House of Commons

European Scrutiny Committee

Fifty-seventh Report of Session 2017–19

Documents considered by the Committee on 6 March 2019

HC 301-lvi

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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/.

Staff

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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's 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:

- Post-Brexit fishing quotas in the event of a no-deal Brexit;
- The European Commission has proposed a draft Implementing Decision which provides for the removal of the Galileo sensor stations from the Falkland Islands and Ascension;
- The Committee has considered the extent of UK participation in the Single Market as provided for in the Withdrawal Agreement, the Political Declaration, and the extent to which EU Single Market law would continue to apply to UK stakeholders in the event of a non-negotiated exit;
- Commission Brexit preparedness: aviation safety.

Summary

Brexit-preparedness: Fisheries

Continuing its scrutiny of the Commission's proposal to facilitate mutual access to UK and EU fishing waters in the event of a no-deal Brexit, the Committee is critical of the Government's continued lack of position. While the Government asserts that its priority is to minimise disruption to businesses, it also notes that quota-holders would only be advised of their catch allocation after Brexit. The Committee urges the Government to support the status quo for the remainder of 2019, using that time to negotiate new arrangements with the EU and other coastal states.

Not cleared; further information requested by 12 March 2019; drawn to the attention of the Environment, Food and Rural Affairs Committee

Brexit: contingency measures on access to social security and healthcare

The Committee has discussed the European Commission's contingency Brexit proposal relating to social security, which aims to provide some limited safeguards for UK and EU nationals affected by Brexit when they seek to access social security arrangements in one of the EU-27 countries based on periods of residence or national insurance contributions in the UK (which, prior to the UK's withdrawal, would count towards benefit entitlements in other EU countries under free movement rules). The Committee has concluded that, as intended, the proposal falls far short of guaranteeing citizens' rights in the way the

Withdrawal Agreement would, but has also cautioned that Parliament's recent resolution on separating off the exit treaty's citizens' rights section as a stand-alone agreement is unlikely to be straightforward legally or politically.

Cleared from scrutiny; further information requested; drawn to the attention of the Committee on Exiting the European Union, the Health and Social Care Committee and the Work and Pensions Committee

Digital Services Tax

The Digital Services Tax was a Commission proposal to introduce an EU-wide tax on an interim basis applicable at three per cent on certain digital activities for which user participation is considered to constitute an essential input and an important source of value, which aligns very closely with the Government's own proposal to introduce a very similar Digital Services Tax from April 2020. In its last report on this proposal the Committee declined to grant the Government a waiver to participate at the Economic and Financial Affairs (ECOFIN) Council on 2018 because of the poor quality of information provided by the Government. In the event this did not matter, as it became clear that the proposal would not achieve the necessary support from the Member States at ECOFIN, because of the requirement for unanimity. Subsequently, France and Germany brought forward a revised proposal which would more narrowly target the advertising revenues generated by digital platforms. The Financial Secretary to the Treasury (Rt Hon. Mel Stride MP) considers the revised proposal "constructive" but indicates that, although the Government continues to support the principle behind the proposal, it retains some concerns about "the allocation of taxable revenues between Member States and some issues relating to scope". Further engagement with officials has provided greater clarity on these issues. The Committee granted the Government a waiver to support the proposal at Council, subject to its concerns being addressed.

Not cleared from scrutiny; scrutiny waiver granted; further information requested; drawn to the attention of the Treasury Committee

Commission Brexit preparedness: Removal of Galileo sensor stations from the Falklands and Ascension

The Commission has proposed an Implementing Decision which would set in motion the removal of the Galileo sensor stations from British Overseas Territories the Falkland Islands and Ascension. This was trailed in an earlier Communication on EU Brexit preparedness. While the Decision makes it clear that third countries may be permitted to host sensor stations where the relevant security and Public Regulated Service (PRS) agreements are in place (they will not be, in the case of the UK on exit day), the breakdown of negotiations on the issue of continued UK involvement in the Galileo PRS appears to have made their removal politically inevitable, as the Government and the Defence Secretary in particular have indicated that the UK would only be willing to continue to host the stations if the EU permitted the UK to retain essentially full involvement in the Galileo PRS (which is currently restricted to Member States, even where the relevant agreements are in place), and the EU have indicated that UK involvement in the PRS and other aspects of the Space Programme will be subject to the standard restrictions applicable to third countries. The Commission has already switched off the stations so the Galileo system is currently

operating without them, without any tangible deterioration in the quality of the service to end users. However, the Member State experts have not yet approved the decision as they want more detailed information about the impacts, and because the sensor stations were switched off at the same time that four new satellites were brought online, which could have affected the data. The Committee seeks further information about the impact of the termination of the contract with British Overseas Territory company Sure (formerly Cable and Wireless) as well as further clarity regarding the UK position, the impact of switching off these stations on Galileo, and the removal process.

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

Single Market review

This communication reviews the progress which has been made during the mandate of the current European Commission on the Single Market, and what further steps are needed to better realise the Single Market's potential. In summary, the Digital Single Market has been successfully delivered, with the vast majority of legislative initiatives having been either adopted or on the verge of adoption by the co-legislators. The Single Market Strategy initiatives present more of a mixed picture, with some key Services Directive-related initiatives in particular (the Services e-card and the Notifications Directive) being blocked by the Member States. The Banking and Capital Markets Unions have also made slow progress. The Commission identifies three challenges in terms of the delivery of the single market: better transposition of rules is required; less gold-plating of EU legislation by Member States; and more effective enforcement of Single Market rules (including state aid and competition rules), as well as more consistent support in the Council of the EU for measures designed to implement the high-level agenda agreed in the European Council.

The Committee's report also picks up on some developments not noted in the Communication, including areas of the Single Market where there is some pushback against European integration (business services; country-of-origin in broadcasting; enforcement of mergers rules). The conclusions of the Committee's Report also briefly summarise the provisions regarding UK participation in the Single Market as provided for in the withdrawal agreement, the Political Declaration, and the extent to which EU Single Market law would continue to apply to UK stakeholders in the event of a non-negotiated exit.

The Parliamentary Under Secretary of State at the Department of Business Energy and Industrial Strategy (Rt Hon. Greg Clark MP) stated that the Government's assessment was that "a strong EU economy is in the UK's interests" and that the Government "therefore continues to support efforts to further improve the functioning of the Single Market".

Not cleared from scrutiny; drawn to the attention of the Business, Energy and Industrial Strategy Committee and the Committee on Exiting the EU

Cross-border police cooperation: Third country participation in the Prüm framework for exchanging DNA, fingerprint and vehicle registration data

The European Commission has asked the Council to agree Decisions which would authorise the EU to sign and conclude Agreements with Liechtenstein and Switzerland

enabling them to take part in EU measures providing for the automated exchange of DNA profiles, fingerprints and vehicle registration data (the so-called "Prüm package") to assist in the investigation of cross-border crime. The proposals are subject to the UK's justice and home affairs opt-in so will only apply to the UK if the Government decides to opt in. The Immigration Minister (Rt Hon. Caroline Nokes MP) indicates that the Government intends to decide whether to opt in before 29 March as the UK will be unable to opt in after exit day (even if a post-exit transition/implementation period is agreed). The European Scrutiny Committee asks the Minister: whether there would be operational or other benefits for the UK in opting into the proposed Agreements, given the long lead-in time needed to prepare for implementation of the Prüm rules and the imminence of the UK's exit from the EU; what status the Agreements would have in UK law once the UK has left the EU and any post-exit transition/implementation period has ended; how suitable a model the Agreements would be for an ongoing relationship between the EU and the UK on Prüm post-exit, given that they would bind the UK to continue to apply EU rules; and whether the UK's non-participation in Schengen would affect the scope and content of a future agreement with the EU on police and criminal justice cooperation.

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

Improving cross-border law enforcement access to financial information

The proposed Directive is intended to improve cross-border law enforcement access to financial information to support the investigation and prosecution of serious crime. The Government has opted in, is content with the final compromise text which has emerged from negotiations between the Council and European Parliament and would like to support its adoption at the March Justice and Home Affairs Council. The European Scrutiny Committee agrees to clear the proposal from scrutiny but notes that there remains some uncertainty as to the effect that it will have on the division of competence between the EU and Member States and how this might affect the UK's ability (post-exit) to cut its own deals with individual Member States in this area of law enforcement cooperation.

Cleared from scrutiny; drawn to the attention of the Committee on Exiting the European Union, the Home Affairs Committee and the Justice Committee

European Maritime Single Window environment

The proposal for a 'European Maritime Single Window environment' (EMSWe) was first considered by the Committee on 14 November 2018. The proposal would bring together, in a coordinated and harmonised way, all reporting obligations associated with port calls. This would be achieved by retaining the current system of NMSWs but introducing a European reporting 'gateway' above or on top of national systems (the EMSWe). The Minister wrote to the Committee on 14 February 2019 requesting clearance of the proposal from scrutiny ahead of its formal adoption (the exact date that the proposal will go to Council is not yet known). Following a request for clarification from officials at the Department for Transport, we understand that the Government is supportive of the proposal and will vote in favour of adoption if the text is similar to the compromise reached between the Romania Presidency and the European Parliament during trilogue negotiations. The compromise text provides for technological neutrality, mandatory

provision for the public availability of ship arrival and departure times, and a time limit on the ability of the Commission to adopt delegated acts (to 4 years). On the basis that the Committee is satisfied with the Government's position on the text of the proposal and is clear that, if it remains substantially unamended, the Government is likely to vote in favour of adoption, we are content to clear it from scrutiny. When the proposal is adopted, we request information on its final form, detailing, in particular, any significant changes versus those previously communicated to the Committee.

Cleared from scrutiny; further information requested; scrutiny waiver granted

Commission Brexit preparedness: aviation safety

The Commission's aviation safety proposal is a unilateral Union measure aimed at mitigating the effects of the UK's withdrawal from the EU on the validity of certain aviation safety certificates and licences. The proposal would provide for the continued validity of such authorisations granted to UK-based organisations by the European Aviation Safety Agency (EASA) for 9 months as of the UK's withdrawal from the EU. It would also, for a limited number of authorisations, extend EU recognition indefinitely in the event of a 'no-deal' or non-negotiated UK exit. The substance of the proposal is not controversial and—as it would provide for the continuation of rights granted to UK-based operators—has been welcomed by the Government and industry. Given its focus, the proposal is of clear political importance and, therefore, the Committee retains it under scrutiny in order to allow its development to be closely monitored. At the same time, the proposal provides the Committee the opportunity to question the Government on its preparations for aviation safety in the event of a no-deal Brexit. The Committee therefore requests further information from the Government on progress towards membership of EASA and the status of 'rollover' bilateral aviation safety agreements with countries such as the USA, Canada and Brazil (these are agreements that the Government has said will be in place in the event of a no-deal Brexit).

Not cleared from scrutiny; further information requested

Working Conditions Directive

The Working Conditions directive would primarily serve to update the Written Statements Directive (which requires that new employees are informed in writing of their conditions of employment). It does, however, also seek to introduce new employment rights. These cover: creating a statutory definition of 'worker' for the first time at EU-level; limiting probationary periods; restricting the use of exclusivity clauses that prevent parallel work; and giving workers more certainty about the hours they are expected to work. Since the publication of the proposal, some of these rights have been significantly modified. By way of example, on the definition of worker, an amendment to the text of the Directive by the Austrian Presidency—at the behest of the UK and a number of other Member States—now allows for national determination as to who the Directive applies to. Further compromise is expected in other areas, however, the quality of correspondence on the proposal from the lead Department (Business, Energy and Industrial Strategy) has been poor and, as a consequence, the Committee is in the dark as to what any further changes may look like. The Minister with charge over the proposal—Kelly Tolhurst MP—wrote to the Committee on 14 February 2018 requesting scrutiny be lifted ahead of adoption

at Council. The Committee rejects this request on the grounds that the Government is unclear on the changes expected to the final text of the Directive, how the Government would react to these and, furthermore, how they would relate, specifically, to its domestic legislative agenda (i.e. in line with the 'Good Work' plan of December 2018).

Not cleared from scrutiny; further information requested; request for clearance ahead of adoption rejected

Parental and Carers' Leave Directive

As originally introduced, the proposed Parental and Carers' Leave Directive would establish a statutory right in Member States to paid paternity, parental and carers' leave for workers with employment contracts. During negotiations, the Directive has been watered down and now provides for: 10 working days of paternity leave; a payment or allowance for a minimum of 2 months parental leave per parent, per child; and a requirement to introduce a minimum of 5 days carers' leave. If adopted in this form, the Directive would create a new right in the UK to paid parental leave (for 2 months) and a right to 5 days unpaid carers' leave. The Minister wrote to the Committee on 11 February 2019 requesting clearance of the file from scrutiny in order for the Government to support adoption which is scheduled to take place on or before the Employment, Social Policy, Health and Consumer Affairs (EPSCO) Council of 15 March 2019. The Committee grants a scrutiny waiver on the basis that that the Government has made clear its support for the proposal (on the basis of its current text). Given its political sensitivity and outstanding questions concerning whether and how the Directive would be given effect to domestically, the Committee does not believe it appropriate to clear the file from scrutiny.

Not cleared from scrutiny; further information requested; scrutiny waiver granted

Documents drawn to the attention of select committees:

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

Business, Energy and Industrial Strategy Committee: Commission Brexit preparedness: Removal of Galileo sensor stations from the Falklands and Ascension [Proposed Decision (NC)]; Single Market review [Communication (NC)]

Defence Committee: Commission Brexit preparedness: Removal of Galileo sensor stations from the Falklands and Ascension [Proposed Decision (NC)]

Environment, Food and Rural Affairs Committee: Brexit-preparedness: Fisheries [Proposed Regulations (NC)]

Committee on Exiting the EU: Brexit: access to social security for EU and UK nationals [Proposed Regulation (C)]; Improving cross-border law enforcement access to financial information [Proposed Directive (C)]; Single Market review [Communication (NC)]

Health and Social Care Committee: Brexit: access to social security for EU and UK nationals [Proposed Regulation (C)]

Home Affairs Committee: Cross-border access to electronic evidence in criminal proceedings [Proposed Decision (NC]; Cross-border police cooperation: Third country

participation in the Prüm framework for exchanging DNA, fingerprint and vehicle registration data [Proposed Decisions (NC)]; Improving cross-border law enforcement access to financial information [Proposed Directive (C)]

Justice Committee: Cross-border access to electronic evidence in criminal proceedings [Proposed Decision (NC]; Cross-border police cooperation: Third country participation in the Prüm framework for exchanging DNA, fingerprint and vehicle registration data [Proposed Decisions (NC)]; Improving cross-border law enforcement access to financial information [Proposed Directive (C)]

Treasury Committee: Digital Services Tax [Proposed Directive (NC)]

Work and Pensions Committee: Brexit: access to social security for EU and UK nationals [Proposed Regulation (C)]

Parental and Carers' Leave Directive

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; but scrutiny waiver granted for adoption at or around the time of the EPSCO Council of 15 March 2019; drawn to the attention of the Business, Energy and Industrial Strategy Committee, the Women and Equalities Committee, and the Work and Pensions Committee
Document details	Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU
Legal base	Articles 1531(1) and 153(2)(b) TFEU; ordinary legislative procedure; QMV
Department	Business, Energy and Industrial Strategy
Document Number	(38689), 8633/19 + ADDs 1–3, COM(17) 253

Summary and Committee's conclusions

1.1 In April 2017, as part of a push to modernise EU social law and policy under the European Pillar of Social Rights, the Commission published a proposal for a Directive on statutory entitlements to paternity, parental and carers' leave for workers. As originally drafted, the proposed Parental and Carers' Leave Directive would establish a statutory right in Member States to paid paternity, parental and carers' leave for workers with employment contracts. The proposal provides that workers should be compensated for each form of leave by at least the same amount as national sick pay.

1.2 A full background to the proposal—including the Government's initial legal and political analysis—can be found in our Report to the House of 29 November 2017 when we first considered the proposal.[1]

1 European Scrutiny Committee, Third Report of Session 2017–19, HC 301–iii

1.3 The Committee last considered the proposal in its Report to the House of 28 November 2018[2] and granted a scrutiny waiver for the Government to support adoption at the Employment, Social Policy, Health and Consumer Affairs (EPSCO) Council of 6 December 2018. Since this time, Minister for Small Business, Consumers and Corporate Responsibility (Kelly Tolhurst MP), has written to inform the Committee—by letter dated 17 January 2019[3]—that no formal discussions on the proposal took place at the December EPSCO Council and, as such, it was not put for adoption.

1.4 The Minister now writes[4] requesting clearance of the file from scrutiny in order for the Government to support adoption which is scheduled to take place on or before the EPSCO Council of 15 March 2019. The Minister provides an update on the expected form of the text which, to all intents and purposes, is the same as that described in our last report. As the compromise text is expected to remain materially similar to that reached in December—which the Government was content with—the Minster has suggested that she will support its adoption.

1.5 As it currently stands, the draft Directive would provide for:

- 10 working days of paternity leave (compensated at a level equivalent to at least sick pay);
- a payment or allowance for a minimum of 2 months parental leave per parent, per child (domestic legislation currently provides a right to 4 months unpaid leave), compensated at a level to be determined by Member States; and
- a requirement to introduce a minimum of 5 days carers' leave (the details of which are to be defined by Member States).

1.6 If adopted in this form, the Directive would create a new right to paid parental leave (for 2 months) and a right to 5 days unpaid carers' leave. The level of remuneration—for parental leave—would be determined by national Governments taking into account the need to facilitate the up-take of parental leave by first-time parents.

1.7 **We thank the Minister for her letters of 17 January 2019 and 11 February 2019.**

1.8 **We are content to agree to the requested scrutiny waiver so that the Government can support the adoption of the proposal at or around the time of the EPSCO Council of 15 March 2019. Due to the political sensitivity of the proposal, we retain it under scrutiny.**

1.9 **We request a report on the outcome of the Council at which the proposal is adopted detailing how the Government voted by 15 April 2019.**

1.10 **In her letter of 11 February, the Minister states that—as it currently stands—the Directive would have to be implemented by Member States 3 years after it is published in the Official Journal. This takes the requirement for implementation beyond the proposed transition/implementation period provided for under the draft Withdrawal Agreement. As such, we seek clarification as to whether the Government plans to give effect to the Directive.**

2 European Scrutiny Committee, Forty-Sixth Report of Session 2017–19, HC 301–xlv
3 Letter from Kelly Tolhurst MP to Sir William Cash MP, 17 January 2019
4 Letter from Kelly Tolhurst MP to Sir William Cash MP, 11 February 2019

1.11 **If the Government does plan to implement the Directive, we request further information on its domestic plans covering, in particular, the level at which compensation will be set for parental leave and how the new right to carers' leave will be given effect to.**

1.12 **We draw this report to the attention of the Business, Energy and Industrial Strategy Committee, the Women and Equalities Committee, and the Work and Pensions Committee.**

Full details of the documents

Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU: (38689), 8633/19 + ADDs 1—3, COM(17) 253.

Previous Committee Reports

Forty-sixth Report HC 301–xlv (2017–19) chapter 2 (28 November 2018); Thirty-first Report HC 301–xxx (2017–19) chapter 1 (13 June 2018); Twelfth Report HC 301–xii (2017–19) chapter 3 (31 January 2018); and Third Report HC 301–iii (2017–19) chapter 1 (29 November 2017).

1 Working Conditions Directive

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Business, Energy and Industrial Strategy Committee and the Work and Pensions Committee; **request for clearance ahead of adoption rejected**
Document details	Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions
Legal base	Article 153(1)(b) and Article 153(2)(b) TFEU; ordinary legislative procedure; QMV
Department	Business, Energy and Industrial Strategy
Document Number	(39396), 16018/17 + ADDs 1–2, COM(17) 797

Summary and Committee's conclusions

1.1 The proposal under scrutiny was introduced in late December 2017 in the wake of the endorsement of the European Pilar of Social Rights by the EU's institutions. The proposal is the first attempt at Union-level to legislate in the area of employment and collective labour law in close to a decade. The Directive has been drafted against the principles of the Pillar of Social Rights, in particular, Principle 5 on 'Secure and adaptable employment' and Principle 7 on 'Information about employment conditions and protection in case of dismissals'. Aside from the legal novelty of the proposal, politically, it forms part of the Commission's drive for a more 'social Europe' (under the guidance of President Jean-Claude Junker).

1.2 The proposal would, primarily, serve to update the Written Statements Directive (which requires new employees to be informed in writing about their conditions of employment).[5] It does, however, also seek to introduce new substantive employment rights. In no particular order, these cover: creating a statutory definition of 'worker' for the first time at EU-level; limiting probationary periods; restricting the use of exclusivity clauses that prevent parallel work; and giving workers more certainty about the hours they are expected to work.

1.3 The Committee's initial assessment of the proposal—including a comprehensive assessment of the political implications of its introduction for domestic employment law and policy—can be found in our first report to the House of 31 January 2018. In response to Ministerial correspondence, a second report was committed to the House on 13 June 2018. Since this time, Minister for Small Business, Consumers & Corporate Responsibility (Kelly Tolhurst MP), has written to the Committee twice (by letter dated 31 August 2018 and 14 February 2019). In her letter of 14 February, she requests scrutiny is lifted on the proposal ahead of its adoption.

5 Council Directive of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (91/533/EEC).

1.4 After a brief synopsis of the Government's views on the proposal, the Minster's letters are taken in turn and, were appropriate, an assessment of her responses to our questions and requests for further information given.

The Government's views on the proposal

1.5 In the Explanatory Memorandum accompanying the proposal, the previous Minister with charge over the draft Directive (former Minister for Small Business (Andrew Griffiths MP)), appeared broadly supportive. He noted, in particular, the alleged overlap between the proposal and the findings of 'Good Work: The Taylor Review of Modern Working Practices'.[6]

1.6 The Minister did take issue, however, with some of the new rights proposed. Noteworthy examples include the extent to which the Working Conditions Directive would allow for unfair dismissal claims from the start of an employment relationship and the proposed introduction of an EU-wide definition of 'worker'. On the former, this was foreseen as a problem because, under UK employment law, unfair dismissal claims are only permitted after 2 years of employment, on the latter, the Government believed that defining who constitutes a worker would limit national flexibility when applying EU employment legislation.

1.7 In further correspondence dated 11 May (to the other place), the former Minister's view of the Directive appeared to soften. Ahead of a General Approach being reached at the 21 June 2018 meeting of EU employment ministers, Mr Griffiths said that the Government had:

> … made significant progress on the text [of the proposal] and [had] achieved [its] objectives particularly with regards to better alignment with [the UK] domestic agenda on written statements, employment in parallel and the right to request a more secure form of employment.

1.8 The progress of the proposal from its publication to the beginning of trilogue negotiations marks a notable change in the quality—and thus utility for the purposes of domestic scrutiny—of the Ministerial correspondence the Committee has received.

1.9 In the spring of 2018, the Committee also received an opinion from the Business, Energy and Industrial Strategy Committee and the Work and Pensions Committee on the proposal in light of the aforementioned Taylor review.[7] The Committees were broadly supportive of the proposal but were wary that changes to EU legislation in this area could create uncertainty for the UK's employment law framework. They also concluded that a full assessment of the potential domestic implications of the Directive would depend on the outcome of the Government's consultation exercise on the Taylor review.

6 Matthew Taylor, 'Good Work: the Taylor Review of Modern Working Practices' (July 2017).

7 This is replicated in an annex appended to our Thirty-first Report, Chapter 2, to the House of 13 June 2018.

Post-General Approach correspondence

31 August 2018

1.10 In response to the questions and requests for further information made in Chapter 2 of our Thirty-first Report to the House of 13 June 2018, the incoming Minister with responsibility for the proposal (Kelly Tolhurst MP), wrote to the Committee on 31 August 2018. The Minister's correspondence was received 6 weeks later than requested—by 16 July 2018—without an apology or explanation for the delay.

1.11 In her letter, the Minister provided a brief overview of the General Approach reached at the June ESPCO Council before turning to our questions and requests for further information. On the definition of 'worker', the Minister noted that the Presidency had agreed an amendment to the text of the Directive—at the behest of the UK and a number of other Member States—that would allow national determination to be made to decide who the Directive applies to.

1.12 The Committee also sought clarification as to whether Article 17 of the Directive would create a new right for workers to challenge unfair dismissal in the UK. The Minister stated that the Directive would not create such a right rather it would place an obligation on employers to show that dismissal was for objective reasons unrelated to workers exercising their rights under the Directive.

1.13 The Committee also asked about the practical implications of the proposed time limit on probationary periods—currently set at 6 months—for UK employment law and policy. In response, over two lines, the Minister explained that—should the Directive be adopted—the Government would likely have to legislate to set a new limit and that this would be considered further when the final text of the Directive is known.

1.14 Finally, the Committee queried whether—when transposing the Directive—Member States would be required to set limits on reference hours and advanced notice periods for workers on flexible hour contracts. In response, the Minister stated that the draft Directive does not set such limits and that, on advanced notice, recognises that variation is permissible so as to take account of the needs of certain sectors and to provide cover in the event of emergency situations.

14 February 2018

1.15 The Minister now writes—14 February 2019—requesting clearance of the proposal ahead of adoption. The Minister is not able to provide the Committee with details of the next Council meeting at which the proposal will likely be put for adoption.

1.16 The Minister's letter is particularly anodyne and noncommittal and is further marked by its failure to provide any useful information to aid the Committee's consideration of her request for the proposal to be cleared from scrutiny. As an example, the only substantive paragraph of note suggests that there is "… clear overlap between [the] proposed Directive and our [the Government's] major reform programme to modernise working practices in

the UK set out in the Good Work Plan".[8] No details are provided on these alleged overlaps or, more importantly, how they relate to the Government's support of—or opposition to—the proposal.

1.17 Again, with regard to the European Parliament's attempts to broaden the protections for vulnerable workers under the proposal, the Minister suggests that the Government is looking at these closely, however, save for reference to a recent report published by the Low Pay Commission (a body that makes remuneration-related recommendations independent of Government), does not explain how such potential changes relate to its support for the proposal.

1.18 The clarity of the Minister's letter is further clouded by statements with no apparent relevance to the decision to endorse adoption. An example is the Minister's commitment that the Government "will continue to provide leadership so that compromise [on the proposal] takes account of the considerable progress that we [the Government] have already made [in this area]…".

1.19 The Minister does not provide an overview of the current form of the proposal—whether from intelligence gained from previous rounds of negotiations or otherwise—and flip-flops on the Government's plans for endorsing adoption. She states a desire to support adoption but this is said to be contingent upon any final compromises on the text having to complement the Government's domestic work. Once again, details are not provided as to the areas where changes are expected, how the Government would react to these and, furthermore, how they would relate, specifically, to its domestic legislative agenda.

1.20 **We thank the Minister for her letters of 31 August 2018 and 14 February 2019. We note that the Minister's letter of 31 August was some 6 weeks overdue and was received without an apology or explanation for this delay.**

1.21 **We retain the proposal under scrutiny and do not grant a waiver for the Government to support its adoption at Council. We do not believe that the Minister has provided the Committee with sufficient information on the Government's voting intentions in order for a decision to lift or waive scrutiny to be made to the House. As the Minister will be aware, it is the role of the Committee to report to the House on political and legal significance of a deposited EU documents. It is therefore the Committee's usual practice not to agree to clearance or a scrutiny waiver until enough information has been provided by the Government to enable the Committee to do this.**

1.22 **In line with our above conclusions, recent correspondence on the proposal has been marked by delay and, with regards to its progress towards adoption, a lack of information on the changes that are expected to the final text, how the Government would react to these and, furthermore, how they would relate, specifically, to its domestic legislative agenda.**

8 HM Government, 'Good Work Plan' (December 2018).

1.23 **We remind the Minister that effective scrutiny is dependent upon the Government engaging with the Committee in a thorough and timely fashion. In the area of social and employment law, in light of the 'non-regression' commitments provided for under the draft Withdrawal Agreement,[9] scrutiny will continue to be an important concern for Parliament after the UK has left the EU.**

1.24 **By no later than 3 weeks after the adoption of the proposal, we request information on how the Government voted at Council and details of how the final text of the Directive differs from that originally drafted by the Commission.**

1.25 **We seek information on the Government's plans for the domestic implementation of the Directive addressing, in particular, whether legislation will be forthcoming to set a new limit on probationary periods and, if so, what this limit will be.[10]**

1.26 **We also request details of the limits to be set on reference hours and advanced notice periods for workers on flexible employment contracts (whether these are to be mandated at EU-level or set directly by Government).**

1.27 **We draw this report to the attention of the Business, Energy and Industrial Strategy Committee and the Work and Pensions Committee.**

Full details of the documents

Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions: (39396), 16018/17 + ADDs 1–2, COM(17) 797.

Previous Committee Reports

Twelfth Report HC 301–xii (2017–19), chapter 5 (31 January 2018); and Thirty-first Report HC 301–xxx (2017–19), chapter 2 (13 June 2018).

9 We are referring, in particular, to Article 4 of Annex 4 to the Protocol on Ireland/Northern Ireland (requiring the Government to ensure that "the level of protection provided for by law, regulations and practices… in the area of labour and social protection" does not fall "below the level provided for by the common standards applicable within the Union and the United Kingdom at the end of the transition period").

10 On the basis of the correspondence we have received to date, we are unsure whether the proposed 6 months limit has been retained and would be mandatory or if it has been amended and/or could be adjusted by Member States.

2 Single Market review

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; drawn to the attention of the Business, Energy and Industrial Strategy Committee and the Committee on Exiting the European Union.
Document details	Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on The Single Market in a changing world—A unique asset in need of renewed political commitment
Legal base	—
Department	Business, Energy and Industrial Strategy
Document Number	(40208), 14633/18 + ADD 1, COM(18) 772 final

Summary and Committee's conclusions

2.1 In November 2018, in response to a request from the European Council in March 2018, to consider the implementation, application and enforcement of key existing legislation, as well as remaining barriers and opportunities for a fully functioning Single Market, the European Commission adopted a Communication[11] entitled "The Single Market in a changing world—a unique asset in need of renewed political commitment".

2.2 The Communication provides a condensed account of the Single Market and its effects. Citizens are deemed to have benefited from the reduction in barriers to trade and the increased competition which this has facilitated, which has led to a wider choice of quality products and services at lower prices: the 35% decrease of telecoms prices over the past decade, the abolition of roaming charges, and the reduction in airport transport costs are cited to illustrate these effects. The Commission states that harmonised standards and consumer protection rules facilitate trust across a wide range of sectors. Free movement is cited as a benefit for citizens, by opening employment opportunities, and facilitating greater coordination of social security rules (so that, for example, European citizens can receive the correct level of pension from different EU Member States in which they have worked).

2.3 The Commission states that businesses have benefited from the harmonisation of divergent national rules and mutual recognition, which have removed non-tariff barriers to intra-EU trade for 80 percent of industrial products. The Commission states that the creation of a scale market encourages diversification, experimentation and innovation which drive productivity and attract investment, which helps to make European business competitive globally. A table shows that there has been a slow but steady increase in intra-EU trade since 2004 (apart from a dip during the financial crisis). The Communication

11 European Commission, Communication: The Single Market in a changing world A unique asset in need of renewed political commitment, COM(18) 772 final.

also reflects on the benefits of the international trade agreements the EU has concluded with many countries which both open up markets and ensure a level playing field for European exporters.

2.4 However, the Communication also enumerates a range of challenges with the more effective delivery of the Single Market. The first of these challenges relates to the transposition of EU rules into national law. While the Communication notes that the average transposition deficit has reduced from 6.3% in 1997 to 0.9% in 2017, the Commission notes that there have been some recent negative developments, and that in relation to the three public procurement directives which were supposed to have been transposed by April 2016, the Commission had to launch 58 infringements against 21 Member States for not communicating any transposition measure, of which 3 are still ongoing.

2.5 "Gold-plating", whereby national implementation of EU rules leads to disproportionate burdens on citizens and businesses, is cited as the second such challenge. The Commission notes that one Member State, in implementing the General Data Protection Regulation (GDPR), has added up to 600 pages of additional legislation to its implementation.

2.6 The third such challenge that is identified relates to enforcement. Highlighting the Dieselgate scandal as an instance of poor enforcement of EU rules, the Commission notes that, to be effective, Single Market legislation requires oversight from properly resourced independent authorities at national level. The importance of enforcement at EU level, both in terms of State aid control and competition law, is also noted.

2.7 The Communication also looks forward, identifying a range of areas in which the potential of the Single Market as a tool to promote growth, jobs and international competitiveness remains unexploited or inadequately exploited. The areas identified include:

- The digitisation of businesses and administrations, and the continuing adaptation of existing EU regulatory framework to the digital environment. The Commission notes that a number of Digital Single Market (DSM) legislative have not yet been adopted by the co-legislators, although since the publication of the Communication most of the outstanding proposals have been adopted. The Communication also notes that, in future, the integration of digital technologies to the economy means that it will no longer make sense to differentiate between the Single Market and the Digital Single Market.

- The data economy: The communication notes the importance of the data economy to the digital economy, and states that the Single Market is the right framework to build a regulatory ecosystem, covering the bases of trust, data availability and capacities/infrastructure. It is emphasised that the proposed ePrivacy Regulation, which has not yet been adopted by the co-legislators, and measures in the Cybersecurity Strategy, will help to achieve the requisite levels of trust, and that the Union can help to boost European capacity in artificial intelligence, high performance computing and quantum technologies.

- Circular economy and sustainable finance: It is stated that the circular economy, where the value of products, materials and resources is preserved for as long as

possible and the generation of waste is minimised, must become an intrinsic characteristic of the Single Market. To respond to a growing demand, the Commission has put forward an Action Plan on financing sustainable growth.

- Persistent challenges in products and services markets: The Commission notes that the biggest rewards would come from further integration of services, and in particular business services—not least, because such services are a critical input to the manufacturing process for industrial goods—but that the gap between the Member States' rhetoric on integration and delivery of the necessary measures is particularly stark in this sector, with the Member States failing (to date) to adopt various EU legislative proposals, such as a proposal Notifications Mechanism and a Services e-Card, which would make modest, incremental improvements in this area.

- Outstanding challenges for network industries: It is stated that consumers and businesses are not fully enjoying the benefits of competition in regulated industries in a number of respects. Notably, although wholesale electricity prices have fallen by around 40% between 2008 and 2017, consumer prices have only declined on average by 13% during this period. The Commission hopes that action on 5G will encourage the rapid development of 5G networks for the data economy, Artificial Intelligence and digitisation.

- Capital markets and banking union: The Commission emphasises the need to increase cross-border bank credit and alternative sources of finance, and to diversify sources of financing—a priority under the Capital Markets Union. The Commission lists a wide range of legislative proposals, few of which have been adopted by the co-legislators.

- Reducing administrative burden and facilitating tax compliance: The Commission notes that a recent survey indicates that administrative and regulatory barriers remain the main barrier to operating across national borders, and identifies a range of actions designed to mitigate these concerns (the Single Digital Gateway; e-Government Action Plan; new procedures from cross-border mergers; and the Value Added Tax mini-one-stop-shop). It is suggested that the adoption of a Common Consolidated Corporate Tax Base (CCCTB) would reduce the additional annual tax compliance cost for a new subsidiary by around 65%.

- Enabling measures: It is noted that rules themselves are not sufficient to make the Single Market work, and that investment in infrastructure and networks is critical. The Commission states that, for the period 2021 to 2027, it has proposed a streamlined budget which will support the Single Market through: the new Connecting Europe Facility, the Space Programme, the Digital Europe Programme, the Horizon Europe Programme, and the Structural and Investment Funds.

2.8 In the Communication's conclusions, the Commission makes a number of recommendations, summarised in the conclusions of our report below, and calls on the European Council to discuss future priorities for the Single Market, methods of

implementation, and to renew engagement with citizens and businesses to voice support publicly for deepening the Single Market in advance of the forthcoming European Parliament elections.

2.9 On 10 December 2018 the Parliamentary Under Secretary of State at the Department for Business, Energy and Industrial Strategy (Lord Henley) submitted an Explanatory Memorandum to Parliament[12] in which he stated that "the Government believes that a strong EU economy is in the UK's interests" and that the Government "therefore continues to support efforts to further improve the functioning of the Single Market". The Minister added that the UK had long supported efforts to liberalise and open markets, and therefore supports many of the individual measures mentioned in the Communication.

2.10 At the meeting of the European Council on 13 and 14 December 2018, it was resolved that the European Council would hold an in-depth discussion in spring 2019 on the future development of the Single Market and European digital policy in preparation for the next Strategic Agenda.

2.11 **We have taken note of the Commission's review of the state of the Single Market and the Government's assessment that "a strong EU economy is in the UK's interests" and that the Government "therefore continues to support efforts to further improve the functioning of the Single Market".**

2.12 **The Communication variously takes stock of the current status of the Single Market, identifies the key issues to be addressed for the Single Market to achieve its potential, acknowledges that further extension of the Single Market is becoming increasingly challenging politically, calls on the Council and Parliament to agree and adopt the Commission's outstanding legislative proposals, and calls on the European Council to ensure that national administrations step up efforts to transpose, apply and enforce Single Market legislation, and to avoid "gold-plating" of EU rules.**

2.13 **In terms of the current Commission's legislative agenda for the Single Market,[13] it is increasingly clear that its principal success has been delivery of the Digital Single Market Strategy, in which a large majority of legislative proposals have now been adopted by the co-legislators, or will be in the coming weeks, including consumer-oriented measures championed by the UK such as the ban on unjustified geo-blocking, the portability of content subscriptions across borders, and the abolition of mobile roaming surcharges. However, progress has been considerably less impressive in relation to the Single Market Strategy and the Banking and Capital Markets Unions.**

2.14 **The Commission has particularly struggled to liberalise intra-EU trade in business services which are not covered by sector-specific frameworks, with the Member States largely failing to support the relatively modest, practical, implementation-oriented reforms contained in the Single Market Strategy (e.g. the Notifications Directive; and the Services e-Card) which were primarily designed to ensure the better implementation of Directive (EC) 2006/123 (the Services Directive). Despite their avowed support for these reforms in the European Council, the Council in particular has focused its**

12 Explanatory Memorandum from the Parliamentary Under-Secretary of State at the Department for Business, Energy and Industrial Strategy (Rt Hon. Lord Henley) to the Chair of the European Scrutiny Committee (10 December 2018).

13 The legislative progress of the Commission's Single Market proposals is summarised in an Annex to the main Communication, available here.

efforts on weakening and obstructing these measures. From this, we infer that the longstanding lack of impetus for further intra-EU liberalisation of business services[14] is unchanged, and likely to diminish further following Brexit. In the area of financial services–where completion of the Single Market is being pursued as part of the Capital Markets Union (CMU) and Banking Union–progress has also been particularly slow: out of 17 CMU legislative proposals only three have so far been agreed by the Council and the Parliament.

2.15 **Contrary to the aims of the Commission's Communication, we observe signs of a growing appetite among the Member States, not for further integration of the Single Market, but for a degree of dis-integration in certain areas. By way of illustration, we observe that: (i) the recent revision of the Audio Visual Media Services Directive weakened the country-of-origin regulatory approach used in this sector, by allowing host countries to impose levies on broadcasters based in other EU countries but targeting their consumers; (ii) negotiations regarding measures relating to the Services Directive saw some Member States attempt to reopen elements of the Directive itself in order to reduce the restrictions on Member States; and (iii) the recently published Franco-German Manifesto for "a European industrial policy fit for the 21st Century"[15] raises the prospect (in response to the Commission's rejection of the Siemens-Alstom merger) of enabling the European Council to override decisions of the Commission with respect to individual mergers, which would amount to the removal of the Commission's exclusive competence in this area of Single Market policy.**

2.16 **In terms of EU exit, the Minister indicates broad support for the Communication, stating that "the Government believes that a strong EU economy is in the UK's interests" and "therefore continues to support efforts to further improve the functioning of the Single Market".**

2.17 **Regarding the implications of EU exit for UK involvement in the Single Market, we note that:**

- **were the Withdrawal Agreement to be ratified, it would preserve full UK participation in the Single Market, minus voting rights in the European institutions, for the duration of the Implementation Period;**
- **if, when the Implementation Period ends, either the future relationship has not been ratified or the future relationship fails to fully remove the need for the Northern Ireland-specific arrangements in the Withdrawal Agreement to become operative, then the territory of Northern Ireland would effectively continue to participate in the Single Market for goods while the rest of the UK would cease to do so; however the Government has separately made a unilateral commitment that Great Britain would maintain regulatory alignment with these goods rules during any period for which the backstop were operative, in order to minimise the emergence of any intra-UK barriers**

14 For clarity, we note that these comments relate to those services primarily covered by the Services Directive, for which harmonised regulatory frameworks do not exist, not the Single Market for services as a whole. There is little evidence of a desire to dismantle, for example, existing harmonised frameworks which apply to, for example, transport services, financial services, legal services, and the digital sector, which are typically much more integrated and trade-facilitating than those sectors for which harmonised frameworks do not exist.

15 Gouvernement FR, A Franco-German Manifesto for a European industrial policy fit for the 21st Century (19 February 2019).

to trade;[16] the backstop thus does not entail ongoing participation in the EU Single Market in terms of the rules applicable to movement of services, persons or capital (or goods, in the case of Great Britain);

- **the Political Declaration regarding the future relationship,[17] which was agreed by the UK and EU negotiators, and which will form the starting point for the EU's mandate for trade negotiations with the UK, states that the future trading arrangement between the UK and the EU will be consistent with "the integrity of the Single Market and the Customs Union and the indivisibility of the four freedoms", which strongly suggests that the possibility of continued UK participation in the Single Market within the future relationship remains a largely binary proposition, conditional on continued UK acceptance of the free movement of persons, and therefore incompatible with the type of goods-only arrangement such as that which was proposed in the Government's White Paper on the Future Relationship ("Chequers");[18] however, this does not preclude other preferential arrangements such as preferential tariff rates, regulatory cooperation, including with EU agencies, and customs cooperation; and**

- **even in the event of a non-negotiated withdrawal (No Deal), although EU Single Market law would no longer have direct effect in the UK, which would be free to diverge from EU rules, we note that EU rules will continue to play a role for UK stakeholders in the following respects: the European Union (Withdrawal) Act 2018 and derived secondary legislation largely preserve EU Single Market rules in UK law at the moment of exit; to minimise friction to UK-EU trade in the event of a No Deal, many of the Government's No Deal guidance notices applicable to particular economic sectors envisage maintaining alignment with EU rules and continuing to accept EU-issued regulatory approvals, sometimes for substantial/indeterminate periods of time, with little suggestion that future regulatory divergence is envisaged; Single Market rules will continue to specify the criteria with which UK goods must comply when they are placed on the EU market; the third country provisions contained in existing and new EU laws across a wide range of sectors and types of regulatory activity will apply to UK economic operators trading with the EU; in areas in which the UK wishes for its rules and regulators to be recognised as adequate/equivalent to those of the EU for certain purposes (e.g. data protection, financial services regulation), the Government is likely to have to maintain a considerable degree of alignment with EU rules; EU legal acts which specifically concern the UK, such as the recent No Deal legislative proposals, will continue to apply to the activity of UK stakeholders operating in the EU in the absence of other negotiated bilateral arrangements; furthermore, many of these unilateral No Deal measures (such as those relating to Road Haulage and Air Transport) include Level Playing Field-type provisions which would require the UK and UK operators to maintain alignment with certain EU rules in order to maintain**

16 HM Government, UK Government commitments to Northern Ireland and its integral place in the United Kingdom (9 January 2019).

17 HM Government, Political Declaration setting out the framework for the Future Relationship between the European Union and the United Kingdom (25 November 2018).

18 HM Government, The future relationship between the United Kingdom and the European Union (12 July 2018).

the levels of market access provided for in them, as well as mechanisms by which redressive measures can be taken to suspend this access where these requirements are not met.

2.18 **We retain this document under scrutiny. We draw it to the attention of the Business, Energy and Industrial Strategy Committee and the Committee on Exiting the European Union.**

Full details of the documents

2.19 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on The Single Market in a changing world—A unique asset in need of renewed political commitment: (40208), 14633/18 + ADD 1, COM(18) 772 final.

Previous Committee Reports

None.

3 Commission Brexit preparedness: Removal of Galileo sensor stations from the Falklands and Ascension

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Business, Energy and Industrial Strategy Select Committee and the Defence Select Committee.
Document details	Commission Implementing Decision (EU) …/… of [XXX] amending, as regards the GSS stations of Ascension and the Falkland Islands, Implementing Decision (EU) 2016/413 determining the location of the ground-based infrastructure of the system established under the Galileo programme and setting out the necessary measures to ensure that it functions smoothly, and repealing Implementing Decision 2012/117/EU.
Legal base	Article 12, paragraph 3(c), and Article 36, paragraph 3, of GNSS Regulation No. 1285/2013; QMV under Article 5(1) of Regulation 182/2011/EU
Department	Business, Energy and Industrial Strategy
Document Number	(40371), Unnumbered

Summary and Committee's conclusions

3.1 The EU's Global Navigation Satellite System (GNSS), Galileo, requires a global network of ground-based infrastructure known as sensor stations. These sensor stations monitor the navigation signals of all the Galileo satellites on a continuous basis and communicate this information to the Galileo Control Centres in Germany and Italy.

3.2 The EU has proposed an Implementing Decision which would remove the legal basis for the presence of the two Galileo sensor stations which are currently located on the British Overseas Territories (BOT) the Falkland Islands and the St Helena dependency Ascension, and which anticipates their physical removal following the UK's withdrawal from the European Union on March 29 2019.

3.3 Whereas EU rules prohibit certain security-related elements of the EU Space Programme from being conducted on the territory of a third country, the proposed Decision explicitly acknowledges that "the creation and operation of Galileo Sensor Stations (GSS) on the territory of a third country is not ruled out but requires the conclusion of appropriate arrangements with the country concerned, covering security matters in particular." For the UK to continue to retain a sensor station on its overseas territories post-exit, it would

have to put in place an overarching security agreement covering classified information, as well as a separate Galileo Public Regulated Service (PRS) agreement if these stations were to continue to use encryption/decryption technologies relating to the PRS.

3.4 At present, however, there appears to be little prospect of the UK and the EU concluding any such arrangements before exit day, as the EU has indicated that any security agreement will be addressed in the next phase of negotiations regarding the future relationship, along with the issue of UK involvement in the EU Space Programme, which has proven particularly contentious. The central point of dispute in this regard has been the UK's request to not only retain access to the Galileo PRS—an encrypted version of the Galileo signal designed to resist jamming and involuntary interference, so that it can provide service continuity for government users during emergencies when other navigation services are being jammed—but also for UK industry to retain its eligibility to participate in the production of the PRS, something which is currently reserved to EU Member States, even where PRS agreements are in place, as set out in Council Decision (EU) 1104/2011.

3.5 The closest thing to an official Government position regarding the sensor stations specifically is contained in a technical note on "UK participation in Galileo", which the Government published on 24 May 2018, and which stated that the UK would be willing as part of securing the UK and the EU's joint security cooperation in the Galileo and European Geostationary Navigation Overlay Service (EGNOS) programmes "to continue to host Galileo sensor stations on UK territory".[19] However, this offer was part of a wider position set out in the paper in which the Government requested to maintain its rights to industrial involvement in the secure elements of the service, which suggests that the offer was conditional on the EU acceding (at least in part) to the UK requests for preferential access.

3.6 The EU balked at this request and negotiations effectively broke down when the Commission published its own document in response in which it stated that future UK involvement in the EU Space Programme, including the PRS, "should be subject to the relevant conditions for the participation of third countries to be established in the corresponding programmes"[20]—in effect clarifying that no exception to the existing rules regarding third country involvement in the PRS would be made for the UK.

3.7 The Defence Secretary (the Rt Hon. Gavin Williamson MP) subsequently issued a sharp rebuke to the Commission stating that if the EU did not cooperate with UK requests for full involvement in the PRS it would be prevented from continuing to base Galileo ground stations in the Falklands and Ascension.[21] On 1 December 2018, effectively giving up on retaining preferential involvement with the Galileo PRS (although the statement did not rule out continued UK involvement in the EU Space Programme more generally), the Prime Minister's office issued a statement to the effect the UK would no longer seek to use the Galileo PRS for defence or critical national infrastructure after Brexit, and that the UK would instead explore options to build its own Global Navigation Satellite System.[22]

19 Department for Exiting the European Union, Technical note: UK Participation in Galileo (24 May 2018).
20 European Commission, Slides: Framework for the future relationship: involvement in the EU's space-related activities (12 June 2018).
21 The Times, 'Gavin Williamson threatens to block EU satellite bases from British territories' (2 October 2018).
22 HM Government, UK to tell EU it will no longer seek access to secure aspects of Galileo (1 December 2018).

3.8 In November 2018, as part of its Brexit Preparedness Work Programme, the European Commission indicated in a Communication[23] that it would bring forward an Implementing Decision which would remove the Galileo ground stations from these territories. A draft version of this implementing decision was submitted to the relevant comitology committee in February 2019.[24]

3.9 In content, the Commission's proposed Implementing Decision simply amends Implementing Decision (EU) 2016/413, which determines the location of Galileo ground infrastructure, so that the words 'Ascension' and 'Falkland Islands' are deleted from it. It also states in the recitals that if no appropriate arrangements with the United Kingdom have been put in place by exit day, the GSS stations located in Ascension and the Falkland Islands should be removed.

3.10 Based on engagement with officials, we understand that the Commission does not propose to immediately remove the sensor stations in their entirety but rather, as part of its wider efforts to require companies based in the UK to return/destroy classified information relating to the EU Space Programme (particularly the Galileo PRS), to initially remove only the very small part of the technology on the site which relates specifically to the cryptographic/classified aspect of the service.

3.11 The EU has already switched off the sensor stations, to demonstrate to the Member States that this would not result in any significant deterioration in the standard of the service, and to justify its proposal to proceed with the removal of these stations. The switching off of the stations has not negatively impacted the quality of the end-service to Galileo users, however some of the Member States have raised concerns that (i) the sensor stations were taken offline at the same time that four new Galileo satellites became operational, which could have hidden some deterioration of performance, and (ii) that this reduction of the scope of the ground segment may have other negative impacts which are less immediately quantifiable, such as the loss of reserve capacity built into the system. For these reasons the draft Implementing Decision was not agreed at a meeting of EU and Member State GNSS technical experts which took place in early March.

3.12 In the Government's Explanatory Memorandum,[25] the Minister of State for Universities, Science, Research and Innovation (Chris Skidmore MP) states that:

> The Government has signalled its preference to explore all possible options for collaboration on certain EU science and space programmes in both its Science & Innovation and Foreign Policy, Defence & Development Future Partnership papers. Any future UK participation in the EU space Programmes will be considered as part of the next phase of the exit negotiations.

23 European Commission, Annex to the Communication: Preparing for the withdrawal of the United Kingdom from the European Union on 30 March 2019: a Contingency Action Plan COM(2018) 880 final.

24 Unnumbered document, Commission Implementing Decision amending, as regards the GSS stations of Ascension and the Falkland Islands, Implementing Decision (EU) 2016/413 determining the location of the ground-based infrastructure of the system established under the Galileo programme and setting out the necessary measures to ensure that it functions smoothly, and repealing Implementing Decision 2012/117/EU (February 2019).

25 Explanatory Memorandum from the Minister at the Department of Business, Energy and Industrial Strategy (22 February 2019).

> The sensor stations are currently managed by Sure (formerly Cable and Wireless), who have a commercial contract with the European Space Agency to manage the sites. The UK Government has no direct involvement in these sites. The legal mechanism for terminating the contracts which govern these stations are currently being explored with lawyers but are unlikely to impact on the UK Government directly.

3.13 **The Commission's proposed Implementing Decision will remove the current legal basis for the presence of Galileo sensor stations on the Falkland Islands and Ascension and provides for their removal following EU exit (currently projected to be March 29 2019). The sensor stations have already been switched off and the Galileo GNSS system is currently operating without them.**

3.14 **The EU's decision to proceed with the removal of the stations was proposed in a previous Communication on Brexit preparedness, and is consistent with its efforts to ensure that companies based in the UK return or destroy classified/security-related information which relates to the EU Space Programme.**

3.15 **Legally, the removal of these sensor stations was not automatic as EU rules do permit Galileo sensor stations to be located on the territory of third countries where the appropriate agreements (an overarching agreement relating to security and classified information, and a separate agreement in relation to the PRS) are in place.**

3.16 **That these agreements will not be in place when the UK leaves the EU partly reflects the phasing of EU withdrawal negotiations, but also more specifically reflects the breakdown in the negotiations regarding the scope for continued UK involvement in the industrial aspects of the Galileo PRS, which—following the EU's clarification that any future UK involvement in the PRS "should be subject to the relevant conditions for the participation of third countries to be established in the corresponding programmes"—culminated in the Defence Secretary (the Rt Hon. Gavin Williamson MP) threatening to block the EU from continuing to locate sensor stations on British Overseas Territories, and the Prime Minister indicating that the UK would no longer seek to use the Galileo PRS for defence or critical national infrastructure after Brexit, and would instead explore options to build its own Global Navigation Satellite System.**

3.17 **The sensor stations have already been switched off with no reduction in the quality of the service received by users, however we note that the draft Implementing Decision was not agreed at a meeting of EU and Member State GNSS technical experts which took place in early March, and that the Member States have requested further information from the Commission about the implications of losing the two stations.**

3.18 **The Minister states that the sensor stations are currently managed by Sure (Sure South Atlantic Ltd.), which has a commercial contract with the European Space Agency to manage the sites, and informs the Committee that the UK Government has no direct involvement in these sites and that "there will be no financial implications on the UK Government from this Implementing Decision." We note, though, that Sure is a British Overseas Territories company, and that the termination of this contract is likely to have an impact on their bottom line.**

3.19 **In the Minister's next update to the Committee regarding this decision, we ask him to provide us with an update regarding any further discussions/progress in relation to the Decision, and to clarify:**

- **what the financial impact of the loss of this contract will be on Sure and how many jobs will be lost on the Falklands and Ascension respectively;**
- **whether the Government's position is that permitting the EU to locate its sensor stations on BOT is strictly conditional on the EU granting the UK the preferential access to the Galileo PRS described in its technical paper;**
- **what the impact of switching off the sensor stations has had on the Galileo system, and what evidence has been provided of this to the Member State GNSS technical experts; and**
- **over what timescales the EU proposes to terminate the contract and remove the different elements of the sensor stations.**

3.20 **We retain the document under scrutiny. We request a response to these questions by 27 March 2019. We draw this report to the attention of the Business, Energy and Industrial Strategy Select Committee and the Defence Select Committee.**

Full details of the documents

Commission Implementing Decision (EU) …/… of [XXX] amending, as regards the GSS stations of Ascension and the Falkland Islands, Implementing Decision (EU) 2016/413 determining the location of the ground-based infrastructure of the system established under the Galileo programme and setting out the necessary measures to ensure that it functions smoothly, and repealing Implementing Decision 2012/117/EU: (40371), Implementing Decision number not yet assigned.

Previous Committee Reports

None, but see previous Committee reports on Brexit and the EU space programmes, including Forty-ninth Report HC 301–xlviii (2017–19), chapter 2 (19 December 2018), and Twenty-fourth Report HC 301–xxiii (2017–19), chapter 1 (18 April 2018).

4 Brexit-preparedness: Fisheries

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Environment, Food and Rural Affairs Committee
Document details	(a) Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2017/2403 as regards fishing authorisations for Union fishing vessels in United Kingdom waters and fishing operations of United Kingdom fishing vessels in Union waters; (b) Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 508/2014 as regards certain rules relating to the European Maritime and Fisheries Fund by reason of the withdrawal of the United Kingdom from the Union
Legal base	(a) Article 43(2) TFEU, ordinary legislative procedure, QMV (b) Articles 42 and 43(2) TFEU, ordinary legislative procedure, QMV
Department	Environment, Food and Rural Affairs
Document Numbers	(a) (40337), 5678/19, COM(19) 49; (b) (40338), 5668/19, COM(19) 48

Summary and Committee's conclusions

4.1 Given the continued uncertainty over UK ratification of the Brexit Withdrawal Agreement, the European Commission published two proposals designed to mitigate the impact on the EU fisheries sector of a "no deal" Brexit scenario. The first proposal (document (a)) aims to ensure that the EU is in a position to grant UK vessels access to EU waters until the end of 2019, on the condition that EU vessels are also granted reciprocal access to UK waters. The second proposal (document (b)) would allow fishermen and operators from EU Member States to receive compensation under the European Maritime and Fisheries Fund (EMFF) for the temporary cessation of fishing activities. This would help off-set some of the impact of a sudden closure of UK waters to EU fishing vessels in a no-deal scenario.

4.2 We first considered the proposals at our meeting of 13 February 2019[26] and raised a number of queries to which the Parliamentary Under Secretary of State for the Environment (Dr Thérèse Coffey MP) has responded.[27]

4.3 On quota allocation in the event of no deal, the Minister confirmed that the Department is still seeking cross-Government agreement to a position, insisting only that UK quota holders would be advised of their allocation for the remainder of 2019 once

26 Fifty-fifth Report HC 301–liv (2017–19), chapter 3 (13 February 2019).
27 Letter from Dr Thérèse Coffey MP to Sir William Cash MP dated 4 March 2019.

the UK had left the EU. She does say, however, that the priority would be to minimise disruption to businesses in the event of no deal, implying that the policy is to maintain the status quo while a new fisheries agreement is negotiated.

4.4 The Minister goes on to emphasise that, post-Brexit, the UK will be bound by international obligations as an independent coastal state under the United Nations Convention on the Law of the Sea and related instruments. The Government will, she says, approach any negotiations on fishing opportunities with full respect for these international obligations and commitments to environmental sustainability.

4.5 The Minister offers no comment on the risk that doubt over EU access to UK waters and vice versa could create an incentive for the industry to focus their 2019 fishing effort in the first three months of the year.

4.6 Agreeing with the Committee that the EU proposal is clearly intended to apply in a situation where there is an agreement between the EU and the UK to continue to respect access and quota arrangements for the rest of 2019, the Minister emphasises that such an agreement would be a matter for negotiation. The Commission's proposal, says the Minister, seeks to keep open the possibility of arrangements for continued shared access to UK and EU waters.

4.7 On the details of the arrangements for quota swaps set out in the proposal, the Minister notes that, between 2013 and 2017, the Marine Management Organisation (MMO) processed between 750 and 1,000 international quota swaps per annum between the UK and other EU Member States. 37 such swaps, comprising 88 stock transactions, have been agreed thus far this year by the MMO. The UK would, in principle, support future arrangements to provide a continued facility for such exchanges as long as there is no delay to swaps being agreed and made. The specific mechanism would be a matter for discussion with the EU.

4.8 Regarding continuity on access and quota in third country waters, separate arrangements between the UK and third countries would be required in the event of a no deal exit. Initial discussions have been held with Norway and the Faroe Islands to explore how to achieve such continuity arrangements for the remainder of 2019. The UK would also need to join regional fisheries management organisations.

4.9 The Minister goes on to address the Committee's query about any UK commitment mirroring the proposed EU compensation to EU vessels for any lost fishing opportunities in the event of no deal. She points out that, on 10 December 2018, the Secretary of State announced £37.2 million of extra funding for the UK seafood sector for projects approved during 2019 and 2020 to boost the industry as the UK becomes an independent coastal state. This is in addition to the existing European Maritime and Fisheries Fund (EMFF) funding, which at €243 million over seven years is broadly equivalent to £32 million a year. The Government and devolved administrations have already committed to match the EMFF funding with around £60 million, so the extra funding will support more projects and the sector will benefit from a total of £320 million.

4.10 **We note that cross-Government approval of a position on quota allocation in a no-deal scenario is yet to be concluded. This is despite the previously articulated position that the Government would respect the agreed 2019 fishing opportunities for the whole year even in the event of a no deal.**

4.11 **We welcome the Minister's assurance that, in the event of a no deal, the Government's priority would be to minimise disruption to businesses whilst a framework agreement was negotiated with the EU. We agree with this principle, as we believe does the majority of the affected industry, and we are therefore disappointed with the uncertainty created by the ongoing lack of a Government position. This uncertainty is symbolised by the statement that UK quota holders would only be advised of their allocation for the remainder of 2019 post-Brexit. On that note, we welcome confirmation that, in the event of a no deal:**

- **UK quota holders will learn on 30 March at the earliest what their quota allocations will be for the remainder of the year;**
- **whether that would remain the case even if an agreement with the EU had not been negotiated, concluded and ratified;**
- **any agreement would be subject to parliamentary scrutiny procedures, including the terms of the Constitutional Reform and Governance Act (CRAGA) 2010 if it effectively amounts to a new Treaty; and**
- **any agreement would be concluded in time to be ratified by the European Parliament by the end of its final Plenary session (18 April 2019) before its elections.**

4.12 **While we appreciate the temptation to use fishing opportunities in UK waters as a bargaining chip in the outstanding negotiations on the Withdrawal Agreement, this would be an extremely risky approach on a number of levels. We re-iterate the desirability of supporting the status quo for the whole of 2019, while working with industry, other interests, Parliament, the EU and other third countries on future arrangements in line with the UK's status as an independent coastal state.**

4.13 **We consider that the practical reality of negotiating a well-considered revised agreement in time for implementation from 30 March is such that the most realistic outcome is in any case continuation of the status quo as proposed by the Commission, as originally proposed by the Secretary of State and as confirmed in the Government's Explanatory Memorandum to us dated 26 November 2018.**[28]

4.14 **Regarding the arrangements for access and quota in third country waters, we note that initial discussions have been held with Norway and the Faroe Islands to explore how to achieve continuity arrangements for the remainder of 2019. It is noteworthy that such "continuity" arrangements have begun with those countries, but that the UK has not even decided whether it wishes to seek continuity arrangements with the EU, let alone begin initial discussions. We ask the Minister to set out the mandate for those discussions with third countries, their format, their progress and the plans for parliamentary scrutiny of any ensuing agreements.**

28 Paragraph 11, Explanatory Memorandum dated 26 November 2018 on Council document 13731/18 (Proposal for a Council Regulation fixing for 2019 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters).

4.15 **We ask that, by midday on 12 March 2019, the Government update us on its position, responding to the above queries in full. No extension of this deadline will be permitted. The document remains under scrutiny and we draw this chapter to the attention of the Environment, Food and Rural Affairs Committee.**

Full details of the documents

(a) Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2017/2403 as regards fishing authorisations for Union fishing vessels in United Kingdom waters and fishing operations of United Kingdom fishing vessels in Union waters: (40337), 5678/19, COM(19) 49; (b) Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 508/2014 as regards certain rules relating to the European Maritime and Fisheries Fund by reason of the withdrawal of the United Kingdom from the Union: (40338), 5668/19, COM(19) 48.

Previous Committee Reports

Fifty-fifth Report HC 301–liv (2017–19), chapter 3 (13 February 2019).

5 Commission Brexit preparedness: aviation safety

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested
Document details	Proposal for a Regulation of the European Parliament and of the Council on certain aspects of aviation safety with regard to the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the Union
Legal base	Article 100(2) TFEU; ordinary legislative procedure; QMV
Department	Transport
Document Number	(40305), 15795/18 + ADD 1, COM(18) 894

Summary and Committee's conclusions

5.1 The proposal under scrutiny is a unilateral Union measure aimed at mitigating the effects of the UK's withdrawal from the EU on the validity of certificates and licences issued by the UK under Regulation (EU) 2018/1139 (on common rules in the field of civil aviation and establishing the European Union Aviation Safety Agency).[29]

5.2 The Commission explains that in the area of aviation safety, the effects of the UK's withdrawal from the EU on certificates and licences issued by the UK can mostly be remedied by stakeholders taking various corrective measures, for example, switching to the civil aviation authority of an EU-27 Member State or, as of now, making an application to the European Union Aviation Safety Agency (EASA) for third-country certification (dated with effect as of the UK's withdrawal from the EU).

5.3 There are, however, some instances where it will not be possible for natural and legal persons to mitigate disruption caused by the UK's withdrawal from the EU. These include, for example, the continued validity of certificates relating to certain aeronautical products, parts, appliances and companies.

5.4 This is because, as of withdrawal from the EU (whether negotiated or not), the UK will become a 'state of design' under the Convention on International Civil Aviation. The rights and responsibilities associated with being a state of design are currently exercised and fulfilled by EASA on behalf of the UK but, as of exit day, will revert to the Civil Aviation Authority (CAA). The upshot of this is that certificates issued by EASA to UK-based companies will be automatically transferred to the CAA. Affected operators will, therefore, have to reapply to EASA for EU authorisation.

29 Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91.

5.5 As recognised in the Commission's impact assessment, failure to provide for this eventuality would likely lead to a period of time where such certificates would not be valid in the EU (i.e. between the UK's withdrawal from the EU—without any agreement being in place—and the normalisation of legal relations between the UK and EU).[30] This is viewed as a problem by the Union as there are globally only a limited number of manufacturers for many of the components used in aircraft—e.g. tyres and engines for large airline-type aircraft—of which a number are based in the UK.

5.6 The Commission's proposal would, therefore, provide for the continued validity of certificates and licences granted to UK-based organisations by EASA—through implementing acts adopted under Regulation (EU) 2018/1139 or Regulation (EC) No 216/2008—for nine months as of EU exit (with the possibility of extension by way of delegated act).[31] As such, the Commission's proposal is not intended to replicate current arrangements or to maintain the *status quo*—as prevails whilst the UK is an EU Member State—but to act as an extension to allow concerned operators and EASA sufficient time to, respectively, apply for, and issue, new certificates and licences accounting for the UK's status as a third country.

5.7 The EASA-issued certificates covered by the proposal are:

- type certificates and restricted type certificates—including the approval of changes to such certificates—for aircraft, engines and propellers;
- supplemental type certificates;
- approval of repairs;
- European Technical Standard Authorisations; and
- design organisation approvals.

5.8 The proposal also provides for the continuing validity of certain certificates issued by CAA-approved organisations in the event of a no-deal Brexit (where the draft Withdrawal Agreement is not ratified by either the EU or UK). Those covered include:

- authorised released certificates for products, parts and appliances;
- certificates of release to service upon completion of maintenance; and
- airworthiness review certificates.

5.9 Separate provision is made for the recognition of theoretical training towards the issuance of a pilots or maintenance engineers' licence that has been undertaken with a UK-based organisation prior to the entry into force of the Regulation.

5.10 On the UK side, the Government has previously stated—in a no-deal notice and correspondence to the other place—that it will continue to recognise certificates issued by EASA or by the competent authority of a Member State or an EEA member for up to

30 Either by granting third-country certificates to affected UK companies or their relocation to an EU-27 Member State.

31 Regulation (EC) No 216/2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/E.

two years after EU exit.[32] Certain certificates, in particular, those relating to aerospace products and parts, will be recognised indefinitely. The Government's plans for legislation in this regard are laid out in the Aviation Safety (Amendment etc.) (EU Exit) Regulations 2019 (which was laid before the House on 26 November 2018).[33]

5.11 Parliamentary Under Secretary of State at the Department for Transport (Baroness Sugg), wrote to the Committee on the proposal under scrutiny by way of Explanatory Memorandum on 14 January 2019. The Minister's comments on the potential implications of the proposal for UK aviation law and policy are brief. She states that the Government supports the proposal "as it is designed to provide continuity within the EU aviation safety system".

5.12 The Minister suggests that the proposal would help business in two ways. First, it would allow affected UK-based organisations more time following exit day to obtain new third country certificates and licences from EASA and, second, it would allow products and parts released to service by UK authorisation holders to continue to be provided and used by EU-based operators.[34]

5.13 In terms of the current progress of negotiations, the Permanent Representatives Committee endorsed an amended version of the proposal on 22 February following negotiations with the European Parliament. The endorsed text is similar to that published in December and has undergone only minor amendment.

5.14 **We thank the Minister for her Explanatory Memorandum on the proposal under scrutiny of 14 January 2019. Given the political importance of the draft Regulation, in particular, its potential implications for UK-based business, we wish to closely follow its development and, therefore, retain it under scrutiny.**

5.15 **As a measure seeking—in part—to mitigate the effects of a no-deal Brexit on aviation safety, the Commission's proposal focuses attention on the preparations of the Government and CAA.**

5.16 **In this regard, we note the** letter of the Secretary of State for Exiting the European Union (Rt Hon Steven Barclay MP) to Lord Boswell of Aynho (Chairman of the House of Lords European Union Committee) **of 25 January 2019.**

5.17 **The** annex to this letter **references 16 air services agreements that have been reached between the UK and third countries.**

5.18 **The Committee requests information on:**

- **when these agreements will be made available to the House;**
- **how the House will be informed of these agreements and the process that the Government will follow to ensure their effective scrutiny;**

32 HM Government, 'Prepare to work and operate in the European aviation sector after Brexit' (January 2019).
33 The Aviation Safety (Amendment etc.) (EU Exit) Regulations 2019.
34 Unlike for type approval in the automotive industry, aviation approval covers whether a part, product or appliance can be used; not whether it can be placed on the market.

- **whether the Government is in the process of negotiating agreements with the USA, Canada and Brazil and, if it is, when these will be published (we note, in particular, Government reports of the conclusion of agreements with the USA and Canada);[35] and**

- **whether these agreements—between the UK, the USA, Canada and Brazil—will contain provision for air safety arrangements or, alternatively, separate Bilateral Aviation Safety Agreements (BASAs) will be sought. This question is asked in light of existing BASAs between the EU and these countries.**

5.19 **On future cooperation with the EU in the area of air safety, we request an update on the progress of negotiations on the UK's future membership of EASA. Notwithstanding that this is foreseen as a matter for future negotiations under the Political Declaration to the Withdrawal Agreement, we believe it pertinent that efforts are made now to explore the possibility of contingency arrangements being put in place should there be a non-negotiated exit from the Union (we do not believe that the nine month extension to the validity of certain certificates—that the proposal under scrutiny would provide—would be sufficient for such arrangements to be reached).**

5.20 **We request, as a hard deadline, a response to our questions and requests for further information by no later than 19 March 2019.**

Full details of the documents

Proposal for a Regulation of the European Parliament and of the Council on certain aspects of aviation safety with regard to the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the Union: (40305), 15795/18 + ADD 1, COM(18) 894.

Previous Committee Reports

None.

35 HM Government, 'UK and US agree new open skies arrangements' (November 2018); and HM Government, 'Transatlantic flight guarantee as UK and Canada agree new air arrangement' (November 2018).

6 Digital Services Tax

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; scrutiny waiver granted; updates requested; drawn to the attention of the Treasury Select Committee
Document details	Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services
Legal base	Article 113 TFEU; special legislative procedure; unanimity
Department	HM Treasury
Document Number	(39585), 7420/18 + ADDs 1–3, COM(18) 148

Summary and Committee's conclusions

6.1 In its report on 28 November 2018[36] the Committee declined to grant the Government a scrutiny waiver to participate at Economic and Financial Affairs (ECOFIN) Council on 4 December 2018, in relation to the European Commission's proposal to introduce an EU-wide tax on an interim basis applicable at three per cent on certain digital activities for which user participation is considered to constitute an important source of value.

6.2 The Committee declined to grant a waiver not because of the proposal itself—which, it noted, aligned closely with the Government's own proposal to introduce a Digital Services Tax (DST) from April 2020—but because the Financial Secretary to the Treasury (Rt Hon. Mel Stride MP) had not provided sufficient information regarding either the specifics of the latest compromise text or the outcomes that would be acceptable to the Government.

6.3 Following a meeting of the Committee of Permanent Representatives to the European Union (COREPER) on 30 November 2018 the Austrian Presidency circulated a document[37] which conceded that that there was not sufficient support to introduce the proposed EU-wide digital tax on revenues for tech companies, given that unanimity is required in the Council to pass tax measures, and countries including Denmark, Sweden, Finland, and Ireland had indicated that they would not support the proposal.

6.4 In an attempt to salvage the proposal, the day prior to ECOFIN, the French and German Governments issued a "Franco-German joint declaration on the taxation of digital companies and minimum taxation"[38] in which they proposed to scale back the scope of the Directive to a three per cent levy which would only apply to the revenues that tech firms make from online advertising, and to apply the Directive from 2021. Ministers considered the document at the Council meeting the following day, and it was agreed

36 Forty-sixth Report HC 301–xlv (2017–19), chapter 14 (28 November 2018).

37 Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services—General approach (29 November 2018).

38 Franco-German joint declaration on the taxation of digital companies and minimum taxation (3 December 2018).

that the Council working group should continue its work on the basis of both the latest Presidency compromise text and the new elements proposed by France and Germany, with the aim of reaching an agreement as soon as possible.[39]

6.5 The Minister provided the Committee with an update on these developments in a letter on 22 December 2018,[40] in which he stated that the Austrian Presidency had since updated the draft Directive to reflect the Franco-German proposal and that technical negotiations would resume in the new year. The Minister indicated that the Government thought the Franco-German proposal "constructive", and said that "the narrower scope will address some concerns the government had about potential spillovers under the previous Directive, which is welcome", but noted that further work was necessary on a number of points, notably the scope of the proposal.

6.6 The Minister also addressed a number of other points raised by the Committee in its previous report, stating that:

- there was a case for further refinement of other parts of the Directive, particularly the provisions determining the place of taxation;
- after due consideration, the Government no longer considered that the EU DST should take account of revenue pass-through (where suppliers of, e.g., online advertising may record revenues which include money that is passed directly on to a host website but recorded as a separate payment, which raises the question as to whether it is necessary to charge tax on the whole amount of such revenues;);
- although the thresholds proposed differ from the UK DST, the government believes they are broadly appropriate as currently stated;
- although the Government has proposed a two per cent rate compared to the three per cent proposed by the Commission, the Government accepts that there are arguments for and against a higher rate; and
- although the scope of the EU DST has been narrowed, the Minister indicated that the Government did not intend to narrow the scope of the proposed UK DST.

6.7 On 26 February 2019 the Minister provided the Committee with a further update, in advance of an anticipated vote at the upcoming ECOFIN on 12 March.[41] The Minister stated that "the concerns outlined in our previous letter remain" and indicated that the Government was specifically seeking further information about "the allocation of taxable revenues between Member States and some issues relating to scope." Officials subsequently provided more detailed clarification of these concerns, which is reflected in our conclusions below.

6.8 If a vote is held, the Minister indicates that the Government's support would "depend on the extent to which our concerns are addressed": he therefore effectively requests a scrutiny waiver to support the proposal if it addresses UK concerns.

39 Council of the European Union, Economic and Financial Affairs Council (4 December 2018).
40 Letter to the Chair of the European Scrutiny Committee (22 December 2018).
41 Letter to the Chair of the European Scrutiny Committee (26 February 2019).

6.9 **We have taken note of the Minister's update regarding the Commission's proposal for a Digital Service Tax, in advance of an anticipated vote at the upcoming ECOFIN on 12 March 2019. Following the failure of the Commission's proposal to secure the unanimous support of the Member States in advance of ECOFIN on 4 December 2018, a Franco-German proposal has been brought forward which would reduce the scope of the proposal to the revenue which digital businesses make from advertising.**

6.10 **The Minister indicates that he considers the proposal "constructive"; however, he indicates that the Government retains some concerns about "the allocation of taxable revenues between Member States and some issues relating to scope".**

6.11 **Further contact with officials clarified that these concerns are as follows:**

- **depending on how certain terms in the compromise text are interpreted, a tax on targeted advertising could affect business models which do not derive significant value from user participation but do happen to generate some revenue from online advertising, in consequence of which the Government has been pushing for more precision in how the scope of the tax is defined; and**
- **the provisions on the place of taxation, which deal with how taxable revenues are attributed between Member States, are ambiguous and could be interpreted differently by Member States. The UK has therefore been pushing for more clarity in the Directive that revenues are attributable to the Member State where the user viewing the advertising is located, and only split between Member States according to higher-level formulary methods when user location can't be identified.**

6.12 **The Minister also reiterates that the outcome of these discussions does not affect the Government's intention to implement a UK Digital Services Tax from April 2020 or the scope of that proposal, which will be wider than the Franco-German proposal.**

6.13 **On this basis the Minister requests a scrutiny waiver to participate at Council, with the Government adapting how it votes to the extent to which its concerns are addressed. We are willing to grant the Government a waiver to support the proposal at ECOFIN Council on 12 March 2019, subject to the Government securing a satisfactory outcome, particularly with respect to the place of taxation provisions. In the meantime we retain the proposal under scrutiny, and draw this report to the attention of the Treasury Select Committee.**

Full details of the documents

Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services: (39585), 7420/18 + ADDs 1–3, COM(18) 148.

Previous Committee Reports

Forty-sixth Report HC 301–xlv (2017–19), chapter 14 (28 November 2018); Thirty-first Report HC 301–xxx (2017–19), chapter 4 (13 June 2018); Fifth Report HC 301–v (2017–19), chapter 10 (13 December 2017).

7 Cross-border access to electronic evidence in criminal proceedings

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 and the Justice Committee
Document details	(a) Recommendation for a Council Decision authorising the participation in negotiations on a second Additional Protocol to the Council of Europe Convention on Cybercrime (CETS No. 185) (b) Recommendation for a Council Decision authorising the opening of negotiations in view of an agreement between the European Union and the United States of America on cross-border access to electronic evidence for judicial cooperation in criminal matters
Legal base	(a) and (b) Article 218(3) and (4) TFEU, QMV
Department	Home Office
Document Numbers	(a) (40362), 6110/19 + ADD 1, COM(19) 71 (b) (40363), 6102/19 + ADD 1, COM(19) 70

Summary and Committee's conclusions

7.1 The proliferation of electronic means of communication (such as emails and text messages) in the digital age presents a challenge for law enforcement authorities. Electronic evidence needed for criminal investigations ("e-evidence") must often be obtained from online service providers who are based in a different jurisdiction. The European Commission considers that current procedures for obtaining e-evidence are too slow. They usually require the involvement of judicial and law enforcement authorities in the investigating Member State and in the country in which the online service provider is based and so take longer to execute. Under new rules proposed in April 2018, the law enforcement authorities of one Member State would be able to secure and obtain e-evidence by serving an order *directly* on an online service provider based in a different jurisdiction but offering services within the EU. Whilst recognising the importance of cross-border law enforcement access to e-evidence, the Government decided *not* to opt into the proposed new Regulation, stating:

> "[….] it is not clear that new EU legislation will be a practical and effective way to address the global issue of providing lawful access to data held anywhere in the world."[42]

42 See the Written Ministerial Statement issued by the Minister for Policing and the Fire Service (Mr Nick Hurd) on 22 October 2018, HCWS 1024

7.2 The Government indicated that its priority was to sign and ratify a bilateral Data Access Agreement with the United States of America, the jurisdiction in which the largest online service providers are based. If the UK had opted into the proposed EU Regulation on law enforcement access to e-evidence, the Minister for Policing and the Fire Service (Rt Hon Nick Hurd MP) considered that the Court of Justice "would likely have concluded that it was unlawful as a matter of EU law for the UK to conclude the agreement" with the USA as it would encroach on an area of exclusive EU competence.[43] Where it is established that the EU has acquired exclusive external competence through the adoption of common EU rules, only the EU, not Member States acting individually, are able to negotiate and conclude international agreements. The Council agreed a general approach on the proposed Regulation in December 2018 with a view to concluding trilogue negotiations with the European Parliament before its current term ends in May 2019.

7.3 The extent to which the EU has acquired exclusive external competence through the adoption of common EU rules is the principal issue in the latest set of Recommendations made by the European Commission for two new Council Decisions. The first proposal, document (a), would authorise the European Commission to negotiate a Second Additional Protocol to the Council of Europe Convention on Cybercrime (CETS No. 185) on behalf of the EU. The purpose of the Protocol is to enhance the capacity of national judicial and law enforcement authorities to access e-evidence when carrying out a criminal investigation by improving mutual legal assistance, enabling direct cooperation with service providers based in a foreign jurisdiction, and establishing a clear legal framework and stronger safeguards. The second proposal, document (b), would authorise the European Commission, on behalf of the EU, to negotiate an agreement with the United States on cross-border law enforcement access to e-evidence. It would complement an existing EU/US agreement on mutual legal assistance ("MLA"), in force since February 2010, which is the principal mechanism for ensuring effective transatlantic criminal justice and law enforcement cooperation but can be slow and costly. The UK does not participate in the EU/US MLA agreement but has its own bilateral treaty with the USA.[44] The proposal would also complement the EU/US Data Protection and Privacy Agreement (the so-called "Umbrella Agreement") which ensures that there are adequate safeguards in place to protect cross-border transfers of personal data.

7.4 The European Commission considers that the EU, rather than individual Member States, must conduct both sets of negotiations. Whilst anticipating that "the two processes will progress at a different pace", it says that they address "inter-linked issues and commitments taken in one negotiation may have a direct impact on other strands of negotiations".[45] Turning first to document (a), the European Commission asserts that the EU has exclusive external competence because the Second Additional Protocol to the Council of Europe Convention on Cybercrime would "overlap to a large extent" with a range of EU instruments setting out common rules on:

- mutual legal assistance in criminal matters;

43 See the Minister's letter of 28 September 2018 to the Chair of the European Scrutiny Committee. The European Commission and the Council Legal Service both consider that the EU has exclusive competence to negotiate a data access agreement with the United States and have urged Member States to refrain from bilateral negotiations—see the Presidency note of 28 May 2018 (Council document 9418/18).

44 Council Decision 2009/820/CFSP on the conclusion of the EU/US Mutual Legal Assistance Agreement is one of the pre-Lisbon EU police and criminal justice measures which ceased to apply to the UK from 1 December 2014—see OJ C 430, 1 December 2014.

45 See p.5 of the Commission's explanatory memorandum accompanying document (a).

- cross-border police cooperation (Europol) and judicial cooperation (Eurojust);
- joint investigation teams;
- cross-border investigations and evidence gathering (the European Investigation Order);
- the prevention and resolution of conflicts of jurisdiction in criminal proceedings;
- data protection; and
- procedural rights in criminal proceedings.

7.5 This overlap would, in the Commission's view, "affect common Union rules or alter their scope" and therefore give rise to exclusive EU competence under Article 3(2) of the Treaty on the Functioning of the European Union (TFEU). It makes clear that its 2018 proposal on cross-border access to electronic evidence, though not yet agreed, must also be taken into account as a "foreseeable future development" of relevant common EU rules. The Commission concludes that the EU is required to act "to protect the integrity of Union law and to ensure that the rules of international law and Union law remain consistent".[46] An Annex (ADD 1) to the proposed Council Decision sets out the detailed objectives which should guide the Commission in conducting the negotiations.

7.6 The purpose of the proposed EU/US agreement, document (b), is to speed up the evidence-gathering process by enabling judicial authorities to secure and obtain e-evidence directly from service providers for use in criminal proceedings. Currently, direct cooperation with US-based service providers only takes place on a voluntary basis and is limited to non-content data (such as subscriber data and traffic data).[47] This fragmented approach creates legal uncertainty and, the Commission suggests, lacks transparency and accountability.[48] Under the CLOUD Act (Clarifying Lawful Overseas Use of Data), adopted by the US Congress in March 2018, the US Government can conclude executive agreements with foreign governments setting out the terms on which online service providers based in the US can provide electronic evidence directly to judicial authorities in other countries. The proposed EU/US Agreement would establish common rules to allow the reciprocal transfer of content and non-content data directly by a service provider to a requesting authority in another jurisdiction, as well as rules to prevent conflicts of law. The European Commission bases its claim to exclusive external competence to negotiate the proposed EU/US agreement on the need to ensure that the outcome is compatible with the EU's (yet to be adopted) internal rules on e-evidence.

7.7 Whilst both proposed Council Decisions concern areas of EU law and policy which fall mainly within the scope of Article 82 TFEU on judicial cooperation in criminal matters, neither cites a Title V (justice and home affairs) legal base. They are based solely on the procedural legal bases set out in Article 218(3) and (4) TFEU which set out how the mandate for negotiations should be agreed and who should conduct them.

46 See recital (6) of the proposed Council Decision—document (a).

47 Content data include the content of an electronic exchange of information. Non-content data encompass subscriber data and traffic data identifying the individuals sending and receiving electronic messages, as well as metadata revealing the timing, frequency and duration of exchanges.

48 According to the European Commission, fewer than half of the requests made to service providers are fulfilled—see p.2 of the explanatory memorandum accompanying document (b).

7.8 The Government considers that the UK's Title V (justice and home affairs) opt-in Protocol applies to both proposed Council Decisions. In his Explanatory Memorandum of 20 February 2019 on document (a), the proposed Council Decision authorising the European Commission to participate in the negotiation of the Second Additional Protocol to the Cybercrime Convention on behalf of the EU, the Minister for Security and Economic Crime (Rt Hon. Ben Wallace MP) says that the Government will press for the inclusion of a substantive justice and home affairs ("JHA") legal base, adding:

> […] the usual practice is for the Council to add a substantive legal base to the Commission proposal (in relation to Council Decisions authorising negotiating mandates) during the course of Council considerations. The addition of a JHA legal base would clarify that the UK's opt-in applies.

7.9 Under the UK's Title V opt-in Protocol, the UK has three months in which to decide whether to opt in to an EU justice and home affairs proposal.[49] This three-month period will extend beyond 29 March 2019, the date on which the UK is expected to leave the European Union. The draft EU/UK Withdrawal Agreement envisages that the UK would still be able to opt into EU justice and home affairs proposals negotiated and agreed during a post-exit transition/implementation period if they "amend, build upon or replace" an existing measure which applied to the UK before exit day.[50] As the proposed Council Decision is a *new* justice and home affairs measure, the UK will not be able to opt in once it has left the EU. The Minister indicates that the Government therefore intends to reach a decision (and notify the Council and European Commission) *before* 29 March 2019. This decision will be informed by:

- the Government's earlier decision not to opt into the proposed EU e-evidence Regulation;
- the possibility for the UK to participate in negotiations on the Second Additional Protocol in its own right post-exit; and
- the outcome of the Government's own analysis of the existence and extent of any exclusive external EU competence.

7.10 On the wider policy implications, the Minister recognises that Council of Europe and other international Conventions establishing practical mechanisms for cross-border cooperation "will become more important as we exit from the EU". He underlines the need for negotiations on the Second Additional Protocol to the Cybercrime Convention to "be mindful of the requirement to accommodate the different systems and processes of a wide range of states (beyond just EU Member State participants)".

7.11 In a separate Explanatory Memorandum of 21 February 2019 on document (b), the proposed Council Decision authorising the EU to negotiate an agreement with the US on cross-border law enforcement access to e-evidence, the Minister for Policing and the Fire Service (Rt Hon. Nick Hurd MP) similarly states that the Government will press for the addition of a substantive justice and home affairs legal base. As the proposed Council Decision is a new measure (and so does not amend, repeal and replace, or build

49 The three-month period starts to run from the date on which the last language version of the proposal is published.

50 See Article 127(5) of the draft EU/UK Withdrawal Agreement.

on an existing measure in which the UK participates), he indicates that the Government intends to reach an opt-in decision before exit day—29 March 2019—taking account of the following considerations:

- the Government's earlier decision not to opt into the proposed EU e-evidence Regulation; and
- the impact that a decision to opt in would have on the UK's ability to conclude its own bilateral Data Access Agreement with the US.

7.12 The Minister notes that bilateral negotiations between the UK and the USA on a reciprocal Data Access Agreement are already underway. The UK/US Agreement would allow "US companies to comply with lawful orders from UK authorities for the production of electronic communications without any conflict of law" and would "fulfil many of the objectives sought by the EU-US negotiating mandate, but through solely bilateral mechanisms, such as those established in the Crime (Overseas Production Order) Act which recently received Royal Assent".

7.13 The Government anticipates that both proposed Council Decisions will be brought to the Justice and Home Affairs Council for formal adoption in June 2019.

Our Conclusions

7.14 **We share the Government's view that both proposed Council Decisions should cite a Title V (justice and home affairs) legal base, not least to remove any doubt that the UK's Title V opt-in Protocol applies. We ask the Government to inform us of the progress it makes in securing additional Title V legal bases and recitals which indicate clearly whether (or not) the UK is bound by the proposed Council Decisions.**

7.15 **We ask the Government to share with us the outcome of its competence analysis of document (a) and to explain, in relation to both proposed Council Decisions, whether it accepts the case made by the European Commission for exclusive EU external competence.**

7.16 **We note that the Government intends to accelerate the process for reaching an opt-in decision so that the EU institutions can be notified before 29 March 2019, the date on which the UK is expected to leave the EU. We would welcome further information on the implications of a decision to opt into either or both proposed Council Decisions, should the post-exit transition/implementation period envisaged in the draft EU/UK Withdrawal Agreement take effect. In particular, we ask the Government:**

- **what role (if any) the UK would be able to play in the ensuing negotiations within the Council of Europe and with the USA;**
- **what effect Article 129 of the draft EU/UK Withdrawal Agreement (on 'Specific arrangements relating to the Union's external action') would have on the UK's freedom of action; and**
- **whether any subsequent Council Decisions on the signature and conclusion of the Second Additional Protocol to the Cybercrime Convention and the EU/US Agreement on cross-border law enforcement access to e-evidence would**

be considered as measures "building on" these initial Council Decisions, meaning that the UK would be entitled to opt in under Article 127(5) of the draft EU/UK Withdrawal Agreement.

7.17 **Pending further information, the proposed Council Decisions remain under scrutiny. We ask the Government to inform us of its opt-in decisions before 29 March 2019. We draw this chapter to the attention of the Home Affairs Committee and the Justice Committee.**

Full details of the documents

(a) Recommendation for a Council Decision authorising the participation in negotiations on a second Additional Protocol to the Council of Europe Convention on Cybercrime (CETS No. 185): (40362), 6110/19 + ADD 1, COM(19) 71.

(b) Recommendation for a Council Decision authorising the opening of negotiations in view of an agreement between the European Union and the United States of America on cross-border access to electronic evidence for judicial cooperation in criminal matters: (40363), 6102/19 + ADD 1, COM(19) 70.

Previous Committee Reports

None, but see our earlier Reports on the proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters: Twenty-eighth Report HC 301–xxvii (2017–19), chapter 3 (16 May 2018), Thirty-seventh Report HC 301–xxxvi (2017–19), chapter 16 (5 September 2018) and Fortieth Report HC 301–xxxix (2017–19), chapter 14 (17 October 2018).

8 Cross-border police cooperation: Third country participation in the Prüm framework for exchanging DNA, fingerprint and vehicle registration data

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee and the Justice Committee
Document details	(a) Proposal for a Council Decision on the signing and provisional application of certain provisions of the Agreement between the EU and Liechtenstein on the application of the Prüm Decisions on cross-border police cooperation and on the accreditation of forensic service providers (b) Proposal for a Council Decision on the conclusion of the Agreement between the EU and Liechtenstein on the application of the Prüm Decisions on cross-border police cooperation and on the accreditation of forensic service providers (c) Proposal for a Council Decision on the signing and provisional application of certain provisions of the Agreement between the EU and Switzerland on the application of the Prüm Decisions on cross-border police cooperation and on the accreditation of forensic service providers (d) Proposal for a Council Decision on the conclusion of the Agreement between the EU and Switzerland on the application of the Prüm Decisions on cross-border police cooperation and on the accreditation of forensic service providers
Legal base	(a) and (c) Articles 82(1)(d), 87(2)(a) and 218(5) TFEU, QMV (b) and (d) Articles 82(1)(d), 87(2)(a) and 218(6)(a) TFEU, QMV, EP consent
Department	Home Office
Document Numbers	(a) (40373), 6253/19 + ADD 1, COM(19) 35; (b) (40374), 6248/19 + ADD 1, COM(19) 24; (c) (40375), 6251/19 + ADD 1, COM(19) 27; (d) (40376), 6249/19 + ADD 1, COM(19) 26

Summary and Committee's conclusions

8.1 The proposed Council Decisions would authorise the EU to sign and conclude Agreements with Liechtenstein and Switzerland enabling them to apply the provisions on cross-border police cooperation contained in three EU measures which together form the "Prüm package".[51] The EU concluded a similar Agreement with Iceland and Norway in 2010 which is not yet in force.

8.2 The Prüm Decisions—Council Decision 2008/615 JHA and Council Decision 2008/616/JHA—establish a framework for the exchange of information between law enforcement authorities responsible for the prevention and investigation of criminal offences. They contain specific rules and procedures regulating the automated searching and comparison of DNA profiles, fingerprint and vehicle registration data. A further Council Framework Decision 2009/905/JHA requires forensic laboratories carrying out analysis of DNA and fingerprints to be accredited so that there is mutual trust in the quality and reliability of the systems underpinning the cross-border exchange of information.

8.3 Despite opting out of the Prüm package in December 2014, the Government concluded shortly afterwards that "that there would be undoubted operational and public protection benefits" in rejoining Prüm and is currently in the process of implementing the measures in the UK.[52] If adopted by the Council, the latest proposed Decisions would extend participation in the key data-sharing elements of Prüm to Liechtenstein and Switzerland. The Agreement (identical in substance for both countries) includes provisions on the uniform application and interpretation of the Prüm rules, based on a regular exchange of relevant case law, and on the diplomatic settlement of disputes. It also includes a mechanism to ensure that Liechtenstein and Switzerland are informed of any changes to the Prüm rules "at the earliest possible occasion" and can submit comments. If either country decides not to accept changes agreed by the EU to the rules governing the exchange of DNA profiles, fingerprint and vehicle registration data, the Agreement must be suspended and may be terminated if Liechtenstein or Switzerland cannot demonstrate that they have "equivalent" domestic laws in place. Both countries are also bound to apply relevant EU data protection laws. A Declaration accompanying the Agreement envisages that experts from Liechtenstein and Switzerland may be invited to technical meetings if their attendance would be "directly relevant to the proper application and development" of the Prüm measures.

8.4 Liechtenstein and Switzerland both participate in the Schengen free movement area and have concluded an agreement with the EU associating them with the implementation, application and development of the Schengen rule book. These rules include the so-called "Swedish initiative" which permits a law enforcement authority in one Member State to request information from its counterpart in another Member State if there are factual reasons for believing that it would be relevant for the purpose of a criminal investigation.[53]

51 The measures concerned are Council Decision 2008/615 JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, Council Decision 2008/616/JHA on the implementation of Council Decision 2008/615/JHA and Council Framework Decision 2009/905/JHA on accreditation of forensic service providers carrying out laboratory activities.

52 See Command Paper 9149 published in November 2015.

53 See Council Framework Decision 2006/960/JHA.

The European Commission considers that the automated exchange of information within the Prüm framework would help to establish the factual reasons necessary to obtain access to further information or criminal intelligence.[54]

8.5 The proposed Council Decisions on the signature and conclusion of the Agreements with Liechtenstein and with Switzerland all cite a Title V (justice and home affairs) legal base, meaning that they will only apply to and bind the UK if the Government decides to opt in. The UK opted into the earlier Agreement with Iceland and Norway and will be bound by it if it takes effect before the UK leaves the EU or during a post-exit transition/implementation period.[55]

8.6 In his Explanatory Memorandum of 21 February 2019, the Minister for Policing and the Fire Service (the Rt Hon. Nick Hurd MP) expresses his full support for data sharing as a means to assist with the investigation and prosecution of serious crimes:

> It is the Government's position that data sharing regimes between countries, with appropriate safeguards, enhance the safety and wellbeing of citizens and visitors to those countries.

8.7 He adds that the UK does not currently have a biometrics data sharing agreement with Liechtenstein or Switzerland.

8.8 The Minister confirms that the UK's Title V opt-in applies to all four proposed Council Decisions and that the Government intends to reach an opt-in decision before 29 March 2019, the date on which the UK is expected to leave the EU, even though this will be sooner than the three-month opt-in period envisaged in the UK's Title V opt-in Protocol. He explains that an early opt-in decision is necessary as the UK will not be entitled to opt into the proposals after its exit from the EU, even if it leaves on the terms set out in the draft EU/UK Withdrawal Agreement. Under that Agreement, the UK may only opt into EU proposals brought forward during a post-exit transition/implementation period if they "amend, build upon or replace" an EU justice and home affairs measure in which the UK participated before its exit from the EU. As the proposed Council Decisions are new measures, an early opt-in decision is necessary if the UK wishes to participate.

8.9 In reaching an opt-in decision, the Minister says the Government "will need to be fully assured that exchanges of personal data come with sufficient protections to ensure they are consistent with fundamental rights" but "is generally supportive of the EU exchanging data with trusted third countries to maximise its potential in the fight against serious and organised crime". In a nod to the UK's future status as a third (non-EU) country, the Minister adds that "the exact nature of the UK's future relationship with tools such as Prüm is yet to be confirmed following the UK's exit from the EU".

Our Conclusions

8.10 **The UK opted into a similar Agreement with Iceland and Norway which was concluded by the EU in 2010. We understand that this Agreement is still not in force. We ask the Minister to explain the reasons for the delay.**

54 See p.2 of the European Commission's explanatory memorandum accompanying the proposed Council Decisions.
55 See Council Decision 2010/482/EU.

8.11 **Given the long lead-in time needed to prepare for implementation of the Prüm rules and the imminence of the UK's exit from the EU, we ask the Minister:**

- **whether there would be operational or other benefits for the UK in opting into the proposed Agreements with Liechtenstein and Switzerland; and**
- **what status the Agreements would have in UK law once the UK has left the EU and any post-exit transition/implementation period has ended.**

8.12 **The EU has so far sought only to sign and conclude Agreements on participation in Prüm with third countries that are formally associated with Schengen. Whilst we understand that the Prüm package is not part of the Schengen rule book, the Preamble to the Agreements underlines the centrality of Schengen membership in establishing close cooperation with the EU in combating crime. The draft Political Declaration setting out the framework for the future relationship between the EU and the UK envisages establishing "arrangements for timely, effective and efficient exchanges" of […] "DNA, fingerprints and vehicle registration data (Prüm)" but also states that these arrangements must take into account "the fact that the United Kingdom will be a non-Schengen third country that does not provide for the free movement of persons".**

8.13 **We ask the Minister:**

- **whether he considers that there would be any legal obstacles to the EU and the UK concluding an agreement on UK participation in Prüm;**
- **whether the Government has discussed the prospects for securing such an agreement with the EU and how the EU has responded; and**
- **whether the proposed Agreements with Liechtenstein and Switzerland, or the Agreement already concluded with Iceland and Norway, would provide a suitable model, given that they would bind the UK to apply EU rules on reciprocal access to DNA profiles, fingerprint and vehicle registration databases, on the accreditation of forensic laboratories and on data protection.**

8.14 **Pending further information, the proposed Council Decisions remain under scrutiny. We ask the Government to inform us of its opt-in decisions before 29 March 2019. We draw this chapter to the attention of the Home Affairs Committee and the Justice Committee.**

Full details of the documents

(a) Proposal for a Council Decision on the signing, on behalf of the European Union, and on the provisional application of certain provisions of the Agreement between the EU and Liechtenstein on the application of certain provisions of Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, of Council Decision 2008/616/JHA on the implementation of Council Decision 2008/615/JHA and the Annex thereto, and of Council Framework Decision 2009/905/JHA on accreditation of forensic service providers carrying out laboratory activities: (40373), 6253/19 + ADD 1, COM(19) 35; (b) Proposal for a Council Decision on the conclusion of the Agreement between the EU and Liechtenstein on the application of certain provisions of Council Decision 2008/615/JHA on the stepping up

of cross-border cooperation, particularly in combating terrorism and cross-border crime, of Council Decision 2008/616/JHA on the implementation of Council Decision 2008/615/JHA and the Annex thereto, and of Council Framework Decision 2009/905/JHA on accreditation of forensic service providers carrying out laboratory activities: (40374), 6248/19 + ADD 1, COM(19) 24; (c) Proposal for a Council Decision on the signing, on behalf of the European Union, and on the provisional application of certain provisions of the Agreement between the EU and Switzerland on the application of certain provisions of Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, of Council Decision 2008/616/JHA on the implementation of Council Decision 2008/615/JHA and the Annex thereto, and of Council Framework Decision 2009/905/JHA on accreditation of forensic service providers carrying out laboratory activities: (40375), 6251/19 + ADD 1, COM(19) 27; (d) Proposal for a Council Decision on the conclusion of the Agreement between the EU and Switzerland on the application of certain provisions of Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, of Council Decision 2008/616/JHA on the implementation of Council Decision 2008/615/JHA and the Annex thereto, and of Council Framework Decision 2009/905/JHA on accreditation of forensic service providers carrying out laboratory activities: (40376), 6249/19 + ADD 1, COM(19) 26.

Background

8.15 A Report published by our predecessors in December 2015, entitled *Cross-border law enforcement cooperation—UK participation in Prüm*, provides a detailed overview of the EU measures which form part of the Prüm package and the case advanced by the then Government for the UK to participate.

Previous Committee Reports

None on these documents. See our earlier Report on *Cross-border law enforcement cooperation—UK participation in Prüm*: Twelfth Report HC 342–xii (2015–16), published 4 December 2015.

9 European Accessibility Act

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; further information requested
Document details	Proposal for a Directive on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services
Legal base	Article 114, TFEU; Ordinary Legislative Procedure; QMV
Department	Business, Energy and Industrial Strategy
Document Number	(37371), 14799/15 + ADDs 1–8, COM(15) 615

Summary and Committee's conclusions

9.1 The objective of this proposed Directive, known as the European Accessibility Act (EAA), is to improve disabled persons' access to products and services, minimising existing and potential differences between Member States—such as in the design of cash machines—as they implement the accessibility requirements of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). While the Government has been supportive of the objective, it has been concerned about excessive prescription, a lack of clarity in some places and the risk of overlap with other legislation. For those reasons, the UK abstained when the General Approach was adopted in December 2017.

9.2 We last reported this document to the House on 31 January 2018,[56] following the General Approach and requested an update on the progress of negotiations with the European Parliament. Since then, we have considered two update letters[57] from the Parliamentary Under-Secretary of State (Lord Henley PC) and—in response—we sought clarity on whether any of the legislation would fall within the proposed post-Brexit common rulebook for goods. The Minister acknowledged that some of the provisions of the legislation apply to manufactured goods but noted that the extent to which they would form part of a common rulebook will be subject to negotiations on the future relationship.

9.3 The Minister has written[58] with a further update following the conclusion of negotiations. He explains that the European Parliament and Council reached an informal "trilogue" agreement on 8 November 2018, following which a provisional text was published.[59] Adoption by the European Parliament is anticipated during the 11–14 March plenary session and Member States will then be invited to give their final approval of the EAA.

9.4 Throughout trilogue discussions, explains the Minister, the UK worked with like-minded Member States to try to achieve a balanced outcome and limit expansion of the scope beyond the General Approach agreed in December 2017. For example, he says, the

56 Twelfth Report HC 301–xii (2017–19), chapter 1 (31 January 2018).
57 Letters from Lord Henley PC to Sir William Cash MP, dated 17 July 2018 and 18 October 2018.
58 Letter from Lord Henley PC to Sir William Cash MP, dated 13 February 2019.
59 Directive on the accessibility requirements for products and services 15174/18 ADD 1.

UK successfully resisted such expansion to include tourism services, and application of the accessibility requirements in the EAA to all publicly procured goods and services, by limiting application to goods and services that are within the scope of the EAA. The UK also protected the existing exemption for micro businesses providing services as well as securing a disproportionate burden test. The Government is content with the time allowed for implementation and transitional measures, for example balancing the development of self-service terminals with flexibility for their continued use until the end of their economic life, or for 20 years (whichever is sooner).

9.5 The Minister indicates the UK's intention to maintain its previous position of abstention when the text comes for a final vote. This is because the text has moved away from the UK's preferred position, most significantly through "prescriptive" provisions on answering emergency service calls and the addition of payment terminals to the scope. These require that:

- emergency phone calls should be appropriately answered using the same communication means as received, namely by using synchronised voice and text (including real time text), or, where video is provided, voice, text (including real time text) and video synchronised as total conversation; and

- payment terminals (such as point of sale card payment devices) will be subject to the general accessibility requirements of the Directive—i.e. they must be designed and produced in such a way as to maximise their foreseeable use by persons with disabilities and shall be accompanied by accessible information on their functioning and on their accessibility features where possible in or on the product.

9.6 In terms of future relevance to the UK, the Minister observes that, once the EAA has entered into force, Member States will have three years in which to adopt the national measures necessary to comply with the EAA. Member States will be required to apply those measures six years after the EAA has entered into force. Given this timescale, the Government will consider under what scenarios the UK may need or wish to align with all or part of the EAA post EU-Exit and ensure that implementation is in keeping with discussions about our future relationship with the EU.

9.7 The Minister concludes by inviting the Committee to clear the file from scrutiny so that the UK can vote on the final text.

9.8 **While the Minister does not require scrutiny clearance to abstain, we are nevertheless content to clear the document from scrutiny at this point.**

9.9 **We note, and accept, the uncertainty as to the extent to which the UK may need or wish to align with this legislation in the future. Noting that some degree of alignment may be necessary or desirable, we would welcome further information on the Government's concerns regarding the provisions relating to emergency service calls and the addition of payment terminals to the scope.**

9.10 **Finally, we recall that the Government tabled a Statement[60] to the Minutes of the Council when the General Approach was adopted in order to explain the UK's abstention. We commended the explanation and the submission of a written statement to that effect and we would encourage the Minister to table a similar explanation of its position on the final vote.**

9.11 **After the final vote, we expect the Minister to write to us confirming adoption, providing a copy of any statement tabled and providing the information requested above.**

Full details of the documents

Proposal for a Directive on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services: (37371), 14799/15 + ADDs 1–8, COM(15) 615.

Previous Committee Reports

Twelfth Report HC 301–xii (2017–19), chapter 1 (31 January 2018); Second Report HC 301–ii (2017–19), chapter 1 (22 November 2017); Fortieth Report HC 71–xxxvii (2016–17), chapter 2 (25 April 2017); Thirtieth Report HC 71–xxviii (2016–17), chapter 3 (1 February 2017); Third Report HC 71–ii (2016–17), chapter 2 (25 May 2016); Eighteenth Report HC 342–xvii (2015–16), chapter 1 (13 January 2016).

60 3583rd meeting of the Council of the European Union 15576/1/17 (p 15).

10 Marketing of fertilisers

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny (decision reported on 13/06/2018)
Document details	Proposal for a Regulation of the European Parliament and of the Council laying down rules on the making available on the market of CE marked fertilising products and amending Regulations (EC) No.1069/2009 and (EC) No.1107/2009
Legal base	Article 114 TFEU; Ordinary legislative procedure; QMV
Department	Environment, Food and Rural Affairs
Document Number	(37625), 7396/16 + ADDs 1–4, COM(16) 157

Summary and Committee's conclusions

10.1 Fertilisers may only circulate freely in the internal market if they comply with a set of conditions relating to agronomic efficacy, nutrient content, packaging, identification and traceability. Such products receive the designation "EC fertiliser".

10.2 At the moment, virtually all product types carrying the "EC fertiliser" designation are conventional inorganic fertilisers, whilst virtually all those produced from organic materials or recycled bio-waste are excluded. The Commission accordingly proposed a new Regulation establishing conditions with which all EC marked fertiliser products—including those made from recycled or organic materials—would have to comply in order to move freely on the internal market. These include limits on the presence of heavy metals, such as cadmium, and contaminants in fertilising products.

10.3 We cleared the proposal from scrutiny at our meeting of 13 June 2018, following agreement in Council and while negotiations with the European Parliament were ongoing. The then Minister for Agriculture, Fisheries and Food (George Eustice MP) wrote[61] to summarise the final outcome of negotiations, which he described as a "good deal" for the UK. The UK's vote, observed the then Minister, was pivotal in acceptance of the deal at the heart of the compromise.

10.4 The then Minister believed that the Regulation balances the needs of the farming and the fertiliser manufacture industries. It will, he said, support nutrient recycling and innovative fertiliser-related products (in particular biostimulants), and will introduce contaminant levels for health and environmental safeguards.

10.5 On the core question of limits on cadmium in inorganic phosphorous fertiliser, the then Minister summarised the compromise in the following terms:

- on coming into application, (i.e. three years after the Regulation comes into force), there will be an immediate cadmium limit of 60mg/kg in inorganic phosphorous fertiliser;

61 Letter from George Eustice MP to Sir William Cash MP, dated 6 February 2019 (received 8 February).

- seven years after coming into force, (i.e. four years after coming into application), there will be a review on the potential for moving to a lower cadmium limit; and
- on application, there will be the option of a low cadmium label for < 20mg/kg products.

10.6 By comparison, the Council originally compromised on a 60mg/kg limit, to be applied eight years after entry into force of the Regulation and to be reviewed 16 years after entry into force. The then Minister acknowledged that, in order to maintain the 60mg/kg limit, there had been a trade-off involving the immediate introduction of the limit upon application of the Regulation and involving a voluntary low cadmium label. A review of the technical and commercial position before any progress to a lower limit was an approach that the UK was very keen to have accepted.

10.7 The then Minister reported that there were also compromises on chromium (if total chromium is above 200mg/kg, information is to be given in the technical documentation) and by-products. While no country had been described as "enthused" by the compromise, all had accepted this outcome—reported the then Minister—in order to garner the benefits from this Regulation. The Regulation is likely to come into force in early April 2019.

10.8 **We welcome the then Minister's summary of the final outcome of this Regulation. As he noted, a careful balance was struck between the various interests involved. We previously cleared the document from scrutiny and require no further information.**

Full details of the documents

Proposal for a Regulation of the European Parliament and of the Council laying down rules on the making available on the market of CE marked fertilising products and amending Regulations (EC) No.1069/2009 and (EC) No.1107/2009: (37625), 7396/16 + ADDs 1–4, COM(16) 157.

Previous Committee Reports

Thirty-first Report HC 301–xxx (2017–19), chapter 8 (13 June 2018); Fifth Report HC 301–v (2017–19), chapter 6 (13 December 2017); Fortieth Report HC 71–xxxvii (2016–17), chapter 13 (25 April 2017); Thirty-second Report HC 342–xxxi (2015–16), chapter 4 (4 May 2016).

11 Third mobility package: European Maritime Single Window

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; further information requested
Document details	Proposed Regulation establishing a European Maritime Single Window environment and repealing Directive 2010/65/EU
Legal base	Article 100(2) TFEU; ordinary legislative procedure; QMV
Department	Transport
Document Number	(39720), 9051/18 + ADDs 1–3, COM(18) 278

Summary and Committee's conclusions

11.1 The proposal under scrutiny seeks to address the problems currently encountered with the operation of Directive 2010/65/EU on reporting formalities for ships arriving in and/or departing from ports in Member States (the Reporting Formalities Directive).[62] The Reporting Formalities Directive requires Member States to introduce 'National Maritime Single Windows' (NSMW) to facilitate the electronic transmission of prescribed information—on a ship, its voyage, crew, passengers, cargo and security information—to relevant national authorities.

11.2 The proposed 'European Maritime Single Window environment' (EMSWe) would bring together, in a coordinated and harmonised way, all reporting obligations associated with port calls. This would be achieved by retaining the current system of NMSWs but introducing a European reporting 'gateway' above or on top of national systems (the EMSWe). This technical interface would be based upon a common software module developed by the Commission that would provide harmonised user interfaces, procedures and data formats. The Commission labels this approach a 'one-stop-shop for reporting' and states that it will allow for the more efficient (re)use of data between national authorities (for example customs and border agencies).

11.3 The Committee's first report on the EMSWe was committed to the House on 14 November 2018. In response to the questions raised and requests for further information made by the Committee, Parliamentary Under Secretary of State at the Department for Transport (Ms Nusrat Ghani MP) wrote on 23 November 2018. The Minister addressed the Committee's queries—relating to the proposed legal basis for the EMSWe, its governance structure and data storage arrangements—and requested a scrutiny waiver in order for the Government to support a General Approach to be sought at the Transport Council of 6 December 2018. This waiver was granted and communicated to the House in our Forty-sixth Report of Session 2017–19 (which was ordered to be printed on 28 November 2018).

62 Directive 2010/65/EU of the European Parliament and of the Council of 20 October 2010 on reporting formalities for ships arriving in and/or departing from ports of the Member States and repealing Directive 2002/6/EC

11.4 In response to our request to be updated on the outcome of the December Transport Council, the Minister wrote to the Committee on 16 January 2019. The Minister has since written again—on 5 March 2019—requesting clearance of the proposal from scrutiny ahead of its formal adoption (the exact date that the proposal will go to Council is not yet known). Following a request for clarification from officials at the Department for Transport, we understand that the Government is supportive of the proposal and will vote in favour of adoption if the text is similar to the compromise reached between the Romania Presidency and the European Parliament during trilogue negotiations.

The Minister's letter of 16 January 2019

11.5 The Minister wrote—on 16 January 2019—with an update on the outcome of the December Transport Council. The Minister explains that the Government voted in favour of the Presidency compromise text and that the Council approved a General Approach (which was similar to the draft shared with the Committee prior to the December Council).

11.6 The Minister also provided a helpful synopsis of the European Parliament's TRAN Committee report (adopted on 16 January 2019).[63] Members of the European Parliament are said to have expressed support for revising the original Reporting Formalities Directive and are seeking amendments to strengthen the original proposal. These changes are related, in particular, to providing for further harmonisation of national reporting requirements, strengthening cooperation between authorities and declarants, and ensuring clearer governance mechanisms (to reduce unnecessary administrative burden).

The Minister's letter of 5 March 2019

11.7 The Minster now writes—on 5 March 2019—requesting clearance of the proposal from scrutiny ahead of its formal adoption. The Minister provides an update on the outcome of trilogue negotiations and highlights the main areas in which changes were made to the proposal. These include the introduction of the principle of technological neutrality, mandatory provision for the public availability of ship arrival and departure times, and a time limit on the ability of the Commission to adopt delegated acts (to four years). The Minister explains that the Government was able to accept these revisions as they did not affect their initial negotiating position.

11.8 On the use of delegated acts, in a slightly different context, the Minister explains that given the number that will be required to support the implementation of the proposal, the Regulation will come into effect six years after its adoption (2025). As this falls outside of the proposed transitionary period under the draft Withdrawal Agreement, the Minister does not foresee any of the Directives having to be implemented domestically. She does note, however, that given strong industry support for the proposal, the Government will assess—as part of its Brexit planning—whether any changes should be made to the UK's National Maritime Single Window.

63 European Parliament Transport and Tourism Committee, 'Report on the proposal for a Regulation of the European Parliament and of the Council establishing a European Maritime Single Window environment and repealing Directive 2010/65/EU' (January 2019)

11.9 **On the basis that the Committee is satisfied with the Government's position on the text of the proposal and is clear that, if it remains substantially unamended, the Government is likely to vote in favour of adoption, we are content to clear it from scrutiny.**

11.10 **When the proposal is adopted, we request information on its final form, detailing, in particular, any significant changes versus those communicated to the Committee in the Minister's letter of 5 March 2019.**

Full details of the documents

Proposed Regulation establishing a European Maritime Single Window environment and repealing Directive 2010/65/EU: (39720), 9051/18 + ADDs 1–3, COM(18) 278.

Previous Committee Reports

Forty-fourth Report HC 301–xliii (2017–19) chapter 4 (14 November 2018); and Forty-sixth Report HC 301–xlv (2017–19) chapter 8 (28 November 2018).

12 Brexit: access to social security for EU and UK nationals

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; further information requested; drawn to the attention of the Committee on Exiting the EU, the Health and Social Care Committee and the Work and Pensions Committee
Document details	Proposal for a Regulation on establishing contingency measures in the field of social security coordination following the withdrawal of the United Kingdom from the European Union
Legal base	Article 48 TFEU; ordinary legislative procedure; QMV
Department	Work and Pensions
Document Number	(40347), 5949/19, COM(19) 53

Background and Committee's conclusions

EU rules on cross-border social security coordination

12.1 EU law provides for a complex system of coordination of access to social security for EU nationals who move between different Member States and the four EFTA countries.[64] The purpose of those rules, set out in Regulation 883/2004 and its Implementing Regulation,[65] is to determine which EU country is responsible for the payment of a number of benefits: both in cash (such as unemployment benefit or maternity pay) and in kind (principally access to public healthcare services).[66] Where an EU citizen is subject to the social security legislation of a particular Member State, usually because it is where they work and therefore pay national insurance contributions, they must be offered the same access to benefits as that country's own nationals.

12.2 As described by the European Commission, European law establishes four key principles which—subject to limited exceptions—must be observed by all EU countries' national authorities when applying national social security legislation to nationals of other Member States:[67]

- non-discrimination on grounds of nationality between a Member State's own nationals and those of other EU Member States (the "**equal treatment**" principle);

64 This legislation has also been extended to the four EFTA countries (Norway, Switzerland, Iceland and Liechtenstein) as part of their acceptance of the free movement of people.

65 Regulation 987/2009.

66 The main principle is referred to as 'unicity': the rules aim to ensure that a specific EU national is only covered by the social security legislation of one Member State, irrespective of the benefit claimed.

67 See Commission document SWD(2016) 460.

- the **aggregation of periods of insurance, employment or residence**[68] in different Member States when making a benefits or social security claim (making them cumulative, so that periods completed in one Member State count towards the eligibility threshold for a particular benefit in another);[69]
- the waiving of residence rules, meaning that benefits in cash and in kind (that is to say long-term medical care) can still be accessed when moving to another EU Member State ("**exportability**"); and
- the **application of only one Member State's legislation** in respect of contributions and entitlement to benefits, so there is no overlapping jurisdiction (with one or more Member States claiming responsibility) or gap (that is to say no Member State taking responsibility) when a person who has exercised free movement rights wants to access social security.

12.3 Under these rules, for example, that a UK national who moves to France from Germany after ten years of paying German national insurance contributions can have those contributions taken into account when applying for a French State Pension or unemployment benefit claim.[70] Similarly, the 'exportability' of an entitlement to long-term healthcare means that UK pensioners who live in countries like France or Spain can access health services locally free of charge, with the costs reimbursed to the appropriate authorities by the UK Government (and vice versa).

Implications of Brexit

12.4 In December 2016, unrelated to the UK's withdrawal from the EU, the European Commission proposed a number of amendments to Regulation 883/2004 (which remain under discussion in Brussels). In our Reports on the proposed changes, the most recent of which we published in January 2019, we concluded that UK's withdrawal from the EU means that—by default—the social security rights and entitlements that UK nationals automatically enjoy when living within the European Union fall away by operation of law on 29 March 2019 (unless a new arrangement were concluded before that day).

12.5 Instead, following Brexit, British citizens in the EU and EU nationals in the UK would be subject to the rules applicable to other 'third country' nationals when trying to access social security in their country of residence. As these are largely set by national rather than European law and typically more restrictive (not least in the UK),[71] there would be an immediate reduction in rights from one day to the next after the UK ceases to be a Member State. Similarly, Brexit would potentially invalidate relevant 'periods'—of

68 Periods of residence are covered by the Regulation because in certain EU countries, access to particular benefits is dependent on having been resident there for a certain amount of time. Under the Regulation, periods of residence in any other Member State must also be taken into account because otherwise the entitlement would indirectly discriminate between that country's own nationals and those of other Member States.

69 Article 6 of Regulation 883/2004 provides: "The competent institution of a Member State whose legislation makes the acquisition […] of the right to benefits […] conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies"

70 In December 2018, the Government said it would continue to pay UK pensioners in EU countries their uprated State Pension subject to reciprocal treatment by those countries for their nationals living in the UK.

71 See for more information on entitlements to UK benefits for non-UK nationals the House of Commons Library Briefing SN06847 (June 2015).

paying national insurance, (self-)employment or residence—built up by EU nationals in the UK from counting towards a social security entitlement if they move to one of the remaining Member States.[72]

12.6 Such an abrupt legal change would have direct and significant human cost for UK and EU citizens who might find themselves unable to access their current social security or healthcare entitlements in their country of residence. For that reason, the draft Withdrawal Agreement negotiated between the Government and the EU would keep all Single Market legislation (including Regulation 883/2004) in operation in the UK for a post-Brexit transitional period, potentially until 31 December 2022.[73] Even after that transition, while freedom of movement would be ended, the relevant social security rights under the Regulation of those UK and EU nationals who are resident in—or have been resident in—each other's territory before the end of transitional period would be guaranteed for life. The UK would also be under a legal obligation to apply any future changes to the Social Security Regulation to citizens in scope of those provisions, even though it will no longer be involved in the drafting of such legislation after it ceases to be a Member State.[74]

12.7 However, ratification of the Withdrawal Agreement remains uncertain, and with it the continued reciprocal application of Regulation 883/2004 for citizens within its scope on the day the UK exits the Single Market. The Agreement was decisively rejected by the House of Commons on 15 January 2019, and it remains highly uncertain whether it will be approved at all. There is currently no provision for the 'citizens' rights' elements of the Withdrawal Agreement, including the section on social security, to be ring-fenced and take effect separately on the day of the UK's withdrawal if the Agreement as a whole is not ratified by Parliament.

12.8 On 27 February 2019 the Government accepted the 'Costa' amendment, which requires the Prime Minister to seek a "joint UK-EU commitment to adopt part two of the Withdrawal Agreement on Citizens' Rights and ensure its implementation prior to the UK's exiting the European Union, whatever the outcome of negotiations on other aspects of the Withdrawal Agreement". It is unclear what steps are being taken to implement this policy, or what the outcome of this process might be. Therefore, both the UK and EU are implementing contingency measures relating to the disruption of social security coordination caused by Brexit, described in more detail below.

Contingency measures for a 'no deal' scenario

12.9 Unless and until the draft Withdrawal Agreement on the UK's exit from the EU is ratified by both sides, there will be continuing uncertainty of the legal status of UK nationals in the EU and vice versa with respect to their social security rights. In the

72 For example, national insurance contributions paid by a French national working in the UK would no longer necessarily count towards a State pension in France, because EU law only requires contributions made in another country which has accepted the free movement of people—and therefore covered by Regulation 883/2004—to be taken into account.

73 The initial transition period would last until 31 December 2020, with the possibility of an extension lasting no more than two years by mutual agreement between the UK and the EU.

74 Under the Withdrawal Agreement, the UK would apply any future changes to Regulation 883/2004 and its Implementing Regulation domestically for those UK and EU nationals living there within its scope. However, the UK would have no input into those changes, which would be decided by the European Parliament and the remaining Member States, based on a proposal by the European Commission.

absence of a separate, ringfenced agreement on this issue, both sides have taken action to provide some form of legal continuity with respect to social security access for nationals of the other party who will be affected by Brexit.

12.10 The UK Government's approach to replacing the systems created by Regulation 883/2004, and mitigate the impact of Brexit in this area, consists of two broad strands. First, it is making amendments to Regulation 883/2004 by means of Statutory Instrument to change how it is 'retained' in domestic UK law in a "no deal" scenario. Its December 2018 policy paper on the rights of citizens in a 'no deal' scenario noted that EU nationals lawfully resident in the UK on 'exit day' "will be able to continue to access in country benefits and services on broadly the same terms as now", including the export of benefits and access to the National Health Service. It added, however, that these entitlements "will be subject to any future domestic policy changes which apply to UK nationals".[75] Separately, the Government has introduced primary legislation that would implement replacement agreements with EU (and non-EU) countries on both social security coordination and reciprocal access to healthcare (and, crucially, make the necessary payments that currently rely on statutory authority implementing EU legal obligations).

12.11 However, reaching such bilateral arrangements with the remaining Member States in time for a 'no deal' Brexit has not proven to be possible. This is not only because of the scale of the work (in addition to all other Brexit preparation work going on in Government), but also because the European Commission initially argued that individual EU countries could not strike bilateral arrangements with the UK to avoid a legal vacuum from 'exit day', because the EU had exercised exclusive competence with respect to qualifying periods of insurance contributions, employment or residence in the UK before that point. Its logic was that such events were governed by an EU Regulation until the UK's withdrawal, given the EU exclusive 'external' competence as well. In January 2019, the Commission restated this position even more bluntly:

> Under the Treaty provisions on free movement, the Union has fully exercised its competence with regard to the coordination of social security systems between the United Kingdom and other Member States related to any exercise of the right to free movement that occurred when the United Kingdom was a Member State of the Union. It is therefore not possible for Member States to conclude and apply bilateral conventions covering the situations falling under this Regulation.

12.12 At the time, the Government called the Commission's interpretation of the division of competences between Member States and the EU "particularly unwelcome" because it complicates what arrangement it can make with individual EU countries bilaterally in the event of a 'no deal' Brexit.

12.13 However, we understand that the legal understanding of the division of competences between the Commission and national governments has since softened, allowing Member States to enter into bilateral agreements with the UK which cover events that occurred

75 However, under the relevant Statutory Instruments laid in December 2018 to amend Regulation 883/2004 as it would continue to apply to EU citizens in the UK post-Brexit, the legal principle of "equal treatment" (between UK and EU nationals) would be removed from Regulation 883/2004 as it applies domestically from April 2019. The Department's Explanatory Memorandum on these draft regulations does not refer to the intended consequences or practical effect of the repeal of this principle, but we have been given to understand that it would continue to apply implicitly unless and until explicitly repealed by primary legislation at a later stage.

before its withdrawal provided it is consistent with the EU's own contingency proposals (see below) and the spirit of Regulation 883/2004. For this reason, the Government believes that the new UK-Ireland Convention on Social Security, which was published in February 2019, does not exceed Ireland's competence to act under the EU Treaties. However, similar replacement agreements cannot be negotiated with all other 26 Member States—plus the EFTA countries—in a 'no deal' scenario.

12.14 The position of British citizens who have lived in the EU for five years or more can in certain cases also be safeguarded under the EU's Long-Term Residence Directive, which grants eligible 'third country' nationals living in an EU country "the same treatment as [EU] nationals regarding access to employment, education, and core social benefits".[76] However, not all UK nationals living in the EU on Brexit day will meet the criteria for long-term residence under this legislation. The unilateral contingency measures announced by countries like Spain, France and the Netherlands also appear to be limited in time, creating further uncertainty, and fall short of what the rights UK nationals living in the EU enjoy currently. Given the risk of a patchwork of rights for Britons in Europe, the Government in December 2018 reiterated that ratification of the Withdrawal Agreement "is the only way the UK Government [can] guarantee the rights" of British people living in the EU.[77]

The EU's contingency proposal on access to social security

12.15 The EU's approach to providing some level of continuity in social security rights for citizens affected by Brexit was unclear until very recently. The European Commission's first 'no deal' policy paper, published in July 2018, made no mention of the impact of Brexit in the area of social security rights specifically.[78] However, by November the Commission was calling on individual Member States to "take a generous approach to the rights of UK citizens who are already resident in their territory". A month later, it explicitly conceded that a disorderly Brexit "would have an impact on […] the social security protection [citizens] benefit from".

12.16 Having reversed its earlier view that access to social security for citizens affected by Brexit was a matter for individual EU countries to resolve, the European Commission published a proposal for an emergency Social Security Regulation at the end of January 2019. This new legislation would provide for limited continuity in the application of the Social Security Coordination Regulation for both UK and EU nationals seeking to access social security in one of the remaining 27 Member States after 29 March 2019, if they had lived and/or worked in the UK previously. This would apply to "certain core principles of social security coordination" as well as "rules […] which give practical effect to the implementation of those principles".[79] The Department for Work and Pensions submitted an Explanatory Memorandum on the proposal with some delay on 25 February 2019.

76 Directive 2003/109/EC Concerning the status of third-country nationals who are long-term residents, as amended.

77 For example, it was only announced in a parliamentary answer on 21 January 2019 that the Department for Health and Social Care had "informally approached other Member States and are prioritising those that are the major pensioner, worker and tourist destinations" for UK nationals, although the outcome of this process is not clear.

78 The paper obliquely refers to the fact that, in a 'no deal' scenario, "there would be no specific arrangement in place for EU citizens in the United Kingdom, or for UK citizens in the European Union".

79 An example of such an implementing rule is the pro-rata calculation of an old-age pension under Regulation 883/2004.

12.17 **Concretely, the proposal would require the remaining Member States to recognise national insurance contributions or residence built up by both UK and EU nationals while exercising their free movement rights (i.e. before the UK formally leaves the EU in a 'no deal' scenario) where these would otherwise automatically lapse on 'exit day'**. Such a lapse would occur because:

- the UK would no longer be a Member State, meaning periods of work and residence there accrued by both UK and EU nationals would not count when determining entitlements under Regulation 883/2004, and
- for UK nationals living in the EU specifically, their qualifying periods—whether built up in the UK or in an EU-27 country—would be irrelevant, because they would be outside the scope of Regulation 883/2004 altogether (which only applies to nationals of countries which participate in the free movement of people).

12.18 In practice, the proposal means UK and EU nationals will be able to use these qualifying periods towards certain social security entitlements in their EU Member State of residence or employment after Brexit if they are eligible make use of the benefits system of that country.[80] The principles of equal treatment and assimilation of rights would also apply, to ensure that where such access exists UK and EU nationals will not be in a worse position with respect to entitlements accrued before the UK's withdrawal. The benefits where these principles must be applied—if someone has a prior right to access them under EU or domestic law—are set out in article 3 of Regulation 883/2004, and include unemployment benefits and maternity pay.[81]

12.19 Because of the structure of the proposal, the way it will impact on EU citizens and UK nationals respectively is very different, naturally benefitting the former more than the latter.

12.20 EU nationals would retain their current rights under Regulation 883/2004 in any EU-27 country, because they would still have freedom of movement to live and work throughout the European Union. As such, they will remain automatically eligible to access the social security system the EU Member State which is responsible for them under the provisions on 'applicable legislation'. For them, the main difference the proposal will make is that it provides a legal basis allowing them to count any qualifying periods of work and residence that occurred in the UK *before* it ceases to be a Member State towards a social security entitlement elsewhere in the EU (but not for any periods after that date, since at that stage they would no longer be exercising EU-derived free movement rights).[82]

80 The proposal would apply to EU nationals who have lived or worked in the UK before 'exit day', and to UK nationals who are or have been subject to the social security legislation of an EU Member State before that date (which typically means they paid national insurance contributions there, or are the relative or dependent of someone who does or did).

81 Where UK qualifying periods continue to count, the principles of equal treatment and assimilation would also continue to apply: Member States could not treat qualifying periods completed in the UK by those in scope of the contingency Regulation differently from those completed in their own territory or in one of the other remaining Member States.

82 The proposal, naturally, has no impact on social security rights for EU nationals living in the UK, which will become an exclusive matter for the Government to determine once no longer bound by EU law.

12.21 For UK nationals who live or have lived in the EU, the benefits the contingency proposal provides are less than for EU nationals. Even where they live in the EU on 'exit day', they would no longer be exercising free movement rights but become 'third country' nationals subject to national and European immigration law. This difference in status underpins the Commission proposal, which therefore falls far short of providing the level of continuity that the Withdrawal Agreement would guarantee:

- first, the proposal explicitly excludes the continued application of the "applicable legislation" rules of Regulation 883/2004. Those rules determine which Member State must provide social security benefits for EU nationals who have exercised freedom of movement. In the absence of continued application of those rules, it is possible for example that *both* the UK and one of the EU Member States would require an employee—for example a frontier worker who commutes across the Channel or someone who works in both the UK and a Member State—to pay national insurance contributions. It appears this also creates the risk that *neither* the UK nor an EU Member State deem themselves responsible for the provision of a certain benefit to a citizen, where previously Regulation 883/2004 would have led to a binding determination as to which of the two countries was responsible;

- secondly, the contingency Regulation makes no provision for the 'export' of cash benefits by EU governments to UK nationals who move to another Member State or to the UK.[83] For example, a British citizen claiming child benefit for children still living in the UK would no longer be able to 'export' this entitlement, meaning the dependents would need to relocate or the benefit will cease to be paid;

- thirdly, lack of a reciprocal arrangement between the UK and the EU on 'in-kind' social security entitlements will also affect the ability of UK pensioners living in the EU to access public healthcare without needing to purchase private health insurance (a right currently guaranteed by Regulation 883/2004),[84] and the contingency proposal similarly does not provide a continuation of the EHIC scheme for access to emergency medical care by British citizens travelling in the European Economic Area;[85]

- fourthly, while the Government's Explanatory Memorandum states the proposal does extend to Gibraltar (which it believes is implicit in the legal text), the European Commission's policy paper on the EU's 'no deal' preparations published in December 2018 states explicitly that the EU's Brexit "contingency measures will not apply to Gibraltar" because the territory is an Overseas Territory, and not strictly a part of the United Kingdom; and

- lastly, even for the limited continuity foreseen by the Commission's contingency proposal, it is unclear what administrative arrangements will be necessary for the exchange of information with the British authorities to confirm periods of residence, contributions or self-employment in the UK that occurred prior

83 'British citizens' is here used as short-hand for anyone affiliated to the UK's social security system under EU law. That would also include EU nationals who last worked in the UK but subsequently retired to another Member State.

84 Under Regulation 883/2004, the costs of such care incurred by British citizens in Europe are reimbursed by the UK Government). This is a reciprocal arrangement, which would automatically fall away in a 'no deal' scenario.

85 Regulation 883/2004 is the basis for the European Health Insurance Card (EHIC) scheme, which entitles holders (when staying temporarily in another EU country than the one where they pay towards social security) to emergency medical care on the same terms as residents of that Member State.

> to 'exit day'. The UK will cease to be part of the existing legal framework that governs such exchanges under Regulation 88/2004 the moment it ceases to be a Member State, which appears to complicate the practical implementation of the Commission proposal.[86]

12.22 In its Explanatory Memorandum on the Commission's contingency proposal, the Department for Work and Pensions reiterates that "the UK's unilateral offer" on social security rights for EU nationals "is more generous" than the EU's, because it "allows aggregation of rights but also allowed the continued export of benefits [and] provides for continued healthcare cover for those [EU nationals] who are legally resident in the UK". However, the fact that such matters are not covered by the Commission's draft legislation means it remains within the competence of individual EU Member States to decide how to treat UK nationals living or working in their territory from 'exit day', meaning on a country-by-country basis reciprocal treatment could be offered.

12.23 The Commission proposal is not yet formal law. It is subject to the ordinary legislative procedure and must be formally agreed jointly by the European Parliament and the remaining Member States in the Council of Ministers. We understand negotiations on the final substance of the legislation have already concluded, after the Member States and the European Parliament adopted their joint position on the proposal on 22 February 2019, with substantive changes limited mostly to clarifying the competence of EU Member States to agree new social security arrangements bilaterally with the UK (see paragraph 13 above). Formal adoption of the legislation by the Parliament and Council is foreseen for early March, allowing it to take effect as and when the UK formally leaves the EU without a Withdrawal Agreement.

Our conclusions and questions for the Minister

12.24 **The rights of UK nationals in the EU and vice versa are one of the major areas of uncertainty caused by Brexit. Equal access to social security—whether in cash, such as unemployment benefit, or in kind, like medical care, for mobile EU citizens has been a core component of freedom of movement rules for many years. The UK's departure from the mechanisms created by the Social Security Coordination Regulation will trigger a major change in the entitlements of citizens whose residence rights are directly affected by the UK's withdrawal.**

12.25 **This area of EU law is extraordinarily complex, with social security rights of British citizens who have moved to the EU differing depending on their economic status, type of employment (if applicable) and where they reside. This will get worse after Brexit in a 'no deal' scenario, when harmonised EU rules will no longer fully apply to UK nationals living in the EU and entitlements will in many cases be dependent on domestic policy choices made by individual EU Member States. To avoid legal chaos, under the draft Withdrawal Agreement, if ratified, there would be no change in rights and entitlements of both UK and EU nationals until the end of the post-Brexit transition period. Moreover, after the end of the transition, UK citizens in the EU and**

86 It is for this reason that the Government's own 'no deal' planning in this area puts a responsibility on the claimant themselves to provide information if the Department for Work and Pensions is unable to obtain it from their counterpart in one of the EU-27 directly.

EU citizens in the UK would be 'grandfathered' into the system for their lifetimes, preserving access to benefits and healthcare they would have been entitled to had the UK remained a Member State.

12.26 **Given the lack of support for the Withdrawal Agreement as a whole, on 27 February 2019 the House of Commons by means of the 'Costa' amendment instructed the Government to "to seek at the earliest opportunity a joint UK-EU commitment to adopt part two of the Withdrawal Agreement on Citizens' Rights and ensure its implementation prior to the UK's exiting the European Union, whatever the outcome of negotiations on other aspects of the Withdrawal Agreement". That would essentially separate the citizens' rights provisions of the Brexit agreement, including the provisions on social security coordination, from the remainder of the treaty.**

12.27 **While we fully support the objectives behind the 'Costa' amendment, the practical implementation of such a ring-fencing exercise of Part Two of the Withdrawal Agreement between the UK and the EU is unlikely to be straightforward.**

12.28 **First, it is unclear whether the EU has the legal competence to conclude a Citizens' Rights Agreement with the UK under Article 50 TEU, or whether it would need to be done under a different legal base in the EU Treaties (in which case it could not be approved on behalf of the EU until the UK has already formally ceased to be a Member State, and the resulting agreement could be 'mixed', meaning ratification by all 27 national parliaments could also be required). Even if the necessary horizontal competence exists under Article 50 for a separate Citizens' Rights deal to be agreed prior to the UK's withdrawal, it is likely the European Commission would need a new detailed negotiating mandate from the Member States to begin the process, since its current instructions require the Brexit negotiations to be handled as a whole.87**

12.29 **Secondly, even if the Commission is authorised to discuss the 'Costa' proposal with the UK Government, it would not be a simple 'copy and paste' exercise to split the citizens' rights section from the main Agreement. In our view, substantial changes would need to be made to the current text of Part Two for it to be ready for separate ratification, for example to:**

- **reflect the absence of a transitional period before the Citizens' Rights section took effect;**
- **include references to articles of the Withdrawal Agreement not contained in Part Two itself, in particular the general—and not uncontroversial—principles which underpin the Agreement as a whole, like articles 2, 3, 4 and 5 on legal definitions, the geographical scope of the Agreement (potentially problematic with respect to Gibraltar), the continued (direct) effect and supremacy of EU law in the UK for EU citizens' rights legislation referred to in Part Two, and the 'good faith' principle;**

87 The Minister for the Cabinet Office (the Rt Hon. David Lidington MP) referred to this in the debate in the House of Commons on 27 February 2019, noting: "*We should not, though, underestimate the challenge in reaching a joint UK-EU commitment, as the amendment calls for, to ring-fence the agreement on citizens' rights. The European Union has been very consistent in saying to us that its legal mandate is clear that nothing is agreed until everything is agreed, and that its view, if these issues were not addressed in the withdrawal agreement, is that there are significant legal problems for the EU in protecting these rights since, in those circumstances, some of these issues would fall within the competence of member states and not of the EU institutions.*"

- **insert provisions on special governance arrangements, as the governance provisions for the Withdrawal Agreement as a whole—including on the functioning of the UK-EU Joint Committee—are not contained in 'Part Two of the Withdrawal Agreement' referred to in the Resolution agreed by the House on 27 February; and**

- **ensure the resulting text is politically acceptable to both sides, for example with respect to the continued jurisdiction of the Court of Justice over EU citizens' rights issues and the continued application of the Social Security Coordination Regulation for EU nationals in the UK, without a UK veto over future changes.**[88]

12.30 **The totality of these changes are not minor, and if they are to be given effect through a binding UK-EU agreement before 30 March—barring an extension of the Article 50 period—they would need to be addressed rapidly. A new ratification process in both the UK and European Parliaments would also need to be undertaken.**

12.31 **Given the potential practical obstacles to a separate UK-EU Citizens' Rights Agreement, we have noted with great interest the European Commission's new contingency proposal in relation to social security rights. The draft legislation provides some welcome clarity about the way in which national insurance contributions made by UK and EU nationals before 'exit day' will be counted towards social security entitlements in an EU country after that date in a 'no deal' scenario. However, it falls far short of the rights that would be guaranteed under the Agreement, and of the UK's unilateral offer on citizens' rights. For example, the Commission has not proposed the continued use of the 'applicable legislation' principle, which provides legal certainty about which country provides benefits to a particular individual; there is no reciprocation of the UK's 'no deal' offer with respect to pensioners' access to public healthcare facilities; or a safeguard for the right of UK nationals to 'export' benefits like unemployment or child benefit from an EU country to the UK.**

12.32 **To enable the Committee, and by extension Parliament and the wider public, to understand more fully the implications of the Commission contingency proposal for UK and EU nationals within its scope, we ask the Department for Work & Pensions to clarify:**

- **whether the proposed discontinuation of the principle of 'applicable legislation' for UK nationals living in the EU under the Commission contingency proposal could lead to a situation where neither the UK Government nor an EU Member State take responsibility for the provision of social security for British citizens where Regulation 883/2004 would have clearly allocated responsibility before 'exit day';**

88 It is unclear whether the EU has the legal competence to conclude a Citizens' Rights Agreement with the UK under Article 50 TEU, or whether it would need to be done under a different legal base in the EU Treaties (in which case it could not be approved on behalf of the EU until the UK has already formally ceased to be a Member State). The 'Costa' amendment also does not deal with the EU's other major 'red line' in the negotiations which it views as equally important as citizens' rights in the event of a 'no deal': the backstop to keep the border with Northern Ireland as open as it is at present.

- **what changes, if any, the Commission proposal would make to the rights and entitlements of frontier workers who work in one of the remaining Member States but live in the UK or vice versa (particularly in Northern Ireland and Gibraltar) compared to their rights under Regulation 883/2004;**
- **whether the EU has confirmed it shares the Government's interpretation that the Commission proposal implicitly extends to Gibraltar (meaning the social security rights of people working or living in Gibraltar, but involved in a cross-border situation with another Member State like Spain, would be the same as anyone else within the scope of the contingency Regulation);**
- **with which other EU Member States besides Ireland the Government intends to agree Social Security Conventions before exit day; and**
- **how the Government is cooperating with the Commission to ensure that UK (and EU nationals) within the scope of the contingency proposal are able to provide evidence of qualifying periods of (self-)employment or residence in the UK prior to 'exit day', after the Government ceases to be part of existing information exchange mechanisms under Regulation 883/2004.**

12.33 **We also note that, while the European Commission's contingency proposal is undoubtedly less generous than the UK's offer, this does not *necessarily* mean the rights of British citizens in the EU will fall short of those enjoyed by EU nationals in the UK in a 'no deal' scenario. The Long-Term Residence Directive provides something of a safety net for eligible UK nationals who have been living in the EU for five years or longer.**

12.34 **Moreover, in the absence of EU-level legislation to address the consequences of Brexit in this area—which takes the matter out of the hands of individual Member States—national governments remain free to decide how to treat UK nationals with respect to social security rights not covered by EU law. Whether such rights will be maintained depends on the domestic approach chosen by each EU country, and could therefore vary wildly across the European Union. It also appears that many countries, like Spain,[89] have put a strict time-limit on the unilateral transitional measures on the treatment of UK nationals living in their territory. The Government, in its Explanatory Memorandum, has not provided any information on the position taken by individual Member States. As such, a direct comparison of the situation for UK and EU nationals affected by Brexit with respect to access to social security is extremely difficult to make.**

12.35 **In practice, it is clear that UK nationals living in the EU will at best face further uncertainty, and potentially lose rights to use social security and healthcare systems in their country of residence to which they had automatic access while the UK was an EU Member State. The Commission proposal is therefore clearly of substantial political importance. However, it is nearing formal adoption at EU-level, and the changes made to the original legal text by the Parliament and Council appear to be relatively limited (most significantly setting out more clearly the competence of individual EU countries to conclude Social Security Conventions with the UK to cover periods of residence or national insurance contributions that occurred before Brexit day). In light of this, we**

89 ABC news report 'The government approves a decree in case the United Kingdom "decides to leave the EU without a deal"' (1 March 2019).

have decided to clear the document from scrutiny. We ask the Department provide us with an update on the final substance of the Regulation, and provide us with a reply to our questions, by 20 March 2019.

12.36 **We also draw the proposal and our assessment thereof to the attention of the Committee on Exiting the European Union, the Health and Social Care Committee and the Work and Pensions Committee.**

Full details of the documents

Proposal for a Regulation on establishing contingency measures in the field of social security coordination following the withdrawal of the United Kingdom from the European Union: (40347), 5949/19, COM(19) 53.

Previous Committee Reports

None. This is a new legislative proposal.

13 Improving cross-border law enforcement access to financial information

Committee's assessment	Legally and politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Committee on Exiting the European Union, the Home Affairs Committee and the Justice Committee
Document details	Proposal for a Directive laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences and repealing Council Decision 2000/642/JHA
Legal base	Article 87(2) TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Number	(39666), 8411/18 + ADDs 1–2, COM(18) 213

Summary and Committee's conclusions

13.1 The European Commission's proposal for a Directive forms part of a broader framework of measures to crack down on money laundering by giving law enforcement authorities the powers they need to obtain access to financial information which may assist in the investigation or prosecution of a criminal offence. It builds on an earlier Directive, adopted in May 2018, which requires Member States to establish a central registry of bank account information (or a central electronic data retrieval system) so that the individuals holding or controlling a bank account can be identified. The proposed Directive would require Member States to:

- give designated national law enforcement authorities and Asset Recovery Offices *direct* access to bank account information held in their Member State's central registry where necessary to prevent, detect, investigate or prosecute a serious criminal offence;
- strengthen the exchange of financial information and analysis between their own designated national law enforcement authorities and Financial Intelligence Units (national centres which collect information on suspicious or unusual financial activity) as well as between Financial Intelligence Units in different Member States;[90]
- introduce time limits for the exchange of information between Financial Intelligence Units in different Member States; and
- give Europol indirect access to bank account and other financial information or analysis via each Member State's National Europol Unit.

90 Whilst it would be for each Member State to designate the relevant national law enforcement authorities, they must include the National Europol Unit.

13.2 As the proposed Directive is a criminal law measure, it is subject to the UK's Title V (justice and home affairs) opt-in and will only apply to the UK if the Government decides to opt in. In his Explanatory Memorandum of 12 June 2018, the Minister for Security and Economic Crime (Mr Ben Wallace MP) indicated that the proposal was "broadly in line with existing UK legislation and practice on the sharing of financial information" but expressed concern that it might compromise the operational autonomy of national Financial Intelligence Units (FIUs) and questioned whether a request from a FIU in another EU Member State should be handled with greater urgency than a request from a FIU in a non-EU country. He confirmed in his letter of 20 September 2018 that the Government had decided to opt in as participation in the proposed Directive would

> bring benefits to the UK through ensuring that our operational agencies are able to seek and receive financial intelligence, including bank account details, where appropriate, in order to tackle both money laundering and wider criminality.

13.3 A further letter of 19 November 2018 assured us that the Government's initial concerns about the operational autonomy of FIUs and the introduction of time limits for responding to information requests had been addressed and that the Presidency intended to seek a "General Approach" at a meeting of Member States' Ambassadors to the EU (COREPER) on 21 November. Although our scrutiny reserve only applies to decisions taken by Ministers within the EU's Council of Ministers, not to decisions taken by officials within COREPER, we reminded the Minister that we expected the Government to ensure that we had sufficient opportunity to examine in good time any Presidency compromise text brought to COREPER for agreement. We made clear that it was wholly unrealistic to expect scrutiny clearance or a scrutiny waiver to be granted with only two days' notice of the COREPER meeting.

13.4 The Minister wrote again on 17 December 2018 to reiterate the Government's strong support for the aims of the proposed Directive and to confirm that the UK had abstained from the vote at COREPER, even though the General Approach text was "sufficiently acceptable" for the UK, as it had not been cleared from scrutiny. He drew our attention to amendments made to the Commission's original proposal which ensured that it would be for each Financial Intelligence Unit (FIU) to decide whether to share financial information with a FIU in another Member State.[91] He noted also that the provision setting out specific time limits for exchanging this information had been deleted.[92] He undertook to provide a further update once the European Parliament had finalised its position on the proposed Directive.

13.5 In our Report agreed on 9 January 2019, we recognised that the General Approach text endorsed by COREPER addressed the Government's concerns but highlighted two elements which would have particular implications for the UK following its exit from the EU. First, the revised text of Article 17 appeared to constrain the ability of Member States to negotiate and conclude new bilateral or multilateral agreements with third (non-EU) countries concerning the exchange of information and mutual legal assistance by

91 Article 7 of the General Approach removes the obligation on FIUs to share financial information with other designated competent authorities.

92 Article 9 in the Commission's original proposal.

introducing new requirements to notify the Commission before entering into negotiations and to obtain authorisation before provisionally applying or concluding such agreements. We asked the Minister:

- whether the notification and authorisation procedure envisaged in Article 17 was being (or had been) replicated in other EU instruments containing provisions on the negotiation and conclusion of agreements with third countries; and
- what assessment he had made of the impact that Article 17 might have on the UK's ability to conclude bilateral agreements with individual EU Member States on information sharing and mutual legal assistance post-exit.

13.6 Second, Article 19 stipulated that Member States would be required to implement the Directive within 24 months of the date on which it enters into force, taking the implementation date beyond the initial transition/implementation period envisaged in the draft EU/UK Withdrawal Agreement (ending in December 2020) during which EU law would continue to apply but within any further extension of that period to December 2022. We asked the Minister how the Government intended to approach implementation of the proposed Directive (once adopted) given that the length of any post-exit transition/implementation period and the extent of any obligation on the UK to implement the measure was uncertain.

13.7 In his letter of 1 March 2019, the Minister informs us that trilogue negotiations have concluded and that COREPER reached a provisional political agreement on a compromise text on 20 February. He expects other Member States to support the compromise reached and invites us to clear the proposed Directive (as amended) from scrutiny so that the Government can vote for its adoption at the forthcoming Justice and Home Affairs Council on 7 March, adding:

> I believe that the Government has obtained most of the changes that we sought to the measure to ensure it provides an effective basis for information exchange.

13.8 Turning to the questions raised in our earlier Report, the Minister explains that the scope of Article 17(3) on the negotiation and conclusion of third country agreements has been narrowed. It would now only require a Member State to notify the European Commission if it intends to negotiate and conclude an agreement which includes provisions on law enforcement access to bank account information with a third country participant in the European Economic Area (Iceland, Norway, Liechtenstein and Switzerland). Without this limited carve-out applicable only to negotiations with non-EU EEA countries, the Minister suggests that the EU might have sought to assert exclusive competence to negotiate and conclude *all* agreements with third countries on the sharing of financial information. He considers that the changes to Article 17(3) "serve as a limited extension of Member States' ability to conduct their own agreements", but only in relation to EEA countries. He is not aware of a similar notification and authorisation requirement in other EU measures setting out procedures for the negotiation of agreements between an EU Member State and a non-EU participant in the European Economic Area.

13.9 The Minister infers from the changes made to Article 17(3) that the EU would only assert exclusive external competence over agreements with a third country containing provisions on the sharing of information by Financial Intelligence Units within the EU. He adds:

> It should be noted that Article 17(3) specifically states that it is without prejudice to the division of competence between the Union and Member States, so it follows that these restrictions apply only insofar as the relevant agreement is within EU competence.

13.10 He accepts that the provisions in Article 17(3) will have implications for the UK's ability to negotiate and conclude bilateral data sharing agreements with individual Member States post-exit.

> As the UK will soon be a third country, and will not be an EEA State, any future agreement on data sharing by FIUs will likely need to be made with the EU, and the UK will not have the option to make such agreements with individual Member States. We believe that the UK will only get a clear steer on the extent to which other Member States accept the EU has competence, if and when we seek bilateral agreements.

13.11 As the UK has opted into the proposed Directive, the Minister accepts that the UK will be under an obligation to give effect to it in national law if the deadline for implementing it falls within the post-exit transition/implementation period envisaged in the draft EU/UK Withdrawal Agreement. He adds:

> The Government will consider the obligations on the UK once the timetable for the UK's exit from the EU is clearer.

13.12 Finally, the Minister says he is content with the "key changes" made during trilogue negotiations with the European Parliament which he summarises as follows:

- under Article 7, the FIU is required to cooperate with the competent authorities specified in the Directive, and to explain any refusal to reply to a request for assistance;
- Article 8 requires designated competent authorities to "reply in a timely manner to requests for law enforcement information, by the FIU" (but the timeliness of the response is not defined, leaving a margin of discretion);
- Article 9(2) requires FIUs to "endeavour to exchange such information promptly", largely replicating existing international agreements in which the UK participates; and
- Article 9 also requires Member States to ensure that financial information or analysis exchanged with other EU Member States is used only for the purpose for which it is provided—the FIU providing the information must give its prior consent for any wider dissemination or use of the information.

Our Conclusions

13.13 **We note that the Minister expects Member States to vote for the proposed Directive if it is brought forward for adoption at the Justice and Home Affairs Council on 7 March and requests scrutiny clearance so that the UK can also vote in favour.**

13.14 **We are grateful to the Minister for sharing with us the compromise *limité* text circulated by the Presidency ahead of the March Justice and Home Affairs Council.[93] We are nonetheless disappointed that we have so little time to consider the outcome of trilogue negotiations between the Council and the European Parliament. As the Minister acknowledges, the compromise text includes changes to Article 17(3) of the proposed Directive which "may impact the UK's ability to conclude bilateral agreements with individual EU Member States where a matter is within exclusive EU competence" once the UK has left the EU. He suggests that Article 17(3), as revised, would prevent EU Member States from concluding bilateral agreements with the UK on the sharing of financial information for law enforcement purposes as the UK will not be a member of the European Economic Area post-exit. We question whether this is the effect of the changes to Article 17(3). At best, the revised wording and the Minister's explanation create uncertainty as to its scope, meaning and effect.**

13.15 **Given that the UK has opted into the proposed Directive and taken part in the negotiations, it is a matter of concern that the Minister is unable to clarify how Article 17(3) will facilitate or constrain the UK in developing future security cooperation with the EU and/or with individual EU Member States. This uncertainty does not bode well for the negotiation of a future EU/UK security agreement. We recognise nonetheless that withholding scrutiny clearance at this late stage would serve no purpose, given that the compromise text has been politically agreed by the Council and European Parliament pending formal adoption. We clear the proposed Directive from scrutiny but, in doing so, draw our observations to the attention of the Exiting the European Union Committee, the Home Affairs Committee and the Justice Committee.**

Full details of the documents

Proposal for a Directive laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences and repealing Council Decision 2000/642/JHA: (39666), 8411/18 + ADDs 1–2, COM(18) 213.

Previous Committee Reports

Fiftieth Report HC 301–xlix (2017–19), chapter 4 (9 January 2019), Forty-sixth Report HC 301–xlv (2017–19), chapter 15 (28 November 2018), Thirty-seventh Report HC 301–xxxvi (2017–19), chapter 17 (5 September 2018) and Thirty-third Report HC 301–xxxii (2017–19), chapter 6 (27 June 2018).

93 The Government can share with the Scrutiny Committees an EU document carrying a *limité* marking on the understanding that "it cannot be published, nor can it be reported on in any way which would bring detail contained in the document into the public domain." See the Government's Guidance on Parliamentary scrutiny of EU documents.

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

(40254) 15437/18 —	Commission recommendation on the international role of the euro in the field of energy on promoting the international role of the euro in the field of energy Accompanying the document Commission Recommendation on the international role of the euro in the field of energy
(40349) 5927/19 + ADD 1 COM(19) 21	Report from the Commission on the implementation of EU macro-regional strategies.

Department for Environment, Food and Rural Affairs

(40379) 6235/19 COM(19) 50	Report from the Commission to the European Parliament and the Council on the functioning of Regulation (EU) No 1337/2011 of the European Parliament and of the Council of 13 December 2011 concerning European statistics on permanent crops.
(40384) 6330/19 COM(19) 76	Report from the Commission to the European Parliament and the Council on the exercise of the delegation conferred on the Commission pursuant to Regulation (EC) No 1760/2000 of the European Parliament and of the Council establishing a system for the identification and registration of bovine animals and regarding the labelling of beef and beef products and repealing Council Regulation (EC) No 820/97.
(40393) 6526/19 COM(19) 82	Proposal for a Council Decision on the submission, on behalf of the European Union, of a proposal for the listing of methoxychlor in Annex A to the Stockholm Convention on Persistent Organic Pollutants.

Department for Transport

(40381) 6311/19 + ADD 1 COM(19) 80	Proposal for a Council Decision on the position to be taken on behalf of the European Union in the relevant Committees of the United Nations Economic Commission for Europe as regards the proposals for modifications to UN Regulations Nos 0, 3, 4, 6, 7, 9, 10, 19, 23, 27, 38, 41, 48, 50, 51, 53, 55, 58, 62, 67, 69, 70, 73, 74, 77, 86, 87, 91, 92, 98, 104, 106, 107, 110, 112, 113, 116, 119, 122, 123 and 128, as regards the proposal for an amendment to the Consolidated Resolution R.E.5, as regards the proposals for four new UN Regulations, and as regards the proposal for an amendment to Schedule 4 of the 1958 Agreement.

HM Revenue and Customs

(40382)
6247/19
COM(19) 57

Report from the Commission on the mid-term evaluation of the Customs 2020 programme.

HM Treasury

(40206)
14689/18
COM(18) 809

Report from the Commission Italy Report prepared in accordance with Article 126(3) of the Treaty on the Functioning of the European Union.

(40209)
14629/18
+ ADD 1
COM(18) 806

Recommendation for a Council Decision establishing that no effective action has been taken by Hungary in response to the Council Recommendation of 22 June 2018.

(40210)
14628/18
+ ADD 1
COM(18) 805

Recommendation for a Council Recommendation with a view to correcting the significant observed deviation from the adjustment path toward the medium-term budgetary objective in Hungary.

(40211)
14627/18
COM(18) 804

Report from the Commission to the Council Commission report to the Council pursuant to Article -11(2) of Regulation (EC) No 1466/97 on the enhanced surveillance mission in Hungary, of 18–19 September 2018.

(40212)
14595/18
COM(18) 801

Report from the Commission to the Council Commission report to the Council pursuant to Article -11(2) of Regulation (EC) No 1466/97 on the enhanced surveillance mission in Romania, of 27–28 September 2018.

(40213)
14594/18
+ ADD 1
COM(18) 803

Recommendation for a Council Decision establishing that no effective action has been taken by Romania in response to the Council Recommendation of 22 June 2018.

(40214)
14589/18
+ ADD 1
COM(18) 802

Recommendation for a Council Recommendation with a view to correcting the significant observed deviation from the adjustment path toward the medium-term budgetary objective in Romania.

(40234) 15090/18 COM(18) 781	Report from the Commission on data pertaining to the budgetary impact of the 2018 annual update of remuneration and pensions of the officials and other servants of the European Union and the correction coefficients applied thereto.
(40253) 15304/18 COM(18) 796	Communication form the Commission towards a stronger international role of the euro.
(40322) — —	European Court of Auditors Special Report No. 01/2019: Fighting fraud in EU spending: action needed.

Home Office

(40352) 5840/19 COM(19) 12	Report from the Commission on Investor Citizenship and Residence Schemes in the European Union.
(40386) 6377/19 COM(19) 77	Proposal for a Council Decision on the position to be adopted, on behalf of the European Union, in the sixty-second session of the Commission on Narcotic Drugs on the addition to the list of substances in the Tables of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

Formal Minutes

Wednesday 6 March 2019

Members present:

Sir William Cash, in the Chair

Martyn Day	Mr David Jones
Richard Drax	Andrew Lewer
Marcus Fysh	Michael Tomlinson
Kate Hoey	David Warburton
Darren Jones	

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 15 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Fifty-seventh Report of the Committee to the House.

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

[Adjourned till Wednesday 13 March at 1.45pm

Standing Order and membership

The European Scrutiny Committee is appointed under Standing Order No.143 to examine European Union documents and—

a) to report its opinion on the legal and political importance of each such document and, where it considers appropriate, to report also on the reasons for its opinion and on any matters of principle, policy or law which may be affected;

b) to make recommendations for the further consideration of any such document pursuant to Standing Order No. 119 (European Committees); and

c) to consider any issue arising upon any such document or group of documents, or related matters.

The expression "European Union document" covers—

i) any proposal under the Community Treaties for legislation by the Council or the Council acting jointly with the European Parliament;

ii) any document which is published for submission to the European Council, the Council or the European Central Bank;

iii) any proposal for a common strategy, a joint action or a common position under Title V of the Treaty on European Union which is prepared for submission to the Council or to the European Council;

iv) any proposal for a common position, framework decision, decision or a convention under Title VI of the Treaty on European Union which is prepared for submission to the Council;

v) any document (not falling within (ii), (iii) or (iv) above) which is published by one Union institution for or with a view to submission to another Union institution and which does not relate exclusively to consideration of any proposal for legislation;

vi) any other document relating to European Union matters deposited in the House by a Minister of the Crown.

The Committee's powers are set out in Standing Order No. 143.

The scrutiny reserve resolution, passed by the House, provides that Ministers should not give agreement to EU proposals which have not been cleared by the European Scrutiny Committee, or on which, when they have been recommended by the Committee for debate, the House has not yet agreed a resolution. The scrutiny reserve resolution is printed with the House's Standing Orders, which are available at www.parliament.uk.

Current membership

Sir William Cash MP (*Conservative, Stone*) (Chair)

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

Martyn Day MP (*Scottish National Party, Linlithgow and East Falkirk*)

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*)