House of Commons

European Scrutiny Committee

Ninth Report of Session 2017–19

Documents considered by the Committee on 10 January 2018 including the following recommendations for debate:

EU budget: discharge for 2016

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. The Committee notes that in the current week the following issues and questions have arisen in documents or in correspondence with Ministers:

Pesticides

- Pesticides policy provides a good example of an area where the UK may wish to take the opportunity to diverge from the EU in the future but, equally, where there would be challenges to be faced in developing new policy post-Brexit, such as divergent interests, devolution and the Irish border.

Paediatric Medicines

- Likely future engagement between the UK and the EU on the development of paediatric medicines, and the impact of divergent UK and EU rules on such medicines.

Seat of the European Medicines Agency and the European Banking Authority

- Whether the UK sought to retain the European Medicines Agency and European Banking Authority.

Summary

Pesticides

The Commission has reported on the progress of implementing the EU's Directive on the sustainable use of pesticides. We have no issues to raise with the Government but report this document to the House as an example of a policy area where the UK has not always been comfortable with the direction of EU policy and might therefore wish to take the opportunity to make changes post-Brexit. On the other hand, it also highlights some of the challenges to be faced in developing new policy: balancing agricultural, health and environmental concerns; taking into account the challenges of devolution and the Irish border; continued adherence, or not, to the EU's environmental principles; and whether or not to replace the Commission's reporting function.

Cleared.

Paediatric Medicines

The Commission assesses the implementation of the Paediatric Medicines Regulation. While availability of such medicines has improved, the picture remains patchy in some therapeutic areas. The Government does not have any UK-specific information and is therefore unable to confirm whether or not it agrees with all of the Commission's assessment. We ask that the Minister:

- commits to the immediate launch of a UK-specific analysis to be completed well in advance of the UK's withdrawal from the EU;
- explains how third countries currently engage with the EU on the development of paediatric medicines and confirm whether or not that level of engagement would be satisfactory post-Brexit or if the UK will be seeking closer engagement; and
- explains the impact of the UK diverging from EU rules in the areas of both paediatric and orphan medicines.

Not cleared; further information requested.

Seat of the European Medicines Agency and the European Banking Authority

The remaining EU Member States have agreed that the London-based European Medicines Agency (EMA) and European Banking Authority (EBA) should relocate from London to Amsterdam and Paris respectively as a result of the UK's decision to leave the EU. The Committee seeks clarity as to whether the UK sought to negotiate retention of the Agencies in London. The relocation costs for the EMA are likely to be at least £500 million as (unlike the EBA), the rental contract for the office space has no break-clause. It has yet to be agreed how those costs will be met. These proposals are uncontentious, but the Committee considers them to be politically important as they relate to the ongoing negotiations regarding the UK's withdrawal from the EU.

Not cleared; further information requested.

Developing interoperable EU information systems to enhance border management and security

The Commission has set out a process and timetable for making the EU's asylum, migration and security databases interoperable by 2020. The Committee reiterates its request for the Government to share with Parliament its assessment of EU capabilities in the justice and home affairs field (begun over a year ago) and to indicate the measures it wishes to prioritise for inclusion in a new strategic agreement with the EU post-exit. We also ask whether enhancing interoperability of EU asylum, migration and security information systems is likely to make it easier or harder for the UK to negotiate access to those systems (should it wish to do so) as part of the UK's exit negotiations.

Cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee.

The European Police College: the Government's post-adoption opt-in decision

The Government confirms that it does not intend to opt into a Regulation establishing the European Police College following its adoption in November 2015. The Committee asks the Government to clarify the UK's current level of engagement with the European Police College and to indicate what plans (if any) it has for future cooperation with this EU Agency once the UK leaves the EU and has third country status. We make clear that we do not consider the Minister's general observation than any future strategic agreement with the EU in the justice and home affairs field post-exit "will be designed to enable the relationship we agree with the EU to operate effectively" constitutes a meaningful response.

Previously cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee and the Committee on Exiting the European Union.

Equal Pay and the Gender Pay Gap: Commission Report and Action Plan

These documents are not legislative proposals. Even the Action Plan is unlikely to have much of an impact on the UK before Brexit according to the Government, though this does not take account of a transition period. However, we are drawing them to the attention of the House for two reasons. Firstly, they beg the question of whether and how the UK will maintain its own commitment after Brexit to reducing and eliminate the gender pay gap (GPG), in default of EU initiatives, supervision and enforcement mechanisms on equal pay. Secondly, there have been recent press reports of UK companies submitting allegedly flawed GPG data to the Government and of persistent GPGs in the public sector. We press the Government on both these issues. We also draw the documents to the attention of the Women and Equalities Committee since the previous Committee held an inquiry and produced a report on equal pay and the GPG.

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

Documents drawn to the attention of select committees:

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

Environment, Food and Rural Affairs Committee: Sustainable use of pesticides [Commission Report (C)]

Environmental Audit Committee: Sustainable use of pesticides [Commission Report (C)]

Exiting the European Union Committee: Location of the European Medicines Agency and European Banking Authority [(a) Proposed Regulation, (b) Proposed Regulation (NC)]; The European Police College: the Government's post-adoption opt-in decision [Proposed Regulation (C)]

Health Committee: State of Paediatric Medicines in the EU [Commission Report (NC)]; Location of the European Medicines Agency and European Banking Authority [(a) Proposed Regulation, (b) Proposed Regulation (NC)]

Home Affairs Committee: Combating payment fraud [Proposed Directive (NC)]; The European Police College: the Government's post-adoption opt-in decision [Proposed Regulation (C)]; Developing interoperable EU information systems to enhance border management and security [Commission Communication (C)]

Treasury Committee: Location of the European Medicines Agency and European Banking Authority [(a) Proposed Regulation, (b) Proposed Regulation (NC)]; UK Excessive Deficit Procedure [Proposed Decision (C)]

Women and Equalities Committee: Equal Pay and the Gender Pay Gap [(a) Commission Report , (b) Commission Communication (NC)]

Work and Pensions Committee: Coordination of social security systems [Proposed Regulation (NC)]

1 EU budget: discharge for 2016

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; recommended for debate in European Committee B
Document details	(a) Annual Report of the Court of Auditors on the Implementation of the budget concerning the financial year 2016, together with the institutions' replies; (b) Annual report of the Court of Auditors on the activities of the 8th, 9th, 10th, and 11th European Development Funds (EDFs) concerning the financial year 2016, together with the institutions' replies.
Legal base	(a) and (b) Articles 287(1) and (4) TFEU
Department	International Development AND Treasury
Document Numbers	(a) (39119), C322/01; (b) (39120), C322/02

Summary and Committee's conclusions

1.1 In September 2017, the European Court of Auditors (ECA) issued its annual reports in respect of the EU budget in 2016.[1] It found that the EU accounts were accurate, and that the revenue underlying the accounts was legal and regular. However, payments from the EU budget continued to be affected by a material level of error (albeit at a lower rate than the year before), reaching 4.8 per cent for reimbursement-based expenditure such as research grants and regional development funding.

1.2 As a result, the Court of Auditors offered only a qualified Statement of Assurance for the general EU budget, and produced an adverse opinion on the legality and regularity of payments made under the European Development Funds (a legally-distinct EU financial instrument which finances development assistance projects in developing countries in Africa, the Caribbean and the Pacific).[2] The auditors also issued a number of recommendations, including a need for a reduction in the EU's "*Reste à Liquider*" (RAL)[3] in the next Multiannual Financial Framework (MFF), and reducing the complexity of the EU's budgetary instruments.

1.3 The Minister of State for International Development (Lord Bates) and the Chief Secretary to the Treasury (Elizabeth Truss) submitted Explanatory Memoranda on the annual reports in November and December 2017 respectively. While they welcomed the reduction in the estimated rate of errors in EU budget payments, the Chief Secretary also added that the Government would "continue to argue for effective financial management and the best possible value for money for British taxpayers from EU spending".

1 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2017:322:TOC.

2 See the previous Committee's Report of 25 April 2017 for more information on the distinct legal and budgetary status of the EDFs.

3 RAL is the difference between payment commitments entered into by the EU, and payments actually made.

1.4 The Member States in the Council will consider the ECA's reports in February, before a formal decision by the European Parliament this spring on granting formal discharge for the 2016 budget.

1.5 **We thank the Ministers for their Explanatory Memoranda on the Court of Auditors' annual reports. We note that material levels of errors persist in many parts of the EU budget, although the rate of error is declining year-on-year. The Committee will return to the recommendations made by the Court, particularly in respect of reducing the RAL and the simplification of the EU's web of budgetary instruments, when the Commission tables its proposals later this year for the new Multiannual Financial Framework after 2020.**

1.6 **We do not consider that these Court of Auditors documents, as ex-post assessments, have any direct implications in the context of the UK's withdrawal from the EU. However, as we have previously noted,[4] the provisional financial settlement reached as part of the Article 50 negotiations means that the UK will continue to pay for a share of the EU's financial commitments after its formal EU exit in March 2019. That settlement will include payments for expenditure commitments made under the 2016 annual budget considered in these auditors' reports. The continued high level of errors affecting certain parts of the EU budget therefore remains of concern, as the costs of those will be carried, in part, by the UK taxpayer even *after* Brexit. We have therefore decided to include these Court of Auditors reports in our debate recommendation of 19 December 2017 on the 2018 EU budget.[5]**

1.7 **We would expect this debate to touch not only on the findings of the Court of Auditors on the implementation of the 2016 EU budget, but also on the broader concerns about the financial and political implications of the post-Brexit transitional arrangement sought by the Government. The Prime Minister has agreed to make payments into the EU budget in 2019 and 2020 as if the UK were still a Member State.[6] Most likely, the UK will also be required to continue applying EU law.[7] However, during this post-Brexit transitional period, the UK will no longer be represented within the EU institutions when the annual budget for 2020 is established; when specific funding decisions are made under the 2019 and 2020 budgets; or when future Court of Auditors' reports on the EU budget are considered.[8]**

1.8 **We are particularly concerned that the Prime Minister appears to envisage a transitional period which, in some respects, may last beyond the EU's current budgetary cycle (which ends in December 2020).[9] This raises the possibility that the UK will be a participant in, and therefore contributor to, the new Multiannual Financial Framework which will begin on 1 January 2021. The expenditure ceilings for that budgetary period are likely to be established by the Council in 2020, after the UK**

4 See the Committee's Reports of 13 November 2017 and 19 December 2017.

5 See the Committee's Report of 19 December 2017.

6 After the end of the transitional period, the UK will make further payments to cover a share of the RAL outstanding. See the DExEU and European Commission Joint Report (8 December 2017) for more information.

7 Guidelines by the European Council on a post-Brexit transitional period (15 December 2017).

8 With the exception of the Annual Report on the 2017 EU budget, which will be considered by the Council in February 2019.

9 On 20 December 2017, the Prime Minister told the Liaison Committee: "[The European Commission has set] that end December 2020 date [for the transition] because that covers their current budget plan period, so that has a neatness for them—if I can put it like that—but we will obviously have to discuss it, because this is a practical issue about how long certain changes would need to take to be put in place".

loses its veto under Article 312(2) TFEU. A transition which lasts beyond December 2020 might therefore not only increase the UK's financial obligations vis-à-vis the EU,[10] the Government would not even have had a vote over the maximum contributions involved or how its taxpayers' money would be spent.

1.9 **Overall, it is the Committee's view that the lack of institutional representation during the transition will severely inhibit the Government's ability to push for "effective financial management and the best possible value for money" after March 2019.[11] The Government has not publicly stated how it will seek to represent the UK at EU-level during this period. As such, the Committee remains to be persuaded that the interests of the UK taxpayer, and its contribution to the EU budget, can be effectively protected.**

Full details of the documents

(a) Annual Report of the Court of Auditors on the Implementation of the budget concerning the financial year 2016, together with the institutions' replies: (39119), C322/01; (b) Annual report of the Court of Auditors on the activities of the 8th, 9th, 10th, and 11th European Development Funds (EDFs) concerning the financial year 2016, together with the institutions' replies: (39120), C322/02.

Background

1.10 After each financial year, the European Parliament scrutinises the implementation of the relevant annual EU budget by the European Commission and other EU institutions. The decision to grant, delay or refuse discharge of budgetary management of each institution is taken by the Parliament, with the Member States in the Council issuing a recommendation.[12] Discharge typically takes place around 18 months after the end of a financial year.

1.11 The Parliament's decision whether to grant discharge is based mainly on the European Court of Auditors' annual reports on the general EU budget[13] and the European Development Funds,[14] in which the ECA assesses the legality and regularity of the EU's payments and revenue. While a refusal by the Parliament to grant discharge has no direct effect, its findings are likely to inform its negotiating position on future EU budgets (over which MEPs have a veto).

10 The provisional financial settlement agreed in December 2017 only presumes UK participation in EU-funded programmes until the end of December 2020.

11 The matter will be complicated further if the transitional period were to extend beyond December 2020, in which case the UK would participate in, and contribute to, the new Multiannual Financial Framework without having had its current veto over its adoption.

12 The Parliament has refused to grant discharge to the European Commission twice, in 1984 (for the 1982 budget) and in 1998 (for the 1996 budget).

13 The ECA's report assesses: the reliability and accuracy of the EU budget accounts and how well the underlying transactions comply with the relevant regulations (known as the 'regularity' of the transactions). It also looks at the performance of the EU budget and results achieved by EU spending. The report contains the ECA's targeted recommendations to address identified errors and weaknesses in schemes and audit systems, and the Commission's responses to those recommendations.

14 The European Development Funds are "off-budget", meaning they are funded by the EU Member States but not as part of the general EU budget. See the Committee's Report of [date] for more information.

The 2016 discharge procedure

1.12 On 28 September 2017, the European Court of Auditors published its annual reports on the implementation of the general EU budget and the European Development Funds in 2016.[15]

1.13 For the general EU budget, the Auditors have issued a Statement of Assurance for €129.3 billion (£114.4 billion) of expenditure, concluding that "the EU accounts are accurate and fairly represent the financial position of the EU, the results of its operations and its cash flows for the year", and that revenue underlying the accounts was "legal and regular". However, as in previous years, the ECA qualified the Statement of Assurance for the general budget, in light of a "material level of error in spending". The Court estimated the error rate for expenditure under the 2016 EU budget to be 3.1 per cent, a "significant reduction" from the 3.8 per cent error rate for the previous annual budget but still above the "materiality" threshold of 2 per cent.

1.14 The auditors concluded that material error in the way EU funding was used not "pervasive",[16] because it was primarily confined to reimbursement based expenditure. This is a type of EU expenditure where beneficiaries claim EU funds for eligible costs they have already incurred (e.g. regional development projects, rural development funding and research grants).[17] The ECA notes that many of the reimbursement errors could have been prevented or corrected by Member State authorities which would have reduced the overall error rate for this type of expenditure from 4.8 to 1.1 per cent.[18]

1.15 For the European Development Funds, the Court of Auditors assessed payments made under the 8th to the 11th Funds.[19] As in previous years, the Auditors issued an adverse opinion in relation to legality and regularity of payments from the EDFs in 2016 after finding a material level of error estimated at 3.3 per cent (compared to 3.8 per cent in 2015). Most errors found related to non-compliance with procurement rules, payments for expenditure that was not actually incurred by beneficiaries, or expenditure not eligible for reimbursement by the EU. The auditors found that, had the European Commission made "proper use of all the information at its disposal", the estimated level of error for this chapter could have been reduced to 2.6 per cent.

1.16 With respect to the EU's revenues (for both the general budget and the EDFs), the ECA concluded that the level of error in revenue was "not material". The report made note of the Commission's decision to make reservation on the amount of own "traditional

15 Official Journal of the European Union, C 321, 28 September 2017.

16 In auditing, an error or an absence of audit evidence is deemed 'pervasive' if "they are not confined to specific elements, accounts or items of the financial statements (i.e. they are spread throughout the accounts or transactions tested), or, if they are so confined, they represent or could represent a substantial proportion of the financial statements, or relate to disclosures which are fundamental to users' understanding of the financial statements".

17 The main risk to the regularity of such reimbursement-based transactions is that beneficiaries claim for ineligible costs; lack of essential documentation before payments are made; or the incorrect application of procurement rules when funding decisions are made.

18 ECA Report, paragraph 6.19.

19 The 8th EDF committed funding from 1995 to 2005. The current, 11th EDF runs from 2014 until 2020.

own resources" (customs duties) collected by the UK in recent years for payment towards the EU budget.[20] In 2016, the Court reported 16 cases of suspected fraud to the EU's anti-fraud body OLAF, down from 42 in 2015.

1.17 The Court was critical of the growing complexity of the EU's budgetary instruments, such as Trust Funds, Guarantee Funds and lending activities:

> "The increasing use of other financial mechanisms to deliver EU policies alongside the EU budget risks undermining this level of accountability and transparency, as reporting, audit and public scrutiny arrangements are not aligned. For example, we audit and report on only some of the financial mechanisms, which limits public scrutiny. In our view, the current arrangements make it difficult to manage, audit, scrutinise and report effectively and to provide an adequate overview of the cost and benefits of the EU for citizens."

1.18 The Auditors also noted that the EU's outstanding expenditure commitments reached an all-time high at the end of 2016 (€239 billion or £212 billion). This is relevant in the context of Brexit, as the UK is due to take on liability for a share of these commitments outstanding at the end of 2020 (to reflect an understanding that they were accrued as part of the 2014–2020 Multiannual Financial Framework, which the UK approved in 2013).[21]

1.19 Based on its findings, the Court of Auditors issued a number of recommendations, including:

- Ensuring a more "appropriate balance" between outstanding payment commitments and actual expenditure (the so-called "*Reste à Liquider*" or RAL);
- Asking the Council and the European Parliament to consider "how the EU budgetary system could be reformed" with a view to its simplification; and
- Proposing "less numerous and more appropriate" performance indicators for the legal framework of programmes in the next Multiannual Financial Framework.

Next steps in the discharge procedure

1.20 The European Court of Auditors presented its report to the Council on 7 November 2017. EU Finance Ministers are expected to issue a recommendation on discharge of the budget to the European Parliament in February, after which MEPs will vote on discharge in May 2018.

1.21 For the past six years, the budgetary control committee has recommended that the Parliament postpone granting a discharge to the Council and the European Council on grounds of failure to cooperate with the Parliament in supplying the information it needs.[22] It appears likely it may do so again this year.

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20 This was the result of an OLAF investigation into the valuation of imports of textiles and footwear from China; OLAF issued its final report and recommendations in March 2017. The amount of TOR concerned by the reservation is yet to be confirmed using information to be supplied by the United Kingdom. We examined this issue in more detail in [December 2017], and drew it to the attention of the Public Accounts Committee.

21 See our Report of 19 December 2017 for more details on the Brexit financial settlement.

22 http://www.europarl.europa.eu/RegData/etudes/ATAG/2014/538960/EPRS_ATA%282014%29538960_REV1_EN.pdf; http://www.europarl.europa.eu/RegData/etudes/STUD/2017/572724/IPOL_STU(2017)572724_EN.pdf.

The Government's view

1.22 In their Explanatory Memoranda, both Ministers stressed the fact that the Government takes financial management of the EU budget "very seriously". While they welcomed the reduction in the rate of errors in the budget, the Chief Secretary noted that the rate for the general EU budget was still above the Court of Auditors' materiality threshold of 2 per cent, adding:

> "While we remain a member of the EU, the UK will continue to argue for effective financial management and the best possible value for money for British taxpayers from EU spending."

Previous Committee Reports

None.

2 Digital Single Market: Tackling unjustified geo-blocking

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; waiver previously granted; further information requested
Document details	Proposal for a Regulation on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market
Legal base	Article 114 TFEU; ordinary legislative procedure; QMV
Department	Business, Energy and Industrial Strategy
Document Number	(37818), 9611/16 + ADDs 1–2, COM(16) 289

Summary and Committee's conclusions

2.1 In May 2016, as part of its wider e-commerce package aimed at breaking down barriers to cross-border online trade, the Commission proposed a Regulation (9611/16)[23] intended to address unjustified geo-blocking and discrimination based on nationality or place of residence. The proposed regulation would impose an obligation on companies to 'sell like at home' and not discriminate against non-home EU Member State consumers in terms of access to prices, sales or payment conditions.

2.2 The legislative procedure has now almost fully concluded, with a package of amendments being agreed in trilogue negotiations on 21 November 2017.[24] The Committee subsequently sought an update from the Government,[25] as well as clarification of whether a bilateral agreement between the UK and the EU would be necessary to retain the beneficial effects of the Regulation for UK consumers.

2.3 In his response,[26] the Minister (Lord Henley) summarises the amendments that were agreed, noting that the exemption for microbusinesses related to the threshold for registration for VAT has been retained, conflict with horizontal EU consumer protection law (notably the Rome I and Brussels I regulations) has been avoided, and copyright-protected services—both audio-visual and non-audiovisual—remain excluded from scope—all in line with the UK negotiating position.

2.4 In response to the Committee's question about the ability of the UK to retain the effects of the Regulation, the Minister states that "cross-border issues require bilateral

23 Proposal for a Regulation 9611/16 of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

24 Euractive.com, Negotiators agree to end geo-blocking in move ahead on EU ecommerce files (21 November 2017).

25 Second Report HC HC 301–ii (2017–19), chapter 6 (22 November 2017).

26 Letter from the Minister, BEIS, to the Chairman of the European Scrutiny Committee (12 December 2017).

agreements". While the Minister appears to be admitting that the UK could not address this issue through domestic law, the proposed EU Regulation applies to businesses in third countries. The Government has not yet adequately explained this apparent contradiction.

2.5 **We acknowledge the Government's update regarding the package of amendments to the Regulation that were agreed in trilogues, including the Minister's assessment that "the final compromise text is in line with UK objectives".**[27]

2.6 **Now that any ambiguity regarding the final text of the Regulation has been removed, the Committee asks the Government to provide a clearer account of the implications of the UK's withdrawal from the European Union for its application to UK stakeholders.**

Application of EU Geo-blocking Regulation to the UK post-exit

2.7 **We note the Government's previous assessment that "the proposed geo-blocking Regulation includes a third country provision, whereby, a trader, based in a third country, who 'directs activities' to consumers based in the European Economic Area (EEA), will be bound by this Regulation. Therefore the Regulation will apply equally to all traders (whether established in a Member State or those established in a third country) operating within the European Union".**[28]

2.8 **We ask the Government to specify whether this means that, post-exit, in the absence of any UK-EU agreement on geo-blocking, each of the Regulation's core provisions (see: Background) will continue to apply to UK-based businesses trading with EU consumers in precisely the same manner as they will continue to apply to EU Member States, or whether the Regulation's effects will be modified in any way.**

2.9 **For example, will UK businesses be obliged to offer EU customers the same terms of access (including prices, within the terms of the Regulation) as UK customers, or will they merely be required to provide all EU customers with the same terms of access, so that UK firms are not practicing geo-blocking within the Union? Will UK businesses be prohibited from rerouting EU customers to a single EU-facing website/interface?**

Brexit implications of geo-blocking: UK consumers

2.10 **The Committee asked the Government whether, if the Government chose to retain the Regulation in domestic legislation following Brexit, this would protect UK consumers seeking to purchase goods or services from EU businesses with the same protections as currently provided for in the Regulation, or whether a bilateral agreement with the EU would be necessary to retain these effects for consumers. The Minister's response is that "cross-border mechanisms require bilateral agreement between two parties",**[29] **implying that domestic legislation cannot be used to prevent third country providers from using discriminatory geo-blocking practices in relation to UK consumers.**

2.11 **That the EU can (through the Regulation) impose requirements on third country providers targeting the EU market, but the UK cannot do so in the absence of a bilateral**

27 Letter from the Minister, BEIS, to the Chairman of the European Scrutiny Committee (12 December 2017).
28 Letter from the Minister to the Chairman of the European Scrutiny Committee (27 June 2017).
29 Letter from the Minister to the Chairman of the European Scrutiny Committee (12 December 2017).

agreement, has a contradictory appearance. Our predecessor Committee previously asked the Government to explain this apparent contradiction in its report on 25 January 2017,[30] and received the rather elliptical response that "the Regulation will only apply to UK businesses to the extent they operate within the European Union."[31] We ask the Government to answer the question more explicitly. Why, if the EU can—in the absence of any bilateral agreement—require that traders based in third countries who direct activities to EEA consumers comply with the Regulation, will the UK not be able to impose the same requirements on foreign providers post-exit?

EU (Withdrawal) Bill and the Regulation

2.12 **On 19 December 2016, the Government indicated that it was "too early to review whether this regulation will be retained under domestic legislation. This will be decided in the coming months."[32] Now that a year has passed, the final text of the Regulation has been agreed, and it is clear that the UK is leaving the Single Market, we ask the Government to clarify whether (i) it seeks to negotiate the inclusion of geo-blocking arrangements in a UK-EU Free Trade Agreement, and (ii) if this proves impossible, whether it intends to incorporate the Regulation into UK law after it has left the European Union. We ask the Government to provide the reasoning behind these decisions.**

2.13 **If the Government is not yet in a position to give a clear answer to any of the above questions we ask for an explanation in each case as to why it is unable to do so at the present time, a summary of next steps, and an indication of when the Government expects to be in a position to provide the Committee with a response.**

2.14 **The waiver granted in the Committee's report of 22 November 2017 continues to apply to the final adoption of the Regulation in Council. In the meantime, we retain the proposal under scrutiny, pending answers to our remaining questions. We request a response by 14 February 2018.**

Full details of the documents

Proposal for a Regulation on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market: (37818), 9611/16 + ADDs 1–2, COM(16) 289.

Background

2.15 Geo-blocking is a practice that enables online sellers to deny consumers based in another EU country access to their websites and content, to re-route traffic to a country-specific or local website or to apply different pricing or other practices according to the consumer's nationality or residence.

30 Twenty-eighth Report HC 71–xxvi (2016–17), chapter 1 (25 January 2017): "If the Government's answers to the previous questions are that (i) UK businesses will have to comply with the Regulation when selling to EEA consumers, whereas (ii) EEA businesses will be free to engage in unjustified geo-blocking of UK consumers even if the Government retains the Regulation in domestic legislation, we ask the Minister to explain the basis of this discrepancy. How can the EU require UK businesses to comply with the geo-blocking Regulation but the UK not be able through domestic legislation to require EU businesses to do the same?".

31 Letter from the Minister to the Chairman of the European Scrutiny Committee (11 June 2017).

32 Letter from the Minister to the Chairman of the European Scrutiny Committee (19 December 2016).

2.16 The European Commission published its proposal for a Regulation on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market on 25 May 2016.[33]

2.17 The main provisions of the Regulation are as follows:

- **Prohibition on automatic blocking of access to online interfaces or re-routing:** Article 3 prevents companies from blocking access to their online interfaces on the basis of customers' residence or automatically re-routing customers to another online interface (for example the customers' home country's website) without their explicit consent, unless there are clear legal reasons for doing so. It also requires sellers to provide a clear justification for automatic blocking or re-routing, and the original version of the online interface must remain accessible to the consumer, should they wish to go back to it. Example: A British customer wants to access an online clothing shop's Italian website. Even though she types in the URL of the Italian version, she gets redirected to the British version. After the entry into force of the Regulation such redirection will require the explicit consent of the user and even if the customer gives consent to the redirection, the original version she sought to visit should remain accessible.

- **Prohibition on applying different 'general conditions of access'**: Article 4 prohibits companies from applying different general conditions of access to their goods and services (including outright refusal to sell goods or services or offer different prices or terms) based on the nationality or place of residence/establishment of a consumer, in three specific situations:

    - Situation 1—sales of physical goods when the trader is based in a different Member State to the customer and the customer is willing to physically obtain the goods on the same basis as a domestic customer. This includes cases where a consumer is willing to: have goods delivered to an address the seller already delivers to; collect goods from a retailer if that retailer already offers that option; or organise onward delivery via a third party. However, this provision will not oblige a business to deliver outside its current delivery area (i.e. if a business currently does not deliver to other Member States it will not be forced to do so under the Regulation). Example: A British customer wishes to buy a refrigerator and finds the best deal on a German website. The customer will be entitled to order the product and collect it at the trader's premises or organise delivery himself to his home.

    - Situation 2—purely electronically supplied services such as cloud services, data warehousing services and the provision of firewalls (excluding those providing access to copyright protected content such as online distributors of digital music, software, games and e-books). Example: A British consumer wishes to buy hosting services for her website from a Swedish company. She will have access to the service, can register and buy this service without having to pay additional fees compared to a Swedish consumer.

33 Proposal for a Regulation 9611/16 of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

- Situation 3—'same place' services, where the services provided by the trader in a Member State different from that of the customer's Member State of residence are supplied at the premises of the trader or physical location where the trader operates. This provision will prohibit traders such as car rental companies and amusement park operators that are offering services in a particular location from applying different general conditions of access. Example: A British family visits a French theme park and wishes to take advantage of a family discount on the price of the entry tickets. The discounted price will be available for the British family.

- **Prohibition on discrimination for reasons related to payment:** Article 5 prevents companies from blocking a sale for reasons related to payment. Companies that choose to accept a particular payment method (e.g. a particular credit card) will not be able to reject transactions with that payment method on the basis of the residency of the customer or where the payment card/account is located. To address fraud risks, this will only apply where the transaction uses two-factor authentication (e.g. chip and pin).

2.18 The Government submitted an Explanatory Memorandum[34] on 15 June 2016, in which the Parliamentary Under-Secretary of State and Minister for Intellectual Property at the (then) Department of Business (Baroness Neville-Rolfe) indicated that the Government welcomed the proposed Regulation, but indicated a number of changes the Government would like to see made to the proposal.

2.19 During Council negotiations, the UK managed to secure text in line with its policy position, including an exemption for certain microbusinesses related to thresholds for registration for VAT, and ensuring that the geo-blocking Regulation did not undercut existing European Consumer Protection law. A General Approach was agreed at Competitiveness Council on 28 November 2016.[35] The General Approach extended the transposition period for the Regulation to eighteen months, which means that it will apply to the UK for a shorter period before it leaves the EU.

2.20 Trilogue negotiations between the co-legislators began soon thereafter, with the major point of disagreement in trilogue negotiations being the scope of the regulation, with European Parliament representatives making it clear that they wanted digital services which provided access to copyright protected works to be included in the Regulation.

2.21 On 21 November 2017 negotiators reached agreement on a package of amendments.[36] The Committee wrote to the Government seeking an update on the compromise text, as well as further clarification of whether a UK-EU agreement would be necessary for the Regulation to benefit UK consumers.[37]

34 Explanatory Memorandum submitted by the Minister at the Department of Business, Energy and Industrial Strategy (15 June 2016).

35 Council of the European Union, Geo-blocking: Council agrees to remove barriers to e-commerce (28 November 2016).

36 Euractive.com, Negotiators agree to end geo-blocking in move ahead on EU ecommerce files (21 November 2017).

37 Second Report HC HC 301–ii (2017–19), chapter 6 (22 November 2017).

The Minister's letter of 12 December 2017[38]

2.22 The Parliamentary Under-Secretary of State at the Department of Business, Energy and Industrial Strategy (Lord Henley) informs the Committee that the final compromise text is in line with UK objectives. In particular, the Minister notes that:

- the agreement retains an exemption for microbusinesses related to the threshold for registration for VAT;
- it ensures that the regulation does not undercut existing European Consumer Protection law, specifically the Rome I and Brussels I regulations;
- the scope of the Geo-blocking Regulation will not include copyright-protected services, both audiovisual and non-audiovisual;
- instead, the Commission will re-examine the scope of the Regulation based on an assessment of how it is working in practice, as set out in the Regulation's review clause. This will be activated two years after the entry into force of the Regulation.

2.23 In response to the Committee's question as to whether the UK would be able to retain the effects of the Geo-blocking Regulation through domestic rules alone or whether a bilateral UK-EU agreement would be necessary to retain these effects after the UK leaves the EU, the Minister states: "It is our view that cross-border mechanisms require bilateral agreement between two parties."

2.24 However, this response does not resolve the apparent contradiction between the Government's view that, post-exit, UK-based businesses directing activities towards the EU market will have to comply with the Regulation, but that a bilateral agreement will be necessary for the UK to apply similar requirements to EU-based businesses.

2.25 Some additional information about the Committee's previous scrutiny of the Government on this point is provided below.

Application of the Regulation to UK-based businesses and vice versa

2.26 Recital 13 of the Regulation states that it applies to all traders operating within the Union, including businesses with their establishment outside the EU:

> "The effects for customers and on the internal market of discriminatory treatment in connection to commercial transactions relating to the sales of goods or the provision of services within the Union are the same, regardless of whether a trader is established in a Member State or in a third country. Therefore, and with a view to ensuring that competing traders are subject to the same requirements in this regard, the measures set out in this Regulation should apply equally to all traders operating within the Union."[39]

38 Letter from the Minister, BEIS, to the Chairman of the European Scrutiny Committee (12 December 2017).

39 Proposal for a Regulation 9611/16 of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

2.27 The preamble to the Regulation also states that businesses are only covered to the extent that they direct their activities towards customers in the EU:

> "Regarding international trade, traders established in third countries are only within the scope of the Regulation to the extent they sell (or intend to sell) goods or services to customers in the Union."[40]

2.28 The (then) Minister who produced the Government's explanatory memorandum on the proposal (Baroness Neville Rolfe) wrote that businesses in third countries would be bound by the Regulation, but that consumers in third countries would not benefit from its effects:

> "Currently, the text (recital 13) states that businesses based in third countries, but who operate in the European Union, are to be bound by this regulation."
>
> "Consumers in third countries may not see any direct benefit from the regulation and would be susceptible to geoblocking or price discrimination from businesses in Member States. This could cause consumers based in third countries to pay more for goods or services from the EEA."[41]

2.29 In its report on 25 January 2017,[42] the Committee asked the Government to provide more clarity regarding the extent UK businesses would, after the UK has left the EU, continue to be constrained by the main provisions in the Regulation. In the Minister's letter of 27 June 2017,[43] Lord Prior (Baroness Neville-Rolfe's successor) responded that:

> "The proposed geo-blocking Regulation includes a third country provision, whereby, a trader, based in a third country, who 'directs activities' to consumers based in the European Economic Area (EEA), will be bound by this Regulation. Therefore the Regulation will apply equally to all traders (whether established in a Member State or those established in a third country) operating within the European Union."

2.30 In the same report (25 January 2017), the Committee asked the Minister to explain whether, if the Government chose to retain the Regulation in domestic legislation following Brexit, this would provide UK consumers seeking to purchase goods or services from EEA businesses with the same protections against unjustified geo-blocking as that those the Regulation will provide customers in EU Member States, or whether a bilateral agreement with the EU would be necessary to achieve these effects. The Minister stated that: " The Government will consider whether an agreement between the UK and EU is needed for this Regulation to benefit UK consumers."[44] This appeared to imply that the Government was unsure whether a bilateral agreement would be necessary to retain the effects of the Regulation.

40 Proposal for a Regulation 9611/16 of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

41 Letter from the Minister to the Chairman of the European Scrutiny Committee (19 December 2016).

42 Twenty-eighth Report HC 71–xxvi (2016–17), chapter 1 (25 January 2017) .

43 Letter from the Minister to the Chairman of the European Scrutiny Committee (27 June 2017).

44 Letter from the Minister to the Chairman of the European Scrutiny Committee (27 June 2017).

2.31 In the same report, the Committee also asked the Government to explain the basis of this discrepancy, if it considered that the EU was able to impose geoblocking obligations on third country providers but that the UK could not do likewise. The Minister answered the question very indirectly, with the observation that: "The Regulation will only apply to UK businesses to the extent they operate within the European Union."[45]

2.32 In our report on 22 November 2017,[46] we pressed the matter again, asking the Government to clarify whether the UK, when it leaves the EU, would be able to retain the beneficial effects of the geo-blocking regulation through domestic rules alone, or whether a bilateral UK-EU agreement would be necessary to retain its effects. In the Government's most recent letter, the Minister states that "It is our view that cross-border mechanisms require bilateral agreement between two parties."[47]

2.33 This is helpful, in that it appears to amount to a recognition, however oblique, that a bilateral agreement will be necessary to retain the effects of the Regulation, and that UK law will not be able to do so. However, the Government has still not provided a clear explanation of why this is the case, as requested by the Committee. Further scrutiny is therefore necessary.

Previous Committee Reports

Second Report HC 301–ii (2017–19), chapter 6 (22 November 2017); Twenty-eighth Report HC 71–xxvi (2016–17), chapter 1 (25 January 2017); Nineteenth Report HC 71–xvii (2016–17), chapter 2 (23 November 2016); Seventh Report HC 71–v (2016–17), chapter 3 (6 July 2016).

45 Letter from the Minister to the Chairman of the European Scrutiny Committee (27 June 2017).

46 Second Report HC 301–ii (2017–19), chapter 6 (22 November 2017).

47 Letter from the Minister, BEIS, to the Chairman of the European Scrutiny Committee (12 December 2017).

3 Equal Pay and the Gender Pay Gap

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Women and Equalities Committee
Document details	(a) Commission report on the implication of the Commission Recommendation on strengthening the principle of equal pay between men and women through transparency; (b) Commission Communication: EU Action Plan 2017–19 Tackling the gender pay gap
Legal base	—
Department	Education (Government Equalities Office)
Document Numbers	(a) (39236), 14735/17, COM(17) 671; (b) (39246), 14733/17+ ADD 1, COM(17) 678

Summary and Committee's conclusions

3.1 The principle of equal pay has been enshrined in the EU Treaties since 1957 and can now be found in Article 157 TFEU. It is also incorporated in Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

3.2 The UK first introduced equal pay legislation in 1970, before joining the EU, in the form of the Equal Pay Act 1970. Equal pay provisions which aim to comply with and implement EU equal pay law referred to above are now set out in the Equality Act 2010. This Act falls within Clause 2 of the European Union (Withdrawal Bill) as "EU-derived domestic legislation", a sub-category of EU law to be retained in UK law after the UK's exit from the EU ("EU retained law"). Also, Clause 4 of the Bill is drafted to include directly effective rights in the body of EU law to be retained in the UK after Brexit (EU retained law). Directly effective rights are provisions of EU treaties which are sufficiently clear, precise and unconditional to confer rights directly on individuals. They can be relied on in national law without the need for implementing measures. In the Explanatory Notes to the Bill, the Government provides some examples of directly effective rights which would be converted into domestic law as a result of this clause and the equal pay provision in Article 157 TFEU is included in that non-exhaustive list.

3.3 The gender pay gap across the EU has remained static over the last five years, with women in the EU earning on average 16% less per hour than men do.[48] A 2013 Commission report found that the practical application of equal pay provisions in the Member States remains problematic. In view of this, in March 2014, the Commission

48 Source: Women in the EU earn almost 16% less per hour than men do across economic sectors: Source Eurostat 2011. The data on the gender pay gap is based on the Structure of Earnings Survey (SES) methodology which is carried out every four years by Eurostat http://epp.eurostat.ec.europa.eu/cache/ITY_SDDS/en/earn_grgpg2_esms.htm.

adopted a Recommendation on strengthening the principle of equal pay between men and women through transparency. Recommendations are not legally-binding on Member States.[49]

3.4 Document (a) is a report on the extent of implementation of that Recommendation by Member States. It is mostly based on information provided by the Member States by 31 December 2015. In assessing the level of national implementation, the report looks at the effectiveness of the Recommendation to determine what, if any, further action is needed.

3.5 The main points highlighted by the report are outlined in further detail at paragraphs 3.18–3.21 below. In summary, the Commission concluded that there is a shortfall in implementation. Although most Member States have some pay transparency measures in place, a third do not. The Commission will therefore continue to monitor Member States' compliance with the equal pay principle, including through enforcement and the annual European Semester exercise. It also concludes that the limited response to the Recommendation means that targeted EU measures, including legislative proposals, possibly may be needed.

3.6 In the light of the report's conclusions, the Commission has issued an Action Plan for 2017–2019 (document (b)). The details of the Action Plan are set out at paragraphs 3.26–3.35 below.

3.7 There have been two relevant developments reported in the UK media recently concerning flawed and altered data submission by some companies and concerning gender pay gaps reported by Government departments. We report these in more detail in paragraphs 3.14–3.17 below.

3.8 The Government's view on both documents is that the UK has a positive record on gender pay gap, introducing "ground-breaking" regulations on reporting on gender pay gap data by large employers. It remains committed to eliminating the overall UK gender pay gap. It notes that the UK is unlikely to be affected by the further legislative areas in this policy area due to Brexit.

3.9 **We thank the Minister (Anne Milton) for her two Explanatory Memoranda.**

3.10 **These documents are not legislative. We understand from the Government that not even the Action Plan is likely to have any significant impact on the UK before Brexit.**

3.11 **However, the documents highlight the gender pay gap as an important issue which the Government will need to take forward on its own after Brexit and after a transition/implementation period. We note some concerning recent developments in the UK concerning the submission of gender pay gap data by companies legally required to do so and continuing gender pay gap shortfalls in Government departments. They are reminders of the importance of maintaining effective supervision and enforcement on equal pay issues in the UK.**

3.12 **We therefore ask the Minister to tell us in due course:**

49 See Article 288 TFEU.

(i) **Why she did not take account of a proposed transition period when assessing the possible impact on the UK of the EU's proposed future actions on the gender pay gap set out in document (b)?**

(ii) **Is the Government confident that it can maintain its own independent and progressive commitment to equal pay and gender pay gap issues once outside "all existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures" of the EU (see the 15 December European Council Guidelines on transition).[50] How will the Government take policy and law forward in this area? Does the Government envisage making any changes to any equal pay related "EU retained law" in future, using the delegated powers to be provided by the European Union (Withdrawal) Bill, once enacted?**

(iii) **How strong is the Government's own commitment as an employer to eliminating the gender pay gap when one of its most recently formed departments, the Department for Exiting the EU, has a reported gender pay gap of 15.26%?[51] This compares very unfavourably to the Minister's own department, where the mean gender pay gap is 5.3%.[52]**

(iv) **Why were the devolved administrations not consulted on these two documents? The Minister's explanatory Memorandum recognises that the Scottish and Welsh administrations can impose specific equality duties on public bodies in Scotland, including on pay transparency[53] and equal opportunities is devolved to Northern Ireland. We accept that these documents are non-legislative, but in particular the Action Plan describes actions which could influence equal pay and gender pay gap policy across the UK after Brexit and transition.**

3.13 **Given the interest of the previous Women and Equalities Committee in this topic (see their Report on the Gender Pay Gap),[54] we retain these documents under scrutiny until we receive a response from the Minister. We also draw these documents to the attention of the current Women and Equalities Committee.**

Full details of the documents

(a) Report from the Commission to the European Parliament, the Council and the European and Economic Social Committee on the implication of the Commission Recommendation on strengthening the principle of equal pay between men and women through transparency: (39236), 14735/17, COM(17) 671; (b) Communication from the Commission to the European Parliament, the Council and the European and Economic Social Committee: EU Action Plan 2017–19 Tackling the gender pay gap: (39246), 14733/17 + ADD 1, COM(17) 678.

50 http://www.consilium.europa.eu/media/32236/15-euco-art50-guidelines-en.pdf.

51 Based on mean hourly rates.

52 As for footnote 4.

53 Although most of the Equality Act 2010 is reserved, the Scottish Government can impose specific equality duties on public bodies in Scotland, including on pay transparency, as can the Welsh Assembly Government, in respect of public bodies in Wales. Competency for equal opportunities is devolved in Northern Ireland, i.e. it is a transferred matter. However, since no action is required under this report, the devolved administrations may merely wish to note its findings.

54 HC 584, Second Report of the Session 2015–16, "The Gender Pay Gap".

Recent developments in the UK on the gender pay gap

3.14 The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017[55] require companies and public sector bodies with more than 250 employees to submit annual gender pay gap data to the Government. A portal has been provided for this purpose.[56]

3.15 There have been recent reports in the Financial Times (FT)[57] about alleged altering of gender pay gap data by four UK companies, subsequent to submitting data to the Government. In one instance, it is alleged that data was changed because the FT's investigation highlighted that the data sets in question were statistically implausible.

3.16 The Department for Education, who is responsible for the gender pay gap portal is reported to have said that employers are legally liable for the accuracy of the 14 data points required to be submitted. Published data has to be signed off at a senior level by employers, but the Government does not check the information. If there is evidence that information being submitted by employers is inaccurate, it can be investigated and subject to enforcement by the Equality and Human Rights Commission.[58] All companies and public sector bodies must submit their data to the portal by 4 April 2018. But the Financial Times reported that the number of companies to have done so already is quite low.[59]

3.17 The gender data gap figures for Government Departments were reported in the Press on 19 December.[60] These figures show that women are being paid less than men across the civil service although the figures compare favourably to other public sector organisations. The disparities range from a 16.9% gap in the Department for Transport (measured on a mean hourly rate basis) to 3% in the Department for Digital, Culture, Media and Sport. In the newly created Department for Exiting the EU, the figure is 15.26%. However, there has been a fall in the overall gap from 13.6% to 12.7%. The BBC reported on 19 December that the civil service, which employs 419,000 staff, compares favourably with the public sector as a whole, where women are paid on average 19.4% less than men and the private sector where the figure is 23.7%.

Document (a): Commission report on the Recommendation

3.18 The Recommendation proposed four specific measures to aid wage transparency, with Member States being encouraged to implement at least one and whichever is the most appropriate for national circumstances. The measures proposed were:

- the right of employees to obtain information on pay levels;
- reporting on pay at company level;
- pay audits at company level; and
- making equal pay, including pay audits, part of the collective bargaining process.

55 SI 2017 No 172.

56 A link to the portal is provided here.

57 Financial Times Online, 15 December, following an investigation by that newspaper. Hugo Boss UK, Dana UK Axle, Eastgate Care Group and Age UK North Tyneside are all alleged to have altered their figures at least once, with Hugo Boss alleged to have changed its submission three times.

58 See footnote 3.

59 By Wednesday 13 December, only 368 out of an estimated 9000 duty-holders had submitted data.

60 http://www.bbc.co.uk/news/uk-politics-42405703.

3.19 It also included other measures that go beyond wage transparency but contribute to pay equality: improved statistics (providing Eurostat with Gender Pay Gap data annually), defining the "work of equal value" in national legislation, developing gender-neutral job specifications and evaluations, consistent monitoring of the equal pay principle and enforcement of remedies to combat pay discrimination.

3.20 The key points highlighted by the report are:

- Pay transparency is instrumental in the effective application of the equal pay principle in practice;
- Only Sweden has implemented all four "wage transparency" measures in its national law;
- Although most Member States have some measures in place, almost a third do not;
- Given that gap in implementation and that unequal pay is still a problem in the EU,[61] the Commission will continue to monitor Member States' compliance with the equal pay principle, including through enforcement and the annual European Semester exercise; and
- The limited response to the Recommendation suggested that targeted EU (legislative) measures may possibly be needed.

3.21 The UK is highlighted in the report as being a Member State which:

- has legislation on pay transparency (together with ten other Member States) and has either adopted new pay transparency measures or improved existing measures (as have five other Member States);
- obliges larger employers (more than 250 employees) to report on their gender pay gaps;
- has company reporting obligations that apply exclusively to the public sector;
- provides a definition of "work of equal value" in legislation;
- has imposed an obligation on Employment Tribunals to order that an employer who has lost an equal pay case to carry out an equal pay audit, unless an exemption applies; and
- in which an employer cannot prevent, whether contractually or otherwise, employees discussing or disclosing their pay (in fact, such "gagging" action by an employer is unenforceable rather than unlawful).

61 Women in the EU earn almost 16% less per hour than men do across economic sectors: Source Eurostat 2011. The data on the gender pay gap is based on the Structure of Earnings Survey (SES) methodology which is carried out every four years by Eurostat http://epp.eurostat.ec.europa.eu/cache/ITY_SDDS/en/earn_grgpg2_esms.htm.

The Government view of document (a)

3.22 The Minister for Women (Anne Milton) at the Department of Education (Government Equalities Office) highlights the UK's positive record in this area in her Explanatory Memorandum of 7 December 2017. It has a strong interest in equal pay and gender pay gap issues. It is committed to eliminating the gender pay in the UK (18.4%).

3.23 The Minister points out that in the UK the full-time gender pay gap is lower than it has ever been. It has recently put in place "ground-breaking" regulations to require large employers (over 250 employees) to publish their gender pay gap data annually, with breaches of the regulations enforceable by the Equality and Human Rights Commission. She notes that the statutory deadlines for publishing on the government's online service are 30th March for the public sector and 4th April 2018 for private and voluntary sector employers. She adds that following the launch of the guidance produced jointly with Advisory, Conciliation and Arbitration Service (ACAS), official communications to all employers potentially in scope and other activity aimed at influential businesses and public sector employers, thousands have signed up to the service indicating that they are on track to comply.

3.24 The Minister adds:

> "In its report, the Commission states that it will continue to monitor Member States' compliance with the equal pay principles, including by enforcing measures where appropriate and in the context of the annual European Semester exercise. The report recognises that lack of visible progress and the persisting gender pay gap suggests a possible need for further targeted measures at EU level."

3.25 However, she emphasises that the Government believes that any firm proposals are unlikely to be adopted before the UK leaves the EU.

Document (b): Action Plan 2017–2019

3.26 The Commission recognises that there are continuing problems in the labour market, including:

- segregation along horizontal lines (with men and women employed in different sectors) and vertically (where men are over-represented in supervisory and management roles);
- stereotypes, reinforced by inadequate work-life policies, for examples on caring responsibilities and limited flexible working opportunities; and
- a lack of transparency and unaddressed discrimination.

3.27 The Commission has identified eight main strands of action to improve the situation. These are set out below.

Improving the application of the equal pay principle

3.28 The Commission will assess the need for further legal measures to improve enforcement of the principle and will further monitor and enforce existing EU rights.

Combating segregation in occupations and sectors

3.29 The Commission will support practices to tackle early on in education and professional life stereotypes leading to differences in the employment of women and men in different fields. The Commission will support companies and other employers in their efforts to ensure equal pay and to attract and retain the underrepresented sex.

Breaking the glass ceiling: initiatives to combat vertical segregation

3.30 The Commission will support practices improving gender balance in decision making processes and positions across sectors.

Tackling the care penalty

3.31 The Commission will support women's economic empowerment by promoting work-life balance policies.

Better valorising women's skills, efforts and responsibilities

3.32 Segregation in occupations and in sectors is pervasive and the situation is changing only slowly. In the shorter or medium term, measures are also needed to improve wages in female-dominated occupations as a recognition of the skills, efforts and responsibilities mobilised in female-dominated sectors.

Fighting the fog: uncovering inequalities and stereotypes

3.33 The Commission will keep collecting and providing the relevant data about the existing gender pay gap and its consequences on earnings and pensions.

Alerting and informing about the gender pay gap

3.34 The Commission will actively engage in awareness raising activities about the gender pay gap and provide guidelines on the principle of equal pay.

Enhancing partnerships to tackle the gender pay gap

3.35 The Commission will continue to engage with key players to exchange good practices, provide funding and address the consequences of the gender pay gap through the European Semester process.

The Government view of document (b)

3.36 The Minister continues in a separate Explanatory Memorandum of the same date:

> "The actions outlined in the communication will take place over a number of years, and so may come into effect after the UK has left the EU."

3.37 She repeats the point made earlier about the UK's full-time gender pay gap being lower than it is has ever been and the Government's commitment to eliminating it. However, she says the Government recognises the need to go further and so supports the Commission's proposed Action Plan.

3.38 She also repeats her earlier references to recent pay transparency measures taken by the Government (see paragraph 3.22).

3.39 She describes a number of supporting actions the Government is taking to close the gender pay gap through a number of different policies and programmes:

> "To address horizontal segregation we are funding programmes in schools and colleges to increase the take-up of maths and physics and to support better teaching of maths, science and computing in schools and to raise awareness of the range of careers that STEM qualifications offer, through programmes such as STEM ambassadors, of whom 42% are women.
>
> "The government is running a number of programmes to tackle occupational segregation in sectors where this is particularly prevalent. For example, funds and initiatives to foster the pipeline and support local work to increase the number of female leaders in education, and setting up the Strategic Transport Apprenticeship Taskforce to address the skills shortage across the transport industry and support greater gender parity with the working population.
>
> "The Government is supporting the work of the Hampton-Alexander Review which has set out a number of targets and recommendations for business, including: re-affirming the 33% target for women on boards of FTSE 350 companies by 2020, as set out in the Davies Review; and setting a voluntary combined target for 33% women in Executive Committees and the layer directly below—to strengthen the talent pipeline—in the FTSE 350 by 2020. We believe that a voluntary, business-led approach with support from government is the best way for the UK to create sustainable change in the composition of its boards. Our approach has seen representation of women on FTSE 100 boards increase from 12.5% in 2011 to 28.1% today.
>
> "In the 2017 Budget £5 million in funding was allocated to increasing opportunities and support for returners in the public and private sector. We will be working with employers across the public and private sector to understand how returners can be supported back into permanent employment.
>
> "The Government has introduced legislation, which extended the existing legal right to request flexible working to all employees with 26 weeks' continuous service. We have also introduced Shared Parental Leave. Shared Parental Leave and Pay enables working parents to share up to 50 weeks of leave and up to 37 weeks of pay in the first year of their child's life."

3.40 She concludes that she hopes that we will see that the Government takes gender pay gap and related issues "very seriously". She adds: "We will work with the Commission to both share and learn from good practice; to contribute to their further proposals and to engage with other stakeholders."

Previous reports

3.41 None.

4 Swiss participation in the EU Railways Agency

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; waiver granted; further information requested
Document details	Recommendation for a Council Decision authorising the Commission to open negotiations with the Swiss Confederation to amend the Agreement between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road with a view to enabling the participation of the Swiss Confederation in the European Union Agency for Railways
Legal base	Non-legislative; Article 218 TFEU is the legal basis for negotiations between the EU and third countries; Council Decision; QMV
Department	Transport
Document Number	(39249), 14507/17, COM(17) 664

Summary and Committee's conclusions

4.1 The European Commission requests a decision[62] from the Council to authorise negotiations with the Swiss Confederation with a view to enabling it to participate in the European Union Agency for Railways (ERA).

4.2 Regulation 2016/796[63] allows countries which are not members of the European Union to participate in ERA. The Swiss Confederation requested such participation in 2013. The Swiss Confederation have already cooperated with ERA for a number of years, and adopted legal provisions in the areas of rail interoperability and safety.

4.3 The Parliamentary Under Secretary of State for Transport at the Department for Transport (Paul Maynard MP) provides a clear analysis of the terms of Swiss participation within ERA, if negotiations are successfully concluded.[64] These are summarised in our conclusions, below. Regarding Brexit, the Minister states that the Government is carefully considering the implications of this decision and that it is a matter for UK-EU negotiations.

4.4 Officials have contacted the Committee to indicate that the decision is likely to be taken in January, although the exact date of the relevant Council meeting has not yet been published.

62 Recommendation for a Council Decision 14507/17 authorising the Commission to open negotiations with the Swiss Confederation to amend the Agreement between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road with a view to enabling the participation of the Swiss Confederation in the European Union Agency for Railways

63 Regulation (EU) 2016/796 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Railways and repealing Regulation (EC) No 881/2004

64 Explanatory Memorandum 14507/17 from the Minister (DfT) to the Chairman of the European Scrutiny Committee

4.5 **The terms of the Swiss Confederation's prospective participation in the EU Railways Agency (ERA) are considered politically important by the Committee because of their implications in the context of the UK's withdrawal from the European Union: they provide a useful template of the standard terms of participation in ERA for third countries. In this regard, the Committee notes that:**

- **Regulation (EU) 2016/796 permits countries which are not members of the European Union to participate in ERA; and that**
- **third countries which participate in ERA can sit on the management board and have a role in the development of EU technical standards and safety initiatives.**

However:

- **only countries which have adopted and are applying Union law, or equivalent national measures, in the field covered by Regulation 2016/796, can participate in the Agency;**
- **third countries which participate in ERA do not have voting rights; and**
- **arrangements for third countries to participate in ERA include provisions regarding financial and staffing arrangements.**

4.6 **The Committee notes the Minister's assurance that the Government is considering carefully the potential implications of Brexit for UK participation in ERA, and that this will be a matter for negotiations.**

4.7 **We ask the Government to provide us with:**

- **a short summary of Government engagement to date with UK stakeholders regarding future UK participation/non-participation in ERA (and observance/non-observance of relevant EU rules), and a short summary of these views;**
- **a cost/benefit analysis of UK participation/non-participation in ERA (and observance/non-observance of relevant EU rules) and cooperation in the field of rail safety and standards post-withdrawal; and**
- **an update on the Government's thinking as to whether it intends to apply to participate in ERA (as it does the European Aviation Safety Agency) and, if so, whether it intends to do so on the same terms as the Swiss, or on other terms (if the latter, please specify).**

4.8 **The Committee grants the Government a waiver to support the proposed Council Decision to authorise negotiations regarding participation of the Swiss Confederation in ERA at the relevant Council meeting in January. In the meantime we retain the proposal under scrutiny and request a response to the above questions by the end of February 2018.**

Full details of the documents

Recommendation for a Council Decision authorising the Commission to open negotiations with the Swiss Confederation to amend the Agreement between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road with a view to enabling the participation of the Swiss Confederation in the European Union Agency for Railways: (39249), 14507/17, COM (17) 664.

Background

4.9 ERA was established to facilitate the development of an open and competitive European rail market. ERA's primary objective is to assist with the implementation of European Union legislation, which is aimed at improving the competitive position of the rail sector by providing the European Commission with technical advice in the fields of railway safety and interoperability. It plays a key role in assisting with the implementation of the Railway Safety and Interoperability Directives.[65] ERA also acts as the system authority for the European Rail Traffic Management System ("ERTMS") project, which has been established to create common railway signalling standards throughout Europe.

4.10 The Agency contributes, on technical matters, to the implementation of the European Union legislation aiming at improving the competitive position of the railway sector by:

- enhancing the level of interoperability of rail systems;
- developing a common approach to safety on the European railway system; and
- contributing to creating a Single European Railway Area without frontiers guaranteeing a high level of safety.

4.11 In addition, the European Union Agency for Railways will become, from 2019 onwards, the European Authority to:

- issue single EU-wide safety certificates to railway undertakings;
- issue vehicle authorisations for operation in more than one country; and
- grant pre-approval for ERTMS infrastructure.

4.12 ERA, which is based in Lille and Valenciennes in northern France, has approximately 160 members of staff.

The proposal[66]

4.13 Article 75(1) of Regulation (EU) 2016/796 allows countries which are not members of the European Union to participate in ERA. The Swiss Confederation requested such participation in 2013.

65 Directive (EU) 2016/798 of the European Parliament and of the Council of 11 May 2016 on railway safety (recast) Directive (EU) 2016/797 of the European Parliament and of the Council of 11 May 2016 on the interoperability of the rail system within the European Union.

66 Recommendation for a Council Decision 14507/17 authorising the Commission to open negotiations with the Swiss Confederation to amend the Agreement between the European Community and the Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road with a view to enabling the participation of the Swiss Confederation in the European Union Agency for Railways

4.14 The proposed Decision would authorise the European Commission to open negotiations with the Swiss Confederation to amend the Land Transport Agreement of 21 June 1999—an existing bilateral agreement between the European Community and Swiss Confederation on the Carriage of Goods and Passengers by Rail and Road—in order to provide the basis for future participation of the Swiss Confederation in the Agency.

4.15 The Swiss Confederation has already cooperated with ERA for a number of years, and adopted legal provisions in the areas of rail interoperability and safety. The Swiss Confederation attends the meetings of the Interoperability and Safety Committee set up under Regulation (EU) 2016/797 of the European Parliament as an observer.

The Government's view

4.16 On 5 December 2017 the Parliamentary Under Secretary of State for Transport at the Department for Transport (Paul Maynard MP) submitted an explanatory memorandum to Parliament in which he outlined the Government's views on the proposed Council Decision.[67]

4.17 The Minister observes that:

- participation in ERA would enable the Swiss Confederation to have a role in the development of EU technical standards and safety initiatives;
- the negotiating Directives set out in the Annex to the proposed Council Decision make it clear that the Swiss Confederation would not have the right to vote on ERA decisions and that Swiss participation will be subject to arrangements made in accordance with Article 75(2) of Regulation 2016/796 which, amongst other things, stipulates that while arrangements may provide for third countries to sit on the ERA management board, they are not permitted to vote; and
- Article 75(2) also states that such arrangements will include provision about financial arrangements and staff.

4.18 The Minister states that the Government is considering carefully all the potential implications arising from the UK's exit from the EU, including the implications for the continued participation in ERA, and that the UK's continued participation in the Agency as a third country, as well as continued cooperation in the field of rail safety and standards, will be a matter for negotiations.

Previous Committee Reports

None.

67 Explanatory Memorandum 14507/17 from the Minister (DfT) to the Chairman of the European Scrutiny Committee.

5 State of Paediatric Medicines in the EU

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Health Committee
Document details	Report from the Commission: State of Paediatric Medicines in the EU—10 years of the EU Paediatric Regulation
Legal base	—
Department	Health
Document Number	(39173), 13779/17, COM(17) 626

Summary and Committee's conclusions

5.1 Prior to 2007, the development and testing of paediatric medicines was unsatisfactory. The EU's Paediatric Medicines Regulation[68] was adopted in 2006 to address these weaknesses. Ten years on, the Commission has assessed the impact of the Regulation. It concludes that the Regulation has been effective at boosting the development of paediatric medicines. Nevertheless, these positive developments are not spread evenly across all therapeutic areas, but concentrate in some, often linked to research priorities in adults rather than children. There have also been issues about the availability of licensed medicines and long deferrals of clinical trials.

5.2 The Commission suggests that further scrutiny is required of why major therapeutic advances have failed to materialise in diseases that are rare and/or unique to children and which, in many cases, are equally supported by the orphan legislation.[69] A joined evaluation of the Paediatrics and Orphan Regulations will be undertaken. In the meantime, the Commission will promote a positive agenda, including: additional transparency; speedier completion of Paediatric Investigation Plans (PIPs); delivering regular updates about developments and trends; fostering international cooperation and harmonisation; and support for projects such as the European Reference Networks.

5.3 The Regulation gives the European Medicines Agency (EMA) and its Paediatric Committee primary responsibility for handling PIPs and the systems of waivers for medicines that are unlikely to benefit children and of deferrals in relation to the timing of the paediatric testing to be conducted. The EMA is taking action to improve these processes.

5.4 The Parliamentary Under-Secretary of State for Health (Lord O'Shaughnessy) is unable to confirm the extent to which the Government agrees—or disagrees—with the report. This is largely because the report's conclusions are based on an EU-wide sample and further work would be needed to confirm whether the conclusions apply to the UK.

68 Regulation (EC) No 1901/2006 of 12 December 2006 on medicinal products for paediatric use.

69 Regulation (EC) No 141/2000 of 16 December 1999 on orphan medicinal products. Orphan medicinal products are intended for the diagnosis, prevention or treatment of life-threatening or very serious conditions that affect no more than 5 in 10,000 people in the European Union. Due to the small usage, the pharmaceutical industry has little financial interest in their development.

5.5 The Minister nevertheless confirms that, while the UK is still represented at the EMA Paediatric Committee, the UK will work with other regulators and stakeholders to undertake the activities proposed in the report. The degree to which the UK will collaborate with the EU on paediatric medicines post-Brexit is still to be confirmed.

5.6 **We note that the Government is unable to confirm the extent to which the Government agrees—or disagrees—with the report. As the UK prepares to leave the European Union in 14 months' time, and as future levels of collaboration with the EU are still to be confirmed, we consider it necessary for the UK to be aware of the level of paediatric medicine development domestically.**

5.7 **We ask that the Minister:**

- **commits to the immediate launch of a UK-specific analysis to be completed well in advance of the UK's withdrawal from the EU;**
- **explains how third countries currently engage with the EU on the development of paediatric medicines and confirm whether or not that level of engagement would be satisfactory post-Brexit or if the UK will be seeking closer engagement; and**
- **explains the impact of the UK diverging from EU rules in the areas of both paediatric and orphan medicines.**

5.8 **We consider this document to be of sufficient political importance to merit a report to the House and we draw it to the attention of the Health Committee.**

Full details of the documents

Report from the Commission: State of Paediatric Medicines in the EU—10 years of the EU Paediatric Regulation: (39173), 13779/17, COM(17) 626.

Background

5.9 The Regulation is structured around three main objectives:

- to encourage and enable high-quality research into the development of medicines for children;
- to ensure, over time, that most medicines used by children are specifically authorised for such use with age-appropriate forms and formulations; and
- to increase the availability of high-quality information about medicines used by children.

5.10 To meet these objectives the Regulation sets up a system of obligations, rewards and incentives, and puts in place measures to ensure that medicines are regularly researched, developed and authorised to meet children's therapeutic needs. It is based on the idea that a company should be obliged to screen every product it develops for its potential use in children, thereby progressively increasing the number of products with paediatric indications.

5.11 The Regulation obliges companies to agree at an early stage of development a paediatric investigation plan (PIP) with the European Medicines Agency (EMA). The Regulation has a direct impact on companies' research and development (R&D) expenditure, as it imposes an investment in paediatric research. If a company fails to comply with the agreement, the respective (adult) marketing authorisation may be blocked. The Regulation therefore goes beyond the mechanisms set up by the legislation on medicines for rare diseases ('Orphan Regulation').

5.12 An incentive system is in place to support paediatric drug development. This includes offering extended supplementary protection certificates (SPCs), which grant an extra period of market exclusivity, and specific rewards for developing orphan medicines.

5.13 The Regulation promotes high-quality information and high-quality research through other measures, such as:

- an EU network of investigators and trial centres carrying out paediatric research;
- an EU inventory of paediatric needs;
- a public database of paediatric studies; and
- a requirement for companies to submit any existing paediatric studies on authorised medicinal products for scrutiny by regulatory authorities.

Content of the report

5.14 The report found that, overall, the Regulation has been successful at greatly increasing the development of paediatric medicines in the EU, with paediatric medicine development now an integral part of overall medicine development. There has been an increase in paediatric research and in the number of new paediatric products.

5.15 While the surge of new medicines for children brought about by the Regulation is positive, in most cases these are linked to adult R&D programmes. While children therefore benefit where adult needs overlap with paediatric ones, the Regulation has had less impact on diseases biologically different in adults and children or only existing in children.

5.16 Over 1000 PIPs have been agreed since the Regulation was implemented, and 131 were complete by end of 2016. As it can take up to ten years to bring a medicine to market, this is in line with expectations. Agreed PIPs cover a wide range of therapeutic areas, but there is a concentration in immunology/rheumatology (14%), infection diseases (14%), cardiovascular disease and vaccines (each 10%).

5.17 The report notes that a new paediatric licence, or adding paediatric information to existing medicines, does not automatically translate into the immediate availability of the product to all paediatric patients in the EU. This may be due to pending reimbursement decisions at national level, prescribing habits (where physicians may not directly switch to newly authorised products) or a staggered roll-out of new products.

5.18 The Regulation allows for deferrals of paediatric trial requirements for companies to ensure research carried out is safe, and to avoid delaying authorisation of adult use. These deferrals are widely used, but they are often long, leading to the delayed completion of the paediatric studies compared to the authorisation of the corresponding adult product.

5.19 The system of incentives to companies has not worked particularly well, with only 55% of completed PIPs having benefitted from a reward.

5.20 Costs per PIP are estimated at €18.9 million and overhead costs of €720,000. The extension of SPCs as a reward causes higher costs for national healthcare providers as these products delay entry of generic products into the market. However, the report concludes that the wider societal benefits of the Regulation, including some spill-over from R&D investment to jobs and growth, means that the Regulation's benefits outweigh the additional costs of certain medicines.

5.21 The proportion of clinical trials that include children has increased from 8.25% in 2007 to 12.4% in 2016. Challenges remain, however, in recruiting participants and these frequently lead to delays.

Explanatory Memorandum of 16 November 2017

5.22 The Minister believes that no immediate policy implications arise for the UK, noting that there are no recommended actions for Member States to take.

5.23 He notes that the findings are based on an EU-wide sample and further work would be needed to confirm whether or not the conclusions are applicable in the UK. To determine whether the Commission assessment has accurately represented the cost of the PIP mechanisms, further work would be required to assess both the payer costs and wider societal benefits in full, as they apply in the round (in the EU), and specifically in the UK. As it stands, the Government is unable to confirm the extent to which it agrees—or disagrees—with the Commission's report.

5.24 The UK has nevertheless welcomed this opportunity to discuss the implementation of the Regulation based on the experience and opinions of interested stakeholders and the industry. While the UK is still represented at the EMA's Paediatric Committee, it will work with other regulators and stakeholders and patients/clinicians to undertake the activities proposed in the report with regards to improvements in the regulatory processes and the identification of true paediatric needs and of opportunities for paediatric drug development through international cooperation. These activities would ensure increased development and availability of licensed paediatric medicines for the years to come.

5.25 On the UK's exit from the EU, the Minister says:

> "The degree to which the UK will collaborate with the EU on paediatric medicines after the UK leaves the EU is still to be confirmed."

Previous Committee Reports

None.

6 Location of the European Medicines Agency and European Banking Authority

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Exiting the EU Committee, the Treasury Committee and the Health Committee
Document details	(a) Proposal for a Regulation amending Regulation (EU) No 1093/2010 as regards the location of the seat of the European Banking Authority; (b) Proposal for a Regulation amending Regulation (EC) No 726/2004 as regards the location of the seat of the European Medicines Agency
Legal base	(a) Article 114 TFEU, (b) Articles 114 and 168(4)(c) TFEU
Department	Health and Treasury
Document Numbers	(a) (39291), 15264/17, COM(17) 734; (b) (39292), 15263/17, COM(17) 735

Summary and Committee's conclusions

6.1 As a direct result of the EU's decision to leave the EU, the remaining EU countries (EU-27) agreed on 27 April 2017 that those EU Agencies with a seat in the UK must re-locate. The EU-27 took the decision on 20 November that the European Medicines Agency (EMA) should move from London to Amsterdam and that the European Banking Authority should move from London to Paris. The Commission accordingly proposes the necessary legislative amendments.

6.2 The Parliamentary Under Secretary of State for Health (Lord O'Shaughnessy) and Economic Secretary to the Treasury (Stephen Barclay) do not object to the EU's decision to relocate either the EMA or the EBA.

6.3 Lord O'Shaughnessy notes that the Commission's explanation of its proposal on the EMA includes a "Budgetary Implications" section in which it asserts that relocation will have budgetary implications, not least due to the early termination of the lease in London. The Commission goes on to make reference to the Council's Brexit negotiation directives of 22 May 2017 stating that the UK should fully cover the relocation costs. The Government observes that the budgetary section does not form part of the legislative change and so should not have been referenced by the Commission. This is particularly so, says the Minister, because relocation costs have not yet been resolved in the exit negotiations. The Joint UK-EU Report on the first phase of the exit negotiations noted that the UK had offered to discuss with Union Agencies located in London how they might facilitate their relocation, in particular as regards reducing the withdrawal costs.

6.4 As both proposals remained under scrutiny, the Government abstained from voting at the meeting of EU Ambassadors (COREPER) on 11 December. A joint Commission-UK statement noted that adoption of the proposals would be without prejudice to the UK or EU positions on the costs of relocating the EMA and EBA.

6.5 The annual accounts of the EMA for the financial year 2016 disclosed an estimated €448 million (£395 million)[70] rent for the remaining rental period between 2017 and 2039 as a contingent liability,[71] given that the rental contract does not include any exit clauses. While contingent liabilities in relation to other relocation costs are yet to be determined by the EMA, press reports in early August based on a private EMA briefing to MEPs put the total cost at over £500 million.[72] By contrast, the EBA's rental contract has a break-clause and so the relocation costs are likely to be substantially less.

6.6 **We note that the Government objects to the Commission's reference to the budgetary implications of relocating the EMA. As the Commission's Explanatory Memorandum does not form part of the legislative proposal, it is for the Commission to explain its proposal as it see fits. The objective of the measure is to provide a legislative basis for the relocation. Relocation will inevitably have a budgetary consequence—estimated at over £500 million for the EMA—and so we can understand why the Commission made reference to it.**

6.7 **We note too, however, that the UK has not agreed to cover the relocation costs fully, and we therefore agree that the Commission statement could have more clearly indicated that payment of the costs was subject to ongoing negotiations.**

6.8 **The Government does not take issue with the decision to relocate either of these Agencies. The Department for Exiting the EU reportedly said in mid-April that no decisions had been taken on this matter and that the issue would form part of the exit negotiations.[73] Noting that the EU-27 agreed on 27 April 2017 that the Agencies should be relocated, we would welcome clarity on whether the UK did indeed seek to retain the Agencies during the negotiations.**

6.9 **These proposals are in principle uncontentious, effectively putting into law a decision that has already been taken. It is nevertheless the case that they need to go through the ordinary legislative procedure involving both the Council and the European Parliament. We ask the Minister to state whether the Government has identified any appetite in the European Parliament to amend the Regulations at all, or if they are likely to pass swiftly through both institutions.**

6.10 **Pending responses to the queries raised, we are holding the proposals under scrutiny. Given the link to the EU exit negotiation, we consider that they will be of interest to the House. We also draw them to the attention of the Exiting the EU Committee, the Health Committee and the Treasury Committee.**

70 £1 = €0.87985 or €1 = £1.13655 as at 30 November.

71 Subject to the outcome of the withdrawal negotiations.

72 'Relocation cost for European Medicines Agency hits €600m after lease bungle', The Times, 2 August 2017.

73 'London battles to keep hold of two main EU agencies', Financial Times, 16 April 2017.

Full details of the documents

(a) Proposal for a Regulation amending Regulation (EU) No 1093/2010 as regards the location of the seat of the European Banking Authority: (39291), 15264/17, COM(17) 734; (b) Proposal for a Regulation amending Regulation (EC) No 726/2004 as regards the location of the seat of the European Medicines Agency: (39292), 15263/17, COM(17) 735.

Background

6.11 The European Banking Authority (EBA) was established under Regulation (EU) No 1993/2010. The European Medicines Agency (EMA) was established under Council Regulation (EEC) No. 2309/93, which was replaced by Regulation (EC) No 726/2004.

6.12 Document (a) relocates the seat of the EBA from London to Paris and document (b) relocates the seat of the EMA from London to Amsterdam. The Council decided that the UK-based EU agencies must be relocated from the UK in the context of the UK's withdrawal from the EU. The remaining 27 Member States selected Paris and Amsterdam by votes in the margins of the General Affairs Council (Article 50) meeting on 20 November 2017. These decisions triggered the need to amend the respective Regulations accordingly.

Explanatory Memorandum of 18 December 2017 on the seat of the EBA

6.13 The Economic Secretary to the Treasury (Stephen Barclay) notes the Government's intention to maintain sound regulatory frameworks and global standards and to build a new relationship with the European Banking Authority. He indicates that the UK abstained on scrutiny grounds when the proposal was put to a vote at COREPER on 11 December. The UK and EU agreed a joint statement recording that consideration and adoption of the proposals (on both the EMA and EBA) was without prejudice to the UK or EU positions on the costs of relocation.

Explanatory Memorandum of 15 December 2017 on the seat of the EMA

6.14 The Parliamentary Under Secretary of State for Health (Lord O'Shaugnessy) accepts the need to amend the legislation in order to reflect the relocation, but he expresses concern about references to the budgetary implications in the Commission's Explanatory Memorandum (CEM). The Commission states, he reports, that the relocation of the EMA will have budgetary implications. This is particularly due to the early termination of its current rental contract in London. The Commission, observes the Minister, expects the UK to meet the costs of the relocation in line with the Council's negotiation directives. He expresses his concerns in the following terms:

> "[The] inclusion of the budgetary implications of the relocation does not form part of the legislative change. The UK therefore objects to the CEM because there is not yet any agreement on relocation costs as they will be subject to EU exit negotiations. The point was made at COREPER on 11

> December 2017 when the UK abstained from voting because this matter needs to pass parliamentary scrutiny. The decision to abstain from voting was a cross-Whitehall agreement to manage this issue.
>
> "To address this point, the joint report from the negotiators of the EU and the UK does not include withdrawal costs within the scope of the components of the financial settlement that the UK accepts. Instead it notes that the UK Government has offered to discuss how they can help to facilitate this relocation with a view to reducing the EMA's withdrawal costs."

6.15 The Minister explains that a vote was taken at COREPER on 11 December and the UK abstained. The vote had taken place prior to passing the UK parliamentary scrutiny procedure and the Commission agreed with the UK that the consideration and adoption of the relevant legislative proposals would be without prejudice to the 8 December Joint Report.

Previous Committee Reports

None.

7 Coordination of social security systems

Committee's assessment	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

7.1 As part of the free movement of people, the EU has created a system for the coordination of social security benefits for EU residents who move between different Member States.[74]

7.2 In December 2016, the European Commission tabled a legislative proposal to bring the relevant legislation (primarily Regulation 883/2004 and its Implementing Regulation)[75] in line with the case law of the European Court of Justice on access to benefits for unemployed EU citizens; to clarify the rules for determining which EU country is responsible for payment of benefits; and to amend the provisions of the Regulation on access to unemployment benefit, salary-related family benefits and long-term care benefits.

7.3 The Committee has set out the details of this proposal in some detail in previous Reports in February and November 2017.[76] We have retained it under scrutiny because of its political importance. Notably, the provisional Withdrawal Agreement on the UK's EU exit foresees the continued application of social security rights derived from the Regulation (including the proposed amendments) for UK citizens already resident in the EU and vice versa on the date of the UK's withdrawal from the EU.[77] The aim is to ensure that social security entitlements that are available to those UK and EU nationals directly affected by Brexit will not disappear after Regulation 883/2004 ceases to apply to the UK.[78]

74 For example, the Regulation is the legal basis for the system that allows many of the 190,000 British pensioners living in other EU countries to access healthcare locally on the same basis as citizens of that country, and to have the costs of their care reimbursed by the Government using a so-called S1 form issued by the UK. The effects of the Regulation have also been extended to the four EFTA countries (Iceland, Norway, Liechtenstein and Switzerland).

75 Regulation 987/2009.

76 See the Committee's Reports of 8 February 2017 and 13 November 2017.

77 Joint Report by DExEU and the European Commission (8 December 2017).

78 In addition, the Government is now seeking an "implementation period" for the immediate post-Brexit period, during which it is likely that Regulation would continue to apply as it did while the UK remained a Member State (i.e. including to EU citizens who move to the UK after March 2019). The European Council's guidelines for the transitional arrangement envisage that the entire EU acquis will continue to apply to the UK during this period, as if it were still a Member State. EU Member States are free to determine at national level how non-EU or EFTA nationals can access their social security systems.

7.4 The proposal to amend Regulation 883/2004 remains under consideration within the European Parliament and the Council, although the latter has established its negotiating position on most elements of the draft legislation through two separate partial general approaches (see paragraphs 7.20 to 7.26 below). The Government has been broadly supportive of the proposed amendments. Nevertheless, the Committee refused to grant a scrutiny waiver that would have allowed the Government to support a partial general approach at the EPSCO Council of 7 December 2017, as the information we had requested on the substance of the proposals had not yet been provided.

7.5 In response, the Minister for Employment (Damian Hinds) abstained from voting at the Council meeting, and wrote to the Committee on 14 December with a comprehensive update on the status of the negotiations within the Council. He also explained that the Government had been supportive of both partial general approaches adopted by the Council so far (see "Background" below).[79] However, the Minister felt unable to provide further information on the Government's contingency planning if the agreement on grandfathering the social security rights of UK nationals already living in the EU is, for whatever reason, not ratified by March 2019.[80]

7.6 Negotiations on the proposed amendments are set to continue in the first half of 2018, with the European Parliament's Employment Committee expected to adopt its negotiating position in June. The incoming Bulgarian Presidency of the Council is hoping to reach a final Council general approach, on access to unemployment benefit, at the meeting of the EPSCO Council the same month. Trilogues would then take place in the second half of the year, with a view to adoption of the new Regulation by the end of 2018.

7.7 **The proposal to amend Regulation 883/2004 remains politically important, given the impact it could have on individual citizens' lives, and its specific significance within the "citizens' rights" chapter of the draft Withdrawal Agreement on the UK's exit from the EU.**

7.8 **We thank the Minister for his detailed letter of 14 December, which clarifies the substance and implications of the two partial general approaches adopted by the Council in October and December last year. These are, we are assured, in line with the Government's own objectives for the revision of the Regulation. The Committee has taken note of the Bulgarian Presidency's intent to finalise the Council's position on the draft Regulation at the EPSCO Council in June 2018. We hope to receive information on the substance of any compromise legal text on unemployment benefits in good time before that meeting.**

7.9 **With respect to the implications of Brexit for UK and EU nationals currently benefitting from Regulation 883/2004, the Committee welcomes the provisional agreement on citizens' rights announced by the Government and the European Commission on 8 December. However, we are disappointed that the Government is still unable to provide any information on its contingency planning should the Withdrawal Agreement, and its Citizens' Rights chapter, not be ratified for whatever reason.**

7.10 **Failure to 'grandfather' existing EU social security rights, for those who have already exercised their freedom of movement before Brexit, would have serious**

79 Letter from Damian Hinds to Sir William Cash (14 December 2017).

80 When the Committee first asked for details of the relevant contingency plans in February 2017, the Minister replied that "it would not be appropriate to comment further on this before negotiations have begun".

consequences for many thousands of people. In the absence of a legally-binding Agreement, the rights UK nationals in the EU derive from Regulation 883/2004 to access, aggregate and export social security entitlements would disappear, and it is not clear whether there would be a unified EU-wide response to address the resulting legal uncertainty for UK nationals. Similarly, it is unclear how the UK Government could unilaterally prevent disruption in the lives of those affected, for example if healthcare providers in Spain and France no longer recognised S1 forms issued by the UK. We will continue to press the Government to provide more clarity about its contingency plans for such an eventuality.

7.11 **Looking further ahead, the Committee had also asked whether the Government would seek a new social security arrangement with the EU after Brexit, for citizens of both sides who want to move between the two *after* the UK's withdrawal from the EU. The Minister was, again, unable to provide clarity on this point. However, if the Government agrees to the post-Brexit transitional arrangement proposed by the EU,[81] Regulation 883/2004 (and freedom of movement more broadly) would apply to the UK until the end of 2020 in any event. That would provide further time for the details of any new EU-UK social security agreement to be negotiated.[82] We will closely follow the negotiations on the transitional period and any subsequent UK-EU economic partnership, especially where these entail a continued obligation on the UK to apply EU law (including Regulation 883/2004).**

7.12 **Given that the proposal remains under discussion, and in view of the uncertainties triggered by Brexit, we retain the proposal under scrutiny. We also draw these developments to the attention of the Work and Pensions Committee.**

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

7.13 Regulation 883/2004 determines which EU Member State is responsible for the calculation and payment of social security benefits for mobile EU citizens who move within the Union. Such citizens are, in principle, entitled to use the local benefits system on the same basis as nationals of their host Member State, including unemployment benefit, child benefit and state pensions, as well as having a right to access short- and long-term healthcare.

7.14 In December 2016, the European Commission tabled a legislative proposal to bring Regulation 883/2004 in line with the case law of the European Court of Justice on access to benefits for unemployed EU citizens; clarify the rules for determining which EU country is responsible for payment of benefits; and to amend the provisions of the Regulation

81 Guidelines for the transitional period adopted by the European Council on 15 December 2017.

82 As we have noted, the EU has only concluded such arrangements with the four EFTA countries which have accepted freedom of movement (although the Government could seek bilateral arrangements with specific EU countries instead).

on access to unemployment benefit, salary-related family benefits and long-term care benefits. The Committee has set out the details of this proposal in some detail in previous Reports in February and November 2017.

7.15 The amendments to the Regulation are unlikely to apply before the UK withdraws from the EU in March 2019. However, the Regulation, and this pending amendment, are nonetheless significant. The UK and EU have both agreed to maintain its provisions for EU nationals resident in the UK on "Brexit Day" and vice versa as part of any Withdrawal Agreement under Article 50 TEU. The two sides have also accepted the need for a mechanism to apply future changes to the Regulation, as agreed at EU-level, to citizens within the scope of the Withdrawal Agreement. In addition, the Government is now seeking an "implementation period" for the immediate post-Brexit period, during which it is likely that Regulation 883/2004 would continue to apply as it did while the UK remained a Member State.

7.16 The Government has been broadly supportive of the proposed amendments. On 23 October 2017, EU Employment Ministers agreed a partial general approach on the elements of the Commission proposal relating to equal treatment and the determination of applicable national legislation. The Committee considered the Council's position, and the Government's override of scrutiny to support its adoption, at our meeting on 13 November. We retained the proposal under scrutiny and asked a number of detailed questions of the Minister of State for Employment (Damian Hinds) about the Government's position, including in the Article 50 negotiations.[83]

7.17 On 22 November, before we had received a reply to our previous Report, the Minister informed us that the Estonian Presidency was also seeking to secure a second partial general approach on long-term care benefits and family benefits at the EPSCO Council on 7 December.[84] He noted that the Government was "prepared to accept the current text", adding that the proposed coordination of long-term care benefits "should not have any financial impact for the UK". As regards the inclusion of family benefits within the scope of the Regulation, the Minister confirmed that the UK "does not administer any benefits of this type", and so there should "only be a limited financial impact".

7.18 To enable the Government to support this partial general approach, the Minister requested a scrutiny waiver in advance of the Council meeting. Given the importance of the dossier and the lack of information we had received from the Government at that point, the Committee did not grant the Minister a scrutiny waiver.[85] The Council did adopt the partial general approach at its meeting on 7 December, with the UK abstaining as a consequence of the Committee's decision.

The Minister's letter of 14 December 2017

7.19 The Minister wrote to the Committee on 14 December, with information on both partial general approaches (of 23 October and 7 December), and the Government's position thereon.

83 Report of 13 November 2017.

84 Letter from Damian Hinds to Sir William Cash (22 November 2017).

85 Report of 6 December 2017.

The partial general approach of 23 October 2017: equal treatment

7.20 On 23 October, the EPSCO Council adopted a partial general approach[86] on the elements of the proposed Regulation relating to European Court of Justice case law on the "equal treatment" principle, which aligns the rights of EU citizens to access to social security with the rights of their host Member State's native citizens. In 2016, the Court had ruled that the separate Free Movement Directive allows Member States to use a "right of residence" test[87] to restrict access to certain non-contributory cash benefits claimed by economically inactive EU citizens resident in their territory under Regulation 883/2004.[88]

7.21 The original Commission proposal would have amended Regulation 883/2004 to codify this case law, without specifying explicitly to which non-contributory benefits the "right of residence" test could be applied. Because Member States could not agree on the scope of the codification (and in particular access to which types of benefits could be restricted under the Court's judgement), the partial general approach adopted by the Council would leave the relevant provisions of the Regulation unamended. The Government supported the Council's position on these provisions, and voted in favour of the compromise text on 23 October.[89]

7.22 In his letter of 14 December, the Minister provided further information on the implications of the Council's approach. He explained that the proposed text would allow the UK to continue to rely on the Court of Justice's judgement to apply the "right of residence" test before it grants a number of income-based benefits.[90] The Minister confirmed that it is the Government's view that the Court's jurisprudence allow the residence test to be applied to "social benefits" more widely, although that interpretation is clearly not shared by all other Member States.[91] Given that the Council's position allows the Government to continue taking its current approach, the Minister had supported its adoption.

86 The Council's general approach is considered "partial" because it only established the Council's position part of the proposal, and not—as is the usual practice—its entirety.

87 The "right of residence" test means that to qualify for certain benefits, an EU national must be actively looking for employment, be able to financially support themselves and have comprehensive sickness insurance. 80% of non-economically active mobile EU citizens derive either residence rights or entitlements to social security through working family members with whom they reside. As such, they will continue to be entitled to equal treatment irrespective of the Court's judgement.

88 See judgement in case C-308/14 *Commission v United Kingdom*. The details of this element of the proposal are set out in more detail in our Report of 13 November 2017.

89 Because of the delays in appointing members of the Committee following the 2017 general election, the Committee was unable to consider the proposal and the Minister's request for a scrutiny waiver in advance of the October Council meeting.

90 Child Benefit, Child Tax Credit, income-based Jobseeker's Allowance and income-based Employment Support Allowance.

91 As noted by the Maltese Presidency in June 2017, "One of the most contentious issues on which delegations could not reach agreement concerned the codification of the case C-308/14—Commission vs. UK. In particular, the discussions concerned whether this case applies to all non-contributory social security benefits, or whether it should apply restrictively to family benefits, such as the benefits at issue in that case".

The partial general approach of 7 December 2017: long-term care benefits and family benefits

7.23 On 7 December, the Council adopted a second partial general approach relating to the coordination of long-term care benefits and salary-related family benefits.[92] The Government abstained despite supporting the compromise text, as the Committee had refused to grant a scrutiny waiver.

7.24 In his letter of 14 December, the Minister confirms the UK does not provide any salary-related family benefits of the type now being brought within the scope of the Regulation. He explained, however, that the new legislation is expected to have a "limited" financial impact in the UK because it already pays a supplement to another Member State where that country is primarily responsible for the payment of a family benefit (Child Benefit and Child Tax Credits in the UK).[93]

7.25 Under the amendment to Regulation 883/2004, the salary-related family benefit will no longer be taken into account when calculating the supplement the UK must pay to the other Member State as it is considered exclusive to the parent, and therefore only payable by the country where the parent is insured. Another Member State would therefore not have to contribute towards it. The Council's partial general approach maintained this element of the Commission proposal, but also clarified that this new category of income-replacing benefits should also cover individual child-raising benefits allocated to a non-working parent raising a child (and hence being unable to take up work). The Minister explained:

> "Whilst we expect the UK to continue paying a family benefit supplement to other Member States, this amount is likely to be smaller than it would have been had the categorisation not been clarified by Council's decision at 7 December EPSCO."

7.26 With respect to the inclusion of a specific category of long-term care benefits in the Regulation, the Government's position is that the coordination of such benefits "should not extend the scope of the Regulation beyond what has already been established by Court of Justice case law". The Minister explained that the text presented to Ministers at the December EPSCO Council "preserves the *status quo* and is therefore acceptable to the Government".

Further discussions within the Council: Unemployment benefits

7.27 The Commission has also proposed revisions to the unemployment benefits chapter that would create new arrangements for the coordination of such benefits. At this stage,

92 This new category covers benefits "intended to replace income during child-raising periods". The UK currently does not provide a benefit that would fall within this category. See Commission Staff Working Document SWD(2016) 460, part 6 of 6, Annex XXV, p. 210.

93 Where entitlement to family benefits arises simultaneously for the same member of the family in more than one EU country, the implementing rules for Regulation 883/2004 set out a series of priority rules which help to determine which country will be primarily responsible for the payment of family benefits (to avoid dual entitlements). Each country concerned is required to calculate the amount of family benefits due for the family, and the Member State that provides the highest amount of family benefits (country A) is required to pay in full. The other Member State (country B) then pay a supplement to that country A for a maximum of 50 per cent of that amount, or the maximum amount of family benefit that would have been provided by country B if it were responsible for paying.

no substantive discussions have yet taken place on these provisions within the Council. However, the Government estimates "that the cost impact of the proposed changes will be small".

The implications of Brexit for social security coordination

7.28 Lastly, the Minister's letter summarised the elements on social security of the provisional Withdrawal Agreement reached with the EU in December 2017.[94] Under the Agreement, once ratified by both sides, the EU's existing social security coordination rules will cover EU citizens who on the "specified date"[95] are, or have been, subject to UK social security legislation and vice versa. The Agreement will also cover EU citizens residing in the UK and UK nationals residing in the EU on the specified date. The Minister explained:

> "For those in scope, on a reciprocal basis the UK and the EU will continue to aggregate social security contributions made both before and after exit, meaning those who have paid into a system, and may pay in future, will have their contributions protected. The right to export benefits to both EU Member States and the UK will continue, as under the current EU rules, for those covered by the deal. Again, for those in scope, the Government will continue to pay an uprated UK State Pension to EU Member States and, in accordance with EU rules, provide associated healthcare cover in the EU, and *vice versa*."

7.29 As noted by the Committee in its Report of November 2017, the UK and EU have also agreed that a mechanism should be established to decide jointly on the incorporation of future amendments to Regulations 883/2004 and its Implementing Regulation (including the pending proposals which we have described in this Report) in the Withdrawal Agreement. The details of that mechanism are to be decided in the second phase of the negotiations, which are expected to start at the end of January 2018.

7.30 The Minister also refers to the questions put to him by the Committee in respect of the possibility of a "no deal" Brexit, if the Withdrawal Agreement, for whatever reason, is not ratified. In such an eventuality, the system of social security coordination would abruptly cease to apply to EU citizens in the UK and vice versa. This would mean UK pensioners in the EU would overnight become ineligible for the system that enables their local healthcare costs to be paid by the NHS, and affect the ability of other UK nationals living in the EU to access, aggregate and export their current social security entitlements.[96]

7.31 The Minister provided no substantive detail on the Government's fall-back strategy for UK nationals living in the EU if the Withdrawal Agreement falls through. His letter refers briefly to the proposed post-Brexit transition period, which the Government and the European Commission are due to negotiate in the coming weeks. Although the Minister did not state so explicitly, this transitional arrangement, if one is agreed, is likely to keep the existing system created by Regulation 883/2004 in place for those who move between the

94 Joint Report by DExEU and the European Commission (8 December 2017).

95 The EU's position is that the "specified date" would be the end of any post-Brexit transitional period, not 29 March 2019.

96 The Committee has set out the implications of a "no deal" scenario in more detail in its Report of 13 November 2017, paras. 15.37 to 15.40.

UK and the EU for its duration. The provisions of the Withdrawal Agreement, as described above, would then only take effect after the transition ends (which, the Commission has argued, should be on 31 December 2020).

7.32 With respect to any future coordination of social security rules for individuals not covered by the Withdrawal Agreement, the Minister stated only that this "will need to be discussed at a later stage of the negotiations with the European Union". He did not reply directly to the Committee's questions in this respect, namely whether the Government would seek a similar arrangement post-Brexit, and how that would be affected by its decision to end the free movement of people.[97]

Previous Committee Reports

Thirty-first Report HC 71–xxix (2016–17), chapter 8 (8 February 2017); First Report HC 301–i (2017–19), chapter 15 (13 November 2017); and Fourth Report HC 301–iv (2017–19), chapter 8 (6 December 2017).

97 Switzerland is the only non-EEA country to which the system created by Regulation 883/2004 applies under the terms of a bilateral EU-Switzerland Agreement. However, it is part of a wider Treaty which also extends free movement of people to that country, which the Government has explicitly ruled out. See paragraph 15.34 of our Report of 13 November 2017 for more information.

8 Combating payment fraud

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	Proposed Directive on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/41/JHA
Legal base	Article 83(1) TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Number	(39018), 12181/17 + ADDs 1–2, COM(17) 489

Summary and Committee's conclusions

8.1 As the number and value of transactions using non-cash payment instruments, particularly credit and debit cards, has increased in recent years, so too has the risk of fraud. Non-cash payment fraud is often connected to the activities of organised crime groups. It also undermines trust in the integrity of online payment systems and the digital single market. A 2001 Council Framework Decision requires Member States to criminalise fraud and counterfeiting of non-cash means of payment but the Commission considers that it is out of date, resulting in regulatory gaps. It says that a "technology neutral" approach is needed to keep pace with the latest developments, such as the growth in payments made on mobile devices and payments using virtual currencies (bitcoin) or other forms of e-money (for example, vouchers and coupons). It has therefore proposed a new Directive which would replace the 2001 Framework Decision and establish a more comprehensive framework for preventing, investigating and prosecuting non-cash payment fraud.

8.2 The 2001 Framework Decision is one of a number of EU police and criminal justice measures which formed part of the UK's 2014 "block opt-out" decision and ceased to apply to the UK in December 2014. The proposed Directive 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. In his Explanatory Memorandum, the Security Minister (Mr Ben Wallace) told us that the measures proposed in the Directive were "broadly in line with existing UK legislation and practice on fraud" but added that the Government was carrying out further analysis to determine whether any legislative changes would be needed if the UK were to opt in. He indicated that the three-month deadline for opting in at the negotiating stage (thereby securing a vote on the outcome) would expire on 15 December 2017.

8.3 We noted that, in deciding not to rejoin the 2001 Framework Decision in 2014, the then Coalition Government had made clear that it was "not for Europe to impose minimum standards on our police and criminal justice system".[98] We asked the Minister whether this remained the Government's position or whether different considerations now applied. In his response dated 1 December, the Minister confirms that the position

98 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.*

remains unchanged. He sets out the factors which will inform the Government's opt-in decision and says that the Government no longer has concerns regarding Article 9 of the proposed Directive on corporate liability.

8.4 **The Minister writes shortly before the expiry of the three-month opt-in deadline on 15 December. We ask him to inform us of the Government's decision and the reasons for it.**

8.5 **The Minister does not address the wider question we raised about the longer-term prospects for maintaining cooperation in this area post-Brexit, given that the UK will not be part of the network of operational contact points responsible for exchanging information on non-cash payment fraud and supporting cross-border investigations and prosecutions. We ask him to do so when he next writes to us. He should explain what practical mechanisms will be available to the UK to ensure effective operational cooperation post-exit. We also request regular progress reports on negotiations.**

8.6 **Pending further information, the proposed Directive remains under scrutiny. We draw this chapter to the attention of the Home Affairs Committee.**

Full details of the documents

Proposal for a Directive of the European Parliament and of the Council on combating fraud and counterfeiting non-cash means of payment and replacing Council Framework Decision 2001/413/JHA: (39018), 12181/17 + ADDs 1–2, COM(17) 489.

Background

8.7 Our earlier Report listed at the end of this chapter provides an overview of the proposed Directive and the Government's position.

The Minister's letter of 1 December 2017

8.8 In his Explanatory Memorandum on the proposed Directive, the Minister indicated that Article 9 of the proposed Directive on the liability of legal persons "arguably goes further than domestic law currently". We noted that the UK participates in two EU criminal law measures—Directives establishing minimum rules on trafficking in human beings and on the sexual abuse and exploitation of children—which contain identical provisions on corporate liability. We asked the Minister to explain whether and why these provisions raised particular concerns in relation to non-cash payment fraud. In his response, the Minister says that he has sought further clarification from officials, adding:

> "I have now concluded that, as with the other two initiatives with identical measures, the UK law is sufficient as it stands to implement the draft Directive's provisions on liability of legal persons."

8.9 In deciding whether to opt into the proposed Directive, the Minister sets out the main factors to be considered:

- whether UK law is already broadly compliant with the changes proposed;
- the Government's approach to new legislative proposals in light of the outcome of the referendum on the UK's membership of the EU; and

- whether UK participation would provide opportunities for cross-border practical operational cooperation and a platform for ongoing dialogue on cross-border challenges and prioritisation.

8.10 The Minister continues:

> "On the first point, the UK is broadly compliant with the central aims of the proposed Directive. The offences set out in that proposed Directive are equivalent to those set out in the Fraud Act 2006 (sections 6 and 7), the Theft Act 1968 (sections 1, 7 and 22), the Criminal Attempts Act 1981 (section 1), the Computer Misuse Act 1990 (sections 2 and 3), and the Serious Crime Act 2007 (sections 44 to 46). The UK's existing offences meet the minimum standards as set out in the draft Directive. The UK also exceeds in some cases the sentences proposed by the draft Directive.
>
> "On the second point, the position is that 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."

Previous Committee Reports

First Report HC 301–i (2017–19), chapter 27 (13 November 2017).

9 Sustainable use of pesticides

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Environment, Food and Rural Affairs and the Environmental Audit Committees
Document details	Commission Report on Member State National Action Plans and on progress in the implementation of Directive 2009/128/EC on the sustainable use of pesticides
Legal base	—
Department	Environment, Food and Rural Affairs
Document Number	(39112), 13138/17, COM(17) 587

Summary and Committee's conclusions

9.1 Pesticides[99] are used, particularly by farmers, to kill or control pests and weeds. Outside the agricultural sector, pesticides have a wide range of uses, preserving wood or fabric, and protecting public health. However, because of their intrinsic properties, pesticides can be harmful to non-target organisms, and can have unwanted adverse effects on human health and the environment.

9.2 The EU Directive[100] on the sustainable use of pesticides, adopted in 2009, provides for a range of actions to achieve sustainable use by reducing the risks and impacts of pesticide use on human health and the environment and promoting the use of Integrated Pest Management (IPM) and of alternative approaches, such as non-chemical alternatives to pesticides. Member States are required to put in place National Action Plans (NAPs) setting out objectives, targets, measurements and timetables to reduce the risks and impacts of pesticide use. The Directive is based partly on the precautionary principle.[101] It was adopted alongside the Plant Protection Products Regulation.[102]

9.3 As required by the Directive, the Commission has reported on the NAPs and on progress in implementing the Directive. In summary, the Commission found that:

- there are significant gaps in many areas of the NAPs, for example in relation to aerial spraying, information to the public, the gathering of information regarding poisoning cases and measures to protect the aquatic environment; and
- Member States need to improve the quality of their NAPs, primarily by establishing specific and measurable targets and indicators for a long-term strategy for the reduction of risks and impacts from pesticide use.

99 Plant protection products which include herbicides, fungicides and insecticides used for plant protection.

100 Directive 2009/128/EC on the sustainable use of pesticides.

101 This applies when there are reasonable grounds for concern that potential hazards may affect the environment or human, animal or plant health, and when at the same time the available data preclude a detailed risk evaluation.

102 Regulation (EC) No 1107/2009 concerning the placing of plant protection products on the market.

9.4 The Minister for Agriculture, Fisheries and Food (George Eustice) observes that there are two inaccuracies in the Report. First, the Report indicated a failure by the UK to respond to the Commission's questionnaire in 2016 on this topic. Responding (see below) to a letter from the House of Lords EU Committee, the Minister clarified that the Government had engaged with the Commission on an informal basis and had provided the requested information. Second, the Report noted that the UK did not have certification systems in place to cover pest management advisors. The UK contends that there is no such obligation in the Directive and that the Commission recognised this when the Directive was adopted.

9.5 On possible further work to improve implementation, the Minister says that the UK will participate as the discussions go forward. It is helpful, he says, to share experiences with other Member States and to continue to develop ways to reduce risks from pesticides further. This should be done, the Minister believes, in the context of national plans that reflect the circumstances, frameworks and priorities of individual countries.

9.6 In his response to the House of Lords EU Select Committee, the Minister provides further detail:

- on the UK's withdrawal from the EU, the Minister notes that the legislation will be converted into national law—as with all retained EU laws, the UK would then, over time, have the opportunity, with Parliamentary scrutiny, to consider any changes to those laws so that the UK's regulatory framework is fit for purpose;
- regarding the sharing of best practice, the Government has considered the content of other NAPs and will keep this under consideration as the UK's own NAP is reviewed; and
- the approach to systematic monitoring of chronic poisoning continues to develop—in 2013, the Health and Safety Executive (HSE) Laboratory began the Prospective Investigation of Pesticide Applicators' Health, building on the earlier Pesticide Users' Health Study.

9.7 Finally, the Minister also reported back on the discussion at the 6 November Agriculture Council. There was widespread agreement that NAPs are a good way for Member States to tailor their approach to meeting the objectives of the Directive, and widespread support—including from the UK—for the principles of Integrated Pest Management.

9.8 **On the one hand, pesticides regulation is an example of the potential opportunities presented by the UK's exit from the European Union. The United Kingdom voted against[103] the original Plant Protection Products Regulation, and it has proved unpopular with industry.[104]**

9.9 **On the other hand, it is an example of some of the already recognised policy challenges to be addressed by the United Kingdom outside the European Union: how to balance environmental, health and agricultural considerations; how to maintain an internal market in the UK while allowing the respective administrations to develop their own policies in devolved areas such as this; how to comply—on a cross-border issue**

103 http://data.consilium.europa.eu/doc/document/ST-13690–2009-INIT/en/pdf.

104 https://www.nfuonline.com/news/latest-news/blog-eu-pesticides-regulation-is-failing-farmers/.

such as this—with the commitments made in respect of the island of Ireland; whether to continue to adhere to the EU's environmental principles, such as the precautionary principle; and whether and how to replace the reporting function currently fulfilled by the European Commission.

9.10 **We have taken note of the helpful clarification set out by the Minister in his letter to the House of Lords European Union Committee, and of his summary of the 6 December Agriculture Council meeting.**

9.11 **We are encouraged that the Government plans to continue its engagement with the Commission and other Member States on this policy area and we welcome the Government's commitment to consider the content of other Member States' NAPs when the UK's own NAP is reviewed in the next few months.**

9.12 **We have no further issues to raise with the Minister and we are content to clear this non-legislative Report from scrutiny. We report it to the House, though, as it provides a good example of some of the policy challenges to be tackled as the UK withdraws from the EU and develops its own policies, particularly in areas where the UK has had concerns about the EU's approach. We also draw it to the attention of the Environment, Food and Rural Affairs Committee and the Environmental Audit Committee.**

Full details of the documents

Commission Report on Member State National Action Plans and on progress in the implementation of Directive 2009/128/EC on the sustainable use of pesticides: (39112), 13138/17, COM(17) 587.

Background

9.13 The Directive on the sustainable use of pesticides (2009/128/EC) sits alongside Regulation (EC) No 1107/2009 concerning the placing of plant protection products on the market. The Regulation provides strict rules for controlling the marketing of plant protection products (PPPs) so that they can only be placed on the market and used if they meet a range of requirements on safety to people and the environment and on efficacy. Where use is authorised, conditions may well be attached.

9.14 The Directive supplements the controls provided in the Regulation with a framework of measures around good practice in the use of pesticides. These include requirements for training of pesticide users, testing of application equipment and promoting the use of approaches such as Integrated Pest Management (IPM).

9.15 The Directive requires Member States to put in place National Action Plans setting out: objectives and measures to reduce risks and impacts of pesticide use on human health and the environment; measures to encourage approaches or techniques to reduce dependency on the use of pesticides; indicators to monitor the use of plant protection products containing active substances of particular concern; and measures to implement the requirements of Articles 5 to 15 of the Directive.

9.16 The UK transposed the requirements of the Directive in the Plant Protection Products (Sustainable Use) Regulations 2012. These Regulations stand alongside incentive

arrangements and voluntary measures to deliver the requirements of the Directive. In particular, the 2012 Regulations ensure that those who work with PPPs are competent for the job, that their equipment is fit for purpose, that they have the necessary information, and take the necessary precautions, to minimise the risks. Some of the measures were new statutory requirements (such as the equipment testing scheme, although there was already a non-statutory scheme) and some were very similar to those already in operation under the UK's existing domestic laws on PPPs (such as the training and certification of people who work with PPPs). Where similar arrangements already existed in the UK, these were replicated to the extent required by the Directive, so as to provide a seamless transition without unnecessary changes for UK businesses.

9.17 The UK's National Action Plan (NAP) was developed in consultation with stakeholders and was published, as required by the Directive.[105]

9.18 The bulk of the Commission's report summarises the main provisions in the Member State NAPs and highlights some examples of good and bad practice. The report includes a general exhortation for Member States to continue to develop their plans and also identifies several discreet actions which the Commission will take to support Member States.

9.19 The Commission will take forward further work as follows:

- explore with Member States how systems for monitoring the impacts of pesticides on human health and the environment can be developed further;
- address the proposal by the Council and European Parliament that the relevant parts of the Directive should be included in cross-compliance;[106]
- support Member States in developing methodologies to assess compliance with IPM principles;
- work with Member States to develop a consensus on the development of harmonised risk indicators;
- disseminate to Member States examples of good practice in implementation of the Directive; and
- produce a further report to enable a fuller assessment of the state of implementation of the Directive.

The Minister's Explanatory Memorandum of 29 October 2017[107]

9.20 The Minister notes that discussion on further work is at an early stage and the UK will participate as the discussions go forward. It is helpful, he says, to share experiences with other Member States and to continue to develop ways to reduce risks from pesticides further. This should be done, the Minister believes, in the context of national plans that reflect the circumstances, frameworks and priorities of individual countries.

105 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/221034/pb13894-nap-pesticides-20130226.pdf.

106 The system whereby receipt of agricultural payments is conditional on compliance with various pieces of legislation.

107 Explanatory Memorandum dated 29 October 2017.

9.21 The Minister also notes that there are a couple of inaccuracies in relation to the UK which the Health and Safety Executive, as the UK regulator, will draw to the Commission's attention. These include the report's commentary on the UK's response to requests for information and the legal position on the certification of advisors.

9.22 Commenting on subsidiarity considerations, the Minister says:

> "The report does tend to suggest that the Commission is considering moving to harmonised positions on aspects of the Directive—for example monitoring schemes, the setting of targets and arrangements for Integrated Pest Management—that are currently at the discretion of Member States. This could be through a proposal for a Regulation to set more prescriptive rules. It is not possible to say at this stage whether that would give rise to subsidiarity concerns, but it is a possibility if a Regulation sought to reduce the ability of Member States to address their own requirements."

Letter of 14 December 2017 to the House of Lords EU Committee

9.23 Writing in response to a House of Lords EU Committee letter on the same topic, the Minister addresses a number of the concerns directed at the UK by the Commission.

9.24 On the Government's general approach to sustainable use, the Minister emphasises that the Government is committed to ensuring that risks to people and to the environment from the use of pesticides are minimised.

9.25 Regarding the UK's apparent failure to respond to the questionnaire, the Minister explains that the Government met with Commission officials to discuss their information requirements and then provided the information agreed at that meeting, The Government took that approach, rather than responding directly to the Commission's questionnaire, because it wanted to understand the context of the request and the way in which the Commission needed to use the information collected. The Government was also concerned that some of the information could not be provided with accuracy in the form requested.

9.26 The Minister observes that there were several inaccuracies in the Commission Report, the most significant of which was the suggestion that the Directive requires advisors to be certificated. That interpretation, he says, is not consistent with the Government's reading of the legislation, nor with the position taken by the Commission during the negotiation of the Directive.

9.27 The Minister comments on three specific areas raised by the House of Lords EU Committee:

- concerning restrictions on the use of pesticides in protected areas, key measures are detailed in the UK NAP and include requirements that the amount used and the frequency of use are as low as reasonably practicable, and that pesticide users obtain agreement or consult nature conservation authorities;
- regarding the system for collecting and disposing of empty containers and packaging, key measures include a number of legislative requirements for hazardous waste and the development of best practice by the Pesticides Forum's Container Management Working Group; and

- on systems for forecasting, warning and early diagnosis for pest and disease control, there are a number of commercial disease forecasting and monitoring services.

9.28 The House of Lords EU Committee requested explanations of the UK approach in a number of other areas:

- risk-reduction targets—these are not a legal requirement and in establishing the NAP, the Government concluded that setting such targets would not be an effective tool to drive sustainable pesticide use;
- certification of advisors—the UK maintained its requirement for certification of users but did not set a requirement for certification of advisors, partly because market forces within the sector already mean that advisors are effectively trained;
- granting derogations to allow aerial spraying to take place—UK derogations are issued on a limited basis for the use of a particular herbicide under the terms of nature conservation agreements to manage bracken encroachment in upland areas; and
- systematic monitoring of chronic poisoning. This is, as the Commission's Report acknowledges, a challenging area and the approach continues to develop. The Pesticide Users' Health Study was established in the late 1990s to monitor the long term health of individuals potentially exposed to low levels of pesticides on a longer term basis, and to help fill the gaps in knowledge about the extent and nature of pesticide-related ill health. In 2013, the HSE Laboratory began the Prospective Investigation of Pesticide Applicators' Health (PIPAH). This builds on the earlier scheme, collecting more detailed information about the study participants.

9.29 The Government plans to review the current NAP in the first half of 2018 and will consult on a draft. The EU (Withdrawal) Bill will ensure that Directive 2009/128/EC is converted into national law and so essentially the same legal provisions, including the requirement to have a NAP, will apply after Exit. This will provide continuity and stability for businesses and stakeholders. As with all retained EU laws, the UK would then, over time, have the opportunity, with Parliamentary scrutiny, to consider any changes to those laws so that the UK's regulatory framework is fit for purpose.

9.30 Commenting on the adoption of practices from other countries, the Minister observes that a feature of the Directive is that it recognises that Member States have different issues, priorities and cultures. In the UK, there is a relatively mature regime for managing the use of pesticides and one in which a mixture of regulation and voluntary approaches has a track record of delivery. In addition, environmental factors such as the UK climate and soil structures means that the UK risk profiles are different from those of other Member States. While the Government is therefore cautious about lifting measures from elsewhere, it has considered the content of other NAPs and will keep this under consideration as the UK's own NAP is reviewed.

9.31 Finally, the Minister reports back on the discussion at the 6 November Agriculture Council. There was widespread agreement that NAPs are a good way for Member States to tailor their approach to meeting the objectives of the Directive, and widespread support—

including from the UK—for the principles of Integrated Pest Management. A wide range of issues were flagged including: building the knowledge of pesticide users; the need for a transparent approach that attracts public confidence; the development of non-chemical options; the role of new technologies in plant breeding and pesticide application; and the difficulties of effective monitoring.

Previous Committee Reports

None.

10 UK Excessive Deficit Procedure

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Treasury Committee
Document details	Recommendation for a Council Decision abrogating Decision 2008/713/EC on the existence of an excessive deficit in the United Kingdom
Legal base	Article 126(12) TFEU; QMV (with the UK not voting)
Department	Treasury
Document Number	(39257), 14828/17, COM(17) 801

Summary and Committee's conclusions

10.1 The EU's Stability and Growth Pact (SGP) requires all Member States to maintain a budget deficit of less than three per cent of GDP, and to keep their government debt below 60 per cent of GDP. In 2008 the EU placed the UK in an Excessive Deficit Procedure (EDP) under the SGP, after the Government's budget deficit rose above the three per cent threshold.[108] Although EU law provides for sanctions where Member States do not correct budgetary imbalances when they are subject to an EDP,[109] the UK is exempt from these by virtue of Protocol 15 to the Treaties.

10.2 The other Member States confirmed the existence of a persistent budget deficit in the UK in April 2009 and in June 2015, although they recognised that the Government had implemented a fiscal consolidation programme following the financial crisis. The European Commission in November 2017 published its latest economic forecasts, which showed that the UK's deficit had decreased to 2.3 per cent in 2016–17, and was expected to remain below 3 per cent over the forecast horizon in 2020.

10.3 Based on these new statistics, the EU's Finance Ministers on 5 December 2017 formally abrogated the UK's Excessive Deficit Procedure. This means the UK is now subject to the "preventative arm" of the Stability and Growth Pact, where the Commission monitors government debt and deficit but no policy recommendations are made unless there is a perceived risk that the SGP's thresholds could be exceeded.

10.4 **As this Excessive Deficit Procedure concerned the UK, we consider its abrogation by the Council of political importance and report it to the House. We also draw it to the attention of the Treasury Committee.**

Full details of the documents

Recommendation for a Council Decision abrogating Decision 2008/713/EC on the existence of an excessive deficit in the United Kingdom: (39257), 14828/17, COM(17) 801.

108 Council Decision 2008/713/EC. It was considered by a previous Committee on 15 October 2008.

109 For example financial penalties. See paragraph 10.6 for more information.

Background

Stability and Growth Pact and the Excessive Deficit Procedure

10.5 The EU's Stability and Growth Pact aims to ensure that EU countries pursue sound public finances and coordinate their fiscal policies, avoiding excessive budget deficits or public debt. It is based on Article 126 of the Treaty on the Functioning of the European Union and the related Protocol 12.

10.6 The SGP consists of two elements, called "arms": the preventative arm (the default for any Member State) and the corrective arm (for Member States in breach or at risk of breaching the Pact's fiscal responsibility thresholds), called the Excessive Deficit Procedure (EDP). The EDP can only be opened by a qualified majority of the Council on a recommendation from the European Commission.[110] Where an excessive deficit is established, the Council also addresses recommendations to the Member State in question as to how that deficit should be reduced. If such recommendations are not followed the Council can decide on "sanctions", including:

- impositing of financial penalties;
- requiring the Member State to make a non-interest bearing deposit with the European Commission until the excessive deficit has been corrected; and
- asking the European Investment Bank to "reconsider its lending policy" towards the Member State in question.

10.7 The UK is subject to the EU's Stability and Growth Pact, but has a special position by virtue of Protocol 15 to the Treaties.[111] This exempts the UK from the requirement to avoid excessive government deficits, and instead establishes a looser obligation for the UK to "*endeavour* to avoid an excessive government deficit". The Protocol also exempts the UK from any sanctions the Council can impose on other Member States for failure to implement its recommendations to reduce the deficit (see above).

The UK's Excessive Deficit Procedure

10.8 On 8 July 2008, following a recommendation from the Commission, the Council decided that an excessive deficit existed in the United Kingdom, triggered in part by the Government's announcement in May that year that it was lowering income tax.[112] On the same date it issued a Recommendation to the Treasury with a view to bringing the excessive deficit situation to an end by the financial year 2009–10 at the latest. In December 2009, having decided earlier that year that the UK had not taken "effective action",[113] the Council issued a revised Recommendation which envisaged that the deficit would be sufficiently reduced by 2014–15.[114]

10.9 In June 2015 the Council again took the view that the UK had not taken effective action in response to its Recommendation of December 2009, although it recognised that

110 The Member State in question cannot vote on matters regarding its own Excessive Deficit Procedure.
111 http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016M/PRO/15&from=EN.
112 Council Decision 2008/713/EC. It was considered by a previous Committee on 15 October 2008.
113 Council Decision 2009/409/EC.
114 These Council Recommendations are not made public.

measures had been put in place within the confines imposed by the exceptional economic constraints created by the financial crisis.[115] It therefore asked the Government to correct its excessive deficit by financial year 2016–17. Specifically, it suggested the UK should reach a headline deficit of 4.1 per cent of GDP in 2015–16 and 2.7 per cent of GDP by the end of 2017.

10.10 In November 2017, the European Commission published its latest economic forecasts. These showed that the UK's budget deficit had dropped below the reference value of 3 per cent of GDP in 2016–17 and was expected to stay below that value beyond 2020. Although the Commission also found that government debt had reached 86.8 per cent of GDP, it expects it to decline in the coming years. As such, it recommended to the Council that it should close the Excessive Deficit Procedure. On 5 December 2017 the Council accepted the Commission's Recommendation and formally placed the UK back in the preventative arm of the SGP.[116]

10.11 The Chief Secretary to the Treasury (Elizabeth Truss) submitted an Explanatory Memorandum on the proposal to abrogate the EDP in respect of the UK on 18 December 2017. The Memorandum reiterated that the UK was never potentially subject to sanctions under the EU's Stability and Growth Pact. As a result of the adoption of the Council Decision, the UK is now in the preventative arm of the SGP alongside all other EU countries except France and Spain.

Previous Committee Reports

Thirty-Fifth Report HC 16–xxxi (2007–08), chapter 13 (15 October 2008); First Report HC 342–i (2015–16), chapter 79 (21 July 2015).

115 Council Decision 2015/1098. Cleared from scrutiny by the previous Committee on 21 July 2015.

116 Council of the EU, "UK's deficit back below 3% of GDP, Council closes procedure" (5 December 2017).

11 The European Police College: the Government's post-adoption opt-in decision

Committee's assessment	Legally and politically important
Committee's decision	Previously cleared from scrutiny (decision reported 13 November 2017); 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 Union agency for law enforcement cooperation (CEPOL), repealing and replacing Council Decision 2005/681/JHA
Legal base	Article 87(2)(b) TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Number	(36238), 12013/14, COM(14) 465

Summary and Committee's conclusions

11.1 The European Police College—CEPOL—is an EU Agency based (since September 2014) in Budapest. It provides training for senior police officers on the European dimension of policing. The UK has participated in CEPOL since its inception in 2000.[117]

11.2 In 2014, the Commission proposed a Regulation to align CEPOL's structure and governance with the principles set out in the Common Approach on EU decentralised Agencies agreed by the Commission, Council and European Parliament in July 2012 and to enable CEPOL to implement a new and more comprehensive European law enforcement training scheme. The Regulation repeals and replaces a 2005 Council Decision on which CEPOL was previously based.

11.3 The proposed Regulation was subject to the UK's Title V (justice and home affairs) opt-in Protocol (Protocol 21 to the EU Treaties), meaning that the UK would only be bound by the new Regulation if the Government decided to opt in. In light of concerns expressed by the Government at the time that the proposal would extend CEPOL's current mandate and "limit the flexibility for Member States to decide how police and other border and law enforcement training should be delivered", our predecessors recommended in September 2014 that the Government's opt-in decision should be debated before the three month deadline for opting in at the outset of negotiations expired in November 2014.[118] They made clear that the debate should address the consequences of not opting in to the proposed Regulation for the UK's continued participation in CEPOL.

117 CEPOL was established in 2000 and was co-located with the College of Policing for England and Wales at Bramshill in Hampshire. The Government announced the sale of the Bramshill site in December 2012 and made clear that CEPOL would be required to relocate. Budapest was agreed as CEPOL's new base in May 2014.

118 See para 22 of the Explanatory Memorandum submitted by the then Minister for Modern Slavery and Organised Crime (Karen Bradley) 7 August 2014.

11.4 The Government failed to schedule an opt-in debate and only informed our predecessors of its decision *not* to opt in to the proposed Regulation in March 2015, four months after the opt-in deadline had expired. The then Minister for Policing (Mike Penning) confirmed that the UK would continue to remain bound by the 2005 CEPOL Decision, adding:

> "The UK would be working with CEPOL according to the old Council Decision, while other Member States work according to the new Regulation.
>
> "Practically speaking, this may not be impossible, especially if the new Regulation does not significantly alter the focus of CEPOL. However, if the Commission considers that UK non-participation makes CEPOL inoperable, it could seek to have us ejected from CEPOL (from the 2005 Decision) through the provisions set out in Article 4a(2) of Protocol 21 of the JHA opt-in Treaty.
>
> "Clearly, this depends on a number of questions that are currently hypothetical: whether we opt in post-adoption; and whether, if we do not, the Commission seeks to trigger the ejection mechanism. However, should we reach that stage, it would be important to note that the Protocol sets a very high threshold for ejection. It requires the measure to be 'inoperable'—not merely inconvenient or difficult to operate. And it must be inoperable for the other Member States, not just for the UK. These are tough tests for the Commission to meet. But we are a long way from that point at the moment."[119]

11.5 Our predecessors noted that there was some uncertainty as to the political and practical feasibility of remaining part of CEPOL on the basis of the 2005 Council Decision and said:

> "We expect the Government to provide a detailed analysis of the options available to the UK to continue to participate in, or otherwise cooperate with CEPOL, once the draft Regulation has been adopted and the question of a possible post-adoption opt-in arises."

11.6 The Regulation was formally adopted in November 2015.[120] The changes to CEPOL's mandate and governance took effect on 1 July 2016. In July 2017 the Minister for Policing and the Fire Service (Mr Nick Hurd) informed us that the Government was "not minded" to opt in to the Regulation post-adoption, adding:

> "From a domestic UK policing training perspective, the Government is not convinced of the benefits of CEPOL. Its penetration across UK policing as a whole is limited: around 100 UK senior officers attend CEPOL courses every year. Many more law enforcement officers attend our UK domestic College of Policing. Existing networks, cooperation and working relationships will largely be maintained between our forces and their opposite numbers in other EU Member States, and the College of Policing's own International Academy will continue to work with other countries' forces."

119 See his letter dated 12 March 2015 to the Chair of the European Scrutiny Committee.
120 See Regulation (EU) 2015/2219.

11.7 He considered that any increase in CEPOL activity would "increase the pressure on College of Policing resources at a time when it is already facing the need to reduce costs, and divert resources away from other support to policing in the UK". Although the College of Policing was continuing to engage with CEPOL, the Minister anticipated that the Commission might seek to initiate the procedure set out in Article 4a of the UK's Title V opt-in Protocol to eject the UK from CEPOL. He added:

> "If the Commission does start ejection proceedings, I do not intend to challenge the inoperability decision in this case—although we would want to ensure the correct process is followed. The Government accepts that the differing management board roles, responsibilities and voting rights in this Regulation compared to the 2005 Decision could make CEPOL 'inoperable for other Member States or the Union'."[121]

11.8 We considered that the Minister's letter raised more questions than it answered. We asked:

- for an assurance that UK policing supported the Government's recommendation not to opt in to the new CEPOL Regulation now that it was in force;
- whether the Commission had intimated that it intended to initiate the procedure to eject the UK from CEPOL and whether it had only refrained from doing so since the Regulation took effect in July 2016 pending confirmation from the Government that the UK had decided not to opt in post-adoption;
- whether the Government considered that the "very high threshold for ejection" had been met in this case, given that the College of Policing continued to engage with CEPOL despite the UK's non-participation in the CEPOL Regulation;
- whether the Government's preference was for the UK to remain bound by the 2005 Council Decision and continue to engage with CEPOL until exit day, or to cut itself loose sooner;
- what assessment the Government had made of the nature and scale of the financial consequences which the UK might be required to bear if it were to be ejected from CEPOL; and
- what plans the Government had for future cooperation with CEPOL once the UK leaves the EU and has third country status.

11.9 We also noted that a decision to eject the UK from CEPOL would have domestic consequences. As the 2005 Council Decision would "no longer be binding upon or applicable to" the UK under Article 4a(2) of the UK's Title V Protocol, it would not become part of the body of "retained EU law" under the Act withdrawing the UK from the European Union. If, by contrast, the Commission decided *not* to initiate the Article 4a procedure, we asked the Minister to confirm that the 2005 Council Decision would become part of retained EU law and to indicate whether he considered that it would be appropriate to use the correcting powers which clause 7 of the European Union (Withdrawal) Bill would confer on Ministers in this case.

121 See the Minister's letter of 20 July 2017 to the Chair of the European Scrutiny Committee.

11.10 In his letter of 7 December the Minister tells us that the Government consulted "relevant stakeholders, including law enforcement", before deciding not to opt in to the CEPOL Regulation. He notes that it is for the Commission to decide whether or not to initiate the procedure to eject the UK from CEPOL, but adds that the Commission "have not indicated any intention to seek the UK's ejection from CEPOL in the near future". He does not anticipate that there would be any direct financial consequences for the UK if it were ejected from CEPOL. As for the UK's future relationship with CEPOL, he observes:

> "Any provisions in the withdrawal agreement and the overarching treaty that we have proposed on security, law enforcement and criminal justice will be designed to enable the relationship we agree with the EU to operate effectively."

11.11 **As we noted in our earlier Report, it is difficult to see why the Commission would not already have taken steps to eject the UK from CEPOL if that were its intention, given that the Regulation has been in force since July 2016. Nor is it clear that the Commission has any incentive to act, given that the UK will leave the EU in March 2019. Unless there is a change in the Commission's position, the CEPOL Regulation will therefore become part of retained EU law under the European Union (Withdrawal) Bill, even though the Government has no wish to participate in CEPOL. In these circumstances (which are far from hypothetical), we are disappointed that the Minister is unwilling to comment on the use of the correcting powers which clause 7 of the European Union (Withdrawal) Bill would confer on Ministers. We are also disappointed that the Minister does not confirm (as we requested) that UK policing supports the Government's decision not to participate in the CEPOL Regulation, though we note that relevant stakeholders (including law enforcement) were consulted.**

11.12 **The Minister tells us that the Government "is content not to participate in CEPOL" and "has not therefore been exercising its rights under the 2005 Decision to participate in CEPOL". By contrast, he told us in earlier correspondence that: "The College of Policing currently acts as the CEPOL co-ordinator for the UK and is *obliged* to participate in CEPOL's Governing Board" (our emphasis). He also said that the College of Policing was "still engaging with CEPOL".**[122]

11.13 **We ask the Minister to clarify the UK's current level of engagement with CEPOL. We also reiterate our request for some indication of the Government's plans (if any) for future cooperation with CEPOL once the UK leaves the EU and has third country status. We do not consider the Minister's general observation that any future agreement between the EU and the UK "will be designed to enable the relationship we agree with the EU to operate effectively" constitutes a meaningful response.**

11.14 **The CEPOL Regulation is now in force and has been cleared from scrutiny. We nonetheless expect the Minister to provide the information we have requested and draw this chapter to the attention of the Home Affairs Committee and the Committee on Exiting the European Union.**

122 See the Minister's letter of 20 July 2017 to the Chair of the European Scrutiny Committee.

Full details of the documents

Proposal for a Regulation establishing a European Union agency for law enforcement cooperation (CEPOL), repealing and replacing Council Decision 2005/681/JHA: (36238), 12013/14, COM(14) 465.

Background

11.15 The Reports listed at the end of this chapter provide a more detailed overview of the proposed Regulation and its lengthy scrutiny history.

11.16 The new CEPOL Regulation adopted in November 2015 repeals and replaces the 2005 CEPOL Decision. As the UK has not opted into the CEPOL Regulation none of its provisions, including those repealing and replacing the 2005 Decision, apply to the UK. The UK therefore remains bound by the 2005 CEPOL Decision.

11.17 The UK's Title V (justice and home affairs) opt-in Protocol makes provision for the UK to be ejected from a measure in which it currently participates (in this case the 2005 CEPOL Decision) if it would be inoperable for other Member States or the EU because the UK has chosen not to opt into a subsequent amending measure (including one that repeals and replaces the earlier measure). The procedure for ejecting the UK from the CEPOL Decision is set out in Article 4a of the Protocol. It can only be initiated by the Commission and must be agreed to by the Council acting by a qualified majority of Member States participating in the CEPOL Regulation. The Council may also decide that the UK should bear "the direct financial consequences, if any, necessarily and unavoidably incurred" as a result of its ejection from the 2005 CEPOL Decision.

The Minister's letter of 7 December 2017

11.18 We asked whether UK policing supported the Government's recommendation not to opt into the new CEPOL Regulation now that it is in force. The Minister responds:

> "As part of the opt-in process, the Government consulted with relevant stakeholders, including law enforcement, and this helped to inform the decision not to opt in post- adoption."

11.19 The Minister says that a decision to initiate the procedure to eject the UK from CEPOL under Article 4a(2) of the UK's opt-in Protocol "is a matter for the Commission", adding:

> "As far as the Government is concerned, the provisions in the Regulation repealing the 2005 Decision setting up CEPOL are not repealed for the UK and we remain part of CEPOL by way of the 2005 Decision. This will continue until and if the Commission decides to initiate ejection proceedings.
>
> "Whilst the Government considers the threshold of the 'inoperability test' to be a high one, we consider in this case that differing management board roles, responsibilities and voting rights mean that UK participation in CEPOL by way of the 2005 Decision could make CEPOL 'inoperable'. The Government is content not to participate in CEPOL, as indicated by the decision not to opt in to the 2015 Regulation. The UK has not therefore been

> exercising its rights under the 2005 Decision to participate in CEPOL. The Commission have not indicated any intention to seek the UK's ejection from CEPOL in the near future, though of course this is [a] matter for them."

11.20 We noted that the Article 4a ejection procedure includes provision for the UK to bear any "direct financial consequences" which are "necessarily and unavoidably incurred" as a result of its ejection and asked what assessment the Government had made of the nature and scale of the financial consequences which the UK might be required to bear. The Minister responds:

> "The Government considers that there are unlikely to be any direct financial consequences which are necessarily and unavoidably incurred as a result of our ejection. CEPOL will continue to be funded from the EU's general budget and the amount that CEPOL receives will not change if the UK is ejected."

11.21 Turning to the UK's future (post-exit) relationship with CEPOL, the Minister tells us that "details of our future cooperation in relation to justice and home affairs measures will be agreed in negotiations". He adds:

> "Any provisions in the withdrawal agreement and the overarching treaty that we have proposed on security, law enforcement and criminal justice will be designed to enable the relationship we agree with the EU to operate effectively."

Previous Committee Reports

First Report HC 301–i (2017–19), chapter 43 (13 November 2017); Thirty-seventh Report HC 219–xxxvi (2014–15), chapter 3 (18 March 2015), Twenty-first Report HC 219–xx (2014–15), chapter 1 (19 November 2014); and Ninth Report HC 219–ix (2014–15), chapter 5 (3 September 2014).

12 Developing interoperable EU information systems to enhance border management and security

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Home Affairs Committee
Document details	Commission Communication: *Seventh Progress report towards an effective and genuine Security Union*
Legal base	—
Department	Home Office
Document Number	(38726), 9348/17, COM(17) 261

Summary and Committee's conclusions

12.1 This Commission Communication is part of a series of monthly reports tracking the progress made in implementing a range of policy and legislative initiatives forming part of the "Security Union"—a framework developed in the aftermath of terrorist attacks and unprecedented migratory pressures to enhance law enforcement cooperation and information sharing across the EU and plug intelligence gaps.

12.2 The EU has established a number of information systems for security, border and migration management. The Commission considers that the current framework governing these systems is fragmented and wants them to work better together. The Communication sets out a process and timetable for making the systems interoperable so that end-users—border guards, customs officials, police and other law enforcement authorities—can access the information they need when they need it. According to the EU Commissioner for the Security Union (Julian King), the approach envisaged by the Commission would constitute "a step-change in the way we manage data for security, helping national authorities [to] better address transnational threats and detect terrorists who act across borders".[123]

12.3 The Communication draws on the work of a high level group of experts established in 2016 to identify shortcomings and information gaps in existing EU information systems and to report on the legal, technical and operational means available to make them interoperable. The expert group published its final report and recommendations in May 2017, along with contributions by the EU Fundamental Rights Agency, the European Data Protection Supervisor and the EU Counter-Terrorism Coordinator.[124]

123 See the European Commission's press release of 16 May 2017 on the seventh report on progress made towards an effective and genuine Security Union.

124 See the final report of the High-level expert group on information systems and interoperability published in May 2017.

12.4 In June 2017 EU Justice and Home Affairs Ministers endorsed the approach set out in the Communication and invited the Commission to bring forward legislative proposals on interoperability in early 2018, with a particular focus on:

- creating a European search portal to allow EU border, security and asylum databases to be searched simultaneously (the portal might also allow access to Europol and Interpol databases);
- developing a shared biometric matching service so that different EU information systems holding biometric data could be searched and matching data "flagged"; and
- establishing a common repository of identity data to help combat identity fraud.[125]

12.5 In his Explanatory Memorandum on the Communication, the Security Minister (Mr Ben Wallace) told us that the Government supported further work on interoperability. Whilst recognising the potential to make the exchange of data within the EU more efficient, he underlined the need for a thorough examination of any proposals put forward by the Commission to test whether they offered "value for money" and genuine efficiencies for UK law enforcement agencies in searching data before deciding on UK participation.

12.6 The Minister provided no analysis of how the UK's departure from the EU might affect its participation in existing EU information systems. Home Office Ministers had informed our predecessors in November 2016 that work was underway "to assess what capabilities EU measures deliver" in all areas of law enforcement and security cooperation and had made clear that maintaining cooperation remained "a top priority".[126] We asked the Minister to share with us the Government's assessment of the capabilities delivered by EU asylum, border management and security information systems and to indicate the priority the Government attaches to securing access to each system on leaving the EU.

12.7 We drew attention to the observations made by the EU Counter-Terrorism Coordinator, the European Data Protection Supervisor and the EU Fundamental Rights Agency on the findings of the high level expert group on information systems and interoperability. We asked the Minister whether he agreed with the European Data Protection Supervisor that the Commission's vision of interoperable EU information systems by 2020 would constitute "a fundamental change to the current architecture" of EU information systems, whether he considered such a "paradigm shift" to be necessary, and what safeguards would be needed to ensure that individual rights were protected.

12.8 We noted that, on leaving the EU, the UK would be treated as a third country. We asked what assessment the Government had made of the provisions on third country access contained in the main EU data sharing instruments and whether the Commission's interoperability goal was likely to make it more or less difficult for the UK to negotiate access to those systems (should it wish to do so) as part of the UK's exit negotiations.

12.9 In his letter of 13 December, the Minister tells us that the Government "value[s] the capabilities delivered by these systems" and that the UK is "one of the biggest contributors to the EU's JHA [justice and home affairs] databases", but says that "it is too early to say

125 See the Conclusions on improving information exchange and ensuring the interoperability of EU information systems agreed by the Justice and Home Affairs Council on 8 June 2017.

126 See the letter of 22 November 2016 from the then Minister for Policing and Fire Services (Brandon Lewis) to the Chair of the European Scrutiny Committee.

what future cooperation we may have in relation to individual measures". He adds that it is "in the clear interest of both the UK and European partners that we find a way to continue to cooperate and exchange this kind of information" but makes clear that the way in which the UK cooperates with the EU as a third country post-exit "will need to be addressed in the course of the negotiations on our future security partnership". He says that he is unable to comment on the nature and scale of the changes to the current architecture governing EU information systems until the Commission publishes its legislative proposals on interoperability. These appeared the day after the Minister's letter and comprise two proposals for Regulations, the first concerning the interoperability of EU information systems in the field of law enforcement, asylum and migration, the second visas and external border control.[127]

12.10 **The Minister tells us that the Government values the capabilities delivered by EU asylum, migration and security information systems without providing any further evidence to support this assessment. He considers that it is "too early to say what future cooperation we may have in relation to individual measures" even though the value of each EU information system must have been a key factor in the Government's capabilities assessment.**

12.11 **In her Florence speech, the Prime Minister called for "a bold new strategic agreement that provides a comprehensive framework for future security, law enforcement and criminal justice co-operation" which would be "unprecedented in its depth, in terms of the degree of engagement that we would aim to deliver".[128] Given these ambitious objectives, we can see no justification for the Government's continued unwillingness to share with Parliament the evidence on which its assessment of EU capabilities in the justice and home affairs field is based or the measures it wishes to prioritise for inclusion in a new strategic agreement with the EU. We will continue to press for this material to be disclosed so that Parliament can perform its scrutiny function effectively.**

12.12 **We accept that the Government will be better placed to comment on the nature and scale of the changes which will be needed to make EU asylum, migration and security information systems interoperable by 2020, as well as the appropriate safeguards, in the context of the proposed Regulations on interoperability published by the Commission in December. We therefore ask the Minister to ensure that his Explanatory Memorandum on these proposals addresses the main concerns on interoperability raised by the EU Counter-Terrorism Coordinator, the European Data Protection Supervisor and the EU Fundamental Rights Agency.**

12.13 **The Minister does not tell us what assessment the Government has made of the (often restrictive) provisions on third country access contained in the main EU information sharing instruments and how they might affect UK participation post-exit. Nor does he explain whether he expects enhanced interoperability of EU asylum, migration and security information systems to make it easier or harder for the UK to negotiate access to those systems (should it wish to do so) as part of the UK's exit negotiations. We trust that he will do so when examining the proposed Regulations**

127 See Council documents 15729/17 and 15119/17 published on 14 December 2017.

128 See the Prime Minister's speech delivered in Florence on 22 September 2017.

on interoperability. As these new legislative proposals will be the main focus of our scrutiny, we are content to clear the Communication from scrutiny. We draw this chapter to the attention of the Home Affairs Committee.

Full details of the documents

Commission Communication: *Seventh progress report towards an effective and genuine Security Union*: (38726), 9348/17, COM(17) 261.

Background

12.14 Our earlier Reports listed at the end of this chapter provide an overview of existing EU information systems in the justice and home affairs field. Some are centralised at EU level with national interfaces in each participating Member State; others operate through a decentralised network of national information systems.

The Minister's letter of 13 December 2017

12.15 We invited the Minister to share with us the outcome of the Government's assessment of the capabilities delivered by EU asylum, border management and security information systems and to indicate the priority it attaches to securing access to each system on leaving the EU. The Minister responds:

> "We value the capabilities delivered by these systems and are one of the biggest contributors to the EU's JHA databases. As we set out in the future partnership paper *Security, law enforcement and criminal justice*, published in September, we are seeking an overarching agreement with the EU that supports future cooperation on security, law enforcement and criminal justice. It is too early to say what future cooperation we may have in relation to individual measures but it is in the clear interest of both the UK and European partners that we find a way to continue to cooperate and exchange this kind of information."

12.16 We highlighted various observations made by the EU Counter-Terrorism Coordinator, the European Data Protection Supervisor and the EU Fundamental Rights Agency on the report of the high level expert group on information systems and interoperability. The EU Counter-Terrorism Coordinator (Gilles de Kerchove) commented that "a paradigm shift in the way we deal with information systems" was necessary, adding:

> "Given the threat picture, the current fragmentation of EU databases and the separation of border security, migration and counter-terrorism purposes of databases no longer reflect reality."[129]

12.17 By contrast, the European Data Protection Supervisor ("EDPS"—Giovanni Buttarelli) described the Commission's vision of interoperability as "ambitious" and entailing "a fundamental change to the current architecture of large-scale IT systems". He made clear that "a proper information security analysis" would be necessary before implementing any changes that might endanger the security of all systems and also underlined the need for "a more consistent, coherent and comprehensive legal framework".

129 See pp.52–4 of the report published by the high level expert group on information systems and interoperability.

Whilst he expressed "no major concerns" with the proposed European search portal, provided it complied with rules on purpose limitation and access rights, he indicated that the proposed biometric matching service would require further "careful analysis" and that the proposed common repository of identity data raised "serious" data protection issues. He made clear that "merging information from databases should not automatically lead to the merger of their objectives, conditions of processing and access management".[130]

12.18 In a similar vein, the EU Fundamental Rights Agency stated that "any interoperable solution or solutions selected for EU information systems will need to be designed in a manner which does not unduly affect core data protection principles". It underlined the need for appropriate safeguards to ensure the quality of the information stored in the systems and the purposes for which it may be processed, as well as to prevent unauthorised access and unlawful sharing with third parties. The Agency made clear that safeguards would also be needed "to ensure that the rules on sharing of data with third countries as laid down in the individual legal instruments are adhered to in the case of interoperability".[131]

12.19 We asked the Minister whether he agreed with the EDPS that the Commission's vision of interoperable EU information systems by 2020 would constitute "a fundamental change to the current architecture" of EU information systems, whether he considered such a "paradigm shift" to be necessary and what safeguards would be needed to ensure the protection of individual rights. He responds:

> "Whilst the Government has been engaged closely in the work of the High Level Expert Group and more generally strongly supports efforts to make the exchange of data within the EU more efficient, the Government cannot comment on whether this is a fundamental and necessary change until the Commission has published its legislative proposal itself. We will write to the Committee with further information once the proposal has been published in December, including what the Government considers the necessary safeguards to be in relation to the proposal."

12.20 We noted that the UK would be a third country once it leaves the EU and asked the Minister:

- what assessment the Government had made of the provisions on third country access contained in the main EU data sharing instruments; and
- whether he anticipated that the Commission's goal of making the EU's centralised information systems interoperable by 2020 would make it more or less difficult for the UK to negotiate access to those systems (should it wish to do so) as part of the UK's exit negotiations.

12.21 The Minister tells us:

> "How the EU will cooperate with the UK as a third country will need to be addressed in the course of the negotiations on our future security partnership."

130 See pages 49 and 51 of the report published by the high level expert group on information systems and interoperability.

131 See pp.43–4 of the report published by the high level expert group on information systems and interoperability.

Previous Committee Reports

First Report HC 301–i (2017–19), chapter 25 (13 November 2017). See also our predecessors' earlier Report on the *Commission Communication on Stronger and Smarter Information Systems for Borders and Security*: Third Report HC 71–ii (2016–17), chapter 27 (25 May 2016).

13 Machine-readable travel documents for refugees and stateless persons

Committee's assessment	Legally and politically important
Committee's decision	Previously cleared from scrutiny (decision reported on 13 November 2017)
Document details	Proposed Council Decision on the position to be adopted on behalf of the European Union in the Executive Committee of the Programme of the United Nations High Commissioner for Refugees
Legal base	Articles 78(2) and 218(9) TFEU, QMV
Department	Home Office
Document Number	(39033), 12163/17 + ADD 1, COM(17) 544

Summary and Committee's conclusions

13.1 The Executive Committee of the United Nations High Commissioner for Refugees (UNHCR) provides advice on international refugee protection and reviews and approves the UNHCR's programmes and budget. The advice it issues takes the form of Conclusions which are adopted by consensus by the members of the Executive Committee. The UK and all other EU Member States except for Malta are members of the Executive Committee and have full voting rights. Malta participates in the Executive Committee as an observer state. The EU participates as a non-state observer, meaning that it can contribute to the development of Executive Committee Conclusions in areas which correspond to the EU's competence for asylum and refugee matters but cannot vote on their adoption.

13.2 The proposed Council Decision concerns an Executive Committee Conclusion on machine-readable travel documents for refugees and stateless persons which was agreed at the annual plenary session of the Executive Committee in early October. The 1951 Refugee Convention requires participating states to issue travel documents to refugees lawfully staying in their territories so that they can travel elsewhere except where "compelling reasons of national security or public order otherwise require".[132] The purpose of the Executive Committee Conclusion is to encourage states to issue travel documents which comply with the latest international standards, meaning that they should be machine-readable to enhance their security.

13.3 Executive Committee Conclusions are not legally binding but may have legal effects insofar as they contribute to the interpretation and development of international standards on refugee protection. The Commission considered that the Conclusion on machine-readable travel documents was "capable of decisively influencing the content of EU legislation"[133] and that a Council Decision requiring EU Member States with voting rights in the Executive Committee to support the adoption of the Conclusion was necessary. It

132 See Article 28 of the 1951 Refugee Convention and related Schedules and Annexes.

133 The Commission refers to Regulation (EC) 2252/2004 on standards for security features and biometrics in passports and travel documents issued by Member States as well as existing and proposed EU rules on individuals qualifying for international protection (see Directive 2011/95/EC).

published a proposal for a Council Decision on 18 September. The proposal was subject to the UK's Title V (justice and home affairs) opt-in, meaning that it would only be binding on the UK if the Government decided to opt in.

13.4 The Immigration Minister (Brandon Lewis) told us that draft Executive Committee Conclusions were presented in May. The delay in publishing the proposed Council Decision meant that it was likely to be put to COREPER on 20 September as "a non-negotiable text" and formally adopted at the General Affairs Council on 25 September, well before the expiry of the three-month opt-in period provided for in the UK's Title V opt-in Protocol. He raised no objection to the substance of the Executive Committee Conclusion, noting that the UK complied with the recommendations contained in it, but indicated that there were likely to be "few benefits to the UK in opting in" and that "there may be some value in not opting in and instead demonstrating an independent position". He added that the Government would "consider laying a statement" when the proposed Council Decision was adopted to protest at the failure to respect the three-month opt-in deadline.

13.5 The delay in establishing the European Scrutiny Committee following the June General Election meant that the proposed Council Decision had already been adopted when we first met to consider documents on 13 November. We therefore cleared the proposal from scrutiny but asked the Minister to inform us of the Government's opt-in decision and the reasons for it. We also asked him to:

- explain why it had taken the Commission so long to publish its proposal and what steps the Government had taken since May to impress on the Commission the need to respect the three-month opt-in period set out in the UK's Title V opt-in Protocol;
- share with us the contents of the UK statement entered in the Council minutes at the time of the adoption of the proposed Decision on 25 September;
- confirm that the EU was only asserting competence in relation to this one Conclusion on machine-readable travel documents (the Minister's letter and Explanatory Memorandum both referred to Executive Committee Conclusions, implying that there were several) and indicate whether he shared the Commission's view that the EU had competence to act since the Conclusion was likely to have legal effects and affect common EU rules;
- explain whether the UK's non-participation in the EU instruments most likely to be affected by the adoption of the Executive Committee Conclusion was a material factor in determining whether or not to opt into the proposed Council Decision;
- clarify why he considered that the text presented to the Council was "non-negotiable", given that the ultimate power of decision rests with the Council; and
- set out the position taken by the UK at the Executive Committee meeting in October and what benefit the Government saw in acting independently of the EU on this matter.

13.6 In his letter dated 1 December, the Minister confirms that the Government decided *not* to opt in to the proposed Council Decision, mainly because "the UK is already compliant"

with the Executive Committee Conclusion on machine-readable travel documents and "we see benefit in acting independently on this matter given the UK's strong leadership on the issue of migration". He says that the UK made a statement in the Council minutes which "referenced that the UK's three-month period in which to take an opt-in decision had not been respected in this case" and refers us to the Council website for further details.

13.7 **We are disappointed that the Minister has not shared the content of the statement which the UK entered in the Council minutes on the adoption of the proposed Council Decision and can see no reason for his reticence. Details of the statements made by the UK and Irish Governments have since been published by the Council. In its statement, the UK "regrets that it has not been given the full three months, in accordance with the Treaties, to take a decision on whether to participate in this measure" and makes clear that the UK is "not taking part in the adoption of the Council Decision, and will not be bound by it".**[134]

13.8 **We note the Minister's explanation for the Commission's choice of a binding Council Decision in this case, following a Court of Justice ruling in 2014 concerning the legal effects of recommendations adopted by the intergovernmental International Organisation of Vine and Wine.**[135] **He does not, however, indicate whether the Government accepts that the Conclusion on machine-readable travel documents adopted by the UNHCR Executive Committee in October meets the criterion set out in the Court's ruling for asserting EU competence, namely that it is "capable of decisively influencing" the content of EU legislation concerning the issuing of travel documents for refugees and stateless persons. Even in cases such as this where the Government has decided not to opt in, we expect the Minister to provide his own assessment of the basis on which the EU is asserting competence to act and, where he considers such action to be unjustified, to make this clear in a statement entered in the Council minutes. We shall continue to monitor the Government's approach to the exercise of EU competence, not least because of the post-exit implications for the UK during any transitional/implementation period agreed with the EU.**

13.9 **The Government's decision *not* to opt into the proposed Council Decision was taken in September. The Minister has yet to issue a Written Ministerial Statement setting out the reasons for the decision—a vital step in ensuring that the Government is accountable to Parliament for the opt-in decisions it takes. We can see no justification for the delay. We urge the Minister to issue his Statement at the earliest opportunity.**

13.10 **As the proposed Council Decision has been cleared from scrutiny, we do not require a response.**

Full details of the documents

Proposed Council Decision on the position to be adopted on behalf of the European Union in the Executive Committee of the Programme of the United Nations High Commissioner for Refugees: (39033), 12163/17 + ADD 1, COM(17) 544.

134 See the full text of the UK minutes statement published by the Council on 12 December 2017.

135 See Case C-399/12.

Background

13.11 Our earlier Report listed at the end of this chapter provides a more detailed overview of the proposed Council Decision and the Government's position ahead of the General Affairs Council meeting on 25 September.

The Minister's letter of 1 December 2017

13.12 The Minister says he is unaware of the reasons for the delay in publishing the proposed Council Decision but adds that the Government has "raised concerns with the Commission and reiterated the need to respect the UK's three-month opt-in period and scrutiny process". He continues:

> "The UK laid a statement on the adoption of this Council Decision at COREPER on 20 September 2017 setting out our position. The statement also referenced that the UK's three-month period in which to take an opt-in decision had not been respected in this case. In turn, this was reflected in the minutes of General Affairs Council on 25 September. The minutes of this meeting have not yet been published, however they will appear on the European Council website once issued."

13.13 The Minister confirms that the EU has only asserted competence in relation to the Executive Committee Conclusion on machine-readable travel documents. Asked whether he shared the Commission's view that the EU has competence to act on the grounds that the Conclusion was likely to have legal effects and affect common EU rules, he responds:

> "The Government is not aware of whether other Member States will be required to do anything new or different as a result of these Conclusions, therefore we are unable to comment on whether a Council Decision is appropriate in this case. Regarding the EU's competence to act, I note that the Court of Justice of the European Union has previously, in the case of C-399/12 (Organisation of Vine and Wine), interpreted 'legal effects' broadly in the context of Article 218(9). Since that case, the Commission has sought a formal EU Council Decision under Article 218(9) where the EU is required to take a position on politically binding documents agreed by international organisations where there is the potential for those documents to have legal effects."

13.14 The Minister indicates that the main consideration informing the Government's decision not to opt into the proposed Council Decision was "the fact that the UK is already compliant with the Conclusions". He says that the Commission presented the proposed Council Decision as a non-negotiable text as it was seeking to establish a common EU position "on the basis of a final, or near final, draft of the Conclusions rather than a negotiating mandate".

13.15 Finally, the Minister explains that "there was no formal voting procedure at the Executive Committee". He continues:

> "Although the Government is generally supportive of the Conclusions, we see benefit in acting independently on this matter given the UK's strong leadership on the issue of migration and our actions in this area which are

already in line with the Conclusions. The delivery of a clear UK position aligns well with our close relations with UNHCR and with our broader approach to migration issues.

"The Government will shortly be laying a Written Ministerial Statement on this matter."

Previous Committee Reports

First Report HC 301–i (2017–19), chapter 45 (13 November 2017).

14 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

(39178) 13715/17 + ADDs 1–3 COM(17) 623	Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank: A stronger and renewed strategic partnership with the EU's outermost regions.
(39210) 14113/17 + ADD 1 COM(17) 646	Report from the Commission to the European Parliament and the Council—Two years after Paris—Progress towards meeting the EU's climate commitments (required under Article 21 of Regulation (EU) No 525/2013 of the European Parliament and of the Council of 21 May 2013 on a mechanism for monitoring and reporting greenhouse gas emissions and for reporting other information at national and Union level relevant to climate change and repealing Decision.
(39221) 14141/17 COM(17)655	Report from the Commission to the European Parliament and the Council on the exercise of the power to adopt delegated acts conferred on the Commission pursuant to Report from the Commission to the European Parliament and the Council on the exercise of the power to adopt delegated acts conferred on the Commission pursuant to Directive 2013/30/EU on safety of offshore oil and gas operations Directive 2013/30/EU.
(39273) — —	Report on the annual accounts of the Bio-based Industries Joint Undertaking for the financial year 2016.
(39274) — —	Report on the annual accounts of the Clean Sky Joint Undertaking for the financial year 2016.
(39275) — —	Report on the annual accounts of the Electronic Components and Systems for European Leadership Joint Undertaking for the financial year 2016.
(39276) — —	Report on the annual accounts of the European Joint Undertaking for ITER and the Development of Fusion Energy for the financial year 2016.

(39277) — —	Report on the annual accounts of the Fuel Cells and Hydrogen Joint Undertaking for the financial year 2016.
(39282) 15121/17 COM(17) 684	Report from the Commission to the European Parliament and the Council on the activities of the IFRS Foundation, EFRAG and PIOB in 2016.

Department for Environment, Food and Rural Affairs

(39200) 13993/17 + ADDs 1–2 COM(17) 642	Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions accompanying the mid-term evaluation of the LIFE programme.
(39247) 14465/17 + ADD 1 COM(17) 672	Proposal for a Council Regulation fixing for 2018 the fishing opportunities for certain fish stocks and groups of fish stocks in the Black Sea.
(39289) 14874/17 +ADD 1	Commission Delegated Regulation (EU) …/... of 23.11.2017 amending Annex I to Regulation (EU) No 1305/2013 of the European Parliament and of the Council and Annexes II and III to Regulation (EU) No 1307/2013 of the European Parliament and of the Council.
(39288) 14939/17 + ADD 1	Commission Delegated Regulation (EU) No../. of 24.11.2017 amending Delegated Regulation (EU) No 1393/2014 establishing a discard plan for certain pelagic fisheries in North-Western waters.
(39301) 12750/17 COM(17) 556	Proposal for a Council Decision Denouncing the Partnership Agreement in the fisheries sector between the European Community and the Union of the Comoros, adopted by Council Regulation (EC) No 1563/2006 of 5 October 2006.
(39324) 15466/17	Commission Delegated Regulation (EU) …/... of 23.11.2017 amending Delegated Regulation (EU) No 1395/2014 establishing a discard plan for certain small pelagic fisheries and fisheries for industrial purposes in the North Sea.

Department of Health

(39270) — —	Report on the annual accounts of the European Medicines Agency for the financial year 2016.

Department for International Trade

(39211) 14111/17 ADD 1 COM(17) 654	Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Implementation of Free Trade Agreements 1 January 2016—31 December 2016.
(39219) 14312/17 COM(17) 667	Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Achieving Prosperity through Trade and Investment Updating the 2007 Joint EU Strategy on Aid for Trade.
(39245) 14765/17 COM(17) 679	Report from the Commission to the European Parliament and the Council on the Implementation of Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.

Department for Transport

(39253) 14708/17 + ADD 1 COM(17) 691	Proposal for a Council Decision on the position to be taken on behalf of the European Union in the Ministerial Council set up under the Treaty establishing the Transport Community.
(39271) — —	Report on the annual accounts of the European Maritime Safety Agency for the financial year 2016.
(39279) — —	Report on the annual accounts of the Single European Sky Air Traffic Management Research Joint Undertaking for the financial year 2016.
(39280) — —	Report on the annual accounts of the Shift-2-Rail Joint Undertaking for the financial year 2016.

Foreign and Commonwealth Office

(39305)	Report by the Head of the European Defence Agency to the Council.

HM Treasury

(38913) 11276/17 COM(17) 379	Report from the Commission to the European Parliament and the Council on the follow-up to the discharge for the 2015 financial year (Summary).
(39036) 12267/17 COM(17) 497	Report from the Commission to the European Parliament and the Council: Annual report to the Discharge Authority on internal audits carried out in 2016 (Article 99(5) of the Financial Regulation).
(39199) 14070/17 COM(17) 629	Commission report to the Council pursuant to article 11(2) of regulation EC 1466/97 on the enhanced surveillance mission in Romania.
(39282) 14829/17 COM(17) 802	Recommendation for a Council Recommendation with a view to correct the significant observed deviation from the adjustment path toward the medium-term budgetary objective in Romania.
(39259) 14830/17 COM(17) 803	Recommendation for a Council Decision establishing that no effective action has been taken by Romania in response to the Council Recommendation of 16 June 2017.
(39264) 14886/17 COM(17) 900	Proposal for a decision of the European Parliament and of the Council amending Decision EU 2017/344 of the European Parliament and of the Council of 14 December 2016 on the mobilisation of the Contingency margin in 2017.
(39268) — —	Special report No 17/2017: The Commission´s intervention in the Greek financial crisis.
(39286) 15169/17 COM(17) 682	Report from the Commission to the European Parliament and the Council on Borrowing and lending activities of the European Union in 2016.

Home Office

(39216) — —	Report on the annual accounts of the European Border and Coast Guard Agency for the financial year 2016 together with the Agency's reply.
(39269) — —	Report on the annual accounts of the European Asylum Support Office for the financial year 2016.

Ministry of Defence

(39260) European Defence Agency draft 2018 Budget proposal and draft 2018 draft Staff Establishment Plan.

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Formal Minutes

Wednesday 10 January 2018

Members present:

Sir William Cash, in the Chair

Steve Double	Darren Jones
Richard Drax	David Jones
Marcus Fysh	Andrew Lewer
Kate Green	Michael Tomlinson
Kate Hoey	David Warburton
Kelvin Hopkins	

5. Scrutiny report

Draft Report, proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1.1 to 14 read and agreed to.

Summary agreed to.

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

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

[Adjourned till Wednesday 17 January at 9.30am.

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)

Douglas Chapman MP (*Scottish National Party, Dunfermline and West Fife*)

Geraint Davies MP (*Labour/Cooperative, Swansea West*)

Steve Double MP (*Conservative, St Austell and Newquay*)

Richard Drax MP (*Conservative, South Dorset*)

Mr Marcus Fysh MP (*Conservative, Yeovil*)

Kate Green MP (*Labour, Stretford and Urmston*)

Kate Hoey MP (*Labour, Vauxhall*)

Kelvin Hopkins MP (*Independent, Luton North*)

Darren Jones MP (*Labour, Bristol North West*)

Mr David Jones MP (*Conservative, Clwyd West*)

Stephen Kinnock MP (*Labour, Aberavon*)

Andrew Lewer MP (*Conservative, Northampton South*)

Michael Tomlinson MP (*Conservative, Mid Dorset and North Poole*)

David Warburton MP (*Conservative, Somerton and Frome*)

Dr Philippa Whitford MP (*Scottish National Party, Central Ayrshire*)