined and are to be used appropriately.

7.4 **We are grateful to the Government for this information. However we are retaining the document under scrutiny pending further reports from the Government about Council consideration of the proposed Regulation.**

7.5 **We should also like to hear from the Government, when it next reports, about its assessment of how much weight the UK will carry post-Brexit in adoption of international vehicle type approval standards by the United Nations Economic Commission for Europe, which would be applicable in the EU in accordance with the proposed Regulation.**

Full details of the documents

Proposed Regulation on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles: (37497), 5712/16 + ADDs 1–4, COM(16) 31.

Background

7.6 Type approval of motor vehicles and their trailers are set out in Directive 2007/46/EC, referred to as the 'Framework Directive'. Following a 2013 Commission 'fitness check' of the Framework Directive which indicated that its effectiveness was reduced by differences in the interpretation and application between Member States, and the September 2015 revelation that VW had been using a device to cheat type approval emissions tests, the Commission presented, in February 2016, this proposed Regulation. The aim is to ensure that vehicle type approval and market surveillance systems for motor vehicles and their trailers are effectively achieving the policy objectives of single market integration, safety and health of citizens and protection of the environment.

7.7 The proposal would make a number of changes to the functioning of the type approval system although, other than updating certain references in emissions regulations, it would not change the technical standards (emissions, braking, noise and so on) to which vehicles are approved. The changes focus on better enforcement of the existing standards.

7.8 In March 2016 the Government commented to us that:

- it is clearly important that high standards for type approval are consistently maintained across the EU, so as to provide a level playing field and to protect citizens and the environment;
- the Government shares the overall objective of raising the standards of all type approval authorities; but
- it was still considering the policy implications of the proposal.

7.9 Nevertheless the Government did make a number of initial, largely positive, points to us about aspects of the proposal, while reiterating its intention to examine the actual implications.

7.10 We recognised the case for better enforcement of the existing standards for type approval of motor vehicles and their trailers. But we said we would not consider this matter again until we had more information from the Government about its fuller analysis of the implications of the proposed Regulation, about the outcome of the consultations it was undertaking and about its consequent negotiating aims. Meanwhile the document remained under scrutiny.

The Minister's letter of 17 January 2017

7.11 The Parliamentary Under-Secretary of State, Department for Transport (Andrew Jones), writes now to update us on the progress of negotiations and the Government's view of the measures it contains, reporting first that:

- in the Council working group negotiations there are a wide range of views about the overall level of ambition for the proposal, with some Member States appearing to want to maintain the current system as far as possible; and
- given this, significant progress has so far been very slow.

7.12 Reminding us that the Government shares the proposal's overall objectives of raising the standards of all EU type approval authorities and ensuring that manufacturers face a level playing field in seeking the approvals needed to place their vehicles on the EU market, the Minister continues that:

- there is an urgent need to restore trust in the EU vehicle approval system, particularly following the cheating by Volkswagen that emerged last year;
- to maintain the credibility of the proposed Regulation the Council must avoid any substantial weakening of the overall package of measures;
- the Government made these points at the Competitiveness Council on 28 November 2016; and
- it is working with like-minded Member States and the Maltese Presidency to seek positive progress over the next six months.

7.13 The Minister then tells us that:

- the Government has sought, and continues to seek, views from interested stakeholders on the impacts, including from the vehicle industry, via the Society of Motor Manufacturers and Traders, to clarify the costs of the changes to the type approval processes and administrative measures;
- the benefits of the proposal are harder to quantify but have at their core a desire to avoid any repetition of the recent Volkswagen situation, and to restore public confidence in the robustness of the regulatory system;
- it is likely to be difficult to produce benefits estimates, due to the large number of ways that non-compliant vehicles may impact on safety or the environment;
- for this reason the Government's consideration of the impacts is focusing on whether there are more cost-effective ways to deliver the desired outcomes of the proposal and if there are ways of refining the policy to maximise the impact it has on non-compliant vehicles; and
- it needs to ensure that consumers are at the heart of the system, but does not want unnecessary costs without direct tangible outcomes.

7.14 Turning to the content of the proposal, the Minister says that:

- the Government intends to support the majority of the measures included in the draft text with some refinements;
- it is particularly supportive of the proposals regarding market surveillance, peer review of type approval authorities and joint assessments of technical services, the forum for the sharing of information between Member States and the Commission, and the enhanced safeguarding clauses;
- on proposed increased powers for the Commission, as an overarching position the Government intends only to support conferring new powers where they are fully justified and clearly achieve the stated objectives of strengthening the type approval system;

- the Commission is seeking powers to intervene in the designation of technical services, in the review of type approval authorities, and where type approvals are challenged, and to undertake its own market surveillance; and
- these powers should help ensure greater consistency between type approval authorities and the Government can see the case for each of these powers if they are sufficiently defined and used appropriately.

7.15 As for further negotiation of the proposed Regulation the Minister tells us that the Maltese Presidency intends to continue working group discussions, and that the proposal is also under consideration by the European Parliament, although no date has yet been set for plenary consideration.

7.16 The Minister also tells us about market surveillance testing in the UK, saying that:

- in April 2016 the Government announced that the Department for Transport would be establishing a new programme of market surveillance testing which will seek to ensure that vehicles and associated products entering UK markets fully comply with the law;
- this builds upon existing enforcement activity but will have a much stronger focus on emissions in the next few years, following the Volkswagen emissions scandal;
- the UK's new Market Surveillance Unit has been established, involving the Department for Transport's agencies, the Driver and Vehicle Standards Agency and the Vehicle Certification Agency, the designated UK Vehicle Type Approval authority, and has started its initial testing programme;
- this is focusing on emissions for a wide range of vehicles including petrol cars, vans, buses and HGVs, complementing the investigation completed in 2016 into diesel cars;
- there will be full transparency and the results will be published in full—for this first set of tests publication is expected to be in the coming spring; and
- in future years the Government intends to expand the testing to a wider selection of vehicle types (motorcycles and tractors) and components such as tyres, bulbs and child seats.

Previous Committee Reports

Twenty-fifth Report, HC 342-xxiv (2015–16), chapter 6 (9 March 2016).

8 Coordination of social security systems

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Work and Pensions Committee
Document details	Proposal for a Regulation amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004
Legal base	Article 48 TFEU; QMV, ordinary legislative procedure
Department	Work and Pensions
Document Number	(38400), 15642/16 + ADDs 1–8, COM(16) 815

Summary and Committee's conclusions

8.1 Each EU Member State is free to determine the features of its own social security system, including which benefits are provided, the conditions for eligibility, how these benefits are calculated and what contributions should be paid. However, national systems must take into account the right of EU citizens and their families to move freely and reside in any EU country.

8.2 To facilitate the free movement of persons, the EU has adopted legislation (specifically Regulation 883/2004 and Regulation 987/2009) for the coordination of social security systems in cross-border cases. The purpose of these Regulations is to determine which country is responsible for the calculation and payment of a range of benefits for mobile EU citizens.[72] Typically, the Member State of employment will be responsible for the provision of social security, although special rules may apply to posted workers, cross-border workers and people who are not economically active.

8.3 The coordination rules are based on the principle of equal treatment: if an EU national moves to a different Member State to take up employment and becomes subject to that country's social security system, they have the same access, rights and obligations as the nationals of that country. Conversely, if EU nationals move to another Member State without taking up employment and paying social security contributions, their home country normally remains responsible for payment of social security. This is the case, for example, for many UK pensioners who have retired to southern Europe: the UK Government continues to pay for their state pension and healthcare costs.

8.4 The European Commission has now published a proposal for a Regulation to amend certain elements of the existing coordination rules in four areas in particular (see "Background" for more information). It proposes to:

72 The coordination rules apply to sickness benefits; maternity and equivalent paternity benefits; invalidity benefits; old-age benefits; survivors' benefits; benefits in respect of accidents at work and occupational diseases; death grants; unemployment benefits; pre-retirement benefits; and family benefits.

- Restrict the rights of **EU citizens who are not economically active** (such as pensioners, the unemployed, and students) to access benefits unless they pass the "right of residence" test, meaning that they can prove that they have comprehensive health insurance and the means to support themselves financially;
- Clarify the responsibility for the payment of **unemployment benefit** in cross-border cases; and
- Create new categories for **child-raising allowances** and **long-term care benefits**.

8.5 The proposal also contains other amendments relating to posted workers and procedures for repayment of incorrectly paid benefits, as well as technical changes relating to derived rights to sickness benefits, the reimbursement of costs for medical examination, the calculation of the annual average costs in the field of sickness benefits and the introduction of measures to facilitate identification of fraud or error in the application of the Regulations.[73]

8.6 Overall, we consider that the Commission's proposals create a closer link between the Member State where social security contributions are made, and the Member State responsible for the payment of any benefits. The codification of the "right of residence" test in respect of benefit claims by economically inactive EU citizens is particularly welcome, reflecting the Government's interpretation of EU law which was upheld by the Court of Justice (see paragraph 8.18 for more information). This will help to ensure that only those EU nationals with a genuine link to the UK will be able to claim benefits when they are not paying National Insurance contributions.

8.7 However, we are disappointed that the Explanatory Memorandum submitted by the Minister of State for Employment (Damian Hinds) on 4 January 2017 contains virtually no assessment of the impact the proposals might have in the UK. The Minister also failed to provide any assessment of the impact of Brexit on this area of intra-EU cooperation.

8.8 Once the Treaties and secondary EU legislation cease to apply to the UK, the Government would in principle be free to stop paying benefits to EU nationals. In parallel, social security entitlements for UK nationals in Europe would also be affected. If the Government wishes to maintain some level of coordination with the EU, simple "repatriation" of the Regulations 883/2004 and 997/2009 onto the UK statute book as part of the Great Repeal Bill will not be sufficient. The coordination of social security necessarily involves cross-border cooperation, and the Government cannot unilaterally require the EU to continue observing the substance of the legislation with respect to British nationals after the UK has left the EU.

8.9 An end to the current system of cross-border coordination might pose particularly acute problems for the approximately 190,000 UK pensioners resident elsewhere in the EU.[74] As economically inactive mobile citizens, most of them rely on Regulation 883/2004 which requires the UK Government to provide them with the UK State Pension, and to reimburse their local healthcare systems for the cost of their medical care. If the

73 The previous Prime Minister, as part of his renegotiation of the UK's EU membership, had secured a political commitment to an additional amendment to Regulation 883/2004. This would have allowed the Government to index child benefit payments in respect of children resident in other Member States. That commitment lapsed when the UK electorate voted to leave the EU, and it has not been included in this proposal. See for more information Annex V of the European Council conclusions of 18–19 February 2016.

74 Public Accounts Committee, oral evidence: "NHS treatment for overseas patients" (21 November 2016), Q48.

provisions of that Regulation no longer apply and no replacement arrangement is agreed, the Government would not be obliged to reimburse those healthcare costs, nor to uprate pensions.[75] In such a scenario, those affected would presumably have to purchase private health insurance in their EU country of residence, or—if they were unwilling or financially unable to do so—return to the UK.

8.10 **In our view, the Prime Minister has rightly called for an early agreement, as part of the Article 50 process, on the rights of UK and EU nationals who have already made use of their right to free movement. If the amended version of Regulation 883/2004 could potentially form the basis for a future bilateral UK-EU agreement on the coordination of social security, the Government should participate fully in the negotiations to ensure the final legislation is aligned with the UK's priorities.**

8.11 **Given the above, we retain this document under scrutiny and draw it to the attention of the Work and Pensions Committee. We ask the Minister to submit a supplementary Explanatory Memorandum as soon as possible setting out in more detail the Government's position on the various elements of the proposed Regulation, and their expected impact on the UK.**

8.12 **We also ask the Minister to clarify how the Government will seek to secure a new arrangement with the EU or individual Member States on coordination of social security to replace, in whole or in part, the substance of the existing Regulations when the UK ceases to be a Member State. The Minister's answer should indicate how the Government is planning to support both those British nationals resident in the EU who are currently entitled to receive UK social security, and those EU nationals resident here who currently benefit from Regulation 883/2004.**

Full details of the documents

Proposal for a Regulation amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004: (38400), 15642/16 + ADDs 1–8, COM(16) 815.

Background

8.13 Each EU Member State is free to determine the features of its own social security system, including which benefits are provided, the conditions for eligibility, how these benefits are calculated and what contributions should be paid, and for all social security branches, such as old age, unemployment and family benefits. However, national social security systems must take into account the right of EU citizens and their families to move freely and reside in any EU country.

75 The State Pension for people who retired before 6 April 2016 is increased each year, with the increase calculated in relation to the average percentage growth in wages in Great Britain, the consumer prices index, or 2.5%, whichever is highest. At present, that increase is also passed on to UK pensioners resident in the EEA and Switzerland by virtue of Regulation 883/2004. The UK has bilateral social security agreements with a number of other countries which confers the same benefit.

8.14 To facilitate the free movement of persons, the EU adopted legislation as far back as 1958 to govern the coordination of social security systems between Member States.[76] The current legislation (Regulation 883/2004, referred to as the Basic Regulation) and 987/2009 (the Implementing Regulation) entered into force in May 2010. Their purpose is to determine which country is responsible for the calculation and payment of a range of social security benefits for mobile EU citizens. The rules aim to ensure that the different national approaches respect the principle of equality of treatment and that EU citizens who move from one Member State to another do not lose their social security rights.

Provisions of Regulation 883/2004 and Regulation 987/2009

8.15 The Basic and Implementing Regulations lay down common rules to protect workers' social security entitlements when moving within the EU.[77] They are based on four main principles:

- EU nationals are covered by the legislation of one Member State at a time, so that social security contributions and entitlements are not duplicated (**the single applicable law principle**). The decision on which country's legislation is applicable is made by the national authorities. In most circumstances, the worker is subject to the legislation of the country where they are, or were most recently, employed. For posted workers, the Member State of origin remains responsible for social security;
- EU nationals have the same rights and obligations as the nationals of the country where they are covered (**the principle of equal treatment**);
- When an EU national claims a benefit, their previous periods of insurance, work or residence in other countries are taken into account if necessary (**the principle of aggregation**); and
- If an EU national is entitled to a cash benefit from one Member State, they may generally receive it even if they are living in a different Member State (**the principle of exportability**). At present, unemployment benefits have to be 'exported' for a minimum of three months, although individual Member States may do so for longer at their own discretion.[78]

8.16 The coordination rules apply to sickness benefits; maternity and equivalent paternity benefits; invalidity benefits; old-age benefits; survivors' benefits; benefits in respect of accidents at work and occupational diseases; death grants; unemployment benefits; pre-retirement benefits; and family benefits. The rights under the Regulations apply not only to EU citizens, but also to members of their families and to their survivors.

Rights of economically inactive EU citizens

8.17 The rules on social security coordination also apply to mobile EU citizens and their immediate families if they are not economically active, in principle giving them a right to access the social security system of their host Member State.

76 See Regulations 3/1958 and 4/1958.

77 Since 2012, the provisions of the Regulations have also applied to the free movement of persons between the EU and the four EFTA countries (Iceland, Norway, Switzerland and Liechtenstein).

78 The UK 'exports' cash benefits for the statutory minimum three month period.

8.18 However, in a series of recent judgements,[79] the European Court of Justice has held that this right to equal treatment is subject to compliance with conditions relating to residence in Directive 2004/38 (the so-called Free Movement Directive). As a result, Member States may refuse to grant non-contributory cash benefits to mobile citizens who are economically inactive, and who do not have a legal right of residence under the Free Movement Directive. Economically inactive citizens have such a right of residence only when they have means of subsistence and comprehensive health insurance. The Commission's proposal for a Regulation aims to codify this case law.

Rights of nationals of non-EU countries

8.19 From 1 January 2011, all EU Member States except the UK and Denmark have extended the scope of the 2004 Regulation to nationals of non-EU countries legally resident or employed in their territory.[80] However, this only applies where a third-country national has links to more than one EU Member State; it does not provide for coordination between a Member State's system of social security and that of a non-EU country.

The proposed Regulation

8.20 As part of its 2016 Work Programme, the European Commission committed to a "Labour Mobility Package", including the revision of the Regulations on the coordination of social security. It has now proposed amendments to the Basic and Implementing Regulation to take into account the recent case law of the European Court of Justice on the rights of economically inactive EU nationals (see paragraphs 8.19–8.20 above), and to clarify the provisions on access to unemployment, family benefits and long-term care benefits.

Economically inactive EU citizens

8.21 The Commission proposes to amend article 4 of Regulation 883/2004 on equal treatment, to clarify in which cases Member State can restrict access to social benefits claimed by economically inactive EU citizens resident in their territory. The proposed amendments would codify recent case law of the European Court of Justice, in which it held that Member States are entitled to make access to non-contributory cash benefits for economically inactive EU citizens subject to a legal right of residence under the Free Movement Directive. To qualify, an EU national needs to be able to support themselves financially and have comprehensive health insurance.

8.22 The Commission estimates that the population of economically inactive mobile EU citizens is 3.7 million. It also says that 80% of them derive either residence rights or entitlements to social security through economically active family members with whom they reside. As such, they will continue to be entitled to equal treatment irrespective of the proposed changes to the Regulation.

8.23 The Minister, in his Explanatory Memorandum of 4 January 2017, does not provide a comprehensive assessment of this aspect of the proposal. This is surprising, given that *prima facie* the new Regulation vindicates the Government's own interpretation of EU

79 See for more information the judgements in cases C-140/12 (*Brey*), C-333/13 (*Dano*) and C-308/14 (*Commission v United Kingdom*).

80 Regulation (EU) No 1231/2010. Ireland has exercised its opt-in (see recital 17).

law, which it successfully defended before the Court of Justice in case C-308/14.[81] The Minister writes merely that the proposed amendment is a "useful clarification". There is no indication of whether the Government believes the amendment as drafted would fully address its concerns about access to non-contributory benefits for unemployed EU nationals.

Long-term care benefits

8.24 The Commission proposal aims to establish a specific regime for the coordination of long-term care benefits (currently categorised as a "sickness benefit"). It has proposed a separate chapter for their coordination in the Basic Regulation, by including a definition and providing for a list of those benefits as available in each Member State. In total around 80,000 mobile citizens are estimated to be entitled to long-term care benefits, at an annual cost of €793 million (£676 million). According to the Commission, this is 0.4% of the total EU expenditure on long-term care benefits.

8.25 The Minister has not provided an assessment of this element of the proposal in his Explanatory Memorandum. He writes that the proposed changes "may impact on what benefits currently are or are not covered by the coordination rules", because there could be a "grey area" with regard to the definition of a "benefit in kind".

Unemployment benefits

8.26 Under the current coordination rules, the Member State whose national legislation on unemployment benefit is applicable is determined by the principle that the worker is affiliated to the social security system of the Member State of their last employment. Special rules exist for frontier workers[82] and for a number of other special categories of workers (such as air crew, sea farers and posted civil servants). In addition, a person who becomes unemployed after a short period in one Member State can rely on social security contributions made in another Member State to meet the entitlement conditions in the former.

8.27 The Commission's proposal would change the rules on unemployment benefit in a number of ways. The aim of the proposed changes is to create a closer link between the provision of social security and the Member State where the citizen was last insured.

8.28 For frontier workers, it proposes that the Member State of residence will be responsible for providing social security for the first 12 months of cross-border employment. After 12 months, frontier workers will be treated as if they were resident in the country where they are employed. This will abolish the current system whereby the Member State of residence pays and is then reimbursed by the Member State of employment.

8.29 For all other workers, the Member State of last employment would only become responsible for unemployment benefit after a worker has paid into its national insurance system for at least three months. Until then, the Member State where they were previously employed remains responsible. The proposal would also remove the ability of an

81 See for more information the Court's judgement in C-308/14 (*Commission v United Kingdom*).

82 A frontier worker is defined in Regulation 883/2004 as someone who pursues "an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he/she returns as a rule daily or at least once a week".

unemployed worker to count social security contributions made in a different Member State towards their unemployment benefit entitlement unless they have been employed in their current Member State for at least three months.[83]

8.30 Lastly, under the terms of the Commission proposal, where someone qualifies for unemployment benefit, they would be able to export that benefit for six months (up from the current three) if they look for work in a different Member State.

8.31 The Minister's Explanatory Memorandum does not provide any indication of the Government's views on this element of the proposed Regulation, or how it may affect the UK public purse.

Family benefits

8.32 The current Regulations provide that mobile EU citizens can claim "family benefits" (which are broadly defined as benefits in kind or in cash intended to meet family expenses). The proposal contains new provisions for the coordination of family benefits which replace lost income during child-raising periods beyond statutory maternity or paternity pay. It carves out these child-raising allowances from the broader category of "family benefits", and makes the right to receive such an allowance applicable only to qualifying EU citizens, and not to those who derive their rights from being the relative of an EU citizen.

8.33 Although it is not made clear in the Minister's Explanatory Memorandum, the Commission's impact assessment states that the type of benefit that will be covered by this new category does not exist in six Member States, including the UK.[84] We would be grateful for an explicit confirmation from the Minister on this point.

Other proposed amendments

8.34 The proposal also aims to strengthen the rules on social security coordination for posted workers in order to prevent potentially unfair practices or abuse. In addition, the proposed Regulation includes a number of technical amendments relating to derived rights to sickness benefits, the reimbursement of costs for medical examination, the calculation of the annual average costs in the field of sickness benefits and the introduction of measures to facilitate identification of fraud or error in the application of the Regulations.

8.35 Finally, the proposal seeks to align the provisions on the recovery of unduly paid social security benefits with the equivalent procedures in the 2010 Directive on mutual assistance for the recovery of claims relating to taxes, duties and other measures.[85] The aim is to provide for a uniform instrument to be used for enforcement measures, as well as standard procedures for requesting mutual assistance and notification of instruments and decisions relating to a claim.

83 For example, a worker who had previously made National Insurance contributions in the UK, takes up employment in France but loses their job. Under the proposed new rules, they would only be able to count their National Insurance contributions towards their French unemployment benefit entitlement if they had paid into the French system for at least three months. If they have not, the UK would remain responsible for the payment of unemployment benefit.

84 Commission Staff Working Document SWD(2016) 460, part 6 of 6, Annex XXV.

85 Directive 2010/24/EU.

8.36 The Minister's Explanatory Memorandum does not touch on these aspects of the proposal other than to summarise them, and to say that the changes to the rules on social security debts will enable Member States to "prevent and tackle fraud and abuse more effectively".

Our assessment

8.37 The current rules on the coordination of social security at EU-level are the product of long and complex negotiations stretching back to the earliest days of the European Economic Community. Their impact on the lives of individual citizens is profound, as they provide a measure of legal and financial clarity about their rights and obligations if they move between Member States.

8.38 National governments have strongly defended their competence to structure their own social security systems, and to determine eligibility conditions and restrictions. On the whole, the proposals put forward by the Commission do not interfere with that Member State competence, and we do not consider that the proposal raises any concerns regarding subsidiarity. We welcome in particular the proposed codification of the "right of residence" test, which means that only those EU nationals with a genuine link to the UK will be able to claim benefits when they are not paying National Insurance contributions.

8.39 However, we are hampered in our scrutiny by the fact that the Minister's Explanatory Memorandum provides little to no substantive assessment of any of the elements of the Commission's proposal. The Minister provides no indication of the impact the proposed Regulation might have on the structure or overall costs of the benefits system, or how EU nationals in the UK (and UK nationals in the EU) might be affected.

8.40 Moreover, even though the Government appears to broadly support the proposed changes, it is far from clear that other Member States agree. The Commission's Explanatory Memorandum states that there was "no general consensus on the changes needed" as regards restriction of benefits for economically inactive persons. Equally, national governments had "divergent views" on amending the rules relating to the aggregation and export of unemployment benefit. There is therefore a strong likelihood that negotiations on this proposal will be protracted and demanding. It is in any case unlikely the new Regulation will enter into effect before the UK's intended exit from the EU.

8.41 In his Explanatory Memorandum of 4 January, the Minister of State for Employment (Mr Damian Hinds) omits the Government's usual formula on continuing to "negotiate, implement and apply EU legislation" until the conclusion of the UK's negotiations to exit the EU. However, for reasons we set out below, we consider that it would be prudent for the Government to approach the negotiations as if the amended rules will apply to the UK.

Implications of Brexit

8.42 The UK's exit from the EU will, in principle, withdraw its benefits system from the EU-wide coordination of social security in cross-border cases. UK nationals employed or resident in the EU could become "third country nationals", subject to national legislation on access to social security without recourse to the provisions of Regulation 883/2004. Similarly, EU citizens in the UK could lose their access to UK benefits, especially if they are not making National Insurance contributions.

8.43 An end to the current system of cross-border coordination might pose particularly acute problems for UK pensioners resident in the EU, who the Government estimates to number approximately 190,000.[86] As economically inactive mobile citizens, most of them rely on Regulation 883/2004 which requires the UK Government to provide them with the UK State Pension, and to reimburse their local healthcare systems for the cost of their medical care.

8.44 If the provisions of that Regulation no longer apply at the point of Brexit and no replacement arrangement is agreed, the Government would not be obliged to reimburse those healthcare costs. Similarly, while the Government would still pay EU-based pensioners their UK State Pension, it could decide to stop passing on the annual increase.[87] In such a scenario, British citizens affected would face living on a lower income while they remained resident in the EU. They would presumably also have to purchase private health insurance in their EU country of residence. For those who were unwilling to pay or lacked the resources to do so, an end to the cross-border coordination of social security might therefore require a permanent return to the UK.

8.45 If the Government wishes to maintain some level of coordination with the EU on the provision of social security, simple 'repatriation' of the EU Regulations onto the UK statute book as part of the Great Repeal Bill will not be enough. It is clear that the Government cannot unilaterally require the EU and its Member States to continue observing the substance of the legislation with respect to British nationals after the UK has left the EU.

8.46 The Prime Minister has rightly called for an early agreement as part of the Article 50 process to provide clarity on the rights of those who have already made use of their right to free movement. Regulation 883/2004 (as amended) could, should the Government so wish, be incorporated into such an agreement subject to any modifications that were acceptable to both the UK and EU.[88] As such, we consider that it would be prudent for the Government to participate fully in the negotiations on this proposal to ensure the final legislation is aligned with the UK's priorities.

The Government's view

8.47 In his Explanatory Memorandum of 4 January 2017, the Minister of State for Employment (Damian Hinds) wrote:

> "The full policy implications will only become clearer when the proposals have been developed further through the negotiations. In general terms however, some of the proposals codifying recent CJEU case law on access to benefits are considered to be useful clarifications which create more legal certainty and support the UK position of requiring a person to have a right to reside in the United Kingdom in order to access certain benefits as upheld by the CJEU in C-308/14 *Commission v United Kingdom*.

86 Public Accounts Committee, oral evidence: "NHS treatment for overseas patients" (21 November 2016), Q48.

87 The State Pension for people who retired before 6 April 2016 is increased each year, with the increase calculated in relation to the average percentage growth in wages in Great Britain, the consumer prices index, or 2.5%, whichever is highest. At present, that increase is also passed on to UK pensioners resident in the EEA and Switzerland by virtue of Regulation 883/2004. The UK has bilateral social security agreements with a number of other countries which confers the same benefit.

88 For example, Switzerland has concluded a bilateral agreement with the EU which effectively applies Regulations 883/2004 and 997/2009 to Swiss nationals in the EU and EU nationals in Switzerland.

> "Where the procedures are revised for the recovery of social security debts by aligning them with the equivalent procedures for recovering tax debts, Member States will be able to prevent and tackle fraud and abuse more effectively. The changes will provide for a uniform instrument to be issued for enforcement measures taken to recover both tax and social security debts and provide standard procedures for requesting mutual assistance.
>
> "The creation of a separate chapter for long-term care benefits may impact on what benefits currently are or are not covered by the coordination rules. A potential grey area exists with regard to the extent to which the term 'benefit in kind' might be defined. Officials will play a full part in these discussions as negotiations on the future form and content of the Labour Mobility Package advance."

8.48 The Minister also notes that the Commission's chosen legal base is Article 48 TFEU, which concerns the free movement of workers. The elements of the proposal which concern economically inactive people are considered by the Commission to be "incidental", but the Minister explains that the "significance of the secondary purpose will be considered further during negotiation of the proposal".

Previous Committee Reports

None, but see in respect of the Basic Regulation 883/2004: (19764), 5133/99, COM(98) 779—Third Report HC 42-iii (2003–04) chapter 12 (17 December 2003); Thirty-seventh Report HC 63-xxxvii (2003–04) chapter 4 (12 November 2003); Fourth Report HC 23-iv (1999–2000) chapter 2 (15 December 1999); and Eighteenth Report HC 34-xviii (1998–99) chapter 2 (5 May 1999).

In respect of the Implementing Regulation 987/2009, see: (27262), 5896/06, COM(06) 16—First Report HC 19-i (2008–09) chapter 15 (10 December 2008); Twenty-fifth Report HC 34-xxv (2005–06) chapter 4 (19 April 2006); and Twentieth Report HC 34-xx (2005–06) chapter 11 (1 March 2006).

9 Carcinogens and Mutagens Directive (Phase II)

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested
Document details	Proposal for a Directive of the European Parliament and of the Council amending Directive 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens and mutagens at work
Legal base	Article 153(2) TFEU; QMV
Department	Work and Pensions
Document Number	(38447), 5215/17 + ADDs 1–3, COM(17) 11

Summary and Committee's conclusions

9.1 Cancer is the leading cause of work-related deaths in the EU, accounting for 53% of the total. In the UK alone, around 3,500 people die each year from occupational cancer caused by exposure to carcinogenic substances, principally through inhalation. To reduce these numbers, the EU has legislation in place to prevent dangerous levels of exposure to such substances in the form of Directive 2004/37/EC.[89] The Commission has now proposed an amendment to the Directive to add more carcinogenics to the list of controlled substances.

9.2 For the carcinogens and mutagens falling under its scope, the Directive requires employers to eliminate or reduce exposure in the workplace as much as possible. For a smaller number of substances, the Directive also sets specific occupational exposure limit values (OELVs) for inhalation. Employers must create a working environment in which their employees are not exposed to these carcinogens in excess of the limits under any circumstances.

9.3 The first substantive amendment to the Directive was proposed by the Commission in May 2016. If adopted, it would introduce or revise exposure limits for an additional thirteen carcinogenics. As this proposal (referred to as "Phase I") is at a different stage of the legislative procedure, we have considered it elsewhere.[90]

9.4 The proposal which forms the subject of this chapter ("Phase II") was published by the Commission in January 2017. It seeks to bring used engine oils within the Directive's scope, and to add exposure limit values for five more carcinogenic substances.[91]

9.5 The Minister for Health and Work (Penny Mordaunt) submitted an Explanatory Memorandum on 22 January 2017. She "broadly welcomes" the proposed amendments,

89 The full text of Directive 2004/37/EC, as amended, is available here.

90 See for our Reports on the Phase I proposal: (37758), 8962/16 COM(16) 248—Sixth Report HC 71-iv (2016–17) chapter 6 (15 June 2016); and Thirteenth Report HC 71-xi (2016–17) chapter 6 (12 October 2016). The Government was granted a scrutiny waiver in October 2016 to enable it to endorse a Council general approach which broadly conformed to the original Commission proposal.

91 Trichloroethylene, 4,4′-methylenedianiline, epichlorohydrine, ethylene dibromide and ethylene dichloride.

but concludes that the impact of the proposal is likely to be insignificant because the carcinogens involved "have limited, and in some cases no, identified use in the UK" (see "Background" for more details). Accordingly, the Minister's has concluded that the new Directive as proposed would not have "any significant impact on UK businesses".

9.6 **We note the Government's broad support for the Commission's proposal, as well as its assessment that impact on UK businesses (and by extension on workers) is likely to be negligible because of existing domestic health and safety legislation.**

9.7 **Given the importance of controlling exposure to carcinogens in the work place, we consider the document to be politically important and accordingly draw it to the attention of the House. We retain the document under scrutiny and await further information from the Government in due course on the progress of negotiations.**

Full details of the documents

Proposal for a Directive of the European Parliament and of the Council amending Directive 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens and mutagens at work: (38447), 5215/17 + ADDs 1–3, COM(17) 11.

Background

9.8 53% of work-related deaths in the EU are caused by Cancer. To reduce these numbers, the EU has legislation in place to control exposure to such substances in the form of Directive 2004/37/EC,[92] which was transposed into UK law by means of the Control of Substances Hazardous to Health Regulations (COSHH).[93]

9.9 The Directive requires employers to eliminate or reduce exposure to all carcinogens and mutagens falling under its scope. Employers must:

- identify and assess risks to workers associated with exposure to specific carcinogens and mutagens at the workplace; and
- prevent exposure where risks occur, in the first instance by ensuring substitution with a non- or less-hazardous process or chemical agent where this is technically possible. Where substitution of the hazardous substance cannot be achieved, it must, as far as it is technically possible, be manufactured and used in a closed system to prevent exposure. Where this—in turn—not technically feasible, worker exposure must be reduced to as low a level as possible.

9.10 In addition to these general minimum requirements, the Directive sets occupational exposure limit values (OELVs) for the inhalation route of exposure for particular carcinogens. Employers must create a working environment in which their employees are not exposed to these carcinogens in excess of the limits. At present, the Directive contains

92 The full text of Directive 2004/37/EC, as amended, is available here.
93 More information on the COSHH Regulations is available from the Health & Safety Executive.

OELVs for three substances, accompanied by a "skin notation" for one of those.[94] These limits represent the maximum exposure deemed to be safe for workers, but Member States are free to impose more stringent restrictions in the interest of health and safety.

Substances and processes to which the Directive applies

9.11 The requirements imposed on employers—to identify and prevent the risks of exposure—apply to any chemical agent classified as a category 1A or 1B carcinogen (indicating a known or presumed cause of cancer, respectively) under the EU Regulation on the classification, labelling and packaging of chemicals (the CLP Regulation).[95]

9.12 However, because the CLP Regulation only applies to chemical products intended to be placed on the market, it does not cover substances that are process-generated, such as hardwood dust. To bring these within the scope of the Directive, an annex explicitly lists a number of substances, mixtures and processes absent from the CLP Regulation.

Revision of Directive 2004/37/EC

9.13 In 2011, the Commission published the results of an independent study on individual substances which might be added to the Directive.[96] Following discussions with the Member States, employer organisations and workers' representatives, the Commission has now translated these study results into concrete amendments, put forward through two separate legislative proposals (Phase I and Phase II, published in May 2016 and January 2017 respectively), of which the second one is the subject of this report.[97]

The Commission proposal

9.14 The Phase II proposal would bring exposure to used engine oils within the scope of the Directive, and assign a skin notation to such oils. It would also add five specific carcinogenic substances[98] to the list of chemicals covered by the requirements of the Directive, and set accompanying exposure limit values and a skin notation for each. In addition, the Commission proposes to assign a skin notation for one further substance.[99]

9.15 The Minister for Health and Work (Penny Mordaunt) submitted an Explanatory Memorandum to us on 22 January 2017. She "broadly welcomes" the proposed amendments, calling the new substances covered "particularly harmful".[100]

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94 A skin notation assigned to a substance identifies the possibility of significant exposure through the skin which contributes to the total body burden of exposure, and consequently to possible health effects. This must be taken into account by employers when undertaking a risk assessment. For substances which cannot enter the body via the skin, the notation is absent.

95 Regulation 1272/2008. The full text of the CLP Regulation, as amended, is available here.

96 IOM Research Project P937/99 (May 2011).

97 See: (37758), 8962/16 COM(16) 248—Sixth Report HC 71-iv (2016–17) chapter 6 (15 June 2016); and Thirteenth Report HC 71-xi (2016–17) chapter 6 (12 October 2016) for Phase I.

98 Trichloroethylene, 4,4'-methylenedianiline, epichlorohydrine, ethylene dibromide and ethylene dichloride.

99 Polycyclic aromatic hydrocarbons mixtures containing benzo[a]pyrene which are carcinogenic. There is no accompanying exposure limit because a concentration limit for such substances is already set by Regulation 1272/2008.

100 In relation to the Phase I amendments, the then-Minister for Health and Work (Mr Justin Tomlinson) broadly welcomed the Commission's proposal. He did raise concerns with respect to the Commission's proposed exposure limit for hardwood dust, which was viewed by the industry as "likely to be difficult to achieve". He added that likely costs and benefits of this reduction are to be explored further in the Government's impact assessment of the Directive, once it is agreed with the European Parliament.

9.16 However, the Minister also explains that the impact of the proposal in the UK is likely to be low because the carcinogens involved "have limited, and in some cases no, identified use in the UK". Moreover, the changes to exposure limits are broadly in line with existing domestic law and business practice:

- For two of the substances which the Commission wants to introduce OELVs (4,4'-methylenedianiline and epichlorohydrine), the proposed exposure limits are identical to those already set by UK law;
- For the other new OELVs, the Health & Safety Executive has concluded that the chemicals involved are either only used in closed systems which prevent direct worker exposure (trichloroethylene and ethylene dichloride), or are only used by a very small number of companies who could comply with the new limits without a "significant impact to business" (ethylene dibromide); and
- As regards the new requirement for employers to assess the risks of exposure to used engine oils, the Minister explains that such oils are already recognised in the UK as carcinogenic, meaning that businesses would not need to undertake further action to comply with the Directive.

9.17 Accordingly, the Minister has concluded that the new Directive as proposed would not have "any significant impact" on UK businesses.

Our assessment

9.18 We note the Government's broad support for the Commission proposal, as well as its assessment that the impact of the changes on UK businesses (and by extension on workers) is likely to be negligible because of existing health and safety legislation.

9.19 Given the importance of controlling exposure to carcinogens in the work place, we consider the document to be politically important and accordingly draw it to the attention of the House. We retain the document under scrutiny and await further information from the Government in due course on the progress of negotiations and on the likely costs and benefits of the proposal both to businesses and to workers.

9.20 With respect to the UK's exit from the EU, we do not consider that this proposal raises any concerns of substance as the Directive has no cross-border implications. Its legal effects can be replicated in UK law, as indeed they already are through the COSHH Regulations. We also take note of the Prime Minister's speech of 17 January 2017, in which she stated that the Government would "protect the rights of workers set out in European legislation".[101] This has since been reiterated in the Government's Brexit White Paper.[102]

101 Speech by Prime Minister Theresa May, "The government's negotiating objectives for exiting the EU" (17 January 2017).

102 Department for Exiting the EU, "The United Kingdom's exit from, and new partnership with, the European Union" (2 February 2017), p. 31.

The Government's views

9.21 On 22 January 2017, the Minister for Health and Work (Penny Mordaunt) submitted an Explanatory Memorandum on the Phase II proposals to amend the Carcinogens and Mutagens Directive. She notes that the Government "broadly welcomes" the proposal, saying that "tackling the cost of occupational ill-health is a key theme of the new strategy for the health and safety system in Great Britain".[103]

9.22 However, the practical impact of the proposal appears to be limited. While acknowledging that the substances to be listed are "particularly harmful", the Minister goes on to say that they have "limited, and in some cases no, identified use in the UK. The OELV for some of these substances is the same as the current UK limit value." In respect of the substances for which the Commission is proposing a lower exposure limit than is currently applied in the UK (trichloroethylene, ethylene dibromide and ethylene dichloride), she notes:

> "Companies using EDB and EDC already have controls in place which can reduce exposure to the proposed limits. Trichloroethylene is only allowed onto the EU market for use in 'closed systems' so there will be no direct exposure to workers."

9.23 Overall therefore, the Minister has concluded that:

> "Current UK legislation already requires exposure to these substances to be reduced to as low a level as is reasonably practicable. Given the hazardous nature of these substances, HSE [the Health & Safety Executive] considers that controls are already required to be in place to reduce exposures to these substances below the occupational exposure limit values (OELVs) proposed by the Commission. Evidence currently available to HSE suggests that exposure are controlled below the proposed OELVs in practice. Therefore, initial HSE analysis suggests that the Commission's proposal would not lead to any significant impact on UK businesses."

9.24 Turning to Brexit, the Memorandum contains the standard formula that "until EU exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation".

Previous Committee Reports

None in respect of this proposal for a Directive.

For the other pending Commission proposal to amend the Carcinogens and Mutagens Directive (Phase I), see: (37758), 8962/16 COM(2016) 248—Thirteenth Report HC 71-xi (2016–17) chapter 6 (12 October 2016); and Sixth Report HC 71-iv (2016–17) chapter 6 (15 June 2016).

103 See for more information the Health & Safety Executive's "New health and safety system strategy" (2016).

10 Restrictive measures against Iran

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested
Document details	(a) Council implementing Regulation (EU) 2017/77 of 16 January 2017 implementing Regulation (EU) No 267/2012 concerning restrictive measures against Iran; (b) Council Decision (CFSP) 2017/83 of 16 January 2017 amending Decision 2010/413/CFSP concerning restrictive measures against Iran
Legal base	Article 29 TEU; Unanimity
Department	Foreign and Commonwealth Office
Document Numbers	(a) (38476), —; (b) (38477),—

Summary and Committee's conclusions

10.1 The EU and the United States have imposed economic sanctions against Iran for a number of years, as part of a broader strategy to ensure the Iranian nuclear programme is used exclusively for peaceful purposes. As part of the Joint Comprehensive Plan of Action (JCPOA) agreed between Iran and the P5+1 group of countries[104] in July 2015, Tehran is currently progressively dismantling the military aspects of its nuclear programme in return for phased lifting of these sanctions by both the EU and US.

10.2 On 16 January 2017, the Foreign Affairs Council amended the EU's list of sanctions (contained in Council Decision 2010/413/CFSP) to remove four entities. The Government overrode scrutiny by failing to inform the Committee of the contents of the Council Decision before it was formally adopted.

10.3 The Minister for Europe (Sir Alan Duncan) submitted an Explanatory Memorandum and an accompanying letter on the adoption of the Council Decision developments on 26 January. He explained that "the decision to delete these entities was taken by the Council following the conclusion of the annual review of the listings". This oblique summary of events obscures the fact that the Committee had previously requested further information about the manner in which sanctions were imposed against Bank Saderat, one of the entities whose entry has now been deleted.

10.4 Bank Saderat had sought the annulment of its inclusion in the sanctions list before the General Court of the EU, which found in its favour in February 2013. The Court's finding, that the reasons for the bank's listing were too vague or lacking evidence, was appealed by the Council with the support of the UK Government.[105] In April 2016, three

104 The P5+1 group consists of the five Permanent Members of the Security Council (the US, Russia, the UK, France and China), as well as Germany and the European Union.

105 See judgement in case T-494/10.

days before the annulment was upheld by the Court of Justice, the Council adopted new legislation so that the sanctions against the bank continued to apply, irrespective of the judges' findings (see "Background" for more information).[106]

10.5 This sequence of events raised important questions about the Council's compliance with the spirit of the Court's findings, and the robustness of the evidentiary standards used by the EU when imposing sanctions. In May 2016, we therefore asked the Minister to outline how the new listing against Bank Saderat was more legally robust than the one annulled by the Court, and to provide an assessment of the impact the annulment on the credibility of the EU regime of restrictive measures more broadly.[107]

10.6 By letter of 21 June 2016, the previous Minister for Europe (Mr David Lidington) committed to address these points "following the conclusion of the Council's review". However, no further assessment of the case has been included in the Minister's latest correspondence with the Committee. While the actual sanctions against Bank Saderat have now expired and been expunged from the Council Decision, the questions surrounding the Council's handling of the case and its wider implications for the EU's sanctions regime remain highly pertinent.

10.7 **We ask the Minister to provide the Committee as soon as possible with his assessment of the credibility of the EU's regime of restrictive measures in light of the annulment of the sanctions against Bank Saderat, and the manner in which the Council pre-empted the annulment. In the meantime we retain the Council Decision under scrutiny.**

10.8 **We also note the override of scrutiny on this document.**

Full details of the documents

(a) Council implementing Regulation (EU) 2017/77 of 16 January 2017 implementing Regulation (EU) No 267/2012 concerning restrictive measures against Iran: (38476), —; (b) Council Decision (CFSP) 2017/83 of 16 January 2017 amending Decision 2010/413/CFSP concerning restrictive measures against Iran: (38477), —.

Background

10.9 The EU has been engaged since December 2006 in a "dual track" strategy to curb Iran's military nuclear activities, consisting of both diplomatic engagement and the imposition of restrictive measures. The latter have been based primarily on resolutions adopted by the United Nations Security Council (UNSC), and include both tier II measures (travel bans and asset freezes directed against specific individuals and organisations) and tier III measures (economic sanctions).

106 The renewed sanctions adopted in April 2016 against Bank Saderat were expressly limited in duration and expired on 22 October 2016. The deletion of its entry in January 2017 is therefore for "legal clarity" only.

107 See: (37716), —: Thirty-third Report HC 342-xxxii (2015–16) chapter 9 (11 May 2016).

10.10 In June 2010, the UNSC adopted a new Resolution on sanctions against Iran because of the latter's failure to ensure the "peaceful nature of its nuclear programme".[108] The Foreign Affairs Council transposed its contents into EU law through Decision 2010/413/CFSP.[109]

10.11 In July 2015, Iran and the "P5+1" group of countries[110] reached an agreement that Iran would progressively dismantle the military aspects of its nuclear programme (the Joint Comprehensive Plan of Action, or JCPOA). Implementation of the agreement by Iran would be subject to monitoring by the International Atomic Energy Agency (IAEA). In return for Iran's compliance, the other parties to the Agreement committed to a phased lifting of sanctions over a period of ten years.

10.12 The JCPOA entered into force on 18 October 2015, when Iran and the P5+1 countries began taking the steps necessary to implement their commitments under the Agreement. The IAEA announced on 16 January 2016 that Iran had implemented key nuclear-related measures described in the JCPOA. As a result the EU and the US have lifted certain proliferation-related sanctions on Iran, while others remain in place.

10.13 The EU's list of sanctions includes an asset freeze directed against Bank Saderat, which runs the largest banking network in Iran. Under the terms of the JCPOA, the measures against the bank were to be lifted in 2023. The reason given by the Council in 2010 for the restrictive measures against the bank were that:

> "Bank Saderat has provided financial services for entities procuring on behalf of Iran's nuclear and ballistic missile programmes, including entities designated under UNSCR 1737. Bank Saderat handled [defence industry organisation] payments and letters of credit as recently as March 2009."

10.14 In October 2010, Bank Saderat asked the General Court of the EU to annul its listing under Council Decision 2010/413/CFSP. In February 2013, the Court ruled in favour of the bank, finding that the general allegation—the provision of financial services for entities procuring on behalf of Iran's nuclear and ballistic missile programme—was illegal because it was too vague. The allegation relating to defence industry organisations (DIOs) was also unlawful, as it was not backed up by evidence to prove the letters of credit related to goods whose export from Iran was prohibited under the resolution cited. The Council, supported by the UK, appealed that judgement.

10.15 On appeal, the General Court's findings were upheld by the Court of Justice in its judgement of 21 April 2016. The original listing of Bank Saderat ceased to have effect on that day.[111] However, three days before the Court dismissed the appeal, the Council adopted a new Decision which introduced a second listing, with a supplementary statement of reasons for applying sanctions to Bank Saderat.[112] This new listing was expressly time-limited, applying only until 22 October 2016.

108 The full text of Resolution 1929(2010) is available on the IAEA website.
109 See Council Decision 2014/413/CFSP.
110 The P5+1 group consists of the five Permanent Members of the Security Council (the US, Russia, the UK, France and China), as well as Germany and the European Union.
111 See judgement in case C-200/13 P.
112 Council Decision 2016/609/CFSP.

10.16 The then-Minister for Europe (Mr David Lidington) informed the Committee of these developments on 29 April 2016. He wrote, inter alia, that the Council was "now considering the supplemented statement of reasons (…) in light of the ECJ judgment". The effect of the new Council Decision was that the sanctions against Bank Saderat remained in force, despite the annulment of the original listing. The Minister provided no assessment of Bank Saderat's successful legal challenge, or in what way the supplementary listing was materially different from the one struck down by the General Court.

10.17 In view of the information available to us, we concluded that the supplementary listing of Bank Saderat appeared to be an artificial legal device to prolong restrictive measures that had a weak legal foundation. We therefore invited the Minister to clarify how the new statement of reasons was stronger than the one already successfully challenged by Bank Saderat, and the effect on the credibility of the EU regime of restrictive measures of this latest unsuccessful episode.

10.18 On 21 June 2016, the Minister replied to the concerns raised in our Report. He noted that the sanctions against Bank Saderat were due to be lifted by 2023 under the terms of the JCPOA, and that the impending judgement in April 2016 therefore made it "important to ensure the amended Statement of Reasons was adopted as quickly as possible". The clear implication is that the Council was determined to maintain the sanctions in question irrespective of the Court's findings.

10.19 As regards the actual legal strength of the Council's new reasons for listing Bank Saderat, the Minister wrote:

> "The Council Decision was expressly adopted on a time-limited basis, and the Council is currently reviewing the listing in light of the European Court of Justice judgement. In these circumstances it would not be appropriate for me to comment whilst the Council's deliberations are ongoing. However, I will write again addressing these points following the conclusion of the Council's review."

10.20 The Decision adopted by the Council on 17 January 2017 removed Bank Saderat from the EU's list of sanctions against Iran. However, the measures against the bank had already effectively been lifted on 22 October 2016, when the new listing adopted by the Council in anticipation of the Court's judgement expired. The removal of the bank's listing is therefore in effect a housekeeping exercise.

10.21 The listing of Bank Saderat and the Council's response to its annulment raised important questions about the robustness of the evidentiary standards used by the EU when imposing sanctions. Despite a commitment given by his predecessor, the Minister has not responded to our request for an assessment of the manner in which the Council handled this case, and its implications for the EU's sanctions regime more broadly. We have asked the Minister to rectify this oversight as soon as possible.

The Government's views

10.22 On 26 January 2017, the Minister submitted an Explanatory Memorandum and accompanying letter on the removal of four entries from Council Decision 2010/413/CFSP. He explained that the deletions were made "following a review of all available information, including any material changes in circumstances, and taking into account existing jurisprudence".

10.23 After providing a summary of the implementation plan for the JCPOA, he concludes that "the deletion of these entities will not substantially reduce the pressure of the sanctions regime against Iran and is consistent with our wider policy".

10.24 As regards the timing of the adoption of the Decision, the Minister notes:

> "The decision (…) was taken by the Council following the conclusion of the annual review of the listings. The EU formally adopted the Council Decision and Council Implementing Regulation on 16 January 2017, and they were published in the Official Journal the following day. The draft legal acts were marked 'LIMITÉ' prior to this date."

Previous Committee Reports

None in respect of this Council Decision and Council Implementing Regulation. However, for the Committee's previous consideration of the Bank Saderat case, see: (37716), —: Thirty-third Report HC 342-xxxii (2015–16) chapter 9 (11 May 2016).

11 Macro-financial assistance

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested
Document details	Proposed Decision about macro-financial assistance for Moldova
Legal base	Article 212 TFEU, ordinary legislative procedure, QMV
Department	HM Treasury
Document Number	(38459), 5383/17 + ADD 1, COM(17) 14

Summary and Committee's conclusions

11.1 The Commission presents this proposed Decision in positive response to a request from the Moldovan Government for financial assistance. Macro-financial assistance is granted to third countries close to the EU to help them address acute balance-of-payments difficulties. Such assistance complements financing provided by the International Monetary Fund in the context of an adjustment and reform programme.

11.2 The Commission proposes providing up to €100 million (£86 million) of macro-financial assistance to Moldova in the form of loans up to €60 million (£51 million), with a maximum average maturity of 15 years, and grants up to €40 million (£34.2 million). On adoption of the proposed Decision, strict conditions would be attached to the disbursements. Each tranche would be conditional on good progress with both the International Monetary Fund programme and specific policy conditionality agreed with the EU.

11.3 While telling us that it welcomes the proposed macro-financial assistance for Moldova, the Government draws our attention to a Special Report of the European Court of Auditors criticising Commission management of earlier assistance to Moldova.[113] However, it adds that the Commission has since taken risk mitigating measures to address many points highlighted by the Court. The Government also stresses to us its commitment to providing macro-financial assistance primarily in the form of loans, rather than grants, which it believes offers greater value for money.

11.4 **In the past we have cleared standard operations of the macro-financial assistance programme from scrutiny without a substantive report. However, we wish to hear from the Government what it envisages the UK's liability would be if Moldova were to default on a loan post-Brexit. Meanwhile the document remains under scrutiny.**

Full details of the document

Proposed Decision providing macro-financial assistance to the Republic of Moldova: (38459), 5383/17 + ADD 1, COM(17) 14.

113 (38058): see Thirteenth Report HC 71-xi (2016–17), chapter 18 (12 October 2016).

Background

11.5 Macro-financial assistance (MFA) is an EU external instrument under which financial assistance is granted to third countries close to the EU to help them address acute balance-of-payments difficulties. MFA complements financing provided by the International Monetary Fund (IMF) in the context of an adjustment and reform programme. It can take the form of grants financed from the EU Budget or loans, for which the Commission is empowered to borrow the necessary funds in capital markets (guaranteed by the Guarantee Fund for external actions) and to lend them on to the beneficiary country. MFA is exceptional in nature and is discontinued once the country can satisfy its external financing needs through other sources.

11.6 MFA operations are based on a number of principles, last defined by the Economic and Financial Affairs Council in October 2002,—the so-called Genval Criteria. These stipulate the geographic scope, preconditions and principal implementation methods of MFA.

The document

11.7 The Moldovan Government asked the Commission for MFA assistance in August 2015 and March 2016. In presenting this proposed Decision in response, the Commission assesses that the proposed amount is justified on the basis of the country's external financing needs, the size of the IMF programme, burden-sharing considerations, and the room for manoeuvre available in the EU Budget.

11.8 Moldova has seen its GDP contract by 0.5% in 2015, and it has experienced high consumer price inflation in recent years. In addition, the government has experienced substantial fiscal pressure due to reduced tax revenues and the interruption of budget support from donors. The key factors identified by the Commission as underlying the worsened state of the Moldovan economy are adverse weather conditions experienced in 2015, an accelerating decrease in remittances and weak export performance, weak domestic credit expansion caused by problems in the banking system, and a fiscal squeeze. Moldova has an Association Agreement with the EU which foresees creation of a Deep and Comprehensive Free Trade Area (DCFTA).

11.9 MFA assistance can only be disbursed alongside an on-track IMF programme. In November 2016, the IMF approved a programme to be supported by a three-year Extended Credit Facility and Extended Fund Facility (ECF/EFF) arrangement. Access under the financial arrangement agreed with the IMF would represent 75% of Moldova's quota in the IMF (SDR 129.4 million—about €161 million or £138 million). Following the February 2016 Foreign Affairs Council a Roadmap for Priority Reforms was agreed between the EU and Moldova, with a deadline of 31 July 2016. There has since been substantial progress with implementation, although as yet not all EU concerns have been addressed.

11.10 The Commission proposes providing up to €100 million (£86 million) of MFA to Moldova in the form of loans up to €60 million (£51 million), with a maximum average maturity of 15 years, and grants up to €40 million (£34.2 million). It says that:

- this would cover approximately 24.9% of the residual financing gap of Moldova, estimated at US$469 million (£371 million) in 2016–18;

- the residual funding gap results from a relatively large current account deficit, the need to build up foreign exchange reserves, and the large debt amortization requirements expected; and

- the assistance would be disbursed in three tranches over 2017 and 2018.

11.11 On adoption of the proposed Decision, strict conditions would be attached to the MFA disbursements. Each tranche would be conditional on good progress with both the IMF programme and the specific policy conditionality agreed with the EU in the Memorandum of Understanding attached to the operation. The Commission suggests possible areas of conditionality of: reforms to strengthen governance in the financial sector, public finance management, energy sector reform, and accompanying measures to strengthen the social safety net, improve the investment climate and support implementation of the DCFTA agreement.

11.12 An accompanying Commission Staff Working Paper provides more detail on the proposal.

The Government's view

11.13 In his Explanatory Memorandum of 31 January 2017 the Chief Secretary to the Treasury (Mr David Gauke) first repeats, in the context of Brexit, the Government's standard mantra that until the UK exits the EU the Government will continue to negotiate, implement and apply EU legislation. He then says that:

- the Government supports EU efforts to provide MFA to third countries under exceptional circumstances and on a temporary basis;

- the conditionality attached to the MFA is a key tool to support continued implementation of reforms in Moldova;

- in September 2016, the European Court of Auditors' Special Report on EU assistance for strengthening the public administration in Moldova evaluated the impact of European Neighbourhood Instrument support to the country, and made criticisms of the Commission's management of the funds;

- following that report the Commission has taken risk mitigating measures to address many points highlighted—the Commission is now taking a more results-based approach to provision of financing across the board, thereby addressing a number of the Court's points;

- in the case of Moldova, the Commission decided to put all budget support payments on hold (since July 2015) pending an IMF agreement, which would provide sufficient guarantees on macro-economic stability and sound public financial management;

- the Court rightly emphasizes the importance of political will to genuinely improve and strengthen public administration capacity in a sustainable manner—the Commission and European External Action Service regularly discuss these issues with the Moldovan government; and

- the Council has called for a careful and controlled use of budget support, enhanced implementation of the principle of conditionality of EU support as well as improved needs assessments in order to improve the sustainability of EU support to Moldova.

11.14 The Minister comments that, whilst the Government welcomes the proposed MFA to Moldova, it stresses its commitment to providing MFA primarily in the form of loans, rather than grants, which it believes offers greater value for money. Turning then to the financial implications he says that:

- the loan principal will be financed by the Commission borrowing on the markets, backed by the EU Budget;
- in addition, the loan will be guaranteed by the European Guarantee Fund for External Actions, which requires 9% of the loan amount to be provisioned from the EU Budget over 2019 and 2020;
- the Fund would meet the costs associated with any subsequent default—no country has ever defaulted on its MFA loans; and
- the Commission has said that the 9% guarantee provision can be accommodated within the ceilings designated for Heading 4 under the Multiannual Financial Framework 2014–2020 and the grants element will be financed from appropriations already budgeted in the MFA budget line for 2017, and programmed for 2018.

Previous Committee Reports

None.

12 Establishing a European Travel Information and Authorisation System

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee and the Committee on Exiting the European Union
Document details	Proposal for a Regulation establishing a European Travel Information and Authorisation System (ETIAS)
Legal base	Articles 77(2)(b) and (d), 87(2)(a) and 88(2)(a) TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Number	(38261), 14082/16 + ADD 1, COM(16) 731

Summary and Committee's conclusions

12.1 The Commission's proposal for an automated European Travel Information and Authorisation System (ETIAS) is intended to strengthen security, reduce the risk of irregular migration and protect public health by requiring nationals of around 60 countries who do not need a visa to visit the Schengen area to complete an online application form and obtain authorisation before they travel.[114] The information provided would be screened against a set of risk indicators and checked against a variety of migration and law enforcement databases, as well as an ETIAS "watch list" of criminal suspects established by Europol. The Commission expects the ETIAS to be operational from 2020, *after* the expected date for the UK's withdrawal from the EU.

12.2 The UK is not entitled to participate in the proposed Regulation establishing the ETIAS as it builds on parts of the Schengen rule book which do not apply to the UK. British nationals will not need to obtain an ETIAS travel authorisation for as long as the UK remains a member of the EU. The immigration status of UK nationals wishing to travel to the Schengen area once the UK leaves the EU is one of the issues to be resolved during the Article 50 exit negotiations. The Immigration Minister (Mr Robert Goodwill) told us:

> "It is too early to say how these proposals would impact on the UK once we have left the EU. This will be considered as part of wider negotiations."[115]

12.3 We noted that for the many UK nationals who do business, visit family or go on holiday to countries within the Schengen area, a new requirement to obtain a visa or travel authorisation before they depart was likely to be one of the more immediately-felt consequences of Brexit. We asked the Minister to describe the main differences between the ETIAS model (which would apply to nationals who do not need a visa to enter the Schengen area) and the current Schengen visa regime and to indicate what outcome the

114 See the European Commission's factsheet on the ETIAS.
115 See para 24 of the Minister's Explanatory Memorandum.

Government would seek to achieve in Article 50 negotiations on the future immigration status of UK nationals, not least because this would help to reduce uncertainty for individuals and carriers.

12.4 As the UK will be a third country following its withdrawal from the EU, we also asked the Minister to comment on the provisions on third country access to ETIAS data and the possible implications for future information sharing arrangements (particularly for security and law enforcement purposes). We questioned why the ETIAS application process required details of the "level and field of education" and "current occupation" and how this was likely to be relevant in establishing the extent of any security, irregular migration or public health risk. Finally, we invited the Minister to elaborate on concerns raised in his Explanatory Memorandum about the interaction between the ETIAS and the Schengen Information System (SIS II).

12.5 **The Minister tells us that the Government is exploring "a number of options as to how EU migration might work once we have left the EU", that the Government will "work to ensure the best possible outcome for the British people" during Article 50 exit negotiations, and that "it would be wrong to set out further positions at this stage". His reluctance to divulge any further information on the outcome the Government is seeking to achieve is difficult to reconcile with his own assessment of the main differences between the full Schengen visa regime and the ETIAS model that would apply to third country nationals who do not need a visa to travel to the Schengen area. There can be little doubt that the full Schengen visa regime would be more costly and onerous for UK nationals. We understand that in a complex negotiation the Government cannot guarantee any particular outcome, but we do not see why that should prevent the Minister from providing further information on the various options the Government is considering and their likely impact on UK nationals. What constitutes "the best possible outcome for the British people" should not be left entirely in the Government's hands. We therefore ask the Minister to share with us details of the options the Government is considering and how they will influence its negotiating position on the proposed Regulation.**

12.6 **We reiterate our concern regarding the provisions in Article 55 of the proposed Regulation on third country access to ETIAS data. We appreciate that the UK is not participating in the proposal and that its influence will be limited. Nevertheless, we note the specific provisions prohibiting the sharing of data with third countries which may be of particular interest for border control or law enforcement purposes. These will self-evidently make it harder for the UK to negotiate effective data-sharing arrangements. We ask the Minister whether and how the Government intends to influence negotiations on Article 55 of the proposed Regulation with a view to achieving a better outcome on data sharing in Article 50 negotiations.**

12.7 **We urge the Minister to engage fully in discussions on the personal information to be included in an ETIAS application and the screening rules used to develop the risk indicators which may lead to the refusal of a travel authorisation, given their potential impact on British nationals once the UK leaves the EU. Is he satisfied that there are adequate safeguards built into the ETIAS, as well as adequate and accessible remedies for individuals in the event of a refusal?**

12.8 **We share the Minister's concerns about possible inconsistencies between the ETIAS and SIS II. We ask him to inform us of developments.**

12.9 **We note from correspondence with the European Union Committee in the House of Lords that the obligation on carriers to verify that visa-free third country nationals have a valid travel authorisation prior to boarding may not apply to rail carriers. We ask the Minister whether this is an unintended oversight and, if not, how significant a loophole he considers this to be.**

12.10 **As well as providing the information we have requested, we request progress reports on the negotiations. Meanwhile, the proposed Regulation remains under scrutiny. We draw this chapter the attention of the Home Affairs Committee and the Committee on Exiting the European Union.**

Full details of the documents

Proposal for a Regulation establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 515/2014, (EU) 2016/399, (EU) 2016/794 and (EU) 2016/1624: (38261), 14082/16 + ADD 1, COM(16) 731.

Background

12.11 Our earlier Report listed at the end of this chapter provides a detailed overview of the proposed Regulation and the Government's position.

The Minister's letter of 26 January 2017

12.12 The Minister addresses the questions raised in our earlier Report concerning the immigration status of UK nationals post-Brexit, third country access to ETIAS data, the type of personal information to be provided to ETIAS and the relationship between ETIAS and SIS II.

The immigration status of UK nationals post-Brexit

12.13 Our earlier Report outlined three possibilities for resolving the immigration status of UK nationals wishing to travel to the Schengen area once the UK leaves the EU:

- UK nationals would be required to apply for a Schengen visa;
- UK nationals would enjoy visa-free access to the Schengen area but would be required to obtain a travel authorisation under the ETIAS scheme; or
- UK nationals would be exempt from the requirement to obtain a Schengen visa or an ETIAS travel authorisation.

12.14 We asked the Minister to explain:

- the main differences between the ETIAS model proposed by the Commission for visa-free entry to the Schengen area and a full Schengen visa regime;

- whether the Government intends to seek visa-free access to the Schengen area for UK nationals post-Brexit;
- whether the Government also intends to press for an exemption from the ETIAS travel authorisation for UK nationals post-Brexit, or to seek instead to minimise the cost and complexity of the application process; and
- if the Government is unable to secure an exemption, whether it would wish to introduce a reciprocal travel authorisation system for EU nationals travelling to the UK post-Brexit.

12.15 The Minister summarises the main differences between the ETIAS model (which would apply to nationals who do not need a visa to enter the Schengen area) and the current Schengen visa regime:

- The ETIAS requires visa-exempt third-country nationals wishing to visit the Schengen area to obtain authority to travel before doing so, on the basis of a light touch assessment process. In contrast, a Schengen visa requires a more detailed assessment of what the applicant proposes to do whilst in the Schengen area.
- The application process for travel authorisation under ETIAS is intended to have as minimal an impact on travellers as possible, with a simple and fast online application process which in the majority of cases will require no further action such as provision of additional evidence on the part of the applicant. In comparison, applicants for a Schengen visa must submit their application at the Consulate of the Member State they intend to visit, including a photograph and biometrics alongside a detailed visa application form, evidence relating to the purpose of their stay, evidence of means of support during their stay and details of their accommodation.
- Applicants for travel authorisation under the ETIAS proposals are expected to receive a response very soon after payment of the fee if the application is straightforward. Applicants for a Schengen visit visa are encouraged to apply at least 15 days before their intended journey, although this can vary depending on the Member State in question.
- An application under the ETIAS model is expected to cost €5, with the authorisation lasting five years and valid for multiple journeys. In contrast, a Schengen short stay visit visa application costs €60, and in the majority of cases the visa is valid for one or more stays equalling less than three months in a single six month period.

12.16 The Minister confirms that neither an authorisation obtained under the ETIAS model nor a Schengen visa will guarantee entry to the Schengen area:

> "A border guard will conduct necessary checks as set out in the Schengen Border Code before allowing entry, and could still refuse under the conditions defined in the Code".

12.17 The Minister is unwilling to indicate what outcome the Government is seeking to achieve on the immigration status of UK nationals wishing to travel to the Schengen area post-Brexit. He comments:

> "There are a number of options as to how EU migration might work once we have left the EU. We are considering various options and it would be wrong to set out further positions at this stage. At every step of these negotiations we will work to ensure the best possible outcome for the British people. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation."

Third country access to ETIAS data

12.18 Our earlier Report noted that the proposed Regulation would prohibit direct third country access to personal data held in the ETIAS Central Unit as well as indirect access through a Member State to personal data obtained from the ETIAS Central Unit for law enforcement purposes. As the UK will be a third country following its withdrawal from the EU, we asked the Minister what assessment the Government has made of the impact of these provisions on the UK's ability to access quickly information which may strengthen security within the UK or be of significant benefit for law enforcement purposes post-Brexit. We also asked whether the Commission's goal of achieving maximum interoperability between EU information systems was likely to make it more or less difficult for the UK to negotiate access to one or more EU databases following its departure from the EU.

12.19 The Minister responds:

> "As you will be aware, the ETIAS proposal is a Schengen building measure and therefore the UK does not participate. However, as Brandon Lewis made clear before the House on 18 January, the question of how the UK shares data with the EU from the point of exit will be an issue for discussion during the negotiations. As the Prime Minister has reaffirmed, the UK is leaving the EU, but we are not leaving Europe. We remain committed to strong cooperation with Member States on security and law enforcement, both now and after we leave the EU."

Personal information to be provided to ETIAS

12.20 We asked the Minister if he could clarify the Commission's reasons for including "level and field of education" and "current occupation" in the list of personal information to be submitted in the ETIAS application form and explain how such information was likely to be relevant in establishing the extent of any security, irregular migration or public health risk. He replies:

> "The proposals state that clearly defined screening rules within the ETIAS Central System will be used to assess each application. These rules will consist of an algorithm which will compare the data recorded in an ETIAS application, and specific risk indicators which point to identified irregular migration, security or public health risks. The Government understands that information such as an individual's education and current occupation will be used to assess applications against these specific screening rules. We expect further information on this point to be provided by the Commission during the course of negotiations."

Interaction with the Schengen Information System

12.21 The Minister's Explanatory Memorandum on the proposed Regulation identified two concerns:

- whether the refusal of an ETIAS following a "hit" against an alert in the Schengen Information System (SIS II) would be compatible with existing purpose limitation rules governing the use of SIS II; and
- the need for "careful consideration" before storing centrally in SIS II any "hit" resulting from checks made against an ETIAS applicant.

12.22 We asked the Minister to elaborate on his concerns. In particular, would it be necessary to amend the rules governing the use of SIS II (currently set out in a 2007 Council Decision on the establishment, operation and use of the SIS II) to ensure that alerts entered in SIS II can be used for the purposes envisaged in the proposed ETIAS Regulation?[116] What were the factors requiring "careful consideration" in determining whether a "hit" against an alert entered in SIS II should be stored centrally in SIS II?

12.23 The Minister responds:

> "Some of the uses that the Commission proposes that SIS II data be put [to] in the ETIAS decision-making process do seem difficult to reconcile with the rules on the processing of SIS II data that are set out in the 2007 Council Decision. For example, Article 22(4)(a) of the ETIAS proposal says that an ETIAS should be refused if the applicant's travel document is subject to an alert under Article 38 of the Council Decision. An Article 38 alert is used to indicate that a document has been 'stolen, misappropriated, lost or invalidated' and is entered to allow the document to be seized or used as evidence (Article 38(1)). Article 46(1) of the Council Decision states that the data in a SIS II alert 'may be processed only for the purposes laid down in [the Article of the Council Decision providing for its creation]'. Article 38 does not provide for an immigration refusal to be taken on the basis of an alert. It therefore seems to us that some form of amendment of the SIS II Council Decision would be needed for such alerts to be used as envisaged. However, the Commission currently appears to disagree, as no such changes were proposed in the recent draft Regulation repealing and replacing the 2007 Council Decision (Council Doc 15814/16, subject of an EM from the Rt. Hon Brandon Lewis MP dated 12 January 2017). We will continue to watch developments."[117]

12.24 Turning to the reasons for the Government's caution regarding the centralised storage in SIS II of hits generated by an ETIAS check, the Minister expresses concern that "this would change the scope of the SIS", adding:

> "It would move from being an instrument to facilitate police to police cooperation towards being a central repository of information on people

116 See Council Decision 2007/533/JHA.

117 For details of the changes proposed to SIS II, see our Thirtieth Report HC 71-xxviii (2016–17), chapter 1 (1 February 2017).

of interest. We believe that this should only be done, if at all, after a careful consideration of the purpose of SIS II and not as a by-product of the creation of ETIAS."

Previous Committee Reports

Twenty-fifth Report HC 71-xxiii (2016–17), chapter 12 (11 January 2017).

13 The resumption of transfers of asylum seekers to Greece under the Dublin rules

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee and the Joint Committee on Human Rights
Document details	Commission Recommendation of 8.12.2016 addressed to the Member States on the resumption of transfers to Greece under Regulation (EU) No. 604/2013
Legal base	Article 292 TFEU
Department	Home Office
Document Number	(38382), 15507/16, C(16) 8525

Summary and Committee's conclusions

13.1 Under the EU's "Dublin rules", the Member State through which an asylum seeker first enters the EU is generally responsible for examining an asylum application unless a close connection can be established with another Member State based on family ties or a previously issued residence permit or visa.[118] This has placed a heavy burden on a small number of exposed frontline Member States—notably Greece and Italy, the main entry points to the EU during the current migration and refugee crisis—who are responsible for identifying, registering and processing claims for asylum, and integrating those who have a valid claim for international protection. Many of those arriving in Greece before March 2016 (when borders with neighbouring Western Balkans were effectively sealed) took advantage of the Schengen area's open borders to seek asylum in other Member States. These asylum seekers cannot be returned to Greece because transfers under the Dublin rules have been suspended since 2011 on the basis of court rulings establishing that there were systemic deficiencies in Greece's asylum system.[119]

13.2 The Commission believes that the resumption of Dublin transfers to Greece is necessary both to discourage large-scale secondary movements within the EU and to restore a degree of certainty and predictability to the EU's asylum, migration and border management policies. At the same time, it recognises that Greece has faced immense challenges in managing exceptionally large inflows of irregular migrants. Although there has been a significant reduction in numbers since the EU and Turkey reached a deal in March 2016 to prevent irregular migration across the Aegean, the latest estimates indicate that there are still around 62,000 irregular migrants in Greece.

118 The latest version of the Dublin Regulation—Dublin III—was adopted in June 2013.

119 Summary of the judgment of the (Strasbourg) European Court of Human Rights in *M.S.S v Belgium and Greece*. Judgment of the (Luxembourg) Court of Justice in *N.S. v UK*. See also the fact sheet on Dublin cases produced by the European Court of Human Rights.

13.3 Since the beginning of 2016, the Commission has adopted three Recommendations identifying deficiencies in Greece's asylum system and the improvements needed to allow a resumption of Dublin transfers. These Recommendations are non-binding. Their purpose is to provide regular reports on the progress made by Greece with a view to assisting Member States in deciding whether or not to return asylum seekers to Greece under the Dublin rules. The Commission makes clear that this is a decision to be taken exclusively by each Member State and is subject to review by the courts.

13.4 In its fourth Recommendation, the Commission recognises that Greece has made "significant progress" in establishing the "essential institutional and legal structures for a properly functioning asylum system" but says that shortcomings remain, particularly in ensuring adequate reception conditions, the prompt lodging and processing of asylum applications and the proper treatment of vulnerable asylum seekers. Whilst the "ultimate goal" remains the full resumption of Dublin transfers to Greece, the Commission recognises that to do so now would place an unsustainable burden on Greece. It recommends instead a gradual resumption of Dublin transfers, each based on individual assurances given by Greece that an applicant's claim for asylum will be dealt with promptly and that EU asylum laws on the reception and treatment of asylum seekers will be respected in each case. Given the still "precarious" treatment of unaccompanied minors, the Commission says that vulnerable asylum applicants should not be transferred to Greece for the time being. The Commission envisages that Dublin transfers would apply only to asylum applicants who entered Greece irregularly from 15 March 2017 onwards or for whom Greece is responsible from that date on the basis of other Dublin criteria, such as family ties. It calls on the European Asylum Support Office (EASO) to deploy a team of experts in Greece to monitor the treatment of individuals transferred under the Dublin rules and ensure that the individual assurances given before transfer are applied in practice.

13.5 The Immigration Minister (Mr Robert Goodwill) welcomes the Commission's assessment that sufficient progress has been made to allow the resumption of some Dublin transfers to Greece from mid-March, "subject to various conditions being met", and supports the measures set out in the Commission Recommendation. He nevertheless remains cautious, noting:

> "At this point it is not possible to speculate whether and to what extent transfers will be possible in practice, as this will depend entirely on the Greek authorities being in a position to deliver the necessary improvements and provide the stated assurances when requested to do so by other Member States."[120]

13.6 He reminds us in now familiar terms of the Government's position on the outcome of last June's referendum on UK membership of the EU:

> "Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU."

120 See para 27 of the Minister's Explanatory Memorandum.

13.7 **Deficiencies in the Greek asylum system are well-documented, with the UN Refugee Agency (UNCHR) reporting in early February that Reception and Identification Centres on the Aegean islands continue to face serious challenges with capacity and shelter allocation for those already present there, regardless of any new arrivals. UNHCR has made clear that it will continue to press for "improved reception conditions and establishment of additional and suitable space on the islands, accelerated transfers, speedy registration and processing of asylum claims, along with regular information provision and sufficient presence of security".**[121]

13.8 **Whilst the progress made by Greece in the last year is welcome, it is disappointing that neither the Commission nor the Minister makes any reference to the views of international organisations (such as UNHCR or the International Organisation for Migration) or non-governmental organisations operating on the ground in Greece on the proposed gradual resumption of Dublin transfers from mid-March onwards.**

13.9 **We note that the Minister is unwilling to speculate on the likelihood that the UK will be in a position to resume Dublin transfers to Greece from mid-March. We consider his caution to be entirely justified. It strikes us as premature for the Commission to announce a phased resumption of Dublin transfers based on speculative improvements which may or may not be in place by 15 March. We ask the Minister for an assurance that the Government will not reinstate Dublin transfers to Greece without first consulting the organisations and agencies operating on the ground and making its own fully informed assessment of the ability and capacity of the Greek authorities to comply fully with any individual assurances given. We would expect this assessment to be made public.**

13.10 **We consider UK participation in the proposed EASO monitoring and reporting mechanism to be an essential pre-requisite for any decision reinstating Dublin transfers from the UK to Greece. We ask the Minister whether he agrees. We would also welcome further details on how these multinational teams would work, how soon they are likely to be established, and to whom they would report. How feasible is it likely to be in practice for these teams to monitor the situation of each asylum applicant returned to Greece and ensure that they are treated in accordance with the assurances given?**

13.11 **Pending the Minister's reply, the Commission Recommendation remains under scrutiny. We draw this chapter to the attention of the Home Affairs Committee and the Joint Committee on Human Rights.**

Full details of the documents

Commission Recommendation of 8.12.2016 addressed to the Member States on the resumption of transfers to Greece under Regulation (EU) No. 604/2013: (38382), 15507/16, C(16) 8525.

The Commission Recommendation

13.12 The Commission considers that there is "a good prospect for a fully functioning asylum system being put in place in the near future" and highlights areas in which Greece has made progress, including:

121 See the Weekly Report dated 3 February 2017 produced by UNHCR's Europe Bureau.

- the adoption of laws bringing Greece's asylum system into line with the EU's asylum rule book;
- a significant increase in overall reception capacity, particularly on the Greek mainland, and in the quantity of accommodation for vulnerable applicants, especially unaccompanied minors;
- substantial improvements in establishing Regional Asylum Offices and increasing the capacity of the Greek Asylum Service (which has tripled in size during 2016);
- a reduction in the backlog of outstanding asylum appeals;
- provision in law for free legal aid at the appeal stage; and
- significant progress in access to education and psychosocial support for child asylum seekers.

13.13 Despite these improvements, the Commission draws attention to the following shortcomings:

- serious overcrowding in the Aegean islands, where there are twice the number of registered irregular migrants as there are reception places;[122]
- insufficient reception capacity for vulnerable applicants—over 1,000 unaccompanied minors are in need of appropriate accommodation;
- poor quality reception facilities, especially in hotspots in the Greek islands, and inadequate security;
- poor overall coordination of the organisation of reception in Greece and the lack of an effective monitoring system;
- continuing delays in the time taken to lodge and process asylum applications, as well as the time taken to issue decisions on appeal; and
- "serious concerns" regarding the protection of vulnerable asylum applicants and the "precarious" situation of unaccompanied minors—the Commission highlights the lack of a properly functioning guardianship system, inadequate accommodation and security concerns.

13.14 The Commission calls on Greece to implement all the measures set out in its latest Recommendation which it considers essential to allow a resumption of Dublin transfers. They include:

- sustained progress in establishing sufficient reception facilities to accommodate all asylum seekers in Greece and which meet the requirements set out in EU legislation on reception conditions—this means creating more open facilities, increasing reception capacity on the Greek islands, meeting the accommodation needs of unaccompanied minors, ensuring access to health care, improving

122 The figures for December 2016 were 16,295 registered migrants for 8,200 places.

the management, coordination and monitoring of reception facilities, and continuously updating a needs assessment to ensure that reception capacity keeps pace with demand;

- effective access to the asylum procedure—this will require appropriate resourcing of the Greek Asylum Service to ensure that all elements of the asylum procedure comply with EU standards;
- effective access to a remedy—this means a fully functioning and adequately resourced Appeals Authority to deal with all pending and likely future appeals and more efficient working methods;
- effective access to free legal aid for appeals against decisions refusing asylum; and
- better treatment of unaccompanied minors and other vulnerable applicants for asylum—this includes the urgent implementation of a guardianship procedure, the provision of psychosocial support, and the availability of family tracing services and legal representation.

13.15 The Commission makes clear that the "substantial funding" provided to Greece from the EU budget (directly or through support for EU agencies and international organisations operating in Greece) must be "fully used" to meet "urgent needs", particularly as regards reception capacity, accommodation and services for the most vulnerable. The Commission also makes clear that other Member States should play their part by responding promptly to calls from the European Asylum Support Office for national experts to assist the Greek authorities and by accelerating the implementation of their relocation commitments.

13.16 The Commission sets out the conditions under which it envisages that a partial resumption of Dublin transfers could take place with effect from 15 March 2017. The key elements are:

- individual assurances in each case that an asylum seeker returned to Greece under the Dublin rules will be treated in accordance with the minimum requirements specified in EU asylum laws on reception conditions, asylum procedures and "in every other relevant respect";
- no vulnerable asylum applicants (including unaccompanied minors) should be transferred to Greece "for the time being"; and
- the creation of a reporting mechanism, coordinated by the European Asylum Support Office and based on the deployment in Greece of national experts from other Member States, to verify whether the individual assurances given by Greece are being complied with in practice.

13.17 The Commission invites Greece to provide a report on its implementation of the Recommendation (issued on 8 December 2016) by mid-February, and to report every two months thereafter.

The Minister's Explanatory Memorandum of 27 January 2017

13.18 The Minister notes that the migration crisis "continues to place real pressure on the Greek asylum and migration system". He continues:

> "On the recommendation that Dublin transfers may be feasible from 17 March 2017, we recall that in its earlier reports the Commission noted that responsibility for deciding on the legality of transfer in individual cases lies exclusively with Member States' authorities under the control of the courts (including preliminary references to the European Court of Justice). We also note that the concept of seeking assurances before a Dublin transfer was established in particular circumstances by the European Court of Human Rights in the case *Tarakhel vs Switzerland*."[123]

13.19 The Minister welcomes the Commission's assessment that sufficient progress has been made to allow some transfers to take place from mid-March, "subject to various conditions being met", but adds:

> "At this point it is not possible to speculate whether and to what extent transfers will be possible in practice, as this will depend entirely on the Greek authorities being in a position to deliver the necessary improvements and provide the stated assurances when requested to do so by other Member States."[124]

13.20 The Minister recognises that the ability of the Greek authorities to provide the necessary assurances in individual cases "will depend on further progress being made to its asylum system" by mid-March. He continues:

> "With that in mind, we support the Commission's recommendations to Greece to ensure that its reception facilities are sufficient, meet the necessary standards and include an appropriate number of open reception facilities that are capable of accommodating all applicants for international protection. We agree that the facilities should at least meet the standards required in the Reception Conditions Directive, that applicants receive the necessary health care and that additional places for unaccompanied minors are available. We support the recommendations that special procedural and reception needs of applicants are identified so that the necessary support can be provided. We also support the recommendation that a number of temporary facilities are kept available or can be made available at short notice to deal with unexpected arrivals. On the issue of Regional Asylum Offices, we note that there appears to be a discrepancy between the number of offices reported as operational on 22 November by Greece (seven) compared to the number in the previous report (eight). It may be the case that priorities have changed, but we mention this simply to note that information that is accurate at the time of one report may have altered by the next not only in terms of an increased number of offices, but also a reduction.

123 See para 26 of the Minister's Explanatory Memorandum.
124 See para 27 of the Minister's Explanatory Memorandum.

> "We support the Commission's recommendation that the Greek authorities continue their efforts to ensure that an effective remedy is available to all applicants by ensuring the full functioning of the new Appeals Authority by establishing the planned 20 Appeals Committees by the end of February 2017. We also support the recommendations regarding: the provision of adequate human resources for the Appeals Authority and the Committees; the clearance of all pending requests for judicial review as soon as possible; the increase in the number of appeal decisions per Committee; and sufficient training for Committee members."[125]

13.21 The Minister notes the "considerable amount of funding" allocated to Greece to help bring its asylum service up to EU standards:

> "We fully support the Commission calls on Greece to ensure that the substantial EU funding is used in the most efficient and effective manner and without further delay. We will continue to monitor the situation and review any new reports provided by Greece and the Commission as the proposed date from which a resumption of transfers may be possible approaches."[126]

Previous Committee Reports

None on this document, but see our earlier Reports on the first Commission Recommendation: Thirty-second Report HC 342-xxxi (2015–16), chapter 11 (4 May 2016); and Twenty-sixth Report HC 342-xxv (2015–16), chapter 6 (16 March 2016).

125 See paras 28–9 of the Minister's Explanatory Memorandum.

126 See para 30 of the Minister's Explanatory Memorandum.

14 Criminal law measures to counter money laundering

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee
Document details	Proposal for a Directive on countering money laundering by criminal law
Legal base	Article 83(1) TFEU; ordinary legislative procedure; QMV
Department	Home Office
Document Number	(38422), 15782/16, COM(16) 826

Summary and Committee's conclusions

14.1 Money laundering enables criminals to conceal the proceeds of their crimes so that they are harder for law enforcement authorities to trace and confiscate. Laundered money provides a ready source of funding for organised crime groups and for individuals or organisations involved in terrorism. The ease with which funds can be moved across borders increases the likelihood that the illicit proceeds of a crime committed in one Member State will be reinvested in another Member State. Criminal investigations into money laundering frequently involve several Member States. The Commission believes that existing EU legislation has not kept pace with developments at international level and that differences in the scope and definition of money laundering offences at national law, as well as the sanctions that apply, impede effective cross-border cooperation. It suggests that there is a risk of "forum shopping" as criminals seek to launder their illicit gains in the jurisdiction in which measures to counter money laundering are perceived to be weakest.

14.2 The proposed Directive would establish minimum rules on the definition of money laundering offences and on criminal sanctions. It would replace the money laundering provisions contained in a Framework Decision adopted in 2001.[127] The changes are intended to bring EU law into line with international standards set out in the Warsaw Convention and Recommendation 3 of the Financial Action Task Force (see the Background section below) and improve cross-border cooperation in the investigation and prosecution of money laundering offences by making it harder for criminals to exploit different national laws.

14.3 The 2001 Framework Decision is one of a number of EU police and criminal justice measures adopted before the Lisbon Treaty took effect in December 2009 which were subject to the UK's 2014 block opt-out decision. The Framework Decision ceased to apply to the UK from December 2014.

127 See Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime.

14.4 The proposed Directive is an EU criminal law measure and is subject to the UK's Title V (justice and home affairs) opt-in, meaning that it will only apply to the UK if the Government decides to opt in.

14.5 The Security Minister (Ben Wallace) says that the Government "strongly supports international cooperation to tackle money laundering" and considers the proposed Directive to be "broadly in line with existing UK legislation and practice on money laundering". He nevertheless identifies two areas of concern—a requirement to take account of certain "aggravating circumstances" when determining the sentence to be given for money laundering offences and the definition of corporate liability which would make it easier to hold a company criminally liable for money laundering. If the Government were to opt into the proposed Directive, it would either have to negotiate these provisions out or amend domestic law.

14.6 The Minister sets out the Government's position on new legislative proposals in light of the referendum outcome:

> "On 23 June, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation."[128]

14.7 He says that the UK's decision to leave the EU will be one of the factors which will inform the Government's opt-in decision. Others include the fact that UK law is already broadly compliant with the proposed Directive and the decision taken by the previous Coalition Government not to rejoin the 2001 Framework Decision (which this proposal would replace) or to opt into a proposal harmonising national laws on the freezing and confiscation of proceeds of crime on the grounds that "the UK, not Europe, should decide on UK criminal law". The Minister does not know when the three month period for opting into the proposed Directive at the negotiating stage will expire—time will start to run from the date on which the last language version of the proposal is published. He undertakes to inform us once the date has been confirmed. He expects the proposal to be considered at the June Justice and Home Affairs Council.

14.8 **In deciding not to rejoin the 2001 Framework Decision on money laundering and on the freezing and confiscation of proceeds of crime in 2014, the previous Coalition Government made clear that it was "not for Europe to impose minimum standards on our police and criminal justice system".[129] We ask the Minister whether this remains the Government's position or whether different considerations apply in this case.**

14.9 **We note that the UK does participate in two EU criminal law measures establishing minimum rules on the substantive elements of offences concerning trafficking in human beings, the sexual abuse and exploitation of children and child pornography.[130]**

128 See para 29 of the Minister's Explanatory Memorandum.

129 See the comments made by the then Home Secretary (Mrs Theresa May) during a debate in the House on 15 July 2013, *HC Deb*, col. 777.

130 See Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims and Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography.

Both measures include provisions on aggravating circumstances and on corporate liability which are similar to those contained in the proposed Directive on money laundering. Can the Minister explain why these provisions are of particular concern in relation to money laundering?

14.10 **According to the Commission, Article 7 of the proposed Directive (dealing with corporate liability) "is in line with Article 10 of the Warsaw Convention". As the UK has ratified the Warsaw Convention, we ask the Minister to confirm that UK law complies with Article 10 and to explain whether (and if so, to what extent) Article 7 of the proposed Directive goes further than the Convention.**

14.11 **We have decided not to recommend an opt-in debate at this stage for two reasons. First, given that the previous Coalition Government decided not to rejoin around 20 EU criminal law measures establishing minimum standards in order to "bring powers in those areas back to the UK", we think it unlikely that the Government will wish to opt into this proposed Directive.[131] Even if it were to do so, the Minister considers that UK law "largely meets the requirements of the Directive" and that its impact on UK law would not be substantial.**

14.12 **We nevertheless retain the proposed Directive under scrutiny and may decide to recommend a debate at a later stage once the Government's intentions are clearer. We ask the Minister to provide the information we have requested at the earliest opportunity and to provide progress reports on the negotiations. We also draw the document to the attention of the Home Affairs Committee.**

Full details of the documents

Proposal for a Directive on countering money laundering by criminal law: (38422), 15782/16, COM(16) 826.

Background

14.13 The changes proposed in the Directive are intended to implement the money laundering provisions of the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism ("the Warsaw Convention") and Recommendation 3 of the Financial Action Task Force (FATF), an inter-governmental standard-setting body (on which the UK is represented) which has established a framework of measures to combat money laundering and terrorist financing.

14.14 FATF Recommendation 3 urges countries to criminalise money laundering in line with international standards established by the United Nations and to apply the crime of money laundering to "all serious offences, with a view to including the widest range of predicate offences". Money laundering assumes that a prior criminal offence has occurred in order to generate the criminal proceeds which are being laundered—the criminal conduct which has given rise to money laundering is referred to as the predicate offence.

131 See the contribution of the then Justice Secretary (Chris Grayling) in *HC Deb*, 15 July 2013, cols. 850–1.

An interpretive note provides further guidance on how Recommendation 3 should be applied with a view to ensuring that national implementing laws are as comprehensive in scope as possible.[132]

14.15 The Warsaw Convention is the latest and most comprehensive international treaty on money laundering. It also requires participating countries to criminalise money laundering but goes further than FATF Recommendation 3, for example, by stipulating that a prosecution for money laundering does not have to be brought in the criminal court that has jurisdiction for the predicate offence and by requiring participating countries to ensure that an individual may be prosecuted for a money laundering offence without having been convicted of a predicate offence. The UK is one of 17 EU Member States that have ratified the Convention. The Commission considers that adoption of the proposed Directive would be "an important step towards EU ratification".

The proposed Directive

14.16 The proposed Directive is based on Article 83(1) of the Treaty on the Functioning of the European Union (TFEU) which authorises the EU to establish "minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis". Money laundering is specifically listed as a serious cross-border crime.

14.17 The purpose of the proposed Directive is to establish minimum rules on the definition of money laundering offences and the sanctions that apply. The Commission takes as its starting position the list of predicate offences for money laundering identified by the FATF and in the Warsaw Convention. However, the proposed Directive would achieve a higher degree of harmonisation as many of the predicate offences are further defined in separate EU criminal law measures, for example on terrorism, trafficking in human beings, migrant smuggling, sexual exploitation, illicit drug trafficking, corruption, fraud and counterfeiting, environmental crime and market abuse.[133] The proposed Directive would also include cybercrime as a predicate offence and any offences not specifically listed which are punishable by a maximum of more than one year's imprisonment. According to the Commission, drawing on the EU's existing criminal law *acquis* should "contribute to reducing existing discrepancies and fostering a more extensive common understanding" of the range and scope of criminal activities underlying money laundering. It believes that greater harmonisation is necessary to remove obstacles to effective cross-border cooperation:

> "Since Member States, when requested to cooperate in investigations or prosecutions regarding money laundering often require that the underlying predicate offence would also have been a predicate offence in their own jurisdiction, had it been committed in their Member State, cooperation is not always possible, and criminals successfully launder their criminal proceeds."[134]

132 See the Recommendations of the Financial Action Task Force and accompanying interpretative notes.
133 See the EU criminal law measures listed in Article 2 of the proposed Directive.
134 See the Commission's explanatory memorandum accompanying the proposed Directive.

14.18 Having identified a wide range of predicate offences, the proposed Directive defines the conduct necessary to constitute a money laundering offence. It would largely replicate the Warsaw Convention by identifying the same "material elements" of money laundering and requiring knowledge or intent to constitute criminal conduct. The proposal would not criminalise negligent money laundering—an option left open by the Warsaw Convention—but the Commission makes clear that Member States would remain free to do so in their national implementing laws.

14.19 The proposed Directive would also replicate provisions of the Warsaw Convention which are intended to make it easier to prosecute money laundering in the following circumstances:

- there is no prior or simultaneous conviction for the offence giving rise to the criminal proceeds;
- the specific details of the offence giving rise to the criminal proceeds (including the identity of the perpetrator), cannot be established—according to the Commission, linking suspicious funds to a specific predicate offence is one of the main obstacles to investigating money laundering in cases spanning more than one criminal jurisdiction; and
- the criminal activity generating the illicit proceeds was committed in a different jurisdiction—the proposed Directive would, however, allow Member States to specify that the predicate offence must be an offence both in the country in which it was committed and in the Member State in which the related money laundering offence is being prosecuted.

14.20 The Warsaw Convention allows participating countries to provide that money laundering offences do not apply to individuals who have committed the predicate offence—so-called "self-laundering". This is intended to eliminate the risk of being punished twice for the same crime. By contrast, the proposed Directive would require Member States to criminalise "self-laundering" since the Commission considers that converting or transferring, or concealing or disguising, illicit proceeds constitutes "an additional criminal act distinguishable from the predicate offence" and causes "additional or a different type of damage". Self-laundering would not apply, however, to mere possession or use of illicit proceeds since this would form part of the predicate offence.

14.21 The proposed Directive includes a number of provisions similar to those found in other EU criminal law instruments, including:

- rules on aiding, abetting, inciting and attempting money laundering offences;
- a requirement for Member States to apply "effective, proportionate and dissuasive criminal penalties" which are further defined as a maximum prison sentence of at least four years in serious cases—the Commission suggests that comparable sanctions have an important deterrent effect and reduce the risk of criminals seeking to launder their illicit gains in the criminal jurisdiction where money laundering laws are perceived to be the weakest;

- a definition of "aggravating circumstances" which encompasses money laundering offences committed by a criminal organisation or by an individual abusing their professional position;
- rules on the liability of legal persons, such as companies, and the sanctions that apply; and
- rules on jurisdiction.

14.22 The proposed Directive stipulates that the same range of investigative tools provided for in national law to combat organised and other forms of serious crime should also be available for money laundering offences.

The Minister's Explanatory Memorandum of 12 January 2017

14.23 The Minister says that combating money laundering forms a major part of the Government's approach to tackling serious and organised crime, as set out in its 2013 Serious and Organised Crime Strategy, and that the Government "strongly supports international cooperation to tackle money laundering". He considers that the proposed Directive is "broadly in line with existing UK legislation and practice on money laundering", as set out in the Proceeds of Crime Act 2002 and the Terrorism Act 2000 (Part 3).[135] He adds that the penalties provided for in UK law exceed those stipulated in the proposed Directive. The Minister nevertheless identifies two concerns with the proposal.

14.24 The first concerns the definition of "aggravating circumstances" in Article 6 of the proposed Directive. Although there is no equivalent provision in domestic law, the Minister notes that the UK's Sentencing Council Guidelines on Fraud, Bribery and Money Laundering must be taken into account by judges when deciding on sentencing. The Guidelines would arguably cover "to some extent" the aggravating circumstances described in Article 6 of the proposal, but would not be sufficient to ensure full compliance. The options available to the Government would be to "negotiate this provision out of the Directive, consider amending the guidelines or make specific legislative provision for aggravated offences".

14.25 The second concern stems from the definition of liability for legal persons, such as companies. The Minister explains the position in UK law:

> "Ordinary common law principles of corporate liability are applicable in this area, and the principle of the directing mind applies so that the company can be imputed with the criminal intent of those directing the company. The lack of supervision would have to be reckless such as to amount to criminal intent."

14.26 If the Government were to decide to opt into the proposed Directive, it would either have to "negotiate this provision out" or "make specific legislative provision for a corporate criminal offence".

14.27 The Minister reiterates the Government's policy of taking opt-in decisions "on a case-by-case basis, putting the national interest at the heart of the decision making process". In reaching a decision, the Government will have "particular regard to":

135 See paras 28 and 32 of the Minister's Explanatory Memorandum.

- the result of the EU referendum on 23 June and the decision to leave the EU;
- the fact that the UK is broadly compliant with the proposed Directive, with the possible exception of Article 6 which may require implementation in UK law; and
- the fact that the UK did not rejoin the 2001 Framework Decision as part of the 2014 block opt-out decision, and did not opt into the 2014 Confiscation Directive on the basis that "the UK, not Europe, should decide on UK criminal law".[136]

14.28 If the UK were to opt into the proposed Directive, the Minister does not anticipate any "significant costs or other financial implications, because the UK is already broadly compliant".[137] He expects the proposal to be considered at the June Justice and Home Affairs Council.

Previous Committee Reports

None.

136 See para 31 of the Minister's Explanatory Memorandum.
137 See para 38 of the Minister's Explanatory Memorandum.

15 European Pillar of Social Rights

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Business, Energy and Industrial Strategy Committee, Education Committee, Health Committee, Women and Equalities Committee and Work and Pensions Committee
Document details	Commission Communication—*Launching a consultation on a European Pillar of Social Rights*
Legal base	
Department	Business, Energy and Industrial Strategy
Document Number	(37614), 7276/16 + ADDs 1–3, COM(16) 127

Summary and Committee's conclusions

15.1 The Commission's Communication launched a consultation on the social dimension of the single currency. The objective was to draw up a "Pillar of Social Rights" applicable to the Eurozone states and any other EU Member States that wish to participate on a voluntary basis. At the same time, the Commission thought the consultation could have highlighted legislative changes that would be desirable for the EU as a whole and for non-EU members of the European Economic Area, to which elements of the social acquis (body of EU law) apply.

15.2 In the course of our scrutiny of this document, we have emphasised the desirability of UK engagement with this exercise despite its non–membership of the single currency and its vote to leave the European Union. We have noted commitments by the Prime Minister to maintain workers' rights as enshrined in EU law once the UK has left the EU. Indeed, in her most recent speech on 17 January 2017, she committed not only to protecting "the rights of workers set out in European legislation", but also to building on them.

15.3 When we last reported on the Commission Communication at our meeting of 13 July, we raised a number of questions in the light of the vote to withdraw from the EU. Details of the response dated 28 September from the Minister for Small Business, Consumers and Corporate Responsibility, (Margot James), are set out below. We subsequently wrote again to the Minister re–iterating the importance of UK engagement.

15.4 The Minister wrote to us on 19 December 2016 attaching a copy of the Government's response to the EU consultation. We have not reproduced a copy of that document, but it is available online.[138] The consultation largely summarises the current UK approach in the various areas. In limited instances, it sets out views on existing EU rules. These we have set out below. Notably, the Government does not see any justification for further labour market action by the EU. The Government also considers that the EU's body of health and safety at work legislation acquis is "a mature framework".

15.5 The Commission has now completed its consultation and is expected to bring forward a proposal for a European Pillar of Social Rights during the Spring.

15.6 **We thank the Minister for providing a copy of the Government's response to the consultation. We welcome this engagement in the exercise, as we had encouraged.**

15.7 **The Commission is due to publish its proposal for a European Pillar of Social Rights within the next few months. We assume that the proposal will be deposited for scrutiny within Parliament. In the light of the Prime Minister's recent commitment to not only protect the rights of workers set out in European legislation but to build on them, we will expect the Government's Explanatory Memorandum (EM) on the Pillar to include the following information:**

- **Whether the Prime Minister's commitment extends to future changes to EU workers' rights;**
- **If not, how the Government would avoid a situation in which UK workers benefit from a lower level of protection than their counterparts in the EU;**
- **If the EU approach to workers' rights both now and in the future will be the baseline for UK action, how the Government intends to engage with discussions on the Pillar both before it leaves the EU and when it is no longer a member of the EU; and**
- **Assuming that the Pillar does not contain a section on "workers' rights", it would be helpful if the Government EM could set out what elements of the Pillar it considers fall within the Government's definition of "workers' rights".**

15.8 **We now clear this document from scrutiny and look forward to the Government's EM on the Commission's proposal. We drew our earlier Reports to the attention of various Committees with an interest in this cross-cutting matter. In order to update them on progress, we accordingly draw this Chapter to the attention of the Business, Energy and Industrial Strategy Committee; Education Committee; Health Committee; Women and Equalities Committee; and Work and Pensions Committee.**

Full details of the documents

Commission Communication—*Launching a consultation on a European Pillar of Social Rights*: (37614), 7276/16 + ADDs 1–3, COM(16) 127.

Background

15.9 The Commission's Communication was clear that the consultation process towards the establishment of the Pillar had three main aims:

- to make an assessment of the current social priorities and the present social acquis (body of EU law), including the extent to which existing rights are applied and remain relevant for today's and tomorrow's challenges, and/or whether new ways should be considered to deliver on these rights;

- to reflect on new trends in work and welfare systems (such as demographic and technological trends), highlighting the main risks and opportunities linked to such trends; and

- to gather views and get feedback on the Commission's outline of the Pillar.

15.10 The consultation process was to be concluded by 31 December 2016, as the basis for the Commission to put forward a final proposal for the Pillar early in 2017.

15.11 Further details on the consultation and on the Commission's outline of a possible Pillar of Social Rights were provided in our Report of 20 April.

15.12 In our Report of 13 July, we observed that the context in which the consultation should be considered had fundamentally changed following the UK's vote to leave the European Union. We noted that the consultation's degree of relevance depended on the nature of the UK's future relationship with the EU once it has withdrawn. We re–iterated our request for details of the Government's analysis and raised a number of Brexit–related issues, including:

- The degree of planned engagement by the Government in the light of the referendum result;

- The degree of applicability of EU social legislation to the UK post–Brexit;

- Whether divergent domestic and EU social laws could operate as a barrier to trade or have implications for workers, businesses, consumers or any other affected group—particularly if there is a "race to the bottom" in order to secure a competitive advantage; and

- Whether the Social Pillar consultation exercise is a useful one for the UK in terms of providing an opportunity for the necessary reflection on which parts of EU social and employment legislation should be retained once the UK has withdrawn from the EU.

15.13 Further to a response from the Government, we wrote again on 19 October, noting that the Prime Minister had committed to maintenance of workers' rights as enshrined in EU law. We considered that this approach magnified the importance of ensuring that the UK is content with the body of EU social and employment legislation and, arguably, with the direction that it is taking. We urged the Government to respond to the consultation.

Minister's letter of 28 September 2016

15.14 On the Government's approach following the referendum, the Minister set out what is now the standard rubric:

> "Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation. We are currently assessing how best to contribute to constructive discussion on this dossier."

15.15 She went on to state that it would be unhelpful for the negotiations to make any assumptions or predictions about the terms of the future UK-EU relationship.

15.16 On matters beyond Brexit, she explained that her officials were working with officials in all other departments concerned to identify risks and opportunities to the UK arising from the Social Pillar. She acknowledged the value in reviewing how the EU social and employment acquis affects the UK:

> "We are considering potential opportunities arising from the Social Pillar for improving both existing legislation and non-legislative initiatives, and will assess these options further as we continue our analysis."

15.17 The Minister confirmed that officials had drawn on the Social and Employment Policy Report produced as part of the Coalition Government's Review of the Balance of Competences between the UK and the EU.

Minister's letter of 19 December 2016

15.18 The Minister wrote to confirm that the UK Government response to the consultation was being sent in time to meet the Commission's 31 December deadline. She attached a copy, which can also be found online.[139] The consultation response is wide-ranging and focuses predominantly on UK policy in the areas covered by the consultation. In a couple of instances, the response opines on EU-level action, as set out below.

15.19 On the labour market:

> "It is important to note that the UK employment framework, where entitlement to employment rights is determined by employment status, is not the same model used in other Member States. Elsewhere in the EU, entitlement to employment protections is often set by contract type and limited to permanent, standard contracts. The UK model helps facilitate a flexible labour market that provides protection for those in atypical employment. On this basis, the UK believes there is no evidence to suggest a need for further action at EU level, although if some Member States need to do more in this area, then they should be able to do so at a national level that suits their labour market."

15.20 On health and safety at work:

> "The UK has a proportionate and risk-based approach to health and safety at work legislation. We regard the EU health and safety at work acquis as a mature framework. It covers the significant risks to workers' health and safety, either through its general or more specific provisions."

Previous Committee Reports

Eighth Report HC 71-vi (2016–17), chapter 4 (13 July 2016); Twenty-ninth Report HC 342-xxviii (2015–16), chapter 2 (20 April 2016).

139 UK evidence for the Pillar of Social Rights

16 Space Strategy for Europe

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny
Document details	Commission Communication: Space Strategy for Europe
Legal base	—
Department	Business, Energy and Industrial Strategy
Document Number	(38226), 13758/16, COM(16) 705

Summary and Committee's conclusions

16.1 The Government wishes the UK space sector to capture 10% of the global market by 2030. The Commission has presented a Communication setting out its Space Strategy for Europe, in which it proposes a wide range of initiatives to deliver four strategic goals: maximising the benefits of space for society and the EU economy, fostering a globally competitive and innovative European space sector, reinforcing Europe's autonomy in accessing and using space in a secure and safe environment; and strengthening the EU's role as a global actor and promoting international cooperation. These could have an impact on the UK's ambitions.

16.2 When we considered this document in December 2016 we noted the importance of the space sector to the UK and the relevance to its space policy of the Commission's Space Strategy for Europe. However, before considering the Commission's Communication again we asked to hear from the Government as to its expectations for space policy post-Brexit, about whether this EU strategy would complement or compete with European Space Agency programmes and about clarifications the Government was seeking from the Commission in relation to compromising the civilian status of EU space programmes.

16.3 The Government, while noting that the UK will remain a member of the European Space Agency post-Brexit and the importance of its programmes for the UK space sector, now tells us that the UK's future relationship with the EU's space strategy will be one element in the Brexit negotiations. It also tells us of the legislative protection of the civilian status of the EU's present space programmes and that the Government will be carefully monitoring this issue in relation to the Commission's forthcoming proposal for a telecommunications programme, GovSatCom.

16.4 **We are grateful to the Government for the clarifications it now gives and clear the document from scrutiny. However, we will be considering further Brexit and civilian use/defence issues when we scrutinise the expected GovSatCom proposal.**

Full details of the document

Commission Communication: Space Strategy for Europe: (38226), 13758/16, COM(16) 705.

Background

16.5 The UK industry's ambition is to capture 10% of the global space market by 2030, to generate a sector worth €40 billion (£34.25 billion) per annum, creating 60,000 new jobs. The Government considers that a strong European space sector will benefit UK industry by generating customers and increasing demand for space-based services and products. It notes that many UK space companies are subsidiaries of larger, multinational European space companies.

16.6 The Commission has been seeking to establish an ambitious EU space policy since the beginning of the last decade. This has been given added impetus by Article 189 TFEU, which requires a "European space policy" to be drawn up and allows establishment of a European space programme. In October 2016 the Commission presented this Communication setting out its Space Strategy for Europe, which discusses the importance of space technology and services to society and the growth of the economy, and summarises the challenges facing the EU space sector from foreign competition and rapid technological change. It then proposes a wide range of initiatives to deliver four strategic goals: maximising the benefits of space for society and the EU economy; fostering a globally competitive and innovative European space sector; reinforcing the Europe's autonomy in accessing and using space in a secure and safe environment; and strengthening the EU's role as a global actor and promoting international cooperation.

16.7 When, in December 2016, we considered the Communication we heard of the Government's broad welcome to the proposed Strategy, its emphasis on the importance of the space sector for the UK and its comment that that many of the proposed activities support and enhance initiatives already underway in the UK. However it also told us that it is seeking clarification of a number of the Commission's proposals. We noted that included whether the Commission is seeking to adapt the civilian Galileo and Copernicus programmes to meet defence user needs, and whether the proposed new EU GovSatCom programme might adversely affect UK business.

16.8 Before considering the Commission's Communication again we asked to hear from the Government as to its expectations for space policy post-Brexit. We noted that the UK is a member of the European Space Agency (ESA) in its own right, and that the Government considered most of the proposals welcome, but we wanted more information about whether this EU strategy will complement or compete with ESA programmes. In addition, we awaited further information about the clarifications the Government was seeking from the Commission, particularly in relation to compromising the civilian status of EU space programmes, such as Galileo and Copernicus, by incorporating defence matters, and in relation to the impacts on the UK space sector. Meanwhile the document remained under scrutiny.

The Minister's letter of 23 January 2017

16.9 The Minister of State for Universities, Science, Research and Innovation, Department for Business, Energy and Industrial Strategy (Joseph Johnson) responds now, first saying that:

- the Commission's Space Strategy for Europe Strategy has been framed to complement the ESA's programmes and the ESA has signed a joint declaration with the EU to endorse the objectives of the Strategy;
- the innovations resulting from ESA programmes currently allow the UK to take full advantage of the opportunities offered by its participation in the EU space programmes, for example using ESA's expertise to support companies that wish to use Galileo signals for new products and services; and
- the Strategy will build on that by encouraging the uptake of space services more generally, by supporting research and innovation and by promoting international cooperation on space matters.

16.10 The Minister continues that:

- ESA programmes play an important role in delivering UK national space objectives;
- in December 2016, the Government negotiated an investment of more than €1.4 billion (£1.2 billion) over the next five years in ESA space initiatives;
- that substantial investment illustrates the importance to the UK of ESA's work and the considerable expertise that the UK already possesses in this area;
- the UK is now the leading investor in ESA's commercial programmes in the areas of navigation, Earth observation and telecoms; and
- the Government welcomes the objectives in the Strategy to further improve the governance between the ESA and the EU and the recognition that good relations between them are pivotal to the success of the EU space programmes.

16.11 Commenting on the Strategy in the context of Brexit the Minister says that:

- the Government continues to share industry's ambition to capture 10% of the global space market by 2030, as set out in the National Space Policy;[140]
- the role of the EU in achieving that will be part of the discussions for the future relationship between the UK and the EU as the UK exit; and
- Brexit will not affect the UK's membership of the ESA.

16.12 Turning to the matter of security and defence needs being met by EU space programmes, the Minister says that:

- the Government is clear that it would oppose any development in these programmes or new proposals that had no clear civil utility;
- it does not support any development of EU-owned military capabilities;

140 See https://www.gov.uk/government/publications/national-space-policy.

- the strategic nature of these space assets means that they require a level of proportionate and appropriate security in which critical national infrastructure and safety-critical users can have confidence, but this need not mean compromising the civilian nature of these programmes;
- the proposal for a new telecommunications programme, GovSatCom, is at a very early stage, and the Government will be studying it carefully as the proposal is developed;
- for the current generation of Copernicus and Galileo programmes, their civilian status was explicitly written into their founding Regulations—as the proposal for GovSatCom becomes clearer, that is one option that the Government will consider to avoid any issues around competence; and
- once the Commission has concluded its impact assessment and has formulated a proposal for the GovSatCom programme, we will be informed of developments when we scrutinise that proposal.

Previous Committee Reports

Twenty-second Report HC 71-xx (2016–17), chapter 3 (14 December 2016).

17 Digital Single Market: Use of the 470–790MHz Radio Spectrum band

Committee's assessment	Legally and politically important
Committee's decision	Cleared from scrutiny
Document details	Proposal for a Decision on the use of the 470–790MHz frequency band in the Union
Legal base	114 TFEU; ordinary legislative procedure; QMV
Department	Culture, Media and Sport
Document Number	(37504), 5814/16 + ADDs 1–2, COM(16) 43

Summary and Committee's conclusions

17.1 Radio spectrum is the part of the electromagnetic spectrum from 3 Hz to 3000 GHz (3 THz). Electromagnetic waves in this frequency range, called radio waves, are widely used in modern technology, which depends on the radio spectrum to transmit and receive information. Different parts of the radio spectrum have different properties, and those that can transmit large volumes of data over long distances and penetrate building structures are consequently in high demand from a variety of different types of service provider.

17.2 Given increasing demand for wireless devices, the efficient allocation and use of spectrum is considered critically important for the growth of the digital economy. The Commission considers that more coordinated use of spectrum would help to limit interference across EU borders and facilitate the timely roll-out of 5G across the EU—considered key for the deployment of innovative services such as connected cars or remote healthcare.

17.3 As part of its Digital Single Market (DSM) Strategy, the Commission published a draft Decision on the use of the ultra-high frequency (UHF) broadcasting band (470–790MHz) in the EU in February. The proposal aims to respond to the growing need for mobile internet, by clearing and allocating the 700MHz band (694–790MHz) for mobile broadband services, while at the same time safeguarding conventional digital terrestrial television (DTT) services at the sub-700MHz band (470–693MHz).

17.4 The Government has supported EU coordination of clearance of the 700MHz band for mobile broadband by 2020, but objected to its proposal to restrict use of the sub-700MHz band to 'downlink-only' (uni-directional) transmissions, as this would potentially have interfered with Ofcom's TV White Spaces initiative. The Government also objected to the introduction of wireless broadband coverage obligations for the 700MHz band at EU level. On 26 May 2016 the Telecommunications Council agreed a General Approach that closely reflected the UK position.

17.5 The Minister now writes to update the Committee on the outcome of trilogue negotiations which took place on 14 December. The Government's main concerns have been accommodated in the outcome. The main circumstance which might prevent the Government from clearing the 700MHz band by 2020 is extreme weather conditions, and

so the Government secured the addition of *force majeur* to the list of justified reasons for a delay. The final text does not grant the Commission a mandate to develop a common EU position in advance of future World Radiocommunications Conferences, but does require it to monitor use of the 470–694MHz band in future—a compromise the Minister accepts. Whether or not to introduce mobile broadband coverage obligations is left to individual Member States, in line with the Government's position. An article by article account of the final provisions in the legal text is provided in the account of the Minister's letter of 20 January 2017.

17.6 **The Minister provides the Committee with a summary of the compromise text that was agreed at the trilogue meeting on 14 December 2016, which substantially addresses UK concerns about the original Commission text. The Minister notes that:**

- **the compromise text allows Member States to delay clearance of the 700MHz band for up to two years after June 2020, although such delays are limited to a "closed list of justifying reasons"—the Government welcomes this increased flexibility;**
- **the main risk to the UK achieving clearance of the 700MHz band by the June 2020 deadline is "a period of bad weather which means that it is too dangerous for engineers to carry out the upgrade work to the 200m+ high TV masts" and the Government has accordingly secured the addition of *force majeur* to the list of justified reasons for a delay;**
- **proposals to restrict use of the 470–694MHz band to downlink-only transmissions—which would have negatively impacted Ofcom's TV White Spaces initiative—have been dropped; instead, the compromise text requires the Commission to monitor use of the 470–694MHz band and to report to the Parliament and Council in due course;**
- **proposals that the EU should establish a common negotiating position for the World Radiocommunications Conference in 2019 are not included in the compromise text; and**
- **proposals to introduce EU level coverage obligations that national regulators would impose when licensing the 700MHz band have also been deleted.**

17.7 **We now clear this document from scrutiny.**

Full details of the documents

Proposal for a Decision on the use of the 470–790MHz frequency band in the Union: (37504), 5814/16 + ADDs 1–2, COM(16) 43.

Background

17.8 The detail of the draft Decision, the Government's position on it and points which the Committee has sought to clarify are set out in the Committee's previous reports, listed at the end of this chapter.

The Minister's letter of 20 January 2017

17.9 The Minister of State for Digital and Culture (Matthew Hancock) writes to the Committee with an update on the progress of the file in trilogue negotiations. He states that "The EU UHF [Ultra-High Frequency] decision completed its first and final trilogue discussion on 14 December".

17.10 The Minister states that the text agreed in trilogues "meets the objectives and red lines set out by the Government in previous correspondence" and provides an article by article account of how it does so. The Minister states that:

- Article 1 provides the overall ambition for Member States to complete clearance of the "700MHz" band (694–790MHz) by 30 June 2020, but now provides for delays of up to two years after that period for "justifiable reasons" which are set out in an annex. The Minister states that the UK intends to complete clearance of the band "by mid-2020, with a review of progress in August 2017" and that the biggest risk to it doing so "is a period of bad weather which means that it is too dangerous for the engineers to carry out the upgrade work to the 300m+ high TV masts". The Minister is therefore pleased that, in line with UK requests, the final text includes *force majeure* as a justifiable reason for delays in clearing the band;

- Article 3 requires Member States to consider coverage and speed obligations when setting licence conditions for mobile services in the 700MHz band, but does not prescribe specific obligations in this regard, leaving this for national regulators to determine;

- Article 4 ensures that the remaining 470–694MHz band shall be primarily used for broadcasting services until at least 2030, but allows "significant flexibility for allocating the band for other uses based on national need", thereby accommodating the divergent needs of Member States, which have very different levels of Digital Terrestrial Television use. This added flexibility means that concerns about the impact of the proposals on Ofcom's TV White Spaces initiative has been addressed; and

- Proposals, backed by the European Parliament, that the Commission should develop an EU position for the World Radiocommunications Conference in 2019, have been deleted from Article 6 of the text, which now merely states that the Commission should "monitor use of the 470–694MHz band and report on any developments to the Council and Parliament"—a compromise with which the Government is content.

17.11 On Brexit, the Minister states that "the UK made the decision to reallocate the 700MHz band for mobile broadband in November 2014. We therefore believe that it is not necessary to introduce specific UK legislation once the UK exits the European Union, or to repeal the proposed decision". On the other hand, if the EU chose to adopt a more integrated, Union-level approach to spectrum management—which the Commission has recently proposed as part of its Directive establishing a European Electronic Communications Code (Recast) (12252/16) and Regulation establishing the Body of European Regulators for Electronic Communications (BEREC) (2016/0286)—this could

have significant ramifications for the UK's ability to influence emerging standards in this policy area. However, these Brexit implications are best considered in relation to the proposed reforms to the EU's regulatory frameworks referred to above.

17.12 The Minister states that the final version of the text "will be raised at COREPER on Friday 20 January where it is expected to be approved to go to a Council Meeting as an FA' Point. The date it will be raised at a Council meeting has not been confirmed but we expect it will take 4–6 weeks after the COREPER meeting".

The Minister's letter of 7 December 2016

17.13 The Minister wrote to update the Committee on progress in relation to the 700MHz decision. The key points he made were that:

- the General Approach agreed by the Telecoms Council on 26 May 2016 contained "no significant changes" from the text for which the Committee had granted a scrutiny waiver;
- the ITRE Committee of the European Parliament had "agreed proposals which have now been signed off by the European Parliament", which contained "some differences with the Council-agreed version"; however, the Minister did not provide an account of these differences; and
- on 16 November the Presidency had published a compromise text which would be the basis for trilogue discussions. The Minister noted that: "There was agreement that the Council General Approach and Presidency text are not as far apart as they could have been, meaning that a quick agreement may be possible".

Previous Committee Reports

First Report HC 71-i (2016–17), chapter 2 (19 May 2016), and Twenty-sixth Report HC 342-xxv (2015–16), chapter 2 (16 March 2016).

18 Digital Single Market: Wholesale roaming charges

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; further information requested; drawn to the attention of the Committee for Exiting the European Union, the Culture, Media and Sport Committee, and the Business, Energy and Industrial Strategy Committee
Document details	(a) Commission Report on the review of the wholesale roaming market; (b) Proposal for a Regulation amending Regulation (EU) No. 531/2012 as regards rules for wholesale roaming markets
Legal base	(a) —; (b) Article 114 TFEU; ordinary legislative procedure; QMV
Department	Culture, Media and Sport
Document Numbers	(a) (37869), 10327/16 + ADD 1, COM(16) 398; (b) (37870), 10329/16 + ADDs 1–2, COM(16) 399

Summary and Committee's conclusions

18.1 On 16 June 2016 the Commission presented a proposal to further reduce EU caps on 'wholesale roaming'—the prices that operators charge each other for use of their networks when their customers roam on the 'visited' operators' networks. This legislative measure was necessary to ensure that the EU's political commitment to abolishing retail roaming surcharges for consumers by 15 June 2017 was commercially sustainable for mobile operators.

18.2 During negotiations regarding the level at which to set the different wholesale roaming caps (for data, SMS and voice calls) tensions have arisen both within and between the different European institutions. EU Member States which experience net influxes of roaming consumers, mainly the southern Member States, have an interest in maintaining higher levels of wholesale caps so that their mobile network operators (MNOs) can benefit from higher revenues. As the UK has a net outflow of roaming consumers, lower wholesale roaming caps are in the interests of UK mobile operators.

18.3 On 2 December 2016 the Telecommunications Council agreed a General Approach in relation to the regulation on rules for wholesale roaming. The data roaming caps set were slightly higher than the Commission's original proposal, but established a downward "glide path" whereby they would steadily reduce over the following five years.

18.4 On 29 November the European Parliament's Committee on Industry, Research and Energy (ITRE) gave Parliament's negotiating team a mandate to negotiate with Council in order to find an agreement. It proposed significantly lower caps than those proposed by the Council, particularly for data roaming.

18.5 Three trilogue negotiation meetings subsequently took place and an informal agreement between the institutions was reached on 31 January. As the Minister anticipated, the European Parliament succeeded in negotiating lower wholesale caps for data roaming than those proposed by the Council. A phased reduction over 5 years is proposed for data caps which will progressively decrease from €7.7 per GB (as of 15 June 2017) to €2.5 per GB (as of 1 January 2022). Wholesale caps for voice calls will fall to 3.2 cents per minute from 15 June 2017, a slight reduction over the level proposed by the Council. SMS roaming will be capped at 1 cent per message—the same cap previously proposed by the Commission and the Council.

18.6 The Minister states that final agreement will take place in the Committee of Permanent Representatives (COREPER) on 8 February. The file will then go as an 'A' vote to Ministerial Council, meaning that the decision will be made without debate, most probably in March or April.

18.7 **We thank the Minister for updating us on the outcome of trilogue negotiations regarding the wholesale roaming regulation in advance of agreement being reached in the Committee of Permanent Representatives (COREPER).**

18.8 **As a consequence of this agreement, the wholesale roaming caps that limit the fees that mobile operators can charge each other when their customers use their networks will be reduced as follows:**

- **Data wholesale roaming caps, currently €0.05/MB, will fall to €0.0077/MB on June 15 2017; thereafter, the caps will be reduced on an annual basis until they reach €0.0025/MB in 2022;**
- **the wholesale cap for voice calls, currently €0.05/min, will be reduced to €0.032/minute on June 15 2017;**
- **the wholesale cap for SMS text messages, currently €0.02/SMS, will be reduced to €0.01/SMS on June 15 2017.**

18.9 **We concur with the Minister's assessment that the agreement represents "a significant further reduction in wholesale data caps relative to the caps proposed in the Council's General Approach" and that it will be "beneficial for both UK consumers and mobile operators". In addition to enabling UK consumers to benefit from surcharge-free roaming services from 15 June 2017, the lower wholesale caps will limit the cost of delivering surcharge-free roaming services to consumers travelling elsewhere in the EU for UK mobile operators.**

18.10 **We are content to clear the document from scrutiny in advance of the forthcoming meetings of the COREPER and the Ministerial Council, on the understanding that the Minister responds in detail to those questions the Committee asked in its report of 18 January 2017 which have not yet been answered (see below). We ask that the Minister do so by 10 March 2017.**

18.11 **We draw the Minister's response and our conclusions to the attention of the Committee for Exiting the European Union, the Culture, Media and Sport Committee, and the Business, Energy and Industrial Strategy Committee.**

Outstanding questions

Brexit implications

18.12 **We note the Minister's previously expressed view that "UK consumers will experience a period of free regulated roaming before the UK's exit from the EU". We ask that the Minister clarify whether he is persuaded that the UK will not be able to retain surcharge-free roaming throughout the EU after Brexit, and explain the basis of his assessment.**

18.13 **We also note EU Commissioner Günther Oettinger's assessment that WTO rules mean that continued UK-EU surcharge-free roaming arrangements could only be concluded in the context of a comprehensive Free Trade Deal.**[141] **We ask the Minister to clarify whether he concurs with this assessment, or whether he believes that a bilateral deal to maintain surcharge-free roaming between the UK and the EU (including caps on wholesale roaming charges) could be concluded outside the scope of a Free Trade Agreement.**

18.14 **We request an assessment of the implications of non-participation in the EU-wide abolition of roaming surcharges for different groups of UK stakeholders (e.g., consumers, businesses, mobile operators).**

Implementing act

18.15 **We request a clear account of the fair use policy and sustainability mechanism implementing act that has been adopted by the Commission, including an account of the Government's position in negotiations in the Communications Committee and a summary of its implications for UK consumers and mobile operators.**

Full details of the documents

(a) Commission Report on the review of the wholesale roaming market: (37869), 10327/16 + ADD 1, COM(16) 398; (b) Proposal for a Regulation amending Regulation (EU) No. 531/2012 as regards rules for wholesale roaming markets: (37870), 10329/16 + ADDs 1–2, COM(16) 399.

Background

18.16 Consumers who use their phones while travelling often pay high charges for roaming on mobile networks in other countries. Since the introduction of the EU roaming regulations (or 'Eurotariff') in 2007, the roaming charges consumers pay to make calls, send SMS or use data from another EU Member State have fallen by over 90%. The EU has capped these charges for EU citizens travelling within the EU and gradually lowered these caps.

18.17 As the roaming regulations are EEA measures, non-EU EFTA members of the EEA (Norway, Iceland, Liechtenstein) participate in them. Non-EEA countries—even including Switzerland, which participates in the EU's Board of European Regulators of

141 Business Insider UK, 'Brits could see a huge increase in mobile phone roaming charges after Brexit' (December 30, 2016) http://uk.businessinsider.com/britain-eu-mobile-phone-roaming-charges-brexit-2016–12

Electronic Communications (BEREC)—do not, meaning that their citizens pay higher charges when using roaming services within the EU. When the UK leaves the EU it could in principle conclude a bilateral arrangement that would allow UK and EU consumers and mobile networks to continue to benefit from caps on roaming charges, were both parties willing to do so; however, World Trade Organisation (WTO) most favoured nation (MFN) rules appear to preclude a preferential arrangement of this kind on a bilateral basis unless it is part of a comprehensive Free Trade Agreement.

18.18 In October 2015 the EU agreed to end the roaming charges that mobile operators charge their customers when they travel abroad by 15 June 2017. Delivering this policy without causing excessive disruption to domestic markets is challenging because of factors such as discrepancies in inbound and outbound travel volumes between northern and southern Member States. To make this policy commercially deliverable for mobile operators it is therefore necessary to take a number of actions, including to introduce lower caps on 'wholesale' roaming charges—the prices that operators charge each other for use of their networks when their customers roam on the 'visited' operators' networks.

18.19 On 16 June 2016 the Commission presented a proposal to further reduce EU caps on wholesale roaming. On 18 November the Minister (Matthew Hancock) wrote to the Committee requesting clearance not of the Regulation, but of a separate measure required to deliver surcharge-free roaming for EU consumers: the implementing act that details the 'fair use policy', which is designed to prevent users arbitraging the disparity in rates between Member States, and the 'sustainability mechanism', which will allow operators to apply a surcharge in exceptional circumstances if they are not able to recover their costs. Unfortunately this file was never deposited for scrutiny and as such is not subject to the scrutiny reserve. Failure to deposit this file for scrutiny is particularly regrettable given the Act's exceptionally high political profile, which at one stage involved the President of the European Commission announcing in his State of the Union speech that the Commission was withdrawing a draft of the implementing act.[142]

18.20 On 2 December the Telecommunications Council agreed a General Approach in relation to the Regulation on wholesale roaming (10329/16). As the Minister in his previous letter had not sought clearance of the Regulation the Government's vote in favour of the General Approach constituted a scrutiny override.

18.21 The Minister acknowledged the override in a subsequent letter, in which he stated that it was necessary to vote in favour of the measure as it was in the UK's interests. He summarises the General Approach, which will reduce wholesale roaming caps for mobile operators. He undertakes to provide further updates on the implementing act in due course, even though it is not under scrutiny.

18.22 In its report on 18 January the Committee requested:

- An update regarding the outcome of trilogue negotiations regarding wholesale charges before the text returns to Council for final agreement;
- On Brexit, an analysis of the effect of the UK leaving the EU on proposals to end intra-EEA roaming surcharges for UK consumers, an account of the implications of non-participation in the EU roaming regulations for different groups of

142 European Commission—Press release: The State of the Union 2016.

UK stakeholders, and an assessment of the extent to which a bilateral UK-EU deal on roaming surcharges could (i) be agreed through a comprehensive Free Trade Agreement (FTA) and whether it could be agreed in the absence of such an arrangement without infringing World Trade Organisation (WTO) most favoured nation rules; and

- A clear account of the fair use policy and sustainability clause implementing act that was adopted by the Commission, the Government's position in negotiations (of this act) in the Communications Committee, and a summary of its implications for UK consumers and mobile operators.

The Minister's letter of 7 February 2017

18.23 The Minister writes in response to the Committee's request for an update on trilogue negotiations. He states that trilogue negotiations with the European Parliament and the Commission took place on 15 December 2016, 18 January 2017 and 31 January, at which "agreement was reached on the final outstanding issue—wholesale data caps."

18.24 The new wholesale data caps are shown below, alongside the higher figures previously agreed in the Council's General Approach:

In Euros	15-Jun-17	15-Jun-18	15-Jun-19	15-Jun-20	15-Jun-21	30-Jun-22
Council General Approach: Data (per MB)	0.01	0.0085	0.007	0.006	0.005	0.005
Trilogue compromise text: Data (per MB)	0.0077	0.006	0.0045	0.0035	0.003	0.0025

18.25 The Minister reports that the agreement represents "a significant further reduction in wholesale data caps relative to the caps proposed in the Council's General Approach" which will "be beneficial for both UK consumers and mobile operators."

18.26 The Minister informs the Committee that agreement was also reached in trilogue on the wholesale cap for voice calls, which will be capped at €0.032/minute—a very small reduction on the cap in the Council's General Approach of €0.035/minute. He adds that the wholesale cap agreed for SMS messages was €0.01/SMS—the same level as that proposed by the Council. The wholesale caps for both voice calls and SMS messages will take effect from June 15, 2017.

18.27 The Minister states that final agreement will take place in COREPER on 8 February. The file will then go as an 'A' vote to Ministerial Council, which is likely to be in March or April.

18.28 The Minister requests that the Committee lift the scrutiny reserve.

Previous Committee Reports

Twenty-seventh report HC 71-xxix (2016–17), chapter 3 (18 January 2017); Eleventh report HC 71-ix (2016–17), chapter 16 (14 September 2016).

19 Resumption of Generalised Trade Preferences to Sri Lanka

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Joint Committee on Human Rights and the Foreign Affairs Committee
Document details	Commission delegated Regulation amending Annex III to Regulation No 978/2012 applying a scheme of generalised tariff preferences.
Legal base	Article 10(4) of Regulation 978/2012; delegated legislation procedure
Department	International Trade
Document Number	(38457), 5270/17 + ADD 1, —

Summary and Committee's conclusions

19.1 The Generalised System of Preferences is a longstanding unilateral EU scheme that provides preferential tariff rates to developing countries that export to the EU. The GSP Plus (GSP+) scheme offers additional preferential access to countries that ratify and commit to implement and report on 27 international conventions relating to human and labour rights, environment, and good governance. GSP+ countries must also meet additional criteria relating to vulnerability.

19.2 The EU withdrew Sri Lanka's GSP+ preferences in 2010 following a Commission investigation that found serious failures by the Government to adhere to its commitments under international conventions on human rights. Following a change of government in 2015, Sri Lanka applied to the Commission in 2016 for a resumption of the GSP+ arrangement.

19.3 The Commission has determined that Sri Lanka meets the eligibility criteria. It is empowered to adopt a delegated Regulation to add Sri Lanka to the list of beneficiary countries of the GSP+ arrangement. Despite shortcomings in implementation of relevant conventions, the Commission observes that Sri Lanka "has made important progress in addressing these shortcomings within a relatively short time span". The Commission believes that the monitoring mechanisms under GSP+ will enable it to maintain dialogue with Sri Lanka on remaining issues, including concerns over a new Prevention of Terrorism Act.

19.4 The Government informs us that it supports Sri Lanka's application to re-enter the GSP+ arrangement, and that it agrees with the Commission's assessment that the Sri Lankan government "has ratified the 27 relevant Conventions and have met the minimum requirements to qualify for GSP+ access".

19.5 While noting that monitoring reports have identified shortcomings that will need to be addressed, the Explanatory Memorandum states that "the UK does not consider that this amounts to serious failures of implementation".

19.6 **The granting of unilateral trade preferences to developing countries is a long-established EU practice, and one that the UK has supported. To qualify for additional GSP+ preferences, applicant countries must provide evidence of adherence to core international conventions on human and labour rights, good governance and environment. In this instance, the Commission, and the Government, have determined that Sri Lanka, despite previous failures which led to the withdrawal of GSP+ access, now meets the basic criteria for re-admittance to the scheme. They appear confident that the monitoring process under the scheme will enable the EU to address existing shortcomings of implementation and reinstatement of GSP+ access would encourage Sri Lanka to make continued progress.**

19.7 **However, we are also aware of concerns raised by civil society that the proposed resumption of preferences is based on a "flawed factual analysis". They assert that granting the trade concession to Sri Lanka now would be premature, given that in March 2017 the UN High Commissioner for Human Rights is due to report comprehensively to the UN Human Rights Council on Sri Lanka's progress in implementing its commitments on accountability and reconciliation.**

19.8 **We recognise the political sensitivity of this delegated regulation. We regret that the 2 month deadline for dealing with this matter expires before the UN High Commissioner's Report. We take note of the Government's commitment to monitor progress by Sri Lanka in implementing relevant conventions on human rights, and in addressing identified shortcomings. We do not think it is necessary to retain this document under scrutiny, but draw it to the attention of the Joint Committee on Human Rights and the Foreign Affairs Committee, who may wish to request the Government for a briefing on the outcome of the UN Human Rights Council's consideration of Sri Lanka in March.**

Full details of the documents

Commission delegated Regulation amending Annex III to Regulation No 978/2012 applying a scheme of generalised tariff preferences: (38457), 4270/17 + ADD 1, —.

Background

Generalised System of Preferences

19.9 The EU has granted trade preferences to developing countries through the Generalised Scheme of Tariff Preferences (GSP) since 1971. The 'GSP+' special incentive arrangement provides additional tariff preferences to developing countries for their exports to the EU. GSP+ beneficiary countries obtain full removal of tariffs on over 66% of tariff lines. At present, 8 countries [143] obtain GSP+ preferences.

143 Armenia, Bolivia, Cape Verde, Kyrgyzstan, Mongolia, Pakistan, Paraguay and the Philippines.

19.10 To qualify, countries must meet the following eligibility criteria:

- be considered vulnerable;
- have ratified 27 international conventions relating to human and labour rights, environment and good governance; and the most recent available conclusions of the monitoring bodies under those conventions do not identify a serious failure to implement any of the conventions;
- have not formulated a prohibited reservation under any of the relevant conventions; and
- accept without reservation the reporting requirements under each convention and give binding undertakings to maintain ratification, ensure effective implementation, accept regular monitoring and review in accordance with procedures under the conventions, and participate and cooperate with the monitoring procedures established by the Commission.

19.11 A country is defined as 'vulnerable' if:

- in terms of value, the seven largest GSP sections of its imports into the EU represent more than 75% in value of its total imports, as an average over the preceding three consecutive years; and
- the country's imports into the EU represent less than 6.5% in value of the total imports into the EU from GSP beneficiary countries, as an average over the preceding three consecutive years.

Sri Lanka's application for GSP+

19.12 Sri Lanka was a beneficiary of the standard GSP arrangement since the scheme's inception, and benefited from GSP+ from 2005. However, in 2010 the EU suspended and then removed Sri Lanka from the scheme following a Commission investigation which identified a number of serious concerns relating to failures to implement specific conventions, human rights abuses, and unlawful restrictions on civil and political rights.

19.13 Following a change of government, Sri Lanka applied for re-admittance to the scheme in July 2016.

The Commission's assessment

19.14 The Commission reports that it has examined the request and established that Sri Lanka meets the GSP+ eligibility criteria. In terms of vulnerability, the seven largest GSP sections of Sri Lanka's imports represent around 92% of its total imports, and the imports of specified products represent around 2.6% of the value of total imports of those products into the EU.

19.15 Reports from the UN Committees responsible for monitoring adherence to the relevant conventions have informed the Commission's assessment that "there is no serious failure to effectively implement any of these conventions".

19.16 The Commission Staff Working Document states in its conclusion that the monitoring bodies of the relevant conventions have detected "shortcomings" in relation to implementation. It notes that the Commission "will be paying particular attention to the identified salient shortcomings in its monitoring of the effective implementation of these conventions".

19.17 The Commission notes the "considerably more positive political context" in Sri Lanka following the election of a new President in 2015. It cites the new government's initiation of a programme of "major reforms to address reconciliation and accountability in relation to the civil war, improve human rights and the rule of law, as well as governance and economic development".

19.18 The Staff Working Document cites the Sri Lankan government's reengagement with the international community, and notes that Sri Lanka remains under regular scrutiny by the UN Human Rights Council—with the next comprehensive report on Sri Lanka due in March 2017. The Commission observes that it will take up remaining issues, including those identified in relation to the Prevention of Terrorism Act, through the "EU-Sri Lanka institutional set-up", which includes a working group on governance, rule of law, and human rights.

19.19 The GSP Regulation empowers the Commission to adopt delegated acts to amend Annex III of the GSP Regulation in order to grant GSP+ to a requesting country by adding it to the list of GSP+ beneficiary countries.

The Government's View

19.20 The Minister of State at the Department for International Trade (Lord Price) informs us that:

> "the UK is a strong supporter of GSP+ in the EU. It encourages trade with developing countries through reduced tariffs on certain goods and ensures beneficiary countries take practical steps to support their sustainable development before entry to the scheme."

19.21 With regard to Sri Lanka's application, the Minister states:

> "the UK supports Sri Lanka's application to re-enter GSP+. We agree with the Commission's assessment that the Sri Lankan Government has ratified the 27 relevant Conventions and have met the minimum requirements to qualify for GSP+ access. The most recent monitoring reports note significant progress by the Sri Lankan government and, whilst identifying shortcomings which need to be addressed, the UK does not consider that this amounts to serious failures of implementation…..More broadly, the UK is a strong supporter of the current Sri Lankan government's efforts to promote reconciliation and human rights in Sri Lanka. Reinstatement of GSP+, and the benefits it would bring to Sri Lanka, would be supportive of these wider efforts."

19.22 The Minister adds that the Government will continue to monitor progress, in particular with regard to the compatibility of forthcoming legislation on Prevention of Terrorism with international human rights and counter terrorism standards.

19.23 The Government informs us that the deadline for raising an objection or extension is 24 February 2017.

Civil Society Representations

19.24 An umbrella group of advocacy groups wrote[144] to the Human Rights and International Trade Committees of the European Parliament on 3 February 2017 to express concern at the Commission's proposal to restore GSP+ status to Sri Lanka.

19.25 Their concerns are as follows:

- the Commission's assessment is based on a "flawed factual analysis" of Sri Lanka's implementation of relevant conventions—in particular, the Convention against Torture. The Commission inaccurately identifies progress in certain areas relating to detainees, witness protection and forthcoming legislation;
- the Commission has disregarded its own internal criteria for the restoration of GSP+; namely 15 conditions that were communicated to the Sri Lankan Government in 2010; and
- the Commission's proposed decision is based on flawed assumptions about how to support effectively the accountability and reconciliation process in Sri Lanka as mandated by the UN Human Rights Council, and could in fact "seriously undermine such support".

19.26 The campaign group urged the European Parliament to review the factual basis for the Commission's case and to reject the proposal pending progress in the implementation of relevant recommendations by the UN Special Rapporteur on Torture and the UN Committee against Terrorism. As an alternative, they asked members of the European Parliament Committee on International Trade to ensure that the deadline for the ratification of the Commission's proposal is extended from two to four months, to allow "full consideration" of the forthcoming report of the UN High Commissioner for Human Rights' on Sri Lanka, and to increase leverage for a "robust follow up resolution at the upcoming UN Human Rights Council Session in March 2017".

Previous Committee Reports

None, but background to the GSP scheme can be found in the Committee's 33rd Report HC 428-xxix (2010–11) Chapter 3.

144 Sri Lanka Campaign for Peace and Justice

20 EU external borders: role of the European Maritime Safety Agency

Committee's assessment	Legally and politically important
Committee's decision	Cleared from scrutiny
Document details	Proposed Regulation amending the role of the European Maritime Safety Agency
Legal base	Article 100(2) TFEU, ordinary legislative procedure, QMV
Department	Transport
Document Number	(37401), 15390/15, COM(15) 667

Summary and Committee's conclusions

20.1 In December 2015 the Commission proposed a Regulation to establish a European Border and Coast Guard Agency, based on the EU's existing External Borders Agency (Frontex), with enhanced powers and a right to intervene in crisis situations. It also proposed a Regulation to amend the remit of the European Maritime Safety Agency to allow it to cooperate with the European Border and Coast Guard Agency in support of national authorities' coastguard activities. A second additional measure was a similar proposal for the European Fisheries Control Agency.

20.2 We have held the proposed Regulation concerning the European Maritime Safety Agency under scrutiny since February 2016. We last considered the matter in October 2016 when we asked the Government to:

- clarify its understanding as to whether some of the expenditure on proposed new tasks for the Agency might relate to activity in which the UK does not participate and for which, therefore, it should not pay;
- explain the practical effect of the Government purporting, on Justice and Home Affairs grounds, not to opt into some aspects of the proposed Regulation; and
- provide us with its minute statement asserting that aspects of the proposal are subject to Protocol (No. 21) to the Treaties on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice.

20.3 The Government says now that the UK makes a contribution to the EU Budget as a whole, and not to individual spending programmes within it. It comments in addition to this assertion that, even when the Government does not consider itself bound by elements of a Regulation, there are still likely to be some benefits for the UK, even if only indirectly, and any costs from such activities to which the UK subscribes would be impossible to split out from the overall contribution.

20.4 As for the Justice and Home Affairs issue, the Government now gives us the minute statement it laid at the Council meeting which it adopted the Regulation. On the practical effect of its purported opt out from aspects of the Regulation the Government explains its reasons for asserting that there is a Justice and Home Affairs issue. It says, however, that,

because this is a partial Justice and Home Affairs measure and because it considers itself bound by the Regulation, there will be no material effect, that the UK remains bound by other Regulations to continue to provide data for the purposes of maritime safety, pollution and security and that there would be no practical change in the UK's current engagement with the European Maritime Safety Agency.

20.5 **We note the Government's not wholly convincing explanation of its view of expenditure on activity in which the UK does not participate. We also note the Government's explanation of the practical effect of its purported opt-in decision, an explanation which leads us to wonder why it persists on a legally indefensible pursuit of matters which, at least in this case, have no practical consequence and create legal uncertainity.**

20.6 **However, we see no value in pursuing these issues further and clear the document from scrutiny.**

Full details of the document

Proposed Regulation amending Regulation (EC) No. 1406/2002 establishing a European Maritime Safety Agency: (37401), 15390/15, COM(15) 667.

Background

20.7 The Commission's December 2015 Communication, *A European Border and Coast Guard and effective management of Europe's external borders,* launched a package of measures intended to address "weaknesses and gaps" in the management of the EU's external borders. The most significant measure proposed was to establish a European Border and Coast Guard Agency, based on the EU's existing External Borders Agency (Frontex), with enhanced powers and a right to intervene in crisis situations.[145]

20.8 The European Maritime Safety Agency is an EU agency charged with reducing the risk of maritime accidents, marine pollution from ships and the loss of human lives at sea by helping to enforce EU legislation. One of the additional measures proposed by the Commission was a Regulation to amend the remit of the European Maritime Safety Agency to allow it to cooperate with the European Border and Coast Guard Agency in support of national authorities' coastguard activities. (A second additional measure was a similar proposal for the European Fisheries Control Agency.)[146]

20.9 When in February 2016 we considered the amendments proposed for the European Maritime Safety Agency we noted the Government's cautious reaction to the proposal in relation to a number of issues, including subsidiarity, the potential impact on UK Border Force operations, cross-border and search and rescue operations, and fisheries management, the adequacy of the capabilities of the European Maritime Safety Agency,

145 (37403), 15398/15 + ADD 1 and (37406), 15403/15: see Fourteenth Report HC 71-xii (2016–17), chapter 6 (26 October 2016), Eleventh Report HC 71-ix (2016–17), chapter 8 (14 September 2016); Sixth Report HC 71-iv (2016–17), chapter 7 (15 June 2016); Twenty-eighth Report HC 342-xxvii (2015–16), chapter 11 (13 April 2016); Twenty-fifth Report HC 342-xxiv (2015–16), chapter 10 (9 March 2016) and Twentieth Report HC 342-xix (2015–16) chapter 10 (20 January 2016).

146 (37402), 15395/15: see Twenty-fourth Report HC 71-xxii (2016–17), chapter 7, (14 December 2016), Fifteenth Report HC 71-xiii (2016–17), chapter 2 (26 October 2016) and Twenty-fourth Report HC 342-xxiii (2015–16), chapter 4 (24 February 2016).

a potential risk of an impact on the use of national resources by the three EU agencies in the future, the implications for the UK's position regarding the Schengen agreement, practicalities given, for example, that the UK Coastguard has no direct involvement in border control tasks and the financial implications, particularly regarding effectiveness and value for money. The Government also told us that it believed proposed provisions requiring the European Maritime Safety Agency to share information could give rise to a Justice and Home Affairs opt-in.

20.10 In April 2016 the Government told us in an interim report that the overall outcome of the current negotiations had been a success for the UK. However, it also said that it had failed to have added to the proposal a Justice and Home Affairs legal base. It commented that it was purporting not to opt in to the provisions it considered Justice and Home Affairs matters, but it would be considering itself as bound by the remainder of the proposed Regulation.

20.11 In October 2016 we heard from the Government that:

- in spring 2016 the Presidency opened negotiations with the European Parliament on the basis of compromises reached by the Council's Shipping Working Group;
- these negotiations were badly delayed by differences within the European Parliament's Transport and Tourism Committee;
- however, an agreed compromise text was adopted by the European Parliament on 6 July 2016;
- the Presidency had planned to have the text agreed in September 2016 through the Council's written procedure; and
- although the compromise text preserved the amendments which addressed the Government's earlier concerns, it intended to abstain from the agreement on the proposal because the unhelpful negotiating processes had not facilitated parliamentary scrutiny of the proposed Regulation.

20.12 The Government also reminded us, in the context of its post-referendum policy of continuing, until the UK exits the EU, to negotiate, implement and apply EU legislation, that it would assert the Justice and Home Affairs opt-in and that it continued to support action to strengthen the external EU border.

20.13 We recognised that the Government had achieved a reasonable outcome on this proposed Regulation and welcomed its recognition of the impact of the negotiation process on parliamentary scrutiny. However, we were not yet ready to clear the document from scrutiny. Instead we wished to hear further from the Government on two points.

20.14 First, in relation to the question as to whether some of the expenditure on proposed new tasks for the Agency might relate to activity in which the UK does not participate and for which, therefore, it should not pay, the Government had told us that "No such costs are envisaged for the period 2017–2020, with the 87 million euro contribution to EMSA coming directly from the existing EU budget". This seemed to us to miss the point. Although additional costs would be met from the existing EU Budget, the UK contributes to that budget and could thus be paying for activity in which it does not participate. We asked for clarification of this matter.

20.15 Secondly we said that, as the Government was very well aware, we shared the widely held legal view that it is not possible to exercise the UK's opt-in in relation to a legislative proposal which does not have a Justice and Home Affairs legal base from Part III, Title V of the TFEU. Nevertheless, we asked to receive from the Government a text of the Regulation identifying those provisions which it considered do not apply to the UK and a copy of any minute statement laid, together with an assessment of what the practical effect was of having purported not to opt in to certain elements of the Regulation on the European Maritime Safety Agency.

The Minister's letter of 3 February 2017

20.16 The Minister of State, Department for Transport (Mr John Hayes), first thanks us for acknowledging that the Government has secured a very good outcome in that it has ensured that the amendments introduced by the Regulation,[147] adopted in September 2016, make a valuable contribution towards more effective, cohesive and stronger EU management of the EU's external Schengen border. He says that the Regulation ensures that Member States whose national coastguard authorities have border control responsibilities are not committed to providing additional resources or assets to support the European Border and Coastguard Agency, the European Maritime Safety Agency and the European Fisheries Control Agency without their prior consent. Furthermore, the outcome also safeguards the European Maritime Safety Agency's core and ancillary tasks in maintaining a high level of maritime safety and pollution monitoring.

20.17 Turning to the relationship between what the UK contributes to the EU Budget, and what benefits it derives from it, the Minister says that:

- the UK makes a contribution to the EU Budget as a whole, and not to individual spending programmes within it;
- the Government agrees that the UK should not be liable for financial costs for activities from which it derives no benefit;
- the issue with partial Justice and Home Affairs measures, of which this is one, is, however, that some activities, such as information and data sharing, can and do fulfil more than one purpose, and can be used by more than one Member State authority;
- therefore, even when the Government does not consider itself bound to those elements, there are still likely to be some benefits for the UK, even if only indirectly; and
- any costs from such activities to which the UK subscribes would be impossible to split out from the overall contribution.

20.18 In relation to Justice and Home Affairs the Minister says that:

- the amendments that have been adopted in the Regulation allow for information gathered by the European Maritime Safety Agency from Member States to be

147 Regulation (EU) 2016/1625.

shared with the European Border and Coast Guard Agency, European Fisheries Control Agency and the national authorities of other Member States to support them in carrying out their coastguard functions;

- such functions may include border control which covers a range of activities, not least general enforcement, with such information also being shared and used for the prevention, detection and investigation of crime, including the trafficking of humans, weapons and drugs, as well as for migration control; and
- it is on these points that the Government maintains that this is a partial Justice and Home Affairs measure.

20.19 The Minister explains further, on the practical effect on the UK of the purported exercise of the opt-in, that:

- the Government believes that, because this is a partial Justice and Home Affairs measure and because it considers itself bound by the Regulation on adoption, there will be no material effect; and
- even so, the UK remains bound by other Regulations to continue to provide data for the purposes of maritime safety, pollution and security and the Government would see no practical change in the UK's current engagement with the European Maritime Safety Agency as a result.

20.20 The Minister concludes by giving us the text of the Government's minute statement laid at the Council meeting adopting the regulation, as follows:

> "The United Kingdom considers that these proposals contain Justice and Home Affairs obligations and therefore, being measures proposed pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union, are subject to Protocol (No. 21) to the Treaties on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice."

Previous Committee Reports

Thirteenth Report HC 71-xi (2016–17), chapter 4 (12 October 2016); Twenty-fourth Report HC 342-xxiii (2015–16), chapter 6 (24 February 2016).

21 Vehicle type approval

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; further information requested
Document details	(a) Commission Regulation on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles; (b) Commission Regulation as regards emissions from light passenger and commercial vehicles
Legal base	(a) Articles 8 and 14(3) of Regulation 715/2007 and Article 39(7) of Directive 2007/46, Regulatory Procedure with Scrutiny (b) Not known
Department	Transport
Document Numbers	(a) (38467), 5365/17 + ADDs 1–8; (b) (38468),—

Summary and Committee's conclusions

21.1 Strict emissions controls will only work if the testing regime is adequate. Requirements for the emission performance of light passenger and commercial vehicles are set out in EU legislation (made under the wider vehicle type approval 2007 Framework Directive) which sets out the safety and environmental requirements that must be met before a vehicle can be placed on the market in the EU. These two Commission Regulations reinforce or replace the existing requirements in order to eliminate known flexibilities in the current laboratory test, which can be used to help achieve unrealistically positive results, and to include a conformity requirement for particle number emissions in the recently introduced real driving emissions (RDE) test.

21.2 The Commission Regulations are subject to veto by the European Parliament and/or the Council. Given positive decisions, or absent decisions within three months the Commission's adoption of the Regulations, they come into force automatically. The deadlines for Council vetoes are in March 2017.

21.3 The Government tells us of its support for the Commission Regulations. It does not suggest that there might be Council opposition to them—both were approved by the Member State committees advising the Commission.

21.4 **We are content to clear these documents from scrutiny. But noting that they in part address issues highlighted by the Volkswagen scandal, we draw them to the attention of the House. We ask the Minister (Mr John Hayes) to confirm the legal basis of document (b) and provide an official text when available.**

Full details of the documents

(a) Commission Regulation supplementing Regulation (EC) No 715/2007 of the European Parliament and of the Council on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, amending Directive 2007/46/

EC of the European Parliament and of the Council, Commission Regulation (EC) No 692/2008 and Commission Regulation (EU) No 1230/2012 and repealing Regulation (EC) No 692/2008: (38467), 5365/17 + ADDs 1–8; (b) Commission Regulation (EU) No…of… amending Regulation (EC) No 692/2008 as regards emissions from light passenger and commercial vehicles (Euro 6): (38468), —.

Background

21.5 The current requirements for the emission performance of light duty vehicles are set out in Regulation (EC) No. 715/2007 and Commission Regulation (EC) No. 692/2008. (Euro 5 vehicles are light passenger vehicles and Euro 6 vehicles are light commercial vehicles.) The first Regulation establishes common technical requirements for type approval with regard to emissions. The second establishes implementing provisions for giving effect to the first Regulation, particularly in relation to requirements and tests. These Regulations are made in the context of the wider vehicle type approval Framework Directive, Directive 2007/46/EC, which sets out the safety and environmental requirements that must be met before a vehicle can be placed on the market in the EU. The Regulations include a laboratory based test, known as the 'Type 1' test, in which the vehicle is driven according to a well-defined drive cycle with acceleration, braking, steady speed and stationary phases. The exhaust emissions are collected during the test and must be below the regulatory limit value for each regulated gaseous pollutant before the vehicle can be approved.

21.6 The drive cycle is based on one first used in the 1990s when emission standards were first introduced and is known as the New European Drive Cycle (or NEDC). It represents a simplified, but repeatable, driving pattern and it was considered that a vehicle that performed well on the test would also perform well when driven on the road. However, as regulatory limits have been tightened and other pressures, such as carbon dioxide (CO_2) targets, have been introduced, it has been shown that emissions generated by new vehicles when driving on the road can substantially exceed the emissions measured on the regulatory NEDC laboratory test, in particular with respect to nitrogen oxide (NOx) emissions of diesel vehicles.

The documents

21.7 The Commission Regulation, document (a), is to replace the NEDC drive cycle with a new laboratory test cycle based on real driving patterns. The test procedure is also being revised to eliminate known flexibilities which can be used to help achieve unrealistically positive results. Together the new cycle and procedure are known as the World Harmonised Light Duty Test Procedure, WLTP. Under the Regulation:

- the Euro 6 pollutant limits would not be changed, but manufacturers would be obliged to meet the existing limits using the new test cycle and procedure;
- the new procedure would also be used to determine the official CO_2 and fuel consumption figure and is expected to significantly reduce the discrepancy between the official figure and that achieved in reality; and
- these requirements would apply to new vehicle types from September 2017 and all vehicles placed on the market would need to comply from September 2018.

21.8 In addition to established concerns about vehicles being engineered to perform well in the limited laboratory tests, but producing substantially greater emissions in real world driving conditions, the Volkswagen emissions scandal and subsequent emissions testing reports published by the UK and other Member States have highlighted the apparent misuse of 'defeat devices', as defined and prohibited by Regulation (EC) No. 715/2007.

21.9 The Commission is addressing these concerns by introducing a real driving emissions (RDE) test into the regulatory approval regime, as in the Commission Regulation, document (b). This proposal follows two earlier 'packages' of RDE legislation:

- the first package set out the test procedure to evaluate the tail-pipe emissions under normal driving conditions using Portable Emission Measurement Systems (PEMS); and

- the second package set out the dates for introduction of NOx emissions compliance criteria for vehicles subjected to this test, in terms of a not-to-exceed 'conformity factor'. This is a multiplication factor applied to the emissions limit specified for the laboratory test. The conformity factor also includes an allowance for measurement uncertainty to reflect the fact that there is greater variability in on-road PEMs measurements than results in tightly controlled laboratory conditions. In order to allow manufacturers time to adapt to the RDE rules, the conformity factor requirements are to be introduced in two steps.

21.10 This latest Regulation is a third 'package', which sets out the conformity factor requirements and dates of application for particle number (PN) emissions. Since the particle filter technology necessary to control these emissions is very effective under real driving conditions, the conformity factor has been set to 1.0 (plus 0.5 margin for measurement uncertainty) at the first step. The same requirement is set for the second step, although the allowance for measurement uncertainty will be reviewed annually from 2017 and may therefore have been reduced by the date of application of the second step.

21.11 The dates of application for PN requirements are the same as those agreed for NOx in the second package of RDE legislation with one important difference—the step one 'all registrations' date is September 2018 rather than September 2019. This is in line with an existing 2012 amendment to the Euro 5/6 legislation which commits the Commission to introducing PN emissions testing under real driving conditions by then.

21.12 The Regulation also includes a number of other important changes to RDE requirements:

- previously the engine warm-up period (about the first five minutes of engine running) were excluded from the measurements—importantly they would now be included to ensure that emissions from short urban journeys are properly controlled;

- the RDE data analysis software specified in the first package of legislation does not allow for plug-in hybrids which can run in a zero emissions driving mode—the Commission has proposed a simple resolution to this, but recognises that this may put such vehicles at a disadvantage compared to conventional petrol and diesel vehicles;

- the Regulation would require manufacturers to declare RDE conformity factors (for NOx and PN) on every vehicle's Certificate of Conformity, which is intended to give consumers a source of reliable information on a vehicle's real world air quality impacts and to encourage competition to produce cleaner vehicles;
- importantly the Commission has included (UK inspired) provisions for exemption from RDE requirements for ultra-small volume manufacturers (fewer than 1,000 registrations per year in the EU) and a derogation until 2020 for small volume manufacturers (worldwide annual production fewer than 10,000 units);
- the Commission has included amendments to the test procedure requirements to allow for speed-limited vans, but has not made any further allowances;
- for multi-stage build vehicles, the Regulation would require the original vehicle manufacturer to certify a vehicle up to a maximum weight and dimensions which would allow multi-stage builders sufficient scope to produce vehicles within these limits;
- the Commission has provided that the existing type approval laboratory emissions test procedure for correcting emissions results to take into account the additional emissions associated with periodic regeneration events (such as diesel particulate filter regeneration or NOx trap purge events) should be applied for RDE test results; and
- the Commission has included more detailed requirements setting out what manufacturers must declare at type approval concerning 'auxiliary emissions strategies', which would come into force immediately the third RDE package is published—they are intended to clarify what information Type Approval Authorities should require.

The Government's view

21.13 In his Explanatory Memorandum of 23 January 2017 the Minister of State, Department for Transport (Mr John Hayes), first repeats the Government's standard incantation that, in the context of the outcome of the EU referendum, that until the UK exits the EU the Government will continue to negotiate, implement and apply EU legislation and that the outcome of the Brexit negotiations will determine what arrangements apply in relation to EU legislation in future after Brexit.

21.14 The Minister then says that:

- the Government supports the Commission's proposals, which it sees as important in helping the UK to meet its air quality targets set by Directive 2008/50/EC on ambient air quality and cleaner air for the EU;
- the UK meets its targets for nearly all pollutants but complying with the requirements for NO2 (the component of NOx that is measured for air quality purposes) is proving challenging, especially in cities and urban environments; and

- road transport is considered to be the single largest source of NOx representing a third of all NOx emissions in the UK.

21.15 In relation to the Commission Regulation concerning the WLTP, document (a), the Minister comments that:

- introduction of the WLTP laboratory test will close the gap between the official fuel consumption and CO_2 emissions figures, and those achieved in real world use;
- the CO_2 figures achieved on WLTP will differ to those achieved on NEDC, which was used as the reference test procedure when the CO_2 emission targets were agreed;
- it has therefore been necessary to develop a methodology to correlate the figures achieved on WLTP into the equivalent NEDC results to maintain the same level of stringency—this procedure will remain in place until the CO_2 targets are revised in 2021 using WLTP as the basis. The correlation procedure was adopted separately as an Implementing Regulation for Regulation (EC) No. 443/2009 in June 2016; and
- the timetable for the introduction of WLTP, September 2017 for new types and September 2018 for registrations, is challenging for vehicle producers but necessary to ensure the UK is able to meet its air quality targets at the earliest opportunity.

21.16 Turning to the Commission Regulation concerning the RDE test, document (b), the Minister says that:

- the timetable for the introduction of the PN emissions requirements into RDE is also challenging but the Government believes it is achievable for vehicle producers and is in line with the dates already set out in existing legislation;
- the inclusion of 'cold start' emissions into the RDE test procedure should help ensure that both NOx and PN emissions from cars and vans on short urban journeys are properly controlled;
- the RDE provisions for small volume manufacturers are essential for UK manufacturers such as Aston Martin, Lotus, Morgan, McLaren, and Caterham—without these it is likely that the burden of testing required to ensure compliance would be unmanageable for these manufacturers;
- achieving agreement on introduction dates and conformity factors for RDE gives manufacturers the certainty needed to invest in developing cleaner vehicles to meet the requirements;
- as cleaner vehicles come to market from 2017 they should contribute to reducing urban NOx emissions, helping the UK to meet its air quality targets in 2020;
- following a UK proposal, a commitment to develop a more complete solution to ensure the fair treatment of hybrid and plug-in hybrid vehicles in RDE testing

was included in the Regulation—the Commission is to develop a more complete solution in a fourth RDE 'package', in the development of which the Government is actively and for which final proposals are expected in June 2017; and

- the requirement that manufacturers declare RDE conformity factors (for NOx and PN) on every vehicle's Certificate of Conformity could in the future facilitate policies to improve air quality—for example the provision of information to help consumers choose the cleanest vehicle which meets their needs.

21.17 Finally, the Minister comments that:

- EU standards will continue to be relevant for domestic producers long after Brexit since UK manufacturers will continue to produce vehicles for wider EU and global markets; and
- the Commission Regulations form part of that landscape and are consistent with the Government's overall approach on improving air quality through technological improvements.

Previous Committee Reports

None.

22 EU Strategy for the Sahel

Committee's assessment	Politically important
Committee's decision	(a) and (c) Cleared from scrutiny; further information requested; (b) Cleared from scrutiny (decision reported on 14 September 2016)
Document details	(a) Joint Staff Working Document—Annual Report on the Sahel Regional Action Plan; (b) Council Decision (CFSP) 2016/1172 of 18 July 2016 amending Decision 2012/392/CFSP on the European Union CSDP mission in Niger; (c) Council Decision (CFSP) 2017/50 of 11 January 2017 amending Decision 2014/219/CFSP on the European Union CSDP Mission in Mali
Legal base	(a) —; (b) and (c) Articles 28, Article 42(4) and Article 43(2) TEU; unanimity
Department	Foreign and Commonwealth Office
Document Numbers	(a) (38436), 5009/17, SWD(16) 482; (b) (37977), —; (c) (38444),—

Summary and Committee's conclusions

22.1 The Sahel Region is one of the poorest regions of the world, and faces a number of challenges: extreme poverty, the effects of climate change, rampant food shortages, fragile governance, corruption, the risk of violent extremism and terrorist-linked security threats. Given the potential spill-over effects of these crises for the rest of Africa and for Europe, the EU has identified security and development in the region as a priority in its external policy.[148] In March 2011, the EU's External Action Service (EEAS) adopted a comprehensive approach to the Sahel region, covering Burkina Faso, Chad, Mali, Mauritania and Niger.[149]

22.2 The implementation of the Sahel Strategy is supported on the ground by three EU Common Defence and Security Policy operations:

- EUCAP Sahel Niger, a capacity-building mission for security forces in Niger (launched in 2012);
- EUTM Mali, a military training mission for the Malian armed forces (launched in 2013); and
- EUCAP Sahel Mali, a capacity-building mission for the Malian security forces (launched in 2014).[150]

148 See for more information, "A Global Strategy for the European Union's Foreign and Security Policy" (June 2016), p. 35.

149 European External Action Service, "Strategy for Security and Development in the Sahel". The Strategy was not deposited for scrutiny.

150 See the "Background" section for more information on these CDSP missions.

22.3 In addition, in 2015 the Commission and European External Action Service (EEAS) published a five-year Regional Action Plan (RAP) to aid the implementation of the EU Sahel Strategy. It identified four priority areas: preventing and countering radicalisation; providing young people with opportunities for development; managing migration and mobility; ensuring effective border control and tackling international organised crime.[151] The RAP is meant to provide a comprehensive framework for EU action in the Sahel region, ensuring that the EU and Member States policies work together towards the same objectives.

22.4 On 18 and 19 January 2017, the Minister for Europe (Sir Alan Duncan) wrote to the Committee with information on three elements of the EU Sahel Strategy: the publication of the first implementation report on the Regional Action Plan; a decision by the Council to extend the mandate of the EUCAP Sahel Mali mission by a further two years; and planned changes to the operational plan for the EUCAP Sahel Niger mission to ensure the safety and security of its staff.

Sahel Regional Action Plan: first Implementation Report

22.5 On 23 December 2016, the Commission and EEAS published the first Annual Report on the implementation of the Sahel Regional Action Plan, covering the period from April 2015 to August 2016.[152] The document outlines the major developments in the region and assesses progress against the RAP's four priority areas. Referring to the terrorist threats in the region and the large numbers of people from the Sahel that continue to attempt to reach Europe via Libya and the Mediterranean, the Commission describes the overall situation as "extremely delicate and challenging".

22.6 The Annual Report highlights a number of areas where "significant progress" has been made towards implementation of the Regional Action Plan. It cites, for example, a sharp reduction in irregular migration from Niger from 70,000 in May 2015 to 1,500 in November. However, progress has not been uniform. Increased border controls in Niger risk displacing the problem to Mali, where security forces are less effective. Similarly, given the scale of food insecurity in the region,[153] the Commission sees "no prospect of the number of undernourished children decreasing significantly" in the near future.

22.7 In his Explanatory Memorandum of 18 January 2017, the Minister described the Annual Report as a "helpful summary" of EU action in the Sahel, and reiterates the Government's continued support for the Regional Action Plan:

> "Overall, the UK remains supportive of the four priorities identified in the Action Plan. The priorities also reflect many of the UK's own priorities as well as bilateral and regional programmes (…). Working in the Sahel requires flexibility and the annual review shows the EU has done this in relation to migration, as this has become more of a strategic priority."

151 See for more information our Report: (36759), 7243/15, SWD(15) 61—First Report HC 342–i (2015–16) chapter 57 (21 July 2015).

152 See SWD(16) 482, "Annual Report on the Sahel Regional Action Plan".

153 The EU estimates that the Sahel region has the largest number of people affected by food shortages anywhere in the world, with 20 to 25 million suffering from food insecurity each year.

EUCAP Sahel Mali and EUCAP Sahel Niger

22.8 On 18 January, the Minister also informed the Committee that the Council had unanimously adopted a Council Decision to extend the EUCAP Sahel Mali mandate by two years, until 14 January 2019. This follows a similar two-year extension of the mission in Niger, which was agreed in July last year. The Decision was supported by the Government in the Council in absence of a waiver granted by this Committee, triggering a scrutiny override (see paragraph 23.14).

22.9 In his Explanatory Memorandum, the Minister emphasised the Government's support for the mission, noting that the capacity of the Malian internal security forces remains weak. In view of the high risk of attack, the operation was also given a €10 million (£8.6 million) increase in its budget for 2017 to pay for medical evacuation capability, thirty additional security personnel and the costs of accommodating staff securely.

22.10 Under the terms of the new two-year mandate, the mission's overall objectives remain unchanged, but operationally certain activities are to be prioritised. In particular, the mission will begin to provide training to Malian security forces away from the capital Bakamo, as well as to the internal security forces of Burkina Faso, Chad and Mauritania.[154]

22.11 In a separate letter, the Minister explains that a review of the security for the EUCAP Sahel Niger mission had led to increase of the threat level for the missions to "high", necessitating additional investment in its security. As a result, the Niger mission is being enlarged with a new security team of twelve staff. The costs of this expansion will be met through the existing budget for the mission, which was cleared by the Committee in September 2016.[155]

Summary of our assessment

22.12 **We agree with the Minister that the changes to the operational plan are necessary to ensure the safety of the EUCAP Sahel Niger mission. In view of the continuing challenging situation in the Sahel, we also support the decision to extend the mandate of the EUCAP Sahel Mali mission by two years. We accept that the substantial increase in costs was unavoidable to ensure the safety of mission personnel.**

22.13 **In view of the rising costs of both missions however, and given that the Government accepts that "much more still needs to be done",[156] we request to be kept informed of the outcome of the next strategic reviews of the Missions by the EEAS. We also ask the Minister whether the extension of the Mali capacity-building programme to security forces from Burkina Faso, Chad and Mauritania should be seen as a precursor to the launch of further CSDP missions in the region.**

22.14 **We now clear the Council Decision extending the mandate of EUCAP Sahel Mali from scrutiny. However, we want to express our serious concern about the way in which the Government overrode scrutiny in supporting its adoption.**

22.15 **We note that on 15 December 2016, the Minister provided our counterparts in the Lords with an unnumbered Explanatory Memorandum on the contents of the draft**

154 These are three countries in the region covered by the Sahel Strategy with no dedicated CDSP mission.
155 See (37977), —: Eleventh Report HC 71-ix (2016–17) chapter 22 (14 September 2016).
156 Letter from Sir Alan Duncan, Minister for Europe (11 October 2016).

Decision in absence of the official text being available.[157] However, the Committee was not informed of the contents of the Decision until after its publication in the Official Journal on 12 January. We are pleased to note that, as a result of discussions between the Minister and our Chairman, the Foreign and Commonwealth Office will now resume sharing LIMITÉ documents on the basis set out in the Cabinet Office (now DExEU) guidance; we confidently expect that these guidelines will be followed in the future.

22.16 **As regards the Annual Report on the Sahel Regional Action Plan, we consider it a useful summary of where progress has been made, and where it remains elusive. The Commission and EEAS are not proposing any changes to the Action Plan, and we are pleased to see that the Government is in agreement that the RAP is sufficiently flexible to accommodate new strategic priorities as required. We are content to clear the Annual Report from scrutiny.**

22.17 **Finally, we note that there is no indication in any of the Minister's correspondence with respect to the Government's intentions on UK-EU cooperation in the Sahel region after the UK withdraws from the European Union.**

Full details of the documents

(a) Joint Staff Working Document—Annual Report on the Sahel Regional Action Plan: (38436), 5009/17, SWD(16) 482; (b) Council Decision (CFSP) 2016/1172 of 18 July 2016 amending Decision 2012/392/CFSP on the European Union CSDP mission in Niger: (37977), —; (c) Council Decision (CFSP) 2017/50 of 11 January 2017 amending Decision 2014/219/CFSP on the European Union CSDP Mission in Mali: (38444), —.

Background

Sahel Strategy for Security and Development

22.18 The Sahel Region in central Africa continues to suffer from instability and conflict. It is one of the poorest regions of the world, and faces a number of challenges: extreme poverty, the effects of climate change, rampant food shortages, rapid population growth, fragile governance, corruption, unresolved internal tensions, the risk of violent extremism, illicit trafficking and terrorist-linked security threats. Given the potential spill-over effects of these crises for the rest of Africa and for Europe, the EU has identified security and development in the region as a priority in its external policy.[158]

22.19 In March 2011, the EU's External Action Service (EEAS) adopted a comprehensive approach to the Sahel region, covering Burkina Faso, Chad, Mali, Mauritania and Niger.[159] The Sahel Strategy is based on the assumption that development and security are mutually supportive and that the issues faced in the Sahel require a regional answer. It includes four lines of actions:

157 http://europeanmemoranda.cabinetoffice.gov.uk/files/2016/12/Signed_EM_(68).pdf

158 See for more information, "A Global Strategy for the European Union's Foreign and Security Policy" (June 2016), p. 35.

159 European External Action Service, "Strategy for Security and Development in the Sahel". The Strategy was not deposited for scrutiny.

- Development, good governance and internal conflict resolution;
- Political and diplomatic action;
- Security and the rule of law; and
- Countering violent extremism and radicalisation.

22.20 In 2013, the EU also appointed its first Special Representative (EUSR) for the Sahel. Their responsibility is to contribute actively to regional and international efforts to achieve lasting peace, security and development in the region.[160] Initial priority was given to Mali and to the regional dimensions of the conflict there (see paragraphs 23.26 to 23.28). The EUSR's specific tasks and their subsequent performance are discussed in our predecessors' earlier Reports.[161] Since 2012, the EU has also launched three Common Defence and Security Policy operations (two civilian capacity-building operations and one military training mission) in Mali and Niger.

EU military and civilian missions in the Sahel

EUCAP Sahel Niger

22.21 In the early part of the decade, instability in the Sahel region increased sharply due to the military *coup* in Mali (see paragraph 23.26 below), the war in Libya and the violent campaigns conducted by Al Qaeda in the Islamic Maghreb and Boko Haram in Nigeria. As a result, the EU launched a civilian capacity-building mission in Niger (EUCAP Sahel Niger) in 2012 to improve the effectiveness of the country's civilian security sector in responding to these threats.[162] The Council has twice renewed its mandate (which was originally due to expire in July 2014): first to July 2016[163] and then again to July 2018.[164]

22.22 On 19 January 2017, the Minister for Europe (Sir Alan Duncan) wrote to the Committee with an update on planned changes to the operational plan for the civilian mission in Niger. He explained that a review of the security for both EUCAP Sahel Mali and Niger in May 2016 had led to increase of the threat level for both missions to "high".

22.23 As a result, the operational plan for the Niger mission is being changed to improve its physical security, principally through the set-up of a security team consisting of 12 new additional staff (raising the Mission's total international staff from 110 to 122). The costs of this expansion will be met through the existing budget for the mission, which was cleared by the Committee in September 2016.[165] The Minister explains that the changes did not require the adoption of a formal Decision by the Council.

160 The current EUSR to the Sahel, Spanish diplomat Angel Losada Fernandez, was appointed in December 2015. His tenure ends on 28 February 2017.

161 See (36629), -: Thirty-fourth HC 219-xxxiii (2014–15), chapter 21 (25 February 2015) and Thirty-second Report HC 219-xxxi (2014–15), chapter 9 (4 February 2015); and (35800), -: Thirty-seventh Report HC 83-xxxiv (2013–14), chapter 21 (26 February 2014).

162 See Council Decision 2012/392/CFSP of 16 July 2012.

163 See Council Decision 2014/482/CFSP of 22 July 2014.

164 See Council Decision (CFSP) 2016/1172 of 18 July 2016.

165 The EUCAP Sahel Niger annual budget for 2017–18 is €26.3 million (£20 million), compared to €18.4 million (£15.6 million) for 2016–17. See for more information the Government's Explanatory Memorandum of 2 August 2016.

22.24 In his letter, the Minister notes that the Government has agreed to the changes. They are considered "necessary for the Mission to deliver its mandate". He also explains that the UK had repeatedly raised concerns about the security of EUCAP Sahel Niger staff working in the central Nigerien city of Agadez.

EU Training Mission in Mali

22.25 In 2012, the Malian military removed the civilian government from power. Subsequently, a coalition of separatist rebels and militant Islamist armed groups pushed the national army out of the country's northern region. In response, the EU resolved to accelerate and enhance the implementation of its Sahel Strategy in order to help tackle the regional consequences of the crisis and to enhance the coherence of the EU approach, with a particular focus on Mauritania, Niger and Mali.[166]

22.26 In late 2012, preparations were underway for a military intervention force (now known as AMISA), under the auspices of the Economic Community of West African States (ECOWAS). The prospect that the entire country might fall to the rebels before AMISA could become operational provoked an urgent French military intervention in January 2013,[167] and on 18 February that year the EU—at the request of the Malian authorities—launched a military training mission for Malian armed forces (EUTM Mali).[168]

22.27 That mission aims to support the training and reorganisation of the Malian Armed Forces and to help improve its military capacity, in order to allow, under civilian authority, the restoration of the country's territorial integrity. The mission has not been involved in combat operations. Its mandate has been extended twice from its original deadline in May 2014 (first to May 2016[169] and then to May 2018).[170] The Committee cleared the last extension in April 2016,[171] and the Mission is now about to enter its fifth year of training and advising the Malian armed forces.

EUCAP Sahel Mali mission

22.28 On 15 April 2014, the Council decided to establish a further civilian mission in Mali to support its internal security forces (EUCAP Sahel Mali), as an additional contribution to the EU's overall support to the country.[172] The mission was formally launched on 15 January 2015, with a two-year mandate and an initial one-year budget of €11.4 million (£9.76 million).[173]

22.29 The aim of the mission is to support the Malian state in ensuring the constitutional and democratic order, establishing the necessary conditions for lasting peace, and to re-establishing its authority throughout the entire territory of Mali. The mission delivers

166 See http://eu-un.europa.eu/articles/en/article_14568_en.htm for full information.
167 See for more information BBC News: "Mali conflict: UN backs France's military intervention" (15 January 2013).
168 See Council Decision 2013/34/CFSP of 17 January 2013 and Council Decision 2013/87/CFSP of 18 February 2013.
169 See Council Decision 2014/220/CFSP of 15 April 2014.
170 See Council Decision 2016/446/CFSP of 23 March 2016.
171 See (37643), —: Twenty-Ninth Report HC 342-xxviii (2015–16) chapter 17 (20 April 2016).
172 See Council Decision 2014/219/CFSP of 15 April 2014. See also our Report: (35889), —: Forty-Third Report HC 83-xxxix (2013–14) chapter 16 (26 March 2014).
173 See Council Decision (CFSP) 2015/76 of 19 January 2015. See also our Report: (36579), —: Twenty-Eighth Report HC 219-xxvii (2014–15) chapter 15 (7 January 2015).

strategic advice and training for the internal security forces in Mali with a view to improving their operational efficacy, reinforcing independent oversight and management, and facilitating their redeployment to the northern region of the country.

22.30 On 11 October 2016, the Minister for Europe (Sir Alan Duncan) wrote to the Committee about the achievements of the mission thus far. Drawing on the outcome of a strategic review undertaken by the EEAS, he highlighted building strong relations with Malian interlocutors and delivering tailored training and advice to the civilian security forces "as notable successes". However, he continued:

> "The Review does recognise that much more still needs to be done, especially in a country where peace is fragile, and the terrorist threat is increasing."[174]

22.31 In its 2016 Annual Report on the Sahel Regional Action Plan (see paragraphs 23.37 to 23.42 below), the European Commission offers more concrete details of the fragility of the situation in Mali:

> "During the past year, the security situation has been deteriorating, featuring increasingly frequent attacks on the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) and national defence and security forces. There is a real risk of the peace process being derailed, with shared responsibilities of Malian parties, leaving the North as an ungoverned space and destabilising dangerously the centre with direct spill-over effects on the neighbouring countries (Burkina Faso and Niger), the whole Sahel region and beyond".

22.32 It therefore did not come as a surprise that the Minister for Europe (Sir Alan Duncan) wrote on 18 January 2017 to inform the Committee that the Council had unanimously extended the mission's mandate by two years, until 14 January 2019. He also emphasised the Government's support for the mission, noting that the capacity of the Malian internal security forces remains weak.

22.33 Under the terms of the new two-year mandate, the mission's overall objectives remain unchanged, but operationally certain activities are to be prioritised:

- Capacity-building for tackling terrorism and organised crime;
- Support activities in border management and addressing migration flows;
- Provision of training to trainees from Burkina Faso, Chad and Mauritania;[175] and
- Decentralisation of the training programme away from the capital in Bamako to other regions of Mali.

22.34 As part of the renewed mandate, the Council provided EUCAP Sahel Mali with a budget for 2017–18 amounting to €29.8 million (£25.5 million). This represents an increase of €10 million (£8.6 million) compared to the previous year. The Minister explained that the increase was necessary to cover the costs of providing adequate security to the mission's staff, in view of the overall situation in Mali (with a "threat" level similar to Afghanistan),

174 Letter from Sir Alan Duncan, Minister for Europe (11 October 2016).
175 These are three countries in the region covered by the Sahel Strategy with no dedicated CDSP mission.

and the mission's mandate to provide training away from the capital Bamako. The majority of the additional budget will be spent on medical evacuation capability, thirty additional security personnel and the costs of accommodating staff securely.[176]

22.35 We also note the Minister's letter of 18 January, in which he explains that the Council Decision was adopted on 11 January 2017, but that it was classified as LIMITÉ until its publication in the Official Journal the day after.

The EU Sahel Strategy Regional Action Plan 2015–20

22.36 In 2015 the Commission and EEAS published a five-year Regional Action Plan (RAP), to aid the implementation of the EU Sahel Strategy. It identified actions and initiatives for the 2015–2020 period, and provided a framework for EU action in the Sahel region. The RAP calls for a comprehensive approach in order to ensure that the policies, instruments and tools used by both the EU and its Member States work together for the same objectives to generate better results.

22.37 Although the Sahel Strategy and its original strategic objectives remain valid, the RAP underlined the need to focus on four priority areas: preventing and countering radicalisation; providing young people with opportunities for development; managing migration and mobility; ensuring effective border control and tackling international organised crime.[177]

22.38 In his Explanatory Memorandum of 29 June 2015, the then-Minister for Europe (Mr David Lidington) described the Regional Action Plan for the Sahel as "a helpful instrument in seeking to deliver concrete action in support of the EU Sahel Strategy", which "aims to harness the EU's comprehensive approach and use a range of instruments to achieve the EU's objectives in the Sahel region". He noted that the UK supported the Action Plan and the four priorities identified.

2016 Annual Report on the Sahel Regional Action Plan

22.39 On 23 December 2016, the Commission and EEAS published the first Annual Report on the implementation of the Sahel Regional Action Plan, covering the period from April 2015 to August 2016.[178]

22.40 The document outlined the major developments in the region and assesses progress against the RAP's four priority areas. The Commission notes that the five Sahel countries remain among the world's poorest, and that development has progressed only "at a slow pace". Referring to the terrorist threats in the region and the large numbers of people from the Sahel that continue to attempt to reach Europe via Libya and the Mediterranean, it describes the overall situation as "extremely delicate and challenging".

22.41 The Annual Report nevertheless highlights a number of areas where "significant progress" has been made towards implementation of the Regional Action Plan. It cites, for

176 The Minister's Explanatory Memorandum on the 2016–17 budget for EUCAP Sahel Mali noted that the threat level in the country was similar to that in Afghanistan. See (37854), —: Seventh Report HC 71-v (2016–17) chapter 15 (6 July 2016).

177 See for more information our Report: (36759), 7243/15, SWD(15) 61—First Report HC 342-i (2015–16) chapter 57 (21 July 2015).

178 See SWD(16) 482, "Annual Report on the Sahel Regional Action Plan".

example, a sharp reduction in irregular migration from Niger (see below); EU funding for youth employment projects in Niger, Mali and Senegal as part of the EU's wider economic development support package under the 11th European Development Fund; supporting inter- and intra-religious dialogue, especially in conflict and border regions; and the provision of humanitarian assistance to people affected by violence, poverty and hunger.[179] However, as we note in paragraph 23.6, progress has not been uniform.

22.42 In his Explanatory Memorandum of 18 January 2017, the Minister for Europe (Sir Alan Duncan) says the Annual:

> "It also gives a good overview of the numerous challenges that face the region. It is because of these challenges, and the need for concerted action by the international community, that the UK is supportive of the Action Plan and welcomes the annual review."

22.43 The Minister explains that the Government remains supportive of the four priority areas identified in the Action Plan, as it "reflect[s] many of the UK's own priorities" and "complements our focus on strengthening regional stability". There is no indication of the Government's intentions as regards cooperation with the EU in the Sahel region after the UK withdraws from the European Union.

Our assessment

22.44 The Committee cleared the Regional Action Plan for the Sahel from scrutiny on 21 July 2015, concluding that the rationale for EU activity to support security and development in the Sahel were as compelling as ever. We also commended the Commission and EEAS for recognising the importance in particular of ongoing efforts towards shared assessments and joint programming, through a consistent monitoring system. [180]

22.45 The package of documents we are now considering—an Annual Report on the implementation of the Regional Action Plan, a two-year extension of the renewal of the EU capacity-building mission in Mali and operational changes to the sister mission in Niger—show the case for continued EU engagement in the region remains strong, and we thank the Minister for keeping us informed. Unquestionably, the UK and its EU partners have an interest in restoring stability to the region and guiding it towards sustainable economic development.

22.46 The documents make for particularly sobering reading as regards the threats facing the CSDP missions in both Mali and Niger, which are now assessed as being equal in severity to those in Afghanistan. The large increase in the annual budgets for the security capacity-building missions (£8.5 million in Mali and £6.7 million in Niger) shows the cost of providing the training to internal security forces in a region beset by conflict, and where attacks are frequent.

22.47 We welcome the Commission's Annual Report on the Sahel Regional Action Plan. It is a useful summary of where progress has been made, and where it remains, for the moment, elusive. It also recognises the interconnected nature of the many problems that beset the Sahel, including poverty and food insecurity, inter-religious conflict and poor

179 See SWD(16) 482, "Annual Report on the Sahel Regional Action Plan", p. 6–14.

180 See: (36759), 7243/15, SWD(15) 61—First Report HC 342-i (2015–16) chapter 57 (21 July 2015).

governance. The Commission and EEAS are not proposing any changes to the Action Plan, and we are pleased to see that the Government is in agreement that the RAP is sufficiently flexible to accommodate new strategic priorities as required.

22.48 As regards the increased security for both the EUCAP Sahel mission in Niger and the renewed mission in Mali, we agree with the Minister that the changes are necessary to ensure the safety of their staff. We thank the Minister for the helpful overview of how the additional budget is to be spent.

22.49 In view of the rising costs however, and given that the Government accepts that "much more still needs to be done", we have asked the Minister to keep the Committee updated on the outcome of the next strategic review of the Mission by the EEAS. The capacity-building mission in Mali has now also been tasked with providing training to security forces from Burkina Faso, Chad and Mauritania. These countries do not host, at present, EU missions of their own. It is unclear whether this extension of the EUCAP Sahel Mali mandate is a first step towards the establishment of further CDSP missions in the region. We have asked the Minister for more information on this point.

The Government's views

Annual Report on the Sahel Regional Action Plan: The Minister's Explanatory Memorandum of 18 January 2017

22.50 The Minister for Europe (Sir Alan Duncan) describes the Annual Report as "helpful summary" of EU action in the Sahel, calling it a "good overview of the numerous challenges that face the region". He continues:

> "Overall, the UK remains supportive of the four priorities identified in the Action Plan. The priorities also reflect many of the UK's own priorities as well as bilateral and regional programmes, as shown in the review's annex. In particular, the Action Plan complements our focus on strengthening regional stability."

22.51 In relation to the large-scale migration caused by the instability and poverty in the Sahel, the Minister says:

> "Working in the Sahel requires flexibility and the annual review shows the EU has done this in relation to migration, as this has become more of a strategic priority. We have been supportive of this shift in focus, recognising the impact that migration has had in Europe and the imperative to act."

22.52 He concludes that the annual report demonstrates how the EU has used development funding, humanitarian aid, diplomatic engagement, as well as the civilian and military training missions in Niger and Mali have resulted in a comprehensive approach.

EUCAP Sahel Mali: The Minister's Explanatory Memorandum and letter of 18 January 2017

22.53 The Minister for Europe (Sir Alan Duncan) submitted an Explanatory Memorandum to the Committee on 18 January regarding the extension of the mandate for the EUCAP Sahel Mali mission. That extension was agreed by the Council on 11 January.

22.54 The Minister noted that the Government supported the renewal of the mandate:

> "The UK Government strongly supports the work of EUCAP Sahel Mali and welcomes the new mandate. The capacity of the Mali ISF [internal security forces] is weak, and they deliver a poor service to the population. They also face considerable security challenges. EUCAP Sahel Mali is providing much needed capacity building and EU Member States offer a good mix of relevant police training expertise and capacity."

22.55 He continues:

> "The Government judged that the changes in the Mission's activities are right. The need to tackle terrorism and organised crime (and associated organised immigration crime) was noted and could help deliver wider UK objectives. On supporting regional countries, we agree with the principle of supporting the G5 Sahel,[181] and that regionalising existing CSDP missions is an important element of the EU's overall support."

22.56 The Minister also provides a breakdown of how the budget for 2017–18 will be spent, helpfully summarising the areas of increased expenditure (primarily personnel costs, running expenditure and capital expenditure).

22.57 In a separate letter to the Committee also dated 18 January, the Minister explains that the Council Decision to extend the EUCAP Sahel Mali mandate was classified as LIMITÉ until its publication in the Official Journal on 12 January. We have expressed our concerns about the implications of not informing us of existence of the document until after its adoption by the Council in paragraphs 23.52 to 23.55.

EUCAP Sahel Niger: The Minister's letter of 19 January 2017

22.58 On 19 January, the Minister for Europe (Sir Alan Duncan) wrote to the Committee on 19 January in respect of the EUCAP Sahel Niger mission. The Committee cleared the renewal of the mission's mandate in September 2016.[182]

22.59 Because of the increased risks to the security of the mission's staff, the EU had sought to make changes to its operational plan. The Minister describes these as follows:

> "—The ability for entitled and duly qualified Mission members to carry long weapons (e.g. a rifle);

181 Burkina Faso, Chad, Mali, Mauritania and Niger.

182 See (37977), —: Eleventh Report HC 71-ix (2016–17) chapter 22 (14 September 2016).

> —The set-up of a security team in Agadez and Niamey in order to ensure proper security for duty travel in the regions. This will imply the recruitment of 12 additional personnel to staff a permanent armed protection team, raising the Mission's authorised total international staff from 110 to 122."

22.60 The Minister note that the additional armed security could not be provided by private security companies because of Nigerien legislation. He concludes:

> "These changes do not require a new Council Decision. The proposed changes (…) will have financial implications, but the additional costs will be met through the existing budget. I believe these additional security measures are necessary for the Mission to deliver its mandate. (…) These measures recognise that the threat is significant and that additional steps are necessary."

Previous Committee Reports

None in respect of the 2016 Annual Report on the 2015–2020 Regional Action Plan for the Sahel, but the Committee reported on the **2015–2020 Regional Action Plan** in July 2015: (36759), 7243/15, SWD(15) 61—First Report HC 342-i (2015–16) chapter 57 (21 July 2015).

In respect of the **EUCAP Sahel Niger mission**, see: (34063), —: Eighth Report HC 86-viii (2012–13) chapter 18 (11 July 2012); (35108), —: Eighth Report HC 83-viii (2013–14) chapter 21 (3 July 2013); (35390), —: Forty-Sixth Report HC 83-xii (2013–14) chapter 13 (9 April 2014); and Nineteenth Report HC 83-xviii (2013–14) chapter 16 (23 October 2013); (36171), —: Sixth Report HC 219-vi (2014–15) chapter 11 (9 July 2014); (36945), —: Fifth Report HC 342-v (2015–16) chapter 27 (14 October 2015); and First Report HC 342-i (2015–16) chapter 69 (21 July 2015); (37124), —: and (37977), —: Eleventh Report HC 71-ix (2016–17) chapter 22 (14 September 2016).

In respect of the **EU Military Training Mission in Mali**, see: (34646), —: Thirty-First Report HC 86-xxxi (2012–13) chapter 13 (6 February 2013); (34664), —: Eighth Report HC 83-viii (2013–14) chapter 17 (3 July 2013); and Thirty-Second Report HC 86-xxxii (2012–13) chapter 14 (13 February 2013) and (37643), —: Twenty-Ninth Report HC 342-xxviii (2015–16) chapter 17 (20 April 2016); and (35915), —: and Forty-Fifth Report HC 83-xl (2013–14) chapter 8 (2 April 2014).

In respect of the **EUCAP Sahel Mali mission**, see: (35889), —: Forty-Third Report HC 83-xxxix (2013–14) chapter 16 (26 March 2014); (36579), —: Twenty-Eighth Report HC 219-xxvii (2014–15) chapter 15 (7 January 2015); (37383), —: Sixteenth Report HC 342-xv (2015–16) chapter 16 (6 January 2016) and Twenty-First Report HC 342-xx (2015–16) chapter 13 (27 January 2016); and (37854), —: Seventh Report HC 71-v (2016–17) chapter 15 (6 July 2016).

23 Strategic Partnership Agreement between the EU and Canada

Committee's assessment	Legally important
Committee's decision	Cleared from scrutiny; further information requested
Document details	Joint Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part
Legal base	Article 37 TEU, and Articles 212(1), 218(6)(a) and 218(8) second paragraph TFEU; unanimity; EP consent
Department	Foreign and Commonwealth Office
Document Number	(38308), 14763/16 + ADD 1 JOIN(16) 56

Summary and Committee's conclusions

23.1 This proposal would enable the EU to conclude (ratify) a Strategic Partnership Agreement (SPA) with Canada intended to:

- Enhance EU-Canada political ties and co-operation on foreign policy and security issues by taking their relationship to the level of a strategic partnership; and
- Upgrade co-operation in a large number of policy areas going beyond trade and economics.

23.2 The SPA will complement the Comprehensive Economic and Trade Agreement.

23.3 The Council has already been authorised to sign the SPA and to trigger provisional application of certain provisions of it. When the proposal for such authorisation was cleared by the Committee we did so on the basis of a description of the text which turned out to be at variance with the published Decision. [183]

23.4 Although there is very little support for the UK view that the UK opt-in applies, the Government informed the Committee that it did not intend to opt in to the Decision to sign and provisionally apply the SPA insofar as it concerned Article 18(2) of it.

23.5 When we first considered this particular proposal we asked:

a) for an explanation of the variance and its effect;

b) whether the Government intended to seek to opt-in to this measure (although the Committee shared the widespread view the UK opt-in was not engaged); and

183 In his letter of 3 October the Minister indicated that The UK has managed to secure limiting language in the Council Decision text, which sets out that provisional application of these articles [i.e. all articles of the Agreement to be provisionally applied] "are limited to matters for which the Union has already exercised its competence internally" whereas the published Decision only applied the limiting language to Articles 12(6)—(9) and 13.

c) what steps would be taken to ensure that it was clear that the EU was only acting to the extent that had exclusive competence, in the light of the Government's policy that this should be the norm.

23.6 The Minister (Sir Alan Duncan) has responded. His letter:

- addresses the substance of question a) without acknowledging any inaccuracy;
- indicates, in respect of question b) that the Government intends to opt-in to Article 18(2) of the SPA; and
- responds to question c) by relying on the limitations on provisional application built into the Decision to sign and provisionally apply the SPA.

23.7 **We welcome the Minister's willingness to provide a more detailed analysis of competence of the SPA. This is a positive development in the light of a reluctance to do so in relation to previous agreements, supplemented by an assertion that making public the Government's consideration of competence "could be used by those who take a different view on the division of competences".[184] We urge him to continue this more open approach. We consider that the persistent fudging of competence questions undermines the UK policy that mixed competence should normally be exercised by Member States.[185]**

23.8 **The Minister explains that limiting language for provisional application requested was requested in respect of Articles 12(6) to (9) and 13 of the SPA because these particular provisions covered matters of shared competence or Member State exclusive competence. An inference can be drawn from this that the Government considers that the other Articles provisionally applied fall within exclusive EU competence. However we consider that it is not clear that this is indeed the case, in particular with: Article 12(10) concerning dialogue and cooperation in the field of employment, social affairs and decent work; Article 14 concerning co-operation on citizens' wellbeing; Article 15 insofar as it applies to co-operation on science, technology, communication technology, security and stability of the Internet; and, Article 16 concerning diversity of cultural expressions, education and youth, and people to people contacts.[186] We therefore ask the Minister to confirm that these Articles only concern, in the Government's view, matters of exclusive EU competence and to indicate why this is so.**

23.9 **We urge the Minister and his staff to ensure that future explanations of textual amendments are accurate. The sure way to achieve this is to provide a text.**

23.10 **We repeat our deprecation of the legal uncertainty that arises because the SPA itself indicates that the UK opt-in applies but this proposal does not acknowledge this to be the case. We also re-iterate our consistently stated view that in the absence of a legal base for this proposal from Title V of Part Three TFEU (concerning an area of freedom, security and justice) the UK opt-in is not engaged. We note that Government now intends to opt-in to Article 18(2) of the SPA in respect of this proposal, whereas, on**

184 For a recent example see the Minister letter of 25 July 2016 and 21 September 2016 in relation to conclusion of an enhanced Partnership Agreement with Kazakhstan.

185 Where competence is shared it can be exercised by either the EU or the Member States, the choice is political.

186 We have not included Articles provisionally applied without limitation which are clearly of exclusive EU competence; or are matters falling within the CFSP, or "parallel" competence as set out in Article 3(3) and (4) TFEU, as EU action based on these competences have a lesser impact on Member States ability to act.

the information provided to this Committee, it did not do so in respect of the Decision to sign and provisionally apply the SPA. Does the Government now intend to seek to opt in to this aspect of the Decision to sign and provisionally apply the SPA, and if not would the discrepancy between the two Decisions have any practical effect?

23.11 **We note that the Minister has not indicated that he is taking any steps to make it transparent that the EU is only concluding this agreement to the extent that it has exclusive competence. We therefore draw this proposal to attention of the House as a further example of the Government's own policy that Member States should normally exercise shared competence being fudged. In this respect we repeat our view that the exercise of competence in concluding an international agreement is different and distinct from the exercise of competence in triggering provisional application of the agreement. Therefore, wording limiting the EU's action in respect of provisional application, whilst helpful, should not be regarded as a substitute for making it clear that the EU is only concluding the SPA to the extent that it has exclusive competence.**

23.12 **Given that the SPA raises no policy issues, we are prepared to clear this proposal in advance of the UK being asked to support this proposal, which may happen this month.**

Full details of the documents

Joint Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Canada, of the other part: (38308), 14763/16 + ADD 1 JOIN(16) 56.

The Minister's letter of 24 January 2017

23.13 On the question of the UK opt-in the Minister states:

> "I note your concern that the Council Decision on the conclusion of the Strategic Partnership Agreement (SPA) does not include a legal base from Title V of Part Three TFEU. Throughout negotiations, UK officials pressed for the inclusion of such a legal base, but were unsuccessful. I am reassured however by the fact that the SPA text itself does contain reference to the Title V legal base. The Government has recently decided to opt in to the ancillary JHA content in Article 18(2) of the SPA, which relates to judicial cooperation in civil and commercial matters. Our assessments indicate that no other parts of the SPA trigger the UK opt in. I will provide a Written Ministerial Statement to Parliament in line with the Code of Practice. The Government will also lay a minute statement at the time of adoption to reaffirm the UK's position that the JHA opt in applies."

23.14 On the question of transparency as to the extent to which the EU is exercising competence, he continues:

> "Your report asks how we intend to make "clear that the EU is only exercising competence to conclude the SPA to the extent that such competence is exclusive". The Government was successful in securing a listing approach

> at signature and provisional application, which set out clearly which parts of the SPA would be provisionally applied. We were also successful in securing the limiting language in Article 3 of the Council Decision (Decision 2016/2118) on signing and provisional application to the effect that provisional application would only be applied 'to the extent that they cover matters falling with the Union's competence...'.
>
> "I am assured that this provides sufficient safeguards and will ensure that the European Union will not be able to act in areas of shared or exclusive Member State competence.
>
> "Based on the finalised Council Decision on signing and provisional application text, I am clear that the UK managed to limit EU action to areas which fall into either EU exclusive or shared competence, in areas where the EU has already exercised competence. As such, and based on the limiting language, Article 3, Article 4(2) and (3), Article 6, Article 7(a), Article 8, Article 10(1), Article 11, Article 12 (1–5) and 12(10) and Articles 18–22, Article 23(1) and Articles 24 and 25, were all excluded from the parts of the agreement to be provisionally applied."

23.15 On the discrepancy between his explanation of the changes to the proposal to sign and provisionally apply the SPA and the text of the published Decision he indicates:

> "You raised specific concerns about the absence of restrictive wording (applied to parts of Article 12 and Article 13) on other articles of the SPA. Our assessment is that in the cases of Article 12 and 13, competence was a mix of EU exclusive, shared and or Member State exclusive and so we requested additional language on Articles 12 and 13 to provide additional safeguards against potential competence creep".

23.16 The letter concludes by providing information on timing:

> "On current timings, we expect the SPA (along with the EU-Canada Comprehensive Economic and Trade Agreement—CETA) to be approved by the European Parliament in February, and returned to the Commission before adoption. Following adoption at Council the SPA will then be provisionally applied".

We understand this to mean that the EU will trigger provisional application of the SPA (as it has been previously authorised to do) once the European Parliament has consented to the conclusion of the SPA and the Council has adopted this proposal.

Previous Committee Reports

Twenty-fifth Report HC 71-xxiii (2016–17), chapter 4, (11 January 2017).

24 Documents not raising questions of sufficient legal or political importance to warrant a substantive report to the House

Department for Business, Energy and Industrial Strategy

(38405) 15656/16 COM(16) 794	Report from the Commission to the European Parliament and the Council on the effectiveness of Recommendation 2014/70/EU on minimum principles for the exploration and production of hydrocarbons (such as shale gas) using high-volume hydraulic fracturing.
(38418) 15792/16 COM(16) 805	Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of EU macro-regional strategies.
(38419) 15784/16 COM(16) 812	Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions European Structural and Investment Funds 2014–2020 2016 Summary Report of the programme annual implementation reports covering implementation in 2014–2015.
(38437) 15970/16 SWD(16) 447	Commission Staff Working Document 2016 Synthesis of Evaluation Results and Plans under the ESIF Programmes 2014–2020

Department for Environment, Food and Rural Affairs

(38441) 5057/17 COM(16) 814	Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee in accordance with Article 138(7) of REACH to review if the scope of Article 60(3) should be extended to substances identified under Article 57(f) as having endocrine disrupting properties with an equivalent level of concern to other substances listed as substances of very high concern.
(38416) 15671/16 + ADD 1 SWD(16) 472	Commission Staff Working Document Fitness Check of the EU Nature Legislation (Birds and Habitats Directives) Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora plus summary of the Fitness Check.
(38461) — —	Unnumbered Doc- Court of Auditors Report 34/2016 Combating Food Waste: an opportunity for the EU to improve the resource-efficiency of the food supply chain.

(38411)
15716/16
COM(16) 789

Proposal for a Decision of the European Parliament and of the Council amending Directive 87/217/EEC of the Council, Directive 2003/87/EC of the European Parliament and of the Council, Directive 2009/31/EC of the European Parliament and of the Council, Regulation (EU) No 1257/2013 of the European Parliament and of the Council, Council Directive 86/278/EEC and Council Directive 94/63/EC as regards procedural rules in the field of environmental reporting and repealing Council Directive 91/692/EEC.

(38412)
15718/16
COM(16) 793

Communication from the Commission to the Council and the European Parliament: Establishing formal recognition that a certain number of acts of Union law in the field of environment that were adopted under Council Directive 91/692/EEC have become obsolete.

Department of Health

(38402)
15632/16
COM(16) 768

Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of the Council Recommendation on promoting health-enhancing physical activity across sectors.

HM Treasury

(38463)
—
+ ADD 1
—

Commission Opinion of 17.1.2017 on the updated Draft Budgetary Plan of Spain.

(38466)
—
+ ADD 1
—

Commission Opinion of 17.1.2017 on the updated Draft Budgetary Plan of Lithuania.

Formal Minutes

Wednesday 8 February 2017

Members present:

Sir William Cash, in the Chair

Steve Double	Craig Mackinlay
Richard Drax	Chris Stephens
Kate Green	Mr Andrew Turner
Kate Hoey	David Warburton

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 8.11 read and agreed to.

Paragraph 8.12 read, amended and agreed to.

Paragraphs 8.13 to 18.9 read and agreed to.

Paragraph 18.10 read, amended and agreed to.

Paragraphs 18.11 to 23.14 read and agreed to.

Paragraph 23.15 read, amended and agreed to.

Paragraphs 23.16 to 24 read and agreed to.

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

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

[Adjourned till Wednesday 22 February at 1.45pm

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)

Alan Brown MP (*Scottish National Party, Kilmarnock and Loudoun*)

Geraint Davies MP (*Labour (Co-op), Swansea West*)

Steve Double MP (*Conservative, St Austell and Newquay*)

Richard Drax MP (*Conservative, South Dorset*)

Kate Green MP (*Labour, Stretford and Urmston*)

Kate Hoey MP (*Labour, Vauxhall*)

Stephen Kinnock MP (*Labour, Aberavon*)

Craig Mackinlay MP (*Conservative, South Thanet)*

Mr Jacob Rees-Mogg MP (*Conservative, North East Somerset*)

Chris Stephens MP (*Scottish National Party, Glasgow South West*)

Graham Stringer MP (*Labour, Blackley and Broughton*)

Michael Tomlinson MP (*Conservative, Mid Dorset and North Poole)*

Mr Andrew Turner MP (*Conservative, Isle of Wight*)

David Warburton MP (*Conservative, Somerton and Frome*)

Mike Wood MP (*Conservative, Dudley South*)

The following members were also members of the Committee during the parliament:

Peter Grant MP (*Scottish National Party, Glenrothes*), Rt Hon Damian Green MP (*Conservative, Ashford*), Nia Griffith MP (*Labour, Llanelli*), Kelvin Hopkins MP (*Labour, Luton North*), Calum Kerr MP (*Scottish National Party, Berwickshire, Roxburgh and Selkirk*), Dr Paul Monaghan MP (*Scottish National Party, Caithness, Sutherland and Easter Ross*), Alec Shelbrooke MP (*Conservative, Elmet and Rothwell*), Kelly Tolhurst MP (*Conservative, Rochester and Strood)*, Heather Wheeler MP (*Conservative, South Derbyshire*)