House of Commons

European Scrutiny Committee

Sixty-second Report of Session 2017–19

Documents considered by the Committee on 3 April 2019, including the following recommendation for debate:

Brexit: UK contributions to the EU budget in 2019 in a 'no deal' scenario

Report, together with formal minutes

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Notes

Numbering of documents

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

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

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

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

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

Abbreviations used in the headnotes and footnotes

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

Euros

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

Further information

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

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

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Meeting Summary

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

Brexit-related issues

The Committee is now looking at documents in the light of the UK'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:

- What scope is there for the UK to cooperate with the European Border and Coast Guard Agency (the successor to Frontex) and to participate in the EU database on authentic and false documents ("FADO") after the UK leaves the EU and any post-exit transition/implementation period has ended?
- What status will agreements with third (non-EU) countries on law enforcement cooperation which the UK participates in before exit day have in UK law once the UK leaves the EU?
- The Committee has asked the Government to provide time for a debate on the financial implications of a 'no deal' Brexit, after the Treasury refused to indicate whether it is minded to accept an EU request to pay £15 billion to the EU in 2019 even if the UK leaves the European Union this month without a Withdrawal Agreement in place, and
- The Committee considered the implications of Brexit for the coordination of social security between the UK and the remaining 27 Member States, considering recently-agreed European rules on access to unemployment benefit and an emergency regulation on social security for UK citizens living in the EU if the Withdrawal Agreement is not ratified.

Summary

Strengthening the European Border and Coast Guard Agency and combating document and identity fraud

The European Commission has put forward a proposal to strengthen the operational capability of the European Border and Coast Guard Agency ("EBCGA", the successor to Frontex) so that it is equipped to operate as "a genuine border police". The Agency would also take over responsibility for a database ("FADO") which assists Member States in identifying forged or falsified identity documents. The UK cannot participate in the EBCGA, as it builds on parts of the Schengen rule book on external border control which do not apply to the UK, but it does participate in the FADO database. The Government will have to decide whether it wishes to continue participating in the FADO database once it is brought within the European Border and Coast Guard Agency or to opt out, meaning that the UK would no longer have direct access to the information held in it. The Explanatory Memorandum submitted by the Immigration Minister (Rt Hon.

Caroline Nokes MP) hints that the Government may wish to participate, not least as it would strengthen the UK's hand in negotiating a future EU/UK internal security treaty which includes the capabilities provided by FADO to detect false documents and prevent identity fraud. The European Scrutiny Committee requests an update on negotiations on the European Border and Coast Guard Agency, including provisions on the Agency's cooperation with third countries and their relevance for the UK post-exit. The Committee also seeks further information on the practical implications for the UK of participating in FADO but not in the EBCGA and the scope for UK participation in FADO as a third country after leaving the EU.

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

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

The European Commission has invited the Council to agree Decisions authorising 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 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 Government now confirms that it has decided to opt into the proposals and reiterates its commitment to full implementation of the Prüm measures in the UK as well as ongoing access to Prüm as part of a post-exit agreement on internal security with the EU. The European Scrutiny Committee recognises that the policy objective of extending participation in Prüm is likely to have operational benefits for the UK (increasing the pool of data its law enforcement authorities can access) and strengthen the UK's case for a continuing relationship with Prüm and other EU data sharing instruments after leaving the EU. The Committee therefore agrees to grant a scrutiny waiver so that that the Government can vote for the proposals when they are brought to the Council for formal adoption but asks the Government to clarify the status in domestic law of "directly effective rights derived from the Agreements" (with Liechtenstein and Switzerland) once the UK has left the EU.

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

Cross-border access to electronic evidence in criminal proceedings

The European Commission has requested authorisation from the Council to negotiate a new Protocol to the Council of Europe Cybercrime Convention and a new agreement with the United States of America to facilitate cross-border law enforcement access to electronic evidence (emails, texts, etc) held by online service providers based in a different jurisdiction. The Commission considers that the EU has exclusive competence to conduct both sets of negotiations, meaning that only the EU, not individual Member States, may lead the negotiations. The Government questions the Commission's view that the EU has exclusive external competence and makes clear that the proposals are subject to the UK's justice and home affairs opt-in. As a result, the UK will only be bound by them if

the Government decides to opt in. The European Scrutiny Committee asks whether the Council and the Commission agree with the Government's analysis of the application of the UK's justice and home affairs opt-in Protocol.

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

UK contributions to the EU budget in a 'no deal' scenario

The Committee has considered a letter received from the Chancellor about the possibility of continued UK payments into the EU budget, even in a 'no deal' scenario where the £39 billion Brexit financial settlement is not ratified by the House of Commons. Under a contingency proposal due to be adopted shortly by the remaining Member States, the UK would be asked to make its £17 billion gross contribution for 2019 in full, in return for continued UK eligibility to receive most types of EU funding for the remainder of the year. The Chancellor's letter, dated 27 March, refused to clarify the Government's position or provide assurance, as requested, that parliamentary approval for any 'no deal' payments to the EU would at the very least require a Statutory Instrument under the affirmative procedure (meaning the Treasury could only release the funds with the House of Commons' explicit consent).

Given the Government's refusal to indicate whether it is minded to accept the EU's request (for example as a way of unblocking trade negotiations in the aftermath of a 'no deal' Brexit), the Committee has used its powers to recommend the EU proposal for debate on the Floor of the House at the earliest opportunity as a precursor to any formal parliamentary approval for further payments to the EU.

Not cleared from scrutiny; recommended for debate on the Floor of the House; drawn to the attention of the Committee on Exiting the European Union, the Public Accounts Committee and the Treasury Committee

Brexit: coordination of social security and access to healthcare

The European Scrutiny Committee has today issued its final report on new European legislation on coordination of social security for EU nationals who exercise their free movement rights. Among other things, the new rules will alter how EU nationals can access unemployment benefit in other Member States, and which country is responsible for the payment of certain benefits. The underlying Regulation also underpins the current, pre-Brexit rights of UK pensioners living in countries like Spain, France or Ireland to access healthcare services locally free of charge, with the costs reimbursed by the British Government.

The Committee considers the new rules to be of political importance because this body of European legislation would continue to apply indefinitely to and in the UK under the draft Withdrawal Agreement, as part of the Citizens' Rights sections for British citizens already living in the EU and vice versa. It also took the opportunity to consider an EU contingency proposal in case the Agreement is not ratified, which protects the right of certain national insurance contributions made in the UK prior to 'exit day' to be taken into account when UK and EU nationals apply for social security assistance in one of the remaining 27 Member States. However, the contingency proposal falls far short of the

rights that would be protected if the Withdrawal Agreement is ratified, as it excludes for example access to healthcare, exportability of benefits and detailed rules to decide which country is responsible for the payment of benefits to a specific individual.

Cleared from scrutiny; drawn to the attention of the Health and Social Care Committee, the Joint Committee on Human Rights and the Work and Pensions Committee

Carcinogens and Mutagens Directive (Phase II)

The proposal under scrutiny concerns the second raft of amendments suggested by the Commission to the Carcinogens and Mutagens Directive (CMD). As originally introduced, these changes would bring used engine oils within the scope of the CMD. It would also add five specific carcinogenic substances to the CMD and set OELVs for each. The proposal was adopted at the Environment Council on 20 December 2018. The final text of the Directive includes significant changes versus the original proposal. At the behest of the European Parliament, Diesel Engine Exhaust Emissions (DEEEs) were brought within the scope of the Directive with an 'occupational exposure limit value' (OELV) set for elemental Carbon (as a 'marker' for DEEEs). On the grounds that the inclusion of DEEEs and the setting of an OELV for elemental Carbon had not been handled correctly, the Government did not support adoption.

Since the Committee last wrote to the former Minister, the Government has committed to bring forward legislation that would place a duty on Government to report to Parliament on future changes to EU law covering workers' rights. This commitment would take the form of a statutory consultation with workers' and employers' representatives followed by a report to Parliament. With regard to the Directive under consideration, its transposition date—of early 2021—takes it outside of the proposed transitionary period under the draft Withdrawal Agreement (ending on 31 December 2020) but means that it would fall within the scope of the Government's consultation commitment. As such, the Committee has sought further information on whether the Government would consult on bringing forward legislation—or by other means giving effect to—the changes under consideration. Given uncertainty surrounding the operation of the Government's commitment, the Committee has also sought clarification of the criteria against which such a decision will be made, for example, covering how occupational safety and health legislation is defined.

Not cleared from scrutiny; further information requested; drawn to the attention of the Business, Energy and Industrial Strategy Committee, the Health and Social Care Committee, and the Work and Pensions Committee

Second mobility package: Clean Vehicles Directive

The proposal under scrutiny concerns the amendment of Directive 2009/33/EU—on the promotion of clean and energy-efficient road transport vehicles—and would widen its scope to include a revised definition of what constitutes a 'clean' light-duty vehicle (LDV). The Directive would also set a minimum public procurement target for clean LDVs. When the Committee last considered the proposal (on 21 November 2018), we granted a scrutiny waiver in order for the Government to support a General Approach to be sought by the Austrian Presidency in the Transport Council of 3 December 2018.

The Minister now writes—27 March 2019—requesting clearance of the proposal from scrutiny ahead of adoption which is scheduled for the middle of April. The Minister helpfully provides an update on the provisional agreement reached on the proposal between the Romanian Presidency and the European Parliament. On the content of the proposal, minimum procurement targets for new 'clean vehicles' have been agreed at 38.5% for cars and vans, 10% for trucks and 45% for buses (half should be zero emission) from spring 2021 up to December 2025 and, from 2025 to December 2030, respectively, 38.5%, 15% and 65%. The Minister is broadly support of the final text of the proposal and states that he "welcomes the progress that has been made [during negotiations on the Directive]" and that he is "satisfied that the provisional agreement goes a long way to meeting the Government's objectives for the Directive". On this basis, the Committee is content to grant a waiver for adoption, however, owing to outstanding questions on the Government's plans for the transposition of the Directive, we do not believe it appropriate to clear the file from scrutiny as requested.

Not cleared from scrutiny; further information requested, scrutiny wavier 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: Carcinogens and Mutagens Directive (Phase II) [Proposed Directive (NC)]

Committee on Exiting the European Union: Brexit: UK contributions to the EU budget in 2019 in a 'no deal' scenario [Proposed Regulation (NC; recommended for debate on the floor of the House)]; Negotiating mandates for EU-US trade talks [Proposed Decisions (NC; scrutiny waiver extended until 22 May 2019)]

Foreign Affairs Committee: Negotiating mandates for EU-US trade talks [Proposed Decisions (NC; scrutiny waiver extended until 22 May 2019)]

Health and Social Care Committee: Brexit: coordination of social security and access to healthcare [Proposed Regulations (C)]; Carcinogens and Mutagens Directive (Phase II) [Proposed Directive (NC)]

Home Affairs Committee: Strengthening the European Border and Coast Guard Agency and combating document and identity fraud [Proposed Regulations (NC)]; Cross-border access to electronic evidence in criminal proceedings [Recommended Council Decisions (NC)]; Cross-border police cooperation: Third country participation in the Prüm framework for exchanging DNA, fingerprint and vehicle registration data [Proposed Decisions (NC; scrutiny waiver granted)]

International Trade Committee: EU safeguard measures on steel imports [Commission Implementing Regulation (C)]; Negotiating mandates for EU-US trade talks [Proposed Decisions (NC; scrutiny waiver extended until 22 May 2019)]

Justice Committee: Cross-border access to electronic evidence in criminal proceedings [Recommended Council Decisions (NC)]; Cross-border police cooperation: Third

country participation in the Prüm framework for exchanging DNA, fingerprint and vehicle registration data [Proposed Decisions (NC; scrutiny waiver granted)]; Recast of the Brussels IIa Regulation [Proposed Regulation (C)]

Public Accounts Committee: UK contributions to the EU budget in 2019 in a 'no deal' scenario [Proposed Regulation (NC; recommended for debate on the floor of the House)]

Treasury Committee: UK contributions to the EU budget in 2019 in a 'no deal' scenario [Proposed Regulation (NC; recommended for debate on the floor of the House)]

Work and Pensions Committee: Brexit: coordination of social security and access to healthcare [Proposed Regulations (C)]; Carcinogens and Mutagens Directive (Phase II) [Proposed Directive (NC)]

1 Brexit: UK contributions to the EU budget in 2019 in a 'no deal' scenario

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; recommended for debate on the floor of the House; drawn to the attention of the Committee on Exiting the EU, the Public Accounts Committee and the Treasury Committee
Document details	Proposal for a Council Regulation on measures concerning the EU budget for 2019 in relation to the withdrawal of the UK
Legal base	Article 352 TFEU and Article 203 EURATOM; special legislative procedure; unanimity
Department	Treasury
Document Number	(40348), 5933/19, COM(19) 64

Summary and Committee's conclusions

1.1 The UK is legally required[1] to contribute to the EU budget while it remains a Member State of the European Union, because of the requirements of membership set out in the EU Treaties. The Treasury is at present a substantial net contributor to the Union's budget, having made a gross contribution of £18.6 billion in 2016.[2] The UK's withdrawal from the European Union would by default remove the obligation to make payments into the EU budget unless some other bilateral arrangement is in place.

1.2 Since shortly after the UK notified the European Council of its intention to withdraw in March 2017 under Article 50 TEU, it has been clear that the EU wanted the UK to pay for a share of existing financial commitments undertaken or incurred by the Union with Britain as a Member State.[3] The Government accepted the existence of such commitments,[4] and the draft Withdrawal Agreement on the UK's exit from the EU, published in

1 At present, the Treasury makes the UK's payments into the EU budget under section 2(4) of the European Communities Act 1972, which allows it to use the Consolidated Fund to "meet any EU obligation to make payments to the EU" as well as "any other expenses incurred under or by virtue of the [EU] Treaties". However, some level of parliamentary oversight was retained as the EU's long-term funding settlements—the Multiannual Financial Framework—and the legislation establishing how it is funded by the Member States—the Own Resources Decision—had to be approved by Act of Parliament before the Government could consent to their adoption at EU-level under the European Union Act 2011.

2 The gross contribution does not take into account EU funding that flows back into the UK, either via public authorities like agricultural subsidies via the Rural Payments Agency or directly to private-sector recipients, like EU research grants.

3 The European Commission issued a position paper to that effect in June 2017, and in her Florence speech in September 2017 the Prime Minister affirmed the UK's position that none of the remaining Member States would have to make higher contributions to the EU budget as a direct result of the UK's departure.

4 For example, in evidence to the House of Lords EU Committee on 29 August 2018, the then-Secretary of State for Exiting the EU (Rt Hon. Dominic Raab MP) said there was still a "question around quite what the shape of [the UK's] financial obligations were" if the Withdrawal Agreement was not ratified, adding that the UK "always pays its dues On 6 February 2019, the Government again told Parliament that "even if the UK leaves without a deal, the Government have always been clear that the UK has obligations to the EU [...] that will survive its withdrawal, and that these obligations would need to be resolved".

November 2018, contains an elaborate financial settlement which sets out in some detail what payments the UK would have to make in the years following its withdrawal.[5] The total cost to the UK taxpayer of the financial settlement in the Withdrawal Agreement has been provisionally estimated by the Treasury at £39 billion.[6]

1.3 This financial settlement, however, depends on the ratification of the Withdrawal Agreement by both sides. The House of Commons has rejected the Agreement three times, most recently on 29 March 2019. Subsequently, the EU and the Government agreed to delay the UK's withdrawal from the European Union under Article 50 until 12 April 2019 at the earliest.[7] In a 'no deal' scenario, i.e. where the Agreement is not ratified before the UK ceases to be an EU Member State, there is no clear legal basis for further UK payments into the EU budget.[8] However, it remains the Government's position that even in such an eventuality "the UK has [financial] obligations to the EU, and the EU […] to the UK, that will survive the UK's withdrawal and that these would need to be resolved".[9]

1.4 The EU, mindful of the financial and political repercussions for its remaining Member States if the UK leaves without a financial settlement in place, has been making the legal preparations for continued British payments into its budget even in a 'no deal' scenario.[10]

1.5 Under a draft version of an emergency Council Regulation tabled by the European Commission in January 2019, the UK would be invited to continue making payments into the budget for the remainder of 2019 even without a Withdrawal Agreement in place.[11] Under the original Commission proposal, the requested payments would amount to a gross contribution of €17.4 billion (£14.9 billion) over the course of 2019, inclusive of the estimated €5 billion (£4.3 billion) UK rebate for the year had the Withdrawal Agreement

5 Principally, the financial settlement covers UK contributions in 2019 and 2020—the final years of the EU's current Multiannual Financial Framework—as if it were still a Member State; a share of EU expenditure commitments outstanding as of 31 December 2020, which will decrease rapidly; and a share of the EU's other liabilities, like pensions of European civil servants.

6 The final settlement is likely to cost more than this. See for more information: National Audit Office, "Exiting the EU: the financial settlement" (20 April 2018).

7 The House of Commons instructed the Government to extend the Article 50 period—and therefore the UK's membership of the EU—on 14 March 2019. The European Council and the Government subsequently agreed to extend the period until 12 April 2019, unless the House of Commons approves the Withdrawal Agreement by 29 March (in which case the extension would last until 22 May 2019). The UK's EU membership could be extended further under Article 50 TEU by common agreement between the UK and all 27 remaining Member States.

8 The Treasury has already introduced legislation to remove EU budgetary law from the UK statute book in a 'no deal' scenario. The Government has also established an EU funding guarantee, which will provide financing from the Treasury to ensure that "UK organisations […] will continue to receive funding over a project's lifetime if they successfully bid into EU-funded programmes before the end of 2020" if the Withdrawal Agreement is not ratified.

9 As the House of Lords EU Committee pointed out in its now well-known report on the UK's financial commitments to the EU after Brexit, under a 'no deal' scenario the "UK would be subject to no enforceable obligation to make any [EU] financial contribution at all". However, this report noted as well that any agreement on post-Brexit "future market access on favourable terms […] is likely to prove impossible to do so without also reaching agreement on the issue of the budget". See: House of Lords European Union Committee, Brexit and the EU budget, 15th Report of Session 2016–17 (4 March 2017).

10 Under Article 310 TFEU, Treaties, the EU's revenue and expenditure must be matched: it cannot run a deficit. Therefore, without British payments EU expenditure would have to be reduced, or other Member States would have to pay more to make up the shortfall (or a combination of both).

11 Given the exceptional circumstances that have led the Commission to make this proposal, the legal basis for the draft Regulation is Article 352 of the Treaty on the Functioning of the European Union. This is a fall-back mechanism that allows the EU to take exceptional measures for which no explicit legal basis is provided elsewhere in the Treaties. Because of this, the proposal requires unanimous agreement of the Member States in the Council, and the consent of the European Parliament. As a consequence, the UK Government also needs to vote in favour of—or abstain on—the Regulation for it to be adopted while the UK is still a Member State.

been ratified. However, the deduction of the rebate from the amount the UK would be asked to contribute is the subject of discussions among the remaining Member States in the Council, and apparently not yet guaranteed.[12] As the proposal would only take effect from the date the Treaties cease to apply to the UK without an exit treaty in place,[13] the amount to be paid post-exit would take into account any regular EU budget contributions made by the Treasury in 2019 prior to formal withdrawal from the Union.[14]

1.6 In return for UK payments into the EU budget for the remainder of 2019, UK recipients would remain eligible to receive most types of EU funding until 31 December 2019 for "legal commitments entered into before the withdrawal date"[15] if they would otherwise have become ineligible for such funding when the UK ceases to be a Member State (i.e. when there is no provision in EU law for the funding in question to be provided to the UK as a 'third country'). Similarly, British public and private entities would be able to bid for *new* funding from EU programmes where calls are put out before the end of 2019 as if the UK were still a Member State. However, this would not apply to bids that relate to security-sensitive EU programmes like the European Defence Fund or the Galileo satellite programme.[16] A revised version of the Council Regulation dated 12 March also clarifies that the cost of agricultural subsidies to British farmers from the date of EU exit onwards would have to be borne by the UK Government itself.[17]

1.7 The EU proposal makes no provision for honouring multi-annual EU funding commitments to UK-based recipients in 2020 or beyond (for example long-term research grants or regional development funding), since it only foresees UK payments in 2019

12 The discussions have centred on the fact that according to the European Commission, the system underpinning how the UK rebate is paid for by the other Member States—which provides a secondary rebate to the largest net contributors, to limit in turn how much they pay towards the UK discount—would automatically fall away at the UK's withdrawal from the Union. That means that, even though the UK would keep its rebate under the 'no deal' offer, these countries would pay more for the 2019 EU budget, while those Member States who do not have a "rebate on the rebate"—like France—would pay less. The draft Regulation as proposed by the Commission does not contain any provisions to keep the current system for financing the rebate in place if the UK agrees to pay. See for more information: Financial Times, "Germany and France battle over UK's EU budget rebate" (28 February 2019).

13 The EU proposal would take effect on the date of EU exit, whether that is on 12 April 2019 as currently scheduled, or following any further extension of the Brexit negotiation period under Article 50. During any such additional extension, the UK would remain a full Member State including the obligation to make regular payments to the EU budget.

14 The exact amount the UK will already have paid towards the full amount by EU exit (and therefore how much it might pay from the date of exit until the end of 2019) is unclear. GNI-based contributions are paid monthly, but under EU law other types of budget contributions (the Traditional Own Resources, like the revenue from customs duties) accrue directly to the EU budget. It appears the UK will already have paid approximately €7 billion into the EU budget between January the end of April 2019, which—as things stand—would be the last full calendar month of EU membership. That would leave a further gross contribution post-exit totalling €10 billion. That translates into monthly payments of approximately €1.3 billion until the end of 2019.

15 Following the European Council of 21 March 2019, the default withdrawal date is now 12 April 2019 unless the House of Commons approves the Withdrawal Agreement.

16 Under separate contingency proposals made by the Commission, there would be different treatment of UK participation the Erasmus+ student exchange programme and EU-funded cross-border cooperation programmes involving Ireland and Northern Ireland.

17 Continued flows of EU funding would also be conditional on the UK accepting the "controls and audits" which apply to EU spending programmes (including oversight by the European Commission, the European Court of Auditors and the EU's anti-fraud body OLAF). The EU could suspend payments to UK recipients if the Government did not make the agreed payments or if "significant deficiencies" were observed in the way the funding was implemented (especially in areas of 'shared management', like Structural Funds, where EU funding is allocated to a public authority which then disburses it to the final recipients).

as a short-term solution to its potential budgetary shortfall.[18] This would also limit the usefulness of UK recipients being able to bid for new EU funding in 2019 in a 'no deal' scenario, since much of the actual disbursement of such grants would not take place until 2020 or later. For the EU to honour those commitments, a further post-2019 bilateral financial settlement would be necessary. By extension, this might inflate the UK's net contribution under the 'no deal' arrangement as proposed by the EU because there would be less money flowing back to British recipients.[19] This issue would not arise under the Withdrawal Agreement, because it deals comprehensively with all EU commitments to the UK and vice versa until they are settled.

1.8 The Chief Secretary to the Treasury (Rt Hon. Elizabeth Truss MP) submitted an Explanatory Memorandum on the European Commission proposal for continued UK contributions on 4 March 2019. While it reiterated the Government's view there UK would have financial commitments to the EU even in a 'no deal' scenario, the Memorandum made no further assessment of the size of those commitments, or how the Government proposes to resolve them with the EU in the absence of a Withdrawal Agreement. With respect to the specific request made by the EU in relation to the 2019 budget, the Minister only noted that that the Treasury was "analysing the Commission proposal",[20] adding that any arrangements with the EU for the 2019 budget would be "without prejudice to negotiating an agreement with the UK on a [comprehensive] financial settlement".[21]

1.9 Given the potential cost to the UK taxpayer if the Government accepted the EU's request for payments in the absence of a legally-binding overarching financial settlement, we wrote to the Chancellor of the Exchequer on 7 March 2019 to request urgent clarification of the Government's intentions and how parliamentary approval would be sought for any payments to the EU in a 'no deal' eventuality.[22] We reported the EU's proposals to the House more comprehensively in our Report of 13 March 2019, noting that political considerations to smooth negotiations with the EU on a new trade agreement would be a major consideration as to whether the Government accepted further contributions to the EU budget beyond withdrawal.[23] We also concluded that acceptance of the EU's offer for

18 The sole exception foreseen is for new public procurement contracts signed by an EU institution involving a UK contractor, which "shall be implemented in accordance with their terms and until their end date" (even if this falls beyond 31 December 2019).

19 According to a report in the Daily Telegraph on 25 February 2019, the estimated net UK contribution for 2019 under the proposal would amount to roughly €7 billion (£6 billion).

20 On 25 February 2019 the *Daily Telegraph* reported that the Cabinet had signed off on a draft Statutory Instrument enabling the Treasury to continue making payments to the EU in a 'no deal' scenario. Such a legal instrument would be necessary because the Government's current statutory authority to make payments to the EU out of the Consolidated Fund under the European Communities Act 1972 would have fallen away, and without being replaced by new powers under an Act of Parliament to implement the Withdrawal Agreement. The press reported that the Statutory Instrument for payments in a 'no deal' scenario would be made under the European Union (Withdrawal) Act 2018, potentially even under the negative—rather than affirmative—procedure.

21 We understand this to refer to a settlement one that would cover financial obligations between the UK and the EU beyond just the 2019 financial year, like the settlement contained in the Withdrawal Agreement).

22 In particular, we requested assurance that—should authorisation for such payments be sought by means of a Statutory Instrument—the relevant regulations would be laid subject to the affirmative procedure, requiring active parliamentary consent.

23 It has also been suggested that an immediate cessation of payments to the EU in respect of financial commitments undertaken with the UK's agreement when it was still a Member State could have wider implications for its perceived reliability as a negotiating partner, and have an impact on the country's sovereign credit rating.

the 2019 budget was likely to lead to a similar request for 2020, given that the financial settlement in the exit treaty would have required full UK budget contributions for both years.

1.10 On 27 March, the Chancellor responded to our letter.[24] He notes that "aspects of the [EU] proposal remain subject to change", presumably a reference to the question of whether the estimated £4.3 billion rebate would be deducted from the gross contribution demanded of the UK for 2019 in a 'no deal' scenario, and how the remaining Member States would pay for it. The Chancellor's reply did not to indicate whether the request for further contributions in the absence of a Withdrawal Agreement as framed in the Council Regulation would, in principle, be acceptable to the Government. Instead, the letter states that "the Government is continuing to analyse the Commission's proposal" and would "make a final decision" only when the remaining Member States finalise the legal text of the offer. He added that the Government was mindful of the "need to secure appropriate parliamentary authority for public expenditure", should the need arise. The Chancellor did not, however, provide the explicit assurance, sought by the Committee, that any Statutory Instrument authorising the Treasury to make payments to the EU in a 'no deal' scenario would be laid under the affirmative procedure (and therefore requiring the active approval of the House of Commons).

1.11 The Chancellor also indicated that the Council Regulation creating the legal framework on the EU side for continued UK contributions in a 'no deal' scenario is likely to be adopted by the remaining Member States after 12 April 2019, when the UK's membership of the EU is now due to cease if the Withdrawal Agreement is not ratified.[25] That means the Government would not have a presence or vote on the proposal in the Council of Ministers when the Regulation is formally approved.[26] The original Commission proposal required the Government to signal its acceptance to continue making payments into the EU budget by 18 April and ensure the first such payment by the end of that month, when 'exit day' was still scheduled for 29 March; it seems likely those legal deadlines will be pushed back now that the Article 50 extension has delayed the UK's withdrawal, meaning the first payment would be due by the end of May 2019.[27]

24 Letter from Philip Hammond to Sir William Cash (27 March 2019).

25 By Decision of the European Council of 22 March 2019, with which the Government and the House of Commons have agreed, the end of the UK's EU membership was delayed from 29 March until 12 April if the Withdrawal Agreement is not ratified. If the Agreement is approved by the House of Commons, the UK would remain a full Member State until 22 May to provide time for passage of the Withdrawal Act Implementation Bill.

26 As noted elsewhere, the Council Regulation is based on Article 352 TFEU, meaning its adoption requires unanimous agreement of the Member States in the Council. As a consequence, if it were voted on while the UK was still a Member State, the Government would also need to vote in favour of—or abstain on—the Regulation for it to be adopted. Prior to the repeal of the European Union Act 2011 in July 2018, the Government would have been unable to let the proposal be adopted without parliamentary agreement under Section 8 of that Act. The European Parliament is due to vote on the Council Regulation at its Plenary Session on 4 April 2019.

27 Similarly, it is likely the first actual payment would be due on 31 May rather than 30 April as foreseen by the original proposal (since it was meant to be at the end of the first full calendar month following the UK's withdrawal). The Council Regulation gives power to the European Commission to change the dates by which UK acceptance of the EU's request must be notified, and of actual payments, by Delegated Act.

Our conclusions

1.12 **While it is clear the Government believes some form of financial settlement would need to be reached with the EU in a 'no deal' Brexit scenario on 12 April 2019, it has refused to indicate what form this might take and how much it could cost the British taxpayer. If the Withdrawal Agreement is definitively rejected by the House of Commons, but the Government nevertheless accepts the EU's offer, a full gross contribution of nearly £15 billion would be due in 2019. We regret that, in the absence of proper and proactive consultation by the Government of Parliament with respect to any 'surviving' UK financial obligations to the EU even in a 'no deal' scenario, the EU has effectively set the terms of the resolution of those commitments in the short term on a "take it or leave it" basis.**

1.13 **Given the EU's 'no deal' proposal entails a high cost to the UK Exchequer in return for uncertain benefits in terms of new EU funding in 2019, the Government's position on this issue remains of paramount political importance. The question of the UK's contributions to the EU budget played a major role in the referendum campaign, and both Parliament and the public deserve clarity about what payments the Treasury might still make even if the UK leaves the European Union without a Withdrawal Agreement in place. Instead, as things stand, we have no formal confirmation if the Government would accept the request for further contributions to the EU budget.**

1.14 **The Chancellor told us on 27 March that the Treasury is still analysing the Commission proposal, because it was at that stage still subject to further change before formal adoption by the Member States. Disappointingly, he refused to indicate whether the latest version of the Regulation—dated 12 March 2019[28]—was in principle acceptable to the Government. This is a marked departure from the normal approach to the parliamentary scrutiny process of EU proposals, where the relevant Department provides regular updates on the Government's position on the legal text as it evolves through discussions in the Council of Ministers, and whether the text as it stands at a given point in the legislative process is acceptable to the UK. We can only conclude that such information is not forthcoming in the present case because of the political implications of setting out the Government's position on the financial consequences of a 'no deal' scenario.**

1.15 **The Government's refusal to provide clarity will, however, not make the question of the financial settlement with the EU in the absence of a Withdrawal Agreement go away. If the House of Commons does not approve the Agreement and the 'no deal' scenario is not otherwise averted, the matter will need to be put to the House in the very near future, and without any prior debate. This is disappointing: if the Government was minded to accept the EU's offer for continued payments even in the absence of an Agreement, significant political and legal issues would arise that Parliament would need to consider. These include not only the matter of the size and timing of UK contributions in such an eventuality, but also how the Treasury would seek Parliament's approval for them, and what powers EU institutions and bodies like the European Commission and the Court of Auditors would have in the UK to supervise how EU funding was managed.**

28 See Council document 6823/19.

1.16 **Any parliamentary agreement to such 'no deal' payments to the EU would also need to take into account the fact that British bids for competitive EU grants—for example under Horizon 2020, the Creative Europe Programme or the Euratom nuclear research programme—are could dry up after 'exit day' even if the Treasury is still paying into the EU budget. This is a likely side effect not only of the lack of clarity about the UK's future partnership with the EU in areas like scientific research, nuclear cooperation and culture, but also the need for further, ad-hoc financial arrangements for 2020 and beyond to settle fully resolve commitments that pre-date the UK's exit from the EU. In addition, the traditional method of calculating the UK rebate ex-post would not apply, so that any reduction in EU funding flowing to the UK would not reduce our eventual net contribution further following future readjustments, as is currently the case.**[29]

1.17 **If acceptance by the Government of the EU offer for 2019 were indeed to lead to further ad hoc financial settlements for 2020 and beyond, in the long term effectively replicating the financial settlement in the Withdrawal Agreement, this would constitute a material disadvantage compared to the latter's comprehensive approach. The Withdrawal Agreement would offer longer-term certainty for the public authorities of both sides, as well as for UK recipients of EU funding. It would also, unlike the contingency proposal, preserve the full application of the rebate (allowing for the downward adjustment of the British contribution in 2019 and 2020 if receipts from the EU budget in that period do indeed decrease substantially).**

1.18 **Overall, given that the UK is a net contributor to the EU budget, whether or not to make payments to the EU in a 'no deal' scenario would be the result of a political, rather than a financial calculation. We emphasise that the Treasury should not take the approval by the House of Commons for any further contributions to the EU for granted, if the UK leaves the EU without a Withdrawal Agreement in place. We are disappointed, therefore, that despite the urgency of the matter the Treasury has not shed any further light on its position with respect to the UK's financial obligations to the EU in a 'no deal' scenario.**

1.19 **Given the Government's inability, or unwillingness, to articulate its position, we now recommend the Council's request for further UK payments into the 2019 EU budget in a 'no deal' scenario for debate on the floor of the House at the earliest opportunity. We also draw our conclusions and recommendation to the attention of the Committee on Exiting the EU, the Treasury Committee and the Public Accounts Committee.**

Full details of the documents

Proposal for a Council Regulation on measures concerning the EU budget for 2019 in relation to the withdrawal of the UK: (40348), 5933/19, COM(19) 64.

Previous Committee Reports

See (40348), 5933/19, COM(19) 64: Fifty-ninth Report HC 301–lvii (2017–19), chapter 6 (13 March 2019).

29 As explained by the Treasury, the European Commission is directly and solely responsible for calculating the UK's rebate. It calculates the rebate on the basis of a forecast of contributions to the EU Budget and the UK's receipts from it. This is subsequently corrected in the light of outturn figures.

2 Market surveillance

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 laying down rules and procedures for compliance with and enforcement of Union harmonisation legislation on products and amending Regulations (EU) No 305/2011, (EU) No 528/2012, (EU) 2016/424, (EU) 2016/425, (EU) 2016/426 and (EU) 2017/1369 of the European Parliament and of the Council, and Directives 2004/42/EC, 2009/48/EC, 2010/35/EU, 2013/29/EU, 2013/53/EU, 2014/28/EU, 2014/29/EU, 2014/30/EU, 2014/31/EU, 2014/32/EU, 2014/33/EU, 2014/34/EU, 2014/35/EU, 2014/53/EU, 2014/68/EU and 2014/90/EU of the European Parliament and of the Council
Legal base	(a) Articles 33 (customs co-operation), 114 (internal market), and 207 (common commercial policy) TFEU; ordinary legislative procedure; QMV; (b)—
Department	Business, Energy and Industrial Strategy
Document Number	(39394), 15950/17, COM(17) 795

Summary and Committee's conclusions

2.1 The Committee has taken issue with the Government's recent poor engagement with scrutiny of this proposed Regulation, which would strengthen the enforcement of EU goods rules through a wide range of measures including the creation of a Union Compliance Network, a system of pre-export checks and controls, and the introduction of a requirement for there to be an authorised representative in the Union who is responsible for compliance.

2.2 The Government has been particularly concerned about this last requirement (the requirement for there to be an authorised representative in the Union) throughout the negotiations. In the Minister's (Kelly Tolhurst MP) update on 9 January 2019,[30] she informed the Committee that the informal mandate to begin trilogues, which was adopted by the Committee of Permanent Representatives to the European Union (COREPER) on 23 November 2018, did not remove the requirement entirely, but did however better target the provisions towards those products which represented a risk to the consumer. The Minister added that, despite some improvements to the text, there remained substantial differences between the Council and Parliament positions, and that she was therefore awaiting further detail on the compromise text agreed by the Parliament and the Council before taking a definitive view on whether to oppose the Regulation or merely to abstain.

30 Letter from the Minister to the Chair of the European Scrutiny Committee (9 January 2019).

2.3 On the basis of this update, in its report on 16 January 2019,[31] the Committee declined to grant the Government a scrutiny waiver due to the lack of detailed information about how Article 4 of the proposal—mandating the presence of a person in the EU responsible for compliance—was revised by COREPER, insufficient information regarding the detailed implications of a number of aspects of the proposal for the UK in the context of EU exit, and because trilogue negotiations had not yet fully concluded.

2.4 The Committee asked the Government to provide it with:

- a thorough summary of the key provisions of the final compromise text as soon as trilogue negotiations conclude, with a particular focus on provisions that may be relevant to the UK when it ceases to be an EU Member State and any implementation period ends; and
- an assessment of the extent to which the proposed Regulation would affect the volume of checks for industrial goods which would have to take place at the EU's external borders.

2.5 The Committee also asked for information relating to the Withdrawal Agreement, in particular the scope of the 'backstop' in relation to market surveillance. The Committee asked whether the Government considered the proposed Regulation to be potentially within the scope of the Protocol on Ireland/Northern Ireland and therefore liable to be added to the relevant Annex (5), as well as whether, in light of the Government's publication 'UK Government Commitments to Northern Ireland and its integral place in the United Kingdom',[32] which stated that the Government will "ensure there would be no divergence in practice between the rules in Great Britain and NI covered by the Protocol in any scenario in which the backstop took effect", the Government intended for Great Britain to unilaterally align with the market surveillance rules referenced in Annex 5 of the Protocol.

2.6 The Committee also asked the Minister to ensure that her officials "liaise[d] closely with our clerks to ensure that we can report again on the proposal in advance of its adoption in Council."

2.7 Detailed official-level exchanges subsequently took place and arrangements were made regarding how this would be achieved, and it was arranged that the Committee would receive an update by 21 February 2019. When the Committee did not receive any update by this date, the Minister's staff provided reasons why the Minister had not been able to sign the letter to the Committee the previous week, and undertook to provide us with an update as early as possible in the following week, so that the Committee could consider it at its final meeting before the prospective adoption of the proposal for a Regulation at TTE Council on 4 March 2019.

2.8 The Committee did not receive the anticipated letter in advance of its meeting (or indeed any time thereafter). It therefore wrote a letter to the Minister on 27 February 2019 expressing its frustration with this sequence of events, and stating that:

31 Fifty-first Report HC 301–I (2017–2019), chapter 1 (16 January 2019).

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

> We retain considerable concerns about this proposal. We understand that the compromise text agreed in trilogue negotiations continues to require a substantial range of businesses based in third countries exporting goods to the Union (including the UK, post-exit) to have an authorised representative in the Union who is responsible for compliance. Although the range of products to which this provision is applicable has been reduced, we understand that it is still substantial. Furthermore, we understand that the obligations of the responsible person have been substantially expanded.
>
> As such, we conclude that the final text of the proposal contains provisions which are clearly detrimental to UK stakeholders.
>
> As you failed to write to us as agreed to provide a clear account of the final compromise text, and given that the final compromise text contains provisions which would have material negative implications for UK exporters targeting the EU market, we decline to grant the Government any form of scrutiny waiver to participate at Council and, exceptionally, **specifically request that the Government vote against this proposal** if it is brought forward for adoption at TTE Council on 4 March 2019, or in any other subsequent Council formation.
>
> We also ask you to consider putting in place contingency arrangements for circumstances where you do not have the capacity to correspond with us in a timely manner, such as enabling a duty minister to handle correspondence. This is an important step in order to enable scrutiny to continue to function effectively.

2.9 On 1 March 2019 the Minister provided a written response to the Committee's letter,[33] offering her apologies for not having responded to the Committee in time. The Minister makes reference to "challenging timescales", however given that the Committee had identified these challenging timescales and asked for cooperation with officials to meet them, and officials had made the necessary preparations to meet these timescales, we do not consider timing to be a reasonable excuse. The Minister also mentions unforeseen circumstances, which we accept, but we were assured that she would be in the office from 25 February 2019, and therefore had at least two days before the Committee met to sign the letter and send it to the Committee, which she did not do.

2.10 The Minister provides the Committee with detailed information in response to its questions. Regarding the key UK concern about the introduction of a requirement for there to be an authorised representative in the Union who is responsible for compliance (Article 4), the Minister provides a detailed account of the obligations this representative would have to fulfil, which include:

- ensuring the declaration of conformity and technical documentation has been drawn up and is made available upon request from a market surveillance authority (MSA) in a language easily understood by that authority;
- informing MSAs when there is reason to believe a product presents a risk;

33 Letter from the Minister to the Chair of the European Scrutiny Committee (1 March 2019).

- cooperating with MSAs to make sure corrective action is taken to resolve any non-compliance or when this is not possible the risk is reduced as required by MSAs; and
- ensuring the name, registered trade name or mark, contact details, including postal address of the economic operator is on the product or packaging.

2.11 The Minister states that, although this provision will apply to a smaller range of products compared to the Commission's original proposal (17 product directives applying to products for which harmonised Union legislation exists are covered, as opposed to the 70 directives covered by the original proposal), "the Government remains of the view that it is not sufficiently risk-based and will create a disproportionate burden on small and medium businesses". The Minister also acknowledges that the strength of the article has been increased: "For example, the original Commission proposal was limited to a person responsible for compliance information whereas the current proposal has the person responsible for compliance committed to undertaking a larger range of activity e.g. assisting with product recalls". In the context of EU exit, and subject to the caveat that the future relationship could remove this requirement, the Minister states that "If subject to the provisions as a third country, complying with this requirement will increase the cost for UK businesses conducting business in the EU". Nonetheless, as set out below, the Minister indicates a preference to abstain on the proposal, because she believes that "it is important that the Government take a position based on the whole proposal" and that there are other elements of it which will strengthen market surveillance, increase protections for consumers, and facilitate international cooperation in some cases.

2.12 The other key provision that is particularly relevant to the UK is Article 35 (International cooperation), which provides measures aimed at increasing cooperation between the Union, its Member States, and international partners. The Minister states that the mutual exchange of information permitted by this provision could be of potential benefit for UK market surveillance post-exit. The Minister notes that the article also provides for a system of pre-export controls to be carried out by third countries on products immediately prior to their export into the EU, adding that "when the third country satisfies a risk-based approach (based on audits within the EU and pre-existing verification systems inside the third country), products may be granted an approval by the Commission that replaces or reduces import controls". This too is potentially beneficial.

2.13 In response to the Committee's request for the Government to provide an assessment of the extent to which the proposal would affect the volume of checks for industrial goods which would have to take place at the EU's external borders, the Minister states that the Commission's impact assessment does not cover the impact on third countries or make an assessment of any additional checks that might be undertaken at its external borders as a result of changes included in the proposal. The Minister acknowledges that there are a number of factors that would affect the volume of checks that take place, and states that through Article 26 there is the potential for the Commission (in consultation with the Network) to adopt implementing acts to determine "benchmarks and techniques for checks on the basis of common risk analysis at the Union level", which could be detrimental or beneficial, depending on the measures, but that Article 35 allows for agreements to be made which would replace or reduce import controls when "the third country possesses an efficient verification system of the compliance or products exported to the Union and

the controls carried out in that third country are sufficiently effective and efficient". In addition, the Minister notes that the impact on the UK depends on the nature of the future relationship, which remains to be negotiated.

2.14 As to whether the Regulation would fall within the scope of the EU rules applicable in the territory of Northern Ireland contained in the Protocol on Northern Ireland/Ireland in the Withdrawal Agreement, the Minister expresses the view that, as the proposal amends Articles 15 to 29 of Regulation (EC) No 765/2008 (which set out the Community market surveillance framework and controls of products entering the Community), which is contained in Annex 5 of the Protocol, "our view is that this proposal would therefore fall under the provisions of Article 15(4) of the Protocol" and that "it is our view that the proposal falls under Article 15(4) of the Protocol and would therefore be incorporated into Annex 5".

2.15 In response to the Committee's other questions about the backstop, the Minister states that the Government's recent publication "UK Government Commitments to Northern Ireland and its integral place in the United Kingdom" reiterated the Government's commitment "to preserving Northern Ireland's place in the UK internal market were the Protocol ever to come into effect", and to establish that "Northern Irish businesses would have unfettered access when placing goods on the rest of the UK market" in this scenario. In terms of the practicalities of how this would work specifically in relation to market surveillance, the Minister states that "my officials are working to identify how this would be delivered in legislation". The Minister reiterates that "both the UK and the EU agree that the Protocol should not need to come into effect and have committed to use best endeavours to take the necessary steps to conclude a final deal that supersedes it in full by the end of the implementation period".

2.16 In conclusion, the Minister states that, while she does "appreciate the Committee's concerns about the proposal and particularly the impact on UK exporters", and the Government's concerns over Article 4 "prevent the Government from supporting the proposal", "there is much to support in the proposal that will strengthen market surveillance and increase protections for consumers". The Minister highlights Article 35 on international cooperation which would enable pre-export checks and intelligence sharing with trusted partners, as well as the improvements made to Article 5 (Requirement for manufacturers to have a declaration of conformity on their website) and Article 14 (Powers and duties of market surveillance authorities). The Minister states that she believes that voting against the proposal "could risk undermining confidence in the UK's approach and commitment to robust market surveillance, which is particularly important as we look to build future trade partnerships." She therefore expresses the hope that the Committee "will be able to reconsider its recommendation to vote against the proposal in light of that".

2.17 **We have taken note of the Minister's update regarding the progress of the negotiations in relation to this proposal, including her helpful, detailed summary of its key provisions.**

2.18 **From a UK perspective, the requirement for there to be an authorised representative in the Union who is responsible for compliance (Article 4), has been a key concern throughout the negotiations because of its implications for UK stakeholders post-exit. Although the final version of this provision will apply to a substantially smaller range**

of products compared to the Commission's original proposal, the Minister considers that the proposal "is still not sufficiently focused on each product's level of risk" and that the responsible person is now also made responsible for a wider range of activity than merely providing compliance information.[34] The Minister acknowledges that when the UK has left the EU, depending on the nature of the future relationship, "if subject to the provisions as a third country, complying with this requirement will increase the cost for UK businesses conducting business in the EU".

2.19 **In response to the Committee's request for an assessment of the extent to which the proposed Regulation would affect the volume of checks for industrial goods which would have to take place at the EU's external borders, the Minister states that the Commission's impact assessment does not extend to the impact on third countries and that it will be difficult to predict the impact on the UK until the future relationship has been concluded. The Minister notes that Article 35 allows for agreements to be made which would replace or reduce import controls when "the third country possesses an efficient verification system of the compliance or products exported to the Union and the controls carried out in that third country are sufficiently effective and efficient", however we note that it is not automatic that the UK will benefit from these provisions post-exit. The Minister also notes that Article 26 creates the potential for the Commission (in consultation with the Network) to adopt implementing acts to determine "benchmarks and techniques for checks on the basis of common risk analysis at the Union level"; however, this provision is ambiguous in its effects, and could be employed in ways that were beneficial or detrimental to UK interests.**

2.20 **Regarding the backstop, the Minister confirms that as the proposal amends Articles 15 to 29 of Regulation (EC) No 765/2008 on market surveillance, which is in the scope of Annex 5 of the Protocol, it is the Government's assessment "that the proposal falls under Article 15(4) of the Protocol and would therefore be incorporated into Annex 5", and would therefore apply to the territory of Northern Ireland—although the Minister cautions that the Protocol is a safeguard which would only be used in the event that "there is a gap between the end of the implementation period and the start of our future trading partnership with the EU" and that "both the UK and the EU agree that the Protocol should not need to come into effect". The Minister states that the Government's commitments in the 9 January publication *UK Government commitments to Northern Ireland and its integral place in the United Kingdom* "are to ensure that, were the Protocol to come into effect and for the duration of its effect, Northern Irish businesses would have unfettered access when placing goods on the rest of the UK market, and that the integrity of the UK single market is preserved".**

2.21 **The Minister assures the Committee that she appreciates its concerns about the proposal, particularly the impact on UK exporters, and states that her concerns over Article 4 prevent her from voting for the proposal; however, she states that there is also "much to support in the proposal that will strengthen market surveillance and increase protections for consumers" and that she believes that voting against the**

34 Their tasks will include: ensuring the declaration of conformity and technical documentation has been drawn up and is made available upon request from a market surveillance authority (MSA) in a language easily understood by that authority; informing MSAs when there is reason to believe a product presents a risk; cooperating with MSAs to make sure corrective action is taken to resolve any non-compliance or when this is not possible the risk is reduced as required by MSAs; ensuring the name, registered trade name or mark, contact details, including postal address of the economic operator is on the product or packaging.

proposal "could risk undermining confidence in the UK's approach and commitment to robust market surveillance, which is particularly important as we look to build future trade partnerships." She therefore expresses the hope that the Committee "will be able to reconsider its recommendation to vote against the proposal in light of that".

2.22 **We have reviewed our recommendation that the Government vote against the proposal and consider that it remains the right recommendation, as it is the Government's own assessment that the Regulation will create disproportionate obligations for stakeholders from third countries exporting to the EU market and that the Regulation will "create a disproportionate burden on small and medium businesses", including UK businesses exporting to the EU post-exit. We therefore recommend once again that the Government vote against the proposal at any forthcoming Council at which it is proposed for adoption. If the Government is concerned to avoid undermining confidence in the UK's approach and commitment to robust market surveillance, the Minister could table a minute statement in order to clarify the reasons for its negative vote. We retain the proposal under scrutiny. In the meantime, we ask the Minister to provide us with a final update on the outcome of any vote in Council in due course.**

Full details of the documents

Proposal for a Regulation of the European Parliament and of the Council laying down rules and procedures for compliance with and enforcement of Union harmonisation legislation on products and amending Regulations (EU) No 305/2011, (EU) No 528/2012, (EU) 2016/424, (EU) 2016/425, (EU) 2016/426 and (EU) 2017/1369 of the European Parliament and of the Council, and Directives 2004/42/EC, 2009/48/EC, 2010/35/EU, 2013/29/EU, 2013/53/EU, 2014/28/EU, 2014/29/EU, 2014/30/EU, 2014/31/EU, 2014/32/EU, 2014/33/EU, 2014/34/EU, 2014/35/EU, 2014/53/EU, 2014/68/EU and 2014/90/EU of the European Parliament and of the Council: (39394), Article 33 TFEU (customs co-operation), Article 114 TFEU (internal market), Article 207 TFEU (common commercial policy); ordinary legislative procedure; QMV.

Previous Committee Reports

Fifty-first Report HC 301–l (2017–19), chapter 1 (16 January 2019); Forty-fifth Report HC 301–xliv (2017–19), chapter 1 (21 November 2018); Twenty-seventh Report HC 301–xxvi (2017–19), chapter 2 (9 May 2018).

3 Second mobility package: Clean Vehicles Directive

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; but scrutiny waiver granted for adoption
Document details	Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/33/EU on the promotion of clean and energy-efficient road transport vehicles
Legal base	Article 192 TFEU; ordinary legislative procedure; QMV
Department	Transport
Document Number	(39209), 14183/17 + ADDs 1–6, COM(17) 653

Summary and Committee's conclusions

3.1 The proposal under scrutiny concerns the amendment of Directive 2009/33/EC—on the promotion of clean and energy-efficient road transport vehicles—and would widen its scope to include a revised definition of what constitutes a 'clean' light-duty vehicle (LDVs).[35] The Directive would also set a minimum public procurement target for clean LDVs and delegate power to the Commission to set a similar target for heavy-duty vehicles (HDVs) once relevant CO2 emission standards have been set at EU-level.

3.2 A full background to the proposal, including information on the Commission's ex-post evaluation of Directive 2009/33/EC, its rational for further regulatory action, and the Government's initial legal and political assessment of the changes suggested by the Commission, can be found in our Twenty-first Report to the House of session 2017–19.

3.3 When the Committee last considered the proposal (on 21 November 2018), we granted a scrutiny waiver in order for the Government to support a General Approach to be sought by the Austrian Presidency in the Transport Council of 3 December 2018. The Minister with charge over the proposal (Jesse Norman MP), has since written to the Committee—on 14 January 2019—providing an update on the outcome of the December Transport Council.[36] He now writes—27 March 2019—requesting clearance of the proposal from scrutiny ahead of adoption.[37]

Minister's letter of 14 January 2019

3.4 In his letter of 14 January 2019, the Minister of State at the Department for Transport (Jesse Norman MP), informed the Committee that the Austrian Presidency did not put the proposal forward for a General Approach choosing, instead, to issue a progress report. The Minister explained that the proposal would be taken forward by the Romanian

35 Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles (Text with EEA relevance).
36 Letter from Jesse Norman MP to Sir William Cash MP, 14 January 2019.
37 Letter from Jesse Norman MP to Sir William Cash MP, 27 March 2019.

Presidency (which had scheduled two Working Group meetings in January 2019 with a view to seeking a mandate from COREPER on 23 January to open Trilogue negotiations with the European Parliament).

3.5 The Minister alerted the Committee to the issues that would likely require further discussion—and resolution—at Working Group meetings. These include those parts of the proposal relating to:

- exemptions and scope—several Member States wanted to widen the scope of the proposal to include coaches;
- definitions—the criteria that must be met in order for a vehicle to qualify as 'clean' (consensus appeared to have been achieved at a value of less than 50gCO2/km (in concert with that provided for in the Car and Vans CO2 Regulation));
- minimum procurement targets—on which there was no consensus; and
- transition period—there was said to be a difference in views between whether the proposal should provide 24 or 36 months for implementation.

3.6 With regard to the questions asked—and the requests for further information made—by the Committee in its second consideration of the proposal (on 21 November 2018), the Minister did not provide direct answers or complete responses. The only response worthy of note was the Minister's suggestion that the Government would be "well placed to meet the Directive's requirements" should it stipulate a 10% public procurement target for HDVs.

Minister's letter of 27 March 2019

3.7 The Minister now writes—27 March 2019—requesting clearance of the proposal from scrutiny ahead of adoption which is scheduled for the middle of April. The Minister helpfully provides an update on the provisional agreement reached on the proposal between the Romanian Presidency and the European Parliament. The Minister's update maps neatly onto the key areas he highlighted in his letter of 14 January:

- exemptions and scope—coaches remain excluded but refuse collection vehicles are included in the final text;
- definitions—a value of 50gCO2/km for new cars and vans has been included;
- minimum procurement targets—targets for new 'clean' vehicles have been agreed at 38.5% for cars and vans, 10% for trucks and 45% for buses (half should be zero emission) from spring 2021 up to December 2025 and, from 2025 to December 2030, respectively, 38.5%, 15% and 65%; and
- transition period—a 24 month implementation period was settled on.

3.8 The Minister is broadly supportive of the final text of the proposal and states that he "welcomes the progress that has been made [during negotiations on the Directive]" and that he is "satisfied that the provisional agreement goes a long way to meeting the

Government's objectives for the Directive". With regard to the final procurement targets suggested, the Minister explains that those included would support the UK's climate change and 'Road to Zero' commitments.[38]

3.9 **We thank the Minister for his letter and for updating the Committee on the progress of negotiations on the proposal. On the basis that the Government is supportive of the Directive and believes that its provisions reflect its own domestic commitments in this area, we grant a scrutiny waiver in order for it to support adoption at Council sometime later this month.**

3.10 **We request further information on the Government's plans for the transposition of the Directive and note, in particular, that the deadline of April/May 2021—provided by the Minister—would fall outside of the implementation period set under the draft Withdrawal Agreement. In light of the Government's clear support for the Directive and the ambition that it has shown—and has been keen to report to the Committee—during negotiations, would the Government consider aligning UK law with the Directive in any event? .**

3.11 **We request a short report on the outcome of the Council at which the proposal is put for adoption along with a response to the question asked above by the end of April 2019. We retain the proposal under scrutiny.**

Full details of the documents

Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/33/EU on the promotion of clean and energy-efficient road transport vehicles: (39209), 14183/17 + ADDs 1–6, COM(17) 653.

Previous Committee Reports

Twenty-first Report HC 301–xx (2017–19), chapter 7 (21 March 2018); and Forty-fifth Report HC 301–xliv (2017–19), chapter 5 (21 November 2018)

38 See Department for Transport, 'The Road to Zero: Next steps towards cleaner road transport and delivering our Industrial Strategy' (July 2018).

4 Negotiating mandates for EU-US trade talks

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; but scrutiny waiver extended until 22 May 2019 (previously granted until 29 March 2019); drawn to the attention of the Committee on Exiting the EU, the Foreign Affairs Committee and the International Trade Committee
Document details	(a) Recommendation for a Council Decision authorising the opening of negotiations of an agreement with the US on the elimination of tariffs for industrial goods (b) Recommendation for a Council Decision authorising the opening of negotiations of an agreement with the US on conformity assessment
Legal base	(a) Articles 207(3), 207(4), 218(3) and 218(4) TFEU, QMV (b) Articles 207(3), 207(4), 218(3) and 218(4) TFEU, QMV
Department	International Trade
Document Numbers	(a) (40336), 5459/19 + ADD 1, COM(19) 16; (b) (40335), 5461/19 + ADD 1, COM(19) 15

Summary and Committee's conclusions

Overview

4.1 As part of a package of measures intended to launch a 'new phase' in EU-US trade relations,[39] the Commission proposed draft negotiating mandates on a) the elimination of tariffs on industrial goods and b) facilitating conformity assessment between the EU and US in January 2019 (see our previous Report chapters for further information on their content).

4.2 These new trade discussions must be considered in the context of escalating trade tensions between these two major trading blocs (following the US's imposition of Section 232 additional duties on steel and aluminium imports from the EU since 1 June 2018 and the continued threat of Section 232 measures on imports of cars and car parts).

4.3 The proposed mandates require the approval by a qualified majority of EU Member States in the Council before talks can begin. However, given the political sensitivities, the Commission is seeking unanimous approval of the mandates.

39 See the Joint Statement of Commission President Juncker and US President Trump of 25 July 2018. Negotiations for an ambitious EU-US trade and investment deal, known as the 'Transatlantic Trade and Investment Partnership (TTIP) stalled in 2016.

The Government's position and the Committee's previous conclusions

4.4 The Government fully supports both mandates as a means of deescalating trade tensions between the EU and US.

4.5 At its meeting on 13 March 2019, the Committee considered that the Minister of State for Trade Policy (George Hollingbery MP) should have provided more information in his original Explanatory Memorandum of 4 February 2019 on the details of the mandates and whether the Government would seek to transition/replicate them post-exit (in either a no deal or negotiated withdrawal scenario). The Committee established (following a series of detailed questions to the Minister) that:

- the mandate on industrial goods: includes fish and fish products as well as forestry products, which the Government supports; includes cars and car parts, but "allows for potential US sensitivities around pick-up trucks to be taken into consideration in the negotiations", meaning that pick-up trucks may be excluded from the final agreement, pending the outcome of negotiations, which the Government supports; includes new, additional provisions which take into account "sensitivities around energy-intensive products"; and commits the Commission to publishing a Sustainability Impact Assessment on the agreements this year, which takes into account the Paris Agreement on Climate Change. While the Government did not appear to have actively sought these changes, it considered that the "changes present no issues for the UK";

- the mandate on conformity assessment is intended to maintain (and where possible improve) regulatory standards. The Committee asked the Minister to clarify in his next update to the Committee whether the UK Government actively supported this objective in Council discussions; and

- the Minister is not willing or able to comment on whether the UK would seek to transition or replicate the potential EU-US agreements post-exit/transition period.

4.6 The Committee granted the Minister a time-limited scrutiny waiver until 29 March 2019 to be able to support the mandates, on the condition that: the scope of the mandates did not significantly deviate from the information shared by the Minister and the Minister continued to keep the Committee updated on the negotiations and the outcome of any vote in the Council, including different Member States' positions. The mandates have not, to date, been presented for adoption in the Council.

The Minister's update letter of 29 March 2019

4.7 The Minister notes that the Presidency is pushing to secure agreement of the mandates in order to implement the Joint Statement. He states that the substance of the latest compromise proposals "remains the same as the compromise versions circulated at the end of February which were detailed in my letter to the committee of 4 March 2019" and that the "UK continues to support these mandates as they currently stand".

Mandate on industrial goods agreement

4.8 The Minister states that the latest version of the proposed Council Decision authorising opening negotiations with the US on an industrial goods agreement:

- "notes the US withdrawal from the Paris Agreement and states that the EU only seeks full free trade agreements with parties to that Agreement". However, "[t]his provision is not included in the body of the mandates". The Minister notes that the Government is a "strong supporter of the Paris Agreement" but has "some concerns about the inclusion of this text [as a recital]" in the draft Council Decision on the basis that it "has not been agreed by Member States elsewhere". Nonetheless, on balance, the Minister considers "it is still in the UK interest to support the mandates"; and

- "now also contains commitments to take into account sensitivities in the energy intensive product and fisheries sectors by phasing out tariffs in these areas", which "does not alter" the UK Government's support for opening negotiations.

Mandate on conformity assessment

4.9 In response to the Committee's question on whether the Government has actively supported the objective to ensure that cooperation activities between the EU and US maintain (and where possible improve) regulatory standards and a high level of protection, the Minister states:

> The UK Government has actively supported this objective in Council discussions on numerous occasions. UK officials have used interventions in Council to note that work on conformity assessment and regulatory cooperation in trade agreements has the potential to be genuinely beneficial to EU industry and we should approach them in the spirit of opportunity, whilst being crystal clear that this is not a route to lowering our levels of statutory protection. This objective has received unanimous support from EU member states.

Brexit implications

4.10 While the Minister does not provide any further information on whether the UK would seek to transition or replicate the potential EU-US trade agreements post-exit/transition period, the Minister now addresses the Committee's comment in relation to the US publishing its negotiating objectives for a future US-UK trade deal and the posture it has taken. The Minister considers the US objectives for post-Brexit trade talks with the UK are:

- "a clear demonstration of the US Administration's commitment to beginning talks as soon as possible and is something that the Government has welcomed"; and

- "the standard form for most US trade negotiations as mandated by federal law", as evidenced by those published for negotiations with the EU and with Japan, which "mark the starting point for the US and not the end".

Expected timetable for adoption

4.11 The Minister expects the Commission to seek endorsement of these revised mandates at COREPER (Ambassadors) on 3 April 2019, but notes that the timing of a vote in Council "has not yet been set". He therefore seeks an extension of the Committee's previously time-limited scrutiny waiver (until 29 March 2019) "[f]ollowing the change in date of the UK's exit from the EU". He reiterates the importance of the UK Government being able to support the mandates in a vote in Council "if this comes during this [Article 50] extension period" and highlights that "[i]f the UK is unable to support the mandates in Council this could lead to the delay in adoption of the mandates and in commencing EU-US negotiations ….[which] presents a significant risk due to the ongoing threat of US Section 232 auto tariffs…".

4.12 **We thank the Minister for his latest update on the negotiations and highlight the slower than expected progress of these mandates within the Council.**

4.13 **While the majority of Member States, including the UK, are keen to launch these new trade talks quickly, France has continued to express concerns about negotiating trade deals with countries that are not party to the Paris Agreement. Furthermore, we understand that France is demanding that the Transatlantic Trade Investment Partnership (TTIP) mandate is revoked before new, more limited trade negotiations with the US are launched. We ask the Minister to explain whether this is a redline for France and, if so, whether the Government shares France's concerns and how/by what mechanism revocation of the TTIP mandate would be implemented (if taken forward).**

4.14 **We note that the latest compromise text on the Council Decision agreeing to open negotiations on an industrial goods[40] agreement, as reported by the Minister in his update of 29 March 2019, now includes (in the recitals):**

- **a reference to the US withdrawal from the Paris Agreement and note that the EU only negotiates comprehensive FTAs with parties to this agreement. While the Government has "some concerns" from a legal/procedural perspective about the inclusion of a recital in the Council Decision that makes ratification of the Paris Agreement a prerequisite for negotiating comprehensive free trade agreements (on the basis that this is to assuage France but "has not been agreed by Member States elsewhere"), the Minister stresses that "it is still in the UK interest to support the mandates"; and**
- **commitments to take into account sensitivities around energy intensive products and fisheries by providing phasing out periods for the elimination of tariffs.**

4.15 **As in previous updates, the Minister continues to stress the political expediency of the UK supporting these mandates, stating that there is a "significant risk" that the US imposes Section 232 tariffs on cars and car parts from the EU if there is no progress in the EU-US negotiations. Following the Article 50 extension agreed between the EU and the UK as a matter of EU and international law, the Minister "request[s] that the**

40 As highlighted in our Report chapter of 13 March 2019 (listed at the end of this Report chapter), industrial goods—defined as products not included in Annex 1 of the WTO Agreement on Agreement—includes fish and fish products and forestry products.

[C]ommittee extends [its scrutiny] waiver [previously granted until 29 March 2019] until the UK's departure from the EU" in order for the Minister to be able to vote in favour of the proposals while the UK is member of the EU (with voting rights).

4.16 **Noting continued uncertainties around the timing of any vote in the Council and the possibility of further changes to the compromise text of the proposals in the interim, we retain the documents under scrutiny, but grant the Minister a further time-limited scrutiny waiver until 22 May 2019 (at the latest), to be able to support the proposals, on the condition that:**

- **the Minister continues to keep the Committee updated on significant developments in the negotiations and the outcome of any vote, including different Member States' positions; and**
- **the final compromise text of the proposed Council Decisions and scope of the mandates does not significantly deviate from the information shared by the Minister.**

4.17 **Therefore, in the event of a UK vote in favour of the proposals in the Council before 22 May 2019, the Minister must a) confirm that the substance of the proposed Council Decisions and accompanying mandates remains the same as the compromise versions detailed in the Minister's letters to the Committee of 4 March 2019 and 29 March 2019 and b) share a copy of the final texts, with a 'compare' version relative to the texts that were circulated to Member States at the end of February 2019.**

4.18 **In the meantime, we draw the Minister's update and our conclusions to the Committee on Exiting the EU, the International Trade Committee and the Foreign Affairs Committee.**

Full details of the documents

(a) Recommendation for a Council Decision authorising the opening of negotiations of an agreement with the US on the elimination of tariffs for industrial goods: (40336), 5459/19 + ADD 1, COM(19) 16; (b) Recommendation for a Council Decision authorising the opening of negotiations of an agreement with the US on conformity assessment: (40335), 5461/19 + ADD 1, COM(19) 15.

Previous Committee Reports

Fifty-ninth Report HC 301–lvii (2017–19), chapter 5 (13 March 2019); Fifty-sixth Report HC 301–lv (2017–19), chapter 7 (27 February 2019).

5 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

5.1 The proposed Council Decisions both seek to facilitate cross-border law enforcement access to electronic evidence ("e-evidence") held by online service providers based in a different jurisdiction for the purpose of a criminal investigation. The first, document (a), would authorise the European Commission to negotiate the Second Additional Protocol to the Council of Europe Convention on Cybercrime (CETS No. 185) on behalf of the EU; the second, document (b), to negotiate an agreement with the US. The European Commission asserts that the EU has exclusive competence to conduct both sets of negotiations. It considers that the Second Additional Protocol would "overlap to a large extent" with a range of EU criminal justice measures and "affect common Union rules or alter their scope", thereby giving rise to exclusive EU competence under Article 3(2) of the Treaty on the Functioning of the European Union (TFEU).

5.2 Moreover, the Protocol and the proposed EU/US Agreement would also be liable to affect the operation of new internal EU rules on access to e-evidence, proposed in April 2018 but not yet agreed, which would enable the law enforcement authorities of one Member State 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. The European Commission says these rules must be taken into account as a "foreseeable future development" of relevant common EU rules and 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".[41] Our earlier Reports listed at the end of this chapter provide a detailed overview of the proposed Council Decisions and the European Commission's e-evidence proposals.

5.3 When we last considered the proposed Council Decisions (on 6 March 2019), we noted that both concerned areas of EU law and policy which fell mainly within the scope of Article 82 TFEU on judicial cooperation in criminal matters but that neither cited a Title V (justice and home affairs) legal base. The Government indicated that it would press for the inclusion of a Title V legal base to make clear that the UK's justice and home affairs opt-in applied to the proposals. It also indicated that it would decide whether to opt in before the UK's planned exit date of 29 March 2019, since amended to 22 May 2019 if the House of Commons approves the draft EU/UK Withdrawal Agreement no later than 29 March, otherwise to 12 April 2019.[42]

5.4 We asked the Government to:

- inform us of the progress made in securing additional Title V legal bases and recitals which indicate clearly whether (or not) the UK is bound by the proposed Council Decisions; and
- share with us the outcome of the Government's 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.

5.5 We requested further information on the implications of a decision to opt into either or both proposed Council Decisions, should a post-exit transition/implementation period be agreed as part of the UK's exit negotiations, highlighting in particular:

- the UK's role (if any) in the ensuing negotiations within the Council of Europe and with the US;
- the effect of Article 129 of the draft EU/UK Withdrawal Agreement (on 'Specific arrangements relating to the Union's external action') 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.

5.6 In their joint letter of 26 March 2019, the Minister for Security and Economic Crime (Rt Hon. Ben Wallace MP) and the Minister for Policing and the Fire Service (Rt Hon Nick Hurd MP) confirm that the Council supports the addition of a substantive justice and home affairs ("JHA") legal base to both proposed Council Decisions, adding:

41 See recital (6) of the proposed Council Decision—document (a).
42 See the European Council Decision adopted on 22 March 2019.

> This clarifies that the JHA opt-in for the UK (and Ireland) is triggered in line with Protocol 21 to the EU Treaties. We would expect that recitals be added to the draft texts by the Council to record the application of the Protocol.

5.7 The Ministers question whether the European Commission has demonstrated that the EU has exclusive external competence for both sets of negotiations but does not exclude the possibility that the Court of Justice might find in the Commission's favour if asked for a ruling:

> In relation to the Second Additional Protocol specifically, the strength of the arguments in favour of exclusive external competence vary for each element of the proposal and the subject matter in question and depend on its degree of association with EU law. Furthermore, some measures under discussion for inclusion in the Second Additional Protocol such as those relating to jurisdiction and trans-border direct access to data (i.e. not involving co-operation between competent authorities) we consider fall outside the scope of EU competence altogether.
>
> It is difficult to point to a conflict or even potential for conflict between the proposed commitments in the Second Additional Protocol (where these have been developed) and internal EU rules relating to the same subject matter. The Government's position is that where there is no conflict with internal EU rules, competence should remain shared and Member States should be able to exercise that competence. We are mindful, however, that the EU Court of Justice's case-law on the test for implied exclusive external competence could be characterised as somewhat divergent, and that there is the risk of the Court finding that such competence arises merely because of the "significant overlap" in terms of the subject matter, without the need for a forensic assessment of the relevant provisions.

5.8 The Ministers recognise that the proposed EU e-evidence Regulation, which envisages creating a regime of European production orders and preservation orders, provides "the strongest argument for exclusive external EU competence" in relation to both proposed Council Decisions, but note that the UK has *not* opted in:

> Therefore, given that e-evidence related matters comprise all of the subject matter under discussion in the case of the EU US mandate and a large part in the case of the Second Additional Protocol, we would not accept that the UK is bound by any exclusive external EU competence in this area.

5.9 The Ministers reiterate their intention to decide whether to opt in "by 29 March", the date originally envisaged for the UK to leave the EU. Should the Government decide to opt in, the Ministers confirm that the UK would be bound by external EU competence, with the following consequences:

- the UK would have no role in negotiating an agreement on law enforcement access to e-evidence with the United States and would be required to halt the UK's ongoing negotiations with the US on a bilateral data access agreement; and
- the UK would be bound by the duty of sincere cooperation and required to follow the agreed EU position in negotiations within the Council of Europe

on the Second Additional Protocol but would not automatically be invited to EU coordination meetings at the Council of Europe or to EU working group meetings in Brussels where the EU's negotiating position is agreed.

5.10 The Ministers think it "unlikely" that the EU would consider any subsequent Council Decisions on the signature or conclusion of the Second Additional Protocol and the EU-US agreement to be measures "building on" these initial Council Decisions. The UK would not, therefore, be entitled to opt into these later Decisions under the provisions of the draft EU/UK Withdrawal Agreement concerning the application of the UK's Title V justice and home affairs opt-in Protocol during a post-exit transition/implementation period.

Our Conclusions

5.11 **We thank the Ministers for addressing the questions we raised in our earlier Report. We ask them whether it remains the Government's intention to reach an early opt-in decision on both proposed Council Decisions by 29 March following the agreement reached by the UK and the EU on 22 March to delay the UK's exit from the EU. We also ask the Ministers to clarify:**

- **which substantive justice and home affairs legal base or bases the Council intends to add to the proposals;**
- **whether the Council and European Commission agree with the Government that the addition of these legal bases would bring into play the Title V justice and home affairs opt-in Protocol; and**
- **whether they also agree that the UK would not automatically be bound by any exclusive external EU competence (based on the UK's participation in EU criminal justice measures which overlap with the subject matter of the Second Additional Protocol and EU/US agreement) and so would be entitled to decide not to opt in.**

5.12 **Pending further information, the proposed Council Decisions remain under scrutiny. 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

Fifty-seventh Report HC 301–lvi (2017–19), chapter 8 (6 March 2019). See also 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).

6 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; scrutiny waiver granted; 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

6.1 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".[43] The EU concluded a similar Agreement with Iceland and Norway in 2010 which is not yet in force.

6.2 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.

6.3 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.[44] If adopted by the Council, the latest proposed Decisions would extend participation in the key data-sharing elements of Prüm to Liechtenstein and Switzerland. Our earlier Report (agreed on 6 March) provides an overview of the proposed Agreement which is identical in substance for both countries.

6.4 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.

6.5 In his Explanatory Memorandum of 21 February 2019, the Minister for Policing and the Fire Service (Rt Hon. Nick Hurd MP) indicated that the Government intended to reach an opt-in decision before exit day (then expected to be 29 March 2019), expressed full support for data sharing as a means to assist with the investigation and prosecution of serious crimes, and noted that the UK does not currently have a biometrics data sharing agreement with Liechtenstein or Switzerland.

6.6 We asked the Minister to explain why the Agreement with Iceland and Norway, concluded by the EU in 2010, was not yet in force. 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 also asked him 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 had left the EU and any post-exit transition/implementation period had ended.

43 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.

44 See Command Paper 9149 published in November 2015.

6.7 We noted that 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. Whilst 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".

6.8 With this in mind, we asked the Minister:

- whether there would be any legal obstacles to the EU and the UK concluding an agreement on UK participation in Prüm;
- whether the Government had discussed the prospects for securing such an agreement with the EU and how the EU had 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.

6.9 We also asked the Minister to inform us of the Government's opt-in decision before 29 March.

6.10 In his letter of 28 March 2019, the Minister reiterates the Government's commitment to the full implementation of Prüm in the UK:

> 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. The UK is supportive of extending the law enforcement access to Prüm to the Swiss Confederation and the Principality of Liechtenstein, both non-EU countries. These states are close partners and enabling further data sharing with them will enhance both their security and ours.
>
> The Government has therefore decided to opt into these Council Decisions.

6.11 The Minister acknowledges that "the Agreements would fall away" once any post-exit transition/implementation period ends and "the rights derived from the Agreements would no longer exist in UK law", but adds:

> Should the UK secure ongoing access to Prüm following the end of the Implementation Period, the UK will seek to conclude new agreements with the Schengen states. These would set out our rights and obligations in relation to those states regarding Prüm. We note that, the EU Withdrawal Act, as amended by the Withdrawal Agreement Bill, would retain in domestic law any directly effective rights derived from the Agreements

> which were concluded by the EU before and during the Implementation Period. However, it would be inappropriate to retain such rights once the UK has ceased to be treated as a Member State during the Implementation Period for the purposes of the Agreements, and they would therefore be revoked.

6.12 The Minister does not consider that there would be any legal obstacles to prevent the EU from concluding an agreement with the UK on its participation in Prüm post-exit/transition, noting that "an EU treaty can provide for broader cooperation than set out in EU secondary legislation". He reiterates the Government's position that the UK is not seeking to replicate existing models of cooperation between the EU and third countries, but to secure "a bespoke agreement with the EU in relation to internal security, reflecting our unique status and shared security interests". He continues:

> What these Prüm agreements do demonstrate, however, is that an EU level treaty of the kind we are proposing can provide for broader cooperation than that envisaged in the relevant EU secondary legislation *i.e.* extending cooperation to third countries where this was not originally provided for. The fact that the EU continues to take this approach with third countries demonstrates that there are no technical or legal obstacles to our proposals for continued participation in EU measures such as Prüm. You will be aware that the Political Declaration sets out the intention of the UK and EU to continue cooperation in relation to Prüm.

6.13 Finally, the Minister says he is unable to comment on the reasons why the agreement negotiated with Iceland Norway on their participation in Prüm is not yet in force, but suggests that it is "part of wider negotiations between these countries and the EU".

Our Conclusions

6.14 **We thank the Minister for informing us of the Government's decision to opt into the proposed Council Decisions. We are willing to grant a scrutiny waiver to enable the UK to support their adoption.**

6.15 **Should the proposed Agreements with Liechtenstein and Switzerland be concluded by the EU before the UK's exit from the EU or during any post-exit transition/implementation period in which EU law continues to apply to the UK, the Minister indicates that "directly effective rights derived from the Agreements" would be preserved in domestic law, but adds:**

> **However, it would be inappropriate to retain such rights once the UK has ceased to be treated as a Member State during the Implementation Period for the purposes of the Agreements, and they would therefore be revoked.**

6.16 **Before clearing the proposed Council Decisions from scrutiny, we ask the Minister to confirm our understanding that:**

- **directly effective rights derived from agreements concluded by the EU with third countries until exit day (if the UK leaves without a deal) or until the end of a post-exit transition/implementation period (if the UK leaves with a deal) would be preserved in domestic law;**
- **these directly effective rights would cease to accrue from exit day (if the UK leaves without a deal) or from the end of a post-exit transition/implementation period (if the UK leaves with a deal) and would not be preserved in domestic law; and**
- **there would be no question of "revoking" rights, they would simply cease to accrue.**

6.17 **We also ask the Minister to provide some indication of the nature of the "directly effective rights" that might accrue under the proposed Agreements with Liechtenstein and Switzerland.**

6.18 **We request a response before the end of April. Meanwhile, the proposed Council Decisions remain under scrutiny. 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

6.19 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

Fifty-seventh Report HC 301–lvi (2017–19), chapter 9 (6 March 2019). 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.

7 Strengthening the European Border and Coast Guard Agency and combating document and identity fraud

Committee's assessment	Politically important
Committee's decision	(a) and (b) Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee
Document details	(a) Proposal for a Regulation on the European Border and Coast Guard (b) Proposal for a Regulation on the false and authentic documents online ("FADO") system and repealing Joint Action 98/700/JHA
Legal base	(a) Articles 77(2)(b) and (d) and 79(2)(c) TFEU, ordinary legislative procedure, QMV (b) Article 87(2)(a) TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Numbers	(a) (40060), 12143/18 + ADD 1, COM(18) 631 (b) (40427), 6676/19,—

Summary and Committee's conclusions

7.1 The Council has recently agreed its negotiating position on a proposed Regulation—document (a)—which would significantly enhance the operational capability of the European Border and Coast Guard Agency (the successor to Frontex) so that it is equipped to operate as "a genuine border police", providing Member States with operational and technical assistance to support the management of their external borders and the return of illegal immigrants.[45] Our earlier Report agreed on 31 October 2018 describes the main features of the proposed Regulation, as envisaged by the European Commission. At its core is the creation by 2020 of a "standing corps" of 10,000 operational staff within the European Border and Coast Guard Agency,[46] some directly employed by the Agency and some seconded by Member States, which could be deployed whenever needed to support Member States in managing their external borders, including as part of a larger migration

45 See the press release issued by the Council on 20 February 2019 and p.12 of the Commission's explanatory memorandum accompanying the proposed Regulation.

46 See Articles 5, 55–9 and Annexes I-IV of the proposed Regulation and p.2 of the Commission's accompanying explanatory memorandum. Members of the standing corps would include officials capable of carrying out border control or return tasks.

management support team involving other EU agencies operating in "hotspot" areas and "controlled centres".[47] The Agency would also have a larger equipment budget to enable it to acquire, maintain and operate its own air, sea and land assets.

7.2 As the proposed Regulation builds on parts of the Schengen rule book on external border control which do not apply to the UK, the UK is not entitled to participate in (or vote on) the proposal and will not be bound by it once adopted.[48] The UK may, however, be invited to attend meetings of the European Border and Coast Guard Agency's Management Board (but without voting rights) or request to take part in some of the Agency' activities while the UK remains an EU Member State and during any post-exit transition/implementation period agreed as part of the UK's exit negotiations.[49] Thereafter, cooperation with the European Border and Coast Guard Agency and with other EU Member States would be based on the third country provisions of the proposed Regulation.[50]

7.3 In her Explanatory Memorandum of 17 October 2018, the Immigration Minister (Rt Hon. Caroline Nokes MP) confirmed that the UK would not take part in the adoption of the proposed Regulation or be bound by it and that it would not necessitate any changes to UK law or have any direct financial implications. She nonetheless made clear that the Government saw "great value in supporting the Agency" and was "broadly supportive" of the proposal, reiterating the Government's "strong interest in effective management of the EU's external border, not just in combating illegal migration and cross-border crime but also as part of the EU-wide counter-terrorism effort". The proposed Regulation would entrust the European Border and Coast Guard Agency with the operation of the EU's false and authentic documents database ("FADO")—an EU police and criminal justice measure in which the UK participates. As the current FADO system operates within the General Secretariat of the Council, the Minister indicated that the Government would seek to clarify with the Commission how the new arrangement would affect the UK's access to the database.

7.4 The Government has since deposited a further proposed Regulation—document (b)—which would repeal and replace the 1998 Joint Action establishing FADO.[51] The proposal sets out the purpose of FADO (to combat document and identity fraud) and the types of document to be included within the database.[52] Information on genuine documents would be accessible to the public, whereas information on forged or falsified documents would only be accessible to the authorities within each Member State responsible for tackling document fraud, such as immigration or law enforcement officers. The proposed Regulation envisages that access to this information may be extended to third (non-EU) countries, international organisations, third parties (such as airlines) or EU institutions and agencies, with the conditions decided on by the European Commission in an implementing act. Member States would be under an express obligation to transmit

47 The types of deployment are set out in Articles 37 and 43 of the proposed Regulation and include "rapid border interventions", "joint operations" with Member States and/or third countries, "migration management support teams" and "return teams".

48 See recital (108) of the proposed Regulation.

49 See recitals (110) and (111) and Articles 71, 98(5) and 102 of the proposed Regulation.

50 See Articles 72–79 of the proposed Regulation.

51 Council Joint Action 98/700/JHA.

52 The database will include images of genuine travel, identity, residence, civil status and other official documents, as well as driving and vehicle licences issued by EU Member States, third countries and international organisations. It will also include images of false, forged or counterfeit documents and information on forgery techniques.

information on genuine and false documents in their possession to the FADO system. As envisaged in the earlier proposal for a Regulation, document (a), the European Border and Coast Guard Agency would take over responsibility for operating the database, given its expertise in document fraud.[53]

7.5 The proposed Regulation cites Article 87(2)(a) of the Treaty on the Functioning of the European Union (TFEU) on law enforcement cooperation as the legal base for FADO. The recitals to the proposal state that it "builds upon the Schengen *acquis*", meaning that it is subject to the Schengen Protocol rather than the UK's Title V (justice and home affairs) opt-in Protocol. Under Article 5 of the Schengen Protocol, the UK has the right to *opt out* of a proposal which builds on part of the Schengen rule book in which the UK already participates. Should the UK choose to do so, the Council would have to decide whether the UK's opt-out decision has wider implications for the UK's continued participation in other parts of the Schengen rule book.

7.6 In her Explanatory Memorandum of 20 March 2019 on the proposed FADO Regulation, the Minister says that a separate Regulation has been proposed to ensure that the UK (and Ireland) can continue to participate in FADO, albeit that the database would be under the control of the European Border and Coast Guard Agency. The FADO system itself would remain "fundamentally unchanged, except for some improvements such as expanding the range of documents". She confirms that the proposal is subject to the Schengen Protocol and that the three-month period available to the UK to decide whether to opt out will expire on 20 May 2019. She adds that the UK's right to opt out would extend into the post-exit transition/implementation period provided for in the draft EU/UK Withdrawal Agreement if it is ratified.[54] If the Withdrawal Agreement is not approved, the UK will lose access to FADO from exit day.

7.7 The Minister considers that UK participation in FADO benefits all FADO users by increasing the number of genuine and false documents that can be consulted via the database. FADO is also a useful tool for Government in validating identity and travel documents, helping to prevent illegal entry to the UK and wider criminal activity linked to the use of false documents. She suggests that a decision to participate in the proposed Regulation before exit would help to secure continued participation in FADO when negotiating the UK's future relationship with the EU, adding that FADO would form part of "the package of current capabilities" which the UK would seek to retain in negotiations on a future internal security agreement with the EU. The Minister confirms that the Government is also developing "no deal" contingency measures in case the UK leaves the EU without a formal agreement setting out the terms of its withdrawal. These are likely to include use of Interpol's i24–7 database, though access is limited to criminal law enforcement authorities and it is less comprehensive than FADO.

7.8 As both the proposed Regulations are inter-linked and are likely to progress at the same pace, the Minister considers it unlikely that a formal agreement can be secured before the European Parliament elections in May but does not rule out the possibility that the European Commission may push for a political agreement.

53 See recital (10) of the proposed FADO Regulation.

54 Under Article 127(5) of the draft EU/UK Withdrawal Agreement, the UK's Title V opt-in and Schengen opt-out Protocols will continue to apply during a post-exit transition/implementation period to proposals which "amend, build upon or replace" measures in which the UK participated before exit day.

Our Conclusions

7.9 **As we have noted in our earlier Reports, the first proposed Regulation, document (a), would signify a substantial scaling-up of the staff and equipment available to the European Border and Coast Guard Agency, a strengthening of its operational capabilities and powers, and a large increase in its funding (totalling €11.3 billion for the period 2021–27) to enable it to act as "a genuine border police".[55] Given the scale of the ambition, we considered that the proposal should be reported to the House, even though (as a Schengen measure) the UK will not take part in its adoption or application. Since we last considered the proposal in December 2018, we understand that the Council has finalised its mandate for negotiations with the European Parliament and envisages a more gradual phasing-in of a standing corps of "up to 10,000 operational staff by 2027".[56] We ask the Minister to update us on progress made in negotiations within the Council, outlining the main changes to the text originally proposed by the European Commission. We would welcome her assessment of the provisions concerning the European Border and Coast Guard Agency's cooperation with third countries and their implications for the UK's future engagement with the Agency post-exit.**

7.10 **Turning to the second proposed Regulation, document (b), we ask the Minister:**

- **whether she agrees with the Council view that it is a Schengen-building measure, given that the 1998 Joint Action which it would repeal and replace makes no reference to the Schengen rule book; and**
- **why she considers that the UK would be automatically bound by the proposed Regulation unless it decides to opt out under Article 5 of the Schengen Protocol, given that the 1998 Joint Action is not included in the list of measures set out in Council Decision 2000/365/EC and Council Decision 2004/926/EC identifying the parts of the Schengen rule book applicable to the UK.**

7.11 **The Minister acknowledges that FADO "will still be placed under the control of the European Border and Coast Guard Agency" but does not explain what practical implications this would have for the UK if the Government were to decide to remain part of FADO. We ask her whether it is the case that the UK would be bound by an obligation to transmit data to FADO without having any say over its operation and management and, if so, whether this is a matter of concern for the Government.**

7.12 **The Minister appears to rule out the possibility of future UK participation in FADO in the event of a "no deal" exit from the EU. We ask her whether she sees any impediment to the UK obtaining "restricted access" to FADO under Article 6 of the proposed Regulation and how access on this basis would differ from the full access the UK currently has and would seek to maintain in a future EU/UK internal security agreement.**

55 See p.1 and p.3 of the Commission's explanatory memorandum accompanying the proposed Regulation and its press release of 12 September 2018, State of the Union 2018—Commission proposes last elements needed for compromise on migration and border reform.

56 See the Council press release of 20 February 2019, European Border and Coast Guard: Council agrees negotiating position.

7.13 **Pending further information, the proposed Regulations remain under scrutiny. We draw this chapter to the attention of the Home Affairs Committee.**

Full details of the documents

(a) Proposal for a Regulation on the European Border and Coast Guard and repealing Council Joint Action no. 98/700/JHA, Regulation (EU) no 1052/2013 and Regulation (EU) no. 2016/1624: (40060), 12143/18 + ADD 1, COM(18) 631; (b) Proposal for a Regulation on the false and authentic documents online ("FADO") system and repealing Joint Action 98/700/JHA: (40427), 6676/19,—.

Previous Committee Reports

Forty-ninth Report HC 301–xlviii (2017–19), chapter 7 (19 December 2018) and Forty-third Report HC 301–xlii (2017–19), chapter 7 (31 October 2018).

8 Carcinogens and Mutagens Directive (Phase II)

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, the Health and Social Care Committee, and the Work and Pensions Committee
Document details	Proposal for Directive amending Directive 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens or mutagens at work (Phase II).
Legal base	Article 153(2) TFEU; ordinary legislative procedure; QMV
Department	Health and Safety Executive
Document Number	(38447), 5251/17 + ADDs 1–3, COM(17) 11

Summary and Committee's conclusions

8.1 Over the last decade, the Commission has been working on updating occupational exposure limit values (OELVs) for a number of carcinogenic substances in line with new scientific evidence. The Commission has sought to give effect to these updates through three 'phases' of amendments to the Carcinogens and Mutagens Directive (CMD).[57]

8.2 The proposal under scrutiny concerns the second raft of amendments suggested by the Commission—known as 'Phase II'—and, as originally introduced, would bring used engine oils within the scope of the CMD (along with assigning specific 'skin notations' identifying that exposure to a substance through the skin may have adverse health effects). It would also add five specific carcinogenic substance to the CMD and set OELVs for each (these substances are trichloroethylene, 4,4'-methylenedianiline, epichlorohydrin, ethylene dibromide and ethylene dichloride).[58]

8.3 The Committee first considered the proposal under scrutiny on 8 February 2017 and has reported to the House on a further four occasions since. A full analysis of the proposal—including the Government's assessment of the potential implications of the amendments suggested for UK occupational health and safety legislation and policy—can be found in our Thirty-first Report of session 2016–17.

8.4 Former Minister of State for Disabled People, Health and Work (Sarah Newton MP), wrote to the Committee on 9 January 2019 informing the chair—Sir William Cash MP—that the proposal was adopted at the Environment Council of 20 December 2018.[59] A brief background to the proposal—including its development during negotiations—is provided

57 Directive 2004/37/EC of the European Parliament and of the Council of 29 April 2004 on the protection of workers from the risks related to exposure to carcinogens or mutagens at work (Sixth individual Directive within the meaning of Article 16(1) of Council Directive 89/391/EEC) (codified version) (Text with EEA relevance).

58 The Commission's first phase proposal was cleared from scrutiny on 13 November 2017, the third was cleared on 27 February 2019.

59 Letter from Sarah Newton MP to Sir William Cash MP, 9 January 2019.

below. This is followed by the Committee's assessment of issues concerning the domestic implementation of the proposal, in particular, with regard the withdrawal of the UK from the EU.

Background to negotiations

8.5 On the development of the proposal, in initial correspondence with the Committee, the Government stated that it was broadly supportive of the Commission's plans and that the addition of specific used engine oils—and corresponding OELVs—to the CMD would have limited implications for domestic health and safety protections.

8.6 During the course of working group negotiations, however, the Committee was informed that the scope of the proposal had been extended to include a skin notation for Polycyclic Aromatic Hydrocarbon (PAH) mixtures. At the time, the Government explained that it did not support the inclusion of PAH mixtures within the scope of the Directive and, as a consequence, abstained on the General Approach agreed at the EPSCO Council of 15 June 2017. Former Minister of State for Disabled People, Health and Work (Penny Mordaunt MP), explained that the Government abstained as a matter of principle—mainly as an impact assessment had not been undertaken—rather than due to concerns regarding the potential domestic implications of setting a skin notation for PAH mixtures.[60]

8.7 After the conclusion of the June EPSCO Council—and before the start of trilogue negotiations—the European Parliament adopted its own position on the proposal. This included the addition of a binding OELV for 'Diesel Engine Exhaust Emissions' (DEEEs). The Government contends that it is difficult to set a single OELV for DEEEs as they are often comprised of a mixture of different substances.

8.8 Further details on the European Parliament's proposals were provided to the Committee by the former Minister of State for Disabled People, Health and Work (Sarah Newton MP). The Minister informed the Committee that the European Parliament's plans included setting OLEVs for two 'markers' for material present in DEEEs (elemental Carbon and Nitrogen Dioxide).[61] The Government raised concerns that these plans—and their interaction with other EU health and safety legislation (i.e. the 4th Indicative Occupational Exposure Limit Value Directive)—would cause difficulties for the mining and tunnelling sectors.

8.9 In correspondence dated 21 November 2018,[62] the former Minister informed the Committee of the state of play of trilogue negotiations and the Government's position on the final text of the proposal. The European Parliament was said to be committed to the addition of DEEEs to the CMD and the inclusion of an OELV for elemental Carbon. The Minister explained that the Government attempted to lead a compromise proposal whereby DEEEs would be added to the CMD but without an OELV. This attempt was, however, unsuccessful. Against the threat of negotiations being stalled, the former Minister explained that the Commission changed its previously held position and agreed that DEEEs should be added to the Directive and an OELV of 0.05 mg/m3 set for elemental Carbon.

60 Letter from Penny Mordaunt MP to Sir William Cash MP, 15 August 2017.
61 Letter from Sarah Newton MP to Sir William Cash MP, 24 April 2018.
62 Letter from Sarah Newton MP to Sir William Cash MP, 21 November 2018.

8.10 The former Minister made plain to the Committee that as the final text of the proposal included an OELV for elemental Carbon—as set at the final Trilogue negotiation—the Government intended not to support its adoption. It is worth noting that at the final trilogue negotiation, the European Parliament accepted a transitional period of two years before any OELV for DEEEs would come into effect. With this is mind, the Government has stated that it was not sure how concerned sectors—mainly mining and tunnelling—would be able to meet a limit after the expiry of the proposed transitional period.

Adoption and domestic implementation

8.11 Former Minister of State for Disabled People, Health and Work (Sarah Newton MP) wrote to the Committee on 9 January 2019 (in response to a request for further information made on 12 December 2019).[63] In her letter, the Minister states that the proposal was adopted at the Environment Council of 20 December and that—in line with its position on the inclusion of an OELV for DEEEs—the Government did not support adoption. The Minister has appended the 'minute statement' that the Government made at the adoption of the proposal to her letter of 9 January. This is reproduced in the annex to this Report and details the Government's reasons for abstention (i.e. that a lack of due process—by way of impact and scientific assessments—had been followed when assessing whether to bring DEEEs within the scope of the CMD).

8.12 The former Minister states that she expects the Directive to be published in the Official Journal of the European Union shortly and, that on this basis, Member States are likely to have until early 2021 to transpose its provisions into national legislation. The limit for DEEs—using elemental Carbon as a marker—will apply from 2023 (and from 2026 in the mining and tunnelling sector).

8.13 In correspondence from the Committee to the Minister dated 12 December 2019, further information was requested on the sectors that the Government believed would be disproportionately affected by the introduction of a DEEE for elemental Carbon. The Committee also enquired as to the steps that the Government plans to take to support industry in this regard and the details of any relevant meetings it has had with interested stakeholders.

8.14 As the differentiated date for the application of the Directive to the mining and tunnelling sectors suggests, these industries are of particular concern. With this in mind, the Minister outlines the details of a new research project—commissioned by the Health & Safety Executive (HSE)—that will collect data on diesel engine technologies and elemental Carbon exposure levels. The results of this study will be used to advise industry on the utility and suitability of exposure controls and exposure limit measuring devices. As requested, the Minister does not, however, provide details on any meetings she has had with relevant stakeholders (e.g. with representatives from the mining and tunnelling sectors). We assume, therefore, that no such meetings have taken place.

EU exit

8.15 The Committee was also interested in the Government's plans for the transposition of the Directive. The Committee's questioning in this regard was framed in terms of the UK's withdrawal from the EU, in particular, the date of the end of the proposed transition/

63 Letter from Sarah Newton MP to Sir William Cash MP, 9 January 2019.

implementation period under the draft Withdrawal Agreement (of 31 December 2020) falling before the likely transposition date for the Directive (of early 2021). This would mean that, in effect, the UK would not—barring any future UK/EU agreement providing otherwise—be under an obligation to transpose the Directive.[64] The Minister endorses this understanding but states that "we [the Government] consider[s] it prudent to maintain efforts to transpose the Directive whilst we remain full members of the EU but will keep this decision under constant review". This statement can be read as implying that the Government *may* choose to transpose the Directive, however, this view is somewhat tempered by a response to a linked question on whether transposition would be pursued in the even of a 'no-deal' Brexit (where the draft Withdrawal Agreement is not ratified by either the UK or EU), which the Minister does not provide a determinative answer to.

Government's commitment on workers' rights

8.16 Since the Committee last wrote to the former Minister (on 12 December), the Government has committed to bring forward legislation that would place a duty on Government to report to Parliament on future changes to EU law covering workers' rights.[65] This commitment would take the form of a statutory consultation with workers' and employers' representatives followed by a report to Parliament (seemingly on whether action to give effect to new or amended workers' rights is suggested). By way of example, the Government has confirmed to the Committee that the Commission's proposed revision to the Written Statements Directive (known as the Working Conditions Directive), would fall under its consultation commitment.

8.17 With regard to the proposal under scrutiny, its transposition date—of early 2021—takes it outside of the proposed transitionary period (ending on 31 December 2020) but means that it would fall within the scope of the Government's consultation commitment. There is, however, uncertainty as to whether the Government would consult on the phase II amendments to the CMD (and thus communicate its decision to Parliament on whether to bring forwards domestic legislation or use administrative means to give effect to these changes). This is because the Government's command paper—which provides draft legislative text to give effect to the commitment—does not clearly specify the criteria that an EU law Regulation or Directive must meet in order to be considered. The section of the draft text covering interpretation defines 'workers' rights' as:

> [Rights] of individuals, and classes of individuals, in the area of labour protection as regards—(a) fundamental rights at work, (b) fair working conditions and employment standards, (c) information and consultation rights at company level, (d) restructuring of undertakings, and (e) health and safety at work.

In-spite of the inclusion of the category of 'health and safety at work', the seemingly indicative list of EU legislation detailed in the Schedule of the text—presumably in order to give an idea as to the acts and categories that would fall under its purview—does not list the Carcinogens Directive (as unamended). It does, however, reference Council Directive

64 For example, such as that on a future economic partnership requiring close adherence to certain social standards (as is required under Article 4 of Annex 4 to the Protocol on Ireland/Northern Ireland under the draft Withdrawal Agreement).

65 HM Government, 'Protecting and Enhancing Worker Rights after the UK Withdrawal from the European Union' (6 March 2019) CP66.

89/391/EC (the occupational health and safety 'Framework' Directive).[66] The Carcinogens Directive is the sixth Directive to be adopted within the meaning of the Framework Directive.

8.18 Strictly speaking, it would not be *legally* sufficient to cite the Framework Directive in the expectation that doing so would encompass all other legal acts adopted within its meaning. By way of example, it does not follow that by citing the Framework Directive, Directive 2009/104/EC on the use of work equipment—which was adopted within the meaning of Article 16(1) of the Framework Directive—would automatically fall within the scope of the Schedule.[67] This argument is supported by the inclusion of Directive 92/85/EEC on improving health and safety for pregnant workers in the Schedule (which was also adopted pursuant to Article 16(1) of the Framework Directive). It is unclear why this act—and only this act—is included and the 19 other Directives adopted within the meaning of the Framework Directive are not.[68]

8.19 One conclusion that can be drawn from this omission is that the EU legal acts included under the Schedule have not been complied against any specific criteria. Although a clearly defined legal commitment is lacking, it would be surprising if the Government did not consult on new EU legislation that concerned the 'core' preserve of occupational safety and health i.e. the maintenance and promotion of workers' health and working capacity. This would include, for example, legislation such as that covering OELVs, however, without a clear definition, it is unclear whether legislation intended to improve the working environment (as an ancillary aim of health and safety laws)—such measures on display screen equipment—would be included.[69]

8.20 This uncertainty attests to the need for clear criteria for defining what constitutes workers' rights for the purposes of the draft legislative text or, if this already exists, its communication to the House. Without this, it appears as though the Government's commitment to consult Parliament on future EU legislation is discretionary: by not clearly defining the categories to which the commitment applies, the Government is free to report—or not—on whatever it so chooses, without a firm basis for scrutiny.

8.21 In this regard, a far more transparent approach would be for reporting and consultation to be dependent upon EU treaty basis. For labour and employment law (broadly construed), an appropriate treaty basis would be Article 153 TFEU. In effect, any future legislative act based on Article 153 would be subject to inclusion in the report required under Clause 2(3) of the Government's drafting on workers' rights (and thus

66 Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

67 Directive 2009/104/EC of the European Parliament and of the Council of 16 September 2009 concerning the minimum safety and health requirements for the use of work equipment by workers at work (second individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (Text with EEA relevance).

68 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).

69 According to the Joint ILO/WHO Committee on Occupational Health, the main purpose of occupational health is centred around three different objectives "(i) the maintenance and promotion of workers' health and working capacity; (ii) the improvement of working environment and work to become conducive to safety and health and (iii) development of work organizations and working cultures in a direction which supports health and safety at work and in doing so also promotes a positive social climate and smooth operation and may enhance productivity of the undertakings". See Joint ILO/WHO Committee on Occupational Health, 'Report of first session' (1950).

subject to the consultation requirement under Clause 2(6)). Given the high political profile of the Government's commitments in this regard, clarification should be forthcoming before the publication of the draft legislative text (as either a Bill or part of a Bill).[70]

The draft Withdrawal Agreement and 'the backstop'

8.22 In our letter of 12 December, we stated that it was unclear whether the Directive would fall within the scope of 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 of protection provided for by the common standards applicable within the Union and the United Kingdom at the end of the transition period"). We asked the Minister that, should the backstop be invoked, whether the Directive would form part of the 'common standards' which neither the UK nor the EU may reduce protections below. In response, the Minister explains that there is no 'explicit' clarity on this point in the Protocol but that the Government is working under the assumption that the Directive falls within the scope of Article 4 of Annex 4 (in that it would form part of the social *acquis* alongside other occupational safety and health protections). The Minister further clarifies that, should the backstop be invoked, "the Directive would be considered as part of the applicable 'common standards'".

8.23 The Minister's comments on the operation of the backstop imply a broad understanding of non-regression: not only would fundamental social and employment standards be included but, notwithstanding the importance of the Directive under scrutiny, also more ancillary concerns. By way of example, prior to the Minister's clarification, it could be assumed that rights such as those to collective industrial action would form part of the common standards referred to in Article 4 of Annex 4, however, the same could not be said of amendments to OELVs on Diesel emissions.

8.24 In practice, the image of non-regression that emerges from the former Minister's correspondence is more akin to equivalence between EU and UK social law and policy than a loose relationship based around shared commitments. Save for the publication of further guidance on the operation of this part of the backstop,[71] it is not clear how the scope of the commitment to non-regression could be practically restricted to provide for anything other than equivalence; a list of indicative legal acts is not included in Article 4 of Annex 4. In this regard, it is worth noting that the need for specific provision in the Withdrawal Agreement on non-regression is justified against the maintenance of the level playing field conditions required for the effective functioning of the single customs territory (as would be created if the backstop were to come into effect).[72] In this context, the acceptability of divergence by either side appears to be a question of advantage: some divergence would likely be accepted providing that the benefit derived were not

70 As part of a Bill, it is possible that the text on the Government's consultation commitment could be included in the forthcoming Withdrawal Agreement Bill (designed to give direct legal effect to parts of the Withdrawal Agreement).

71 The Joint Committee—as established under the draft Withdrawal Agreement—is empowered under Article 164(4)(c) to "seek appropriate ways and methods of preventing problems that might arise in areas covered by this Agreement [the Withdrawal Agreement] or of resolving disputes that may arise regarding the interpretation and application of the Agreement". If requested by the UK or EU or at its own initiative, Article 164(4)(c) would allow the Joint Committee to produce guidance on the scope of Article 4 to Annex 4 of the Protocol.

72 As per Article 6 of the Protocol on Ireland/Northern Ireland.

considered to be too great. Deviation from even the most innocuous of standards—such as the changes under scrutiny—could lead to benefits with the potential to distort the functioning of the single customs territory; warning against the idea that only the most fundamental of social rights would be covered by the commitment to non-regression of labour and social standards.

8.25 On a linked point, it is also worth questioning the relationship between the Government's consultation commitment and the non-regression clause in the draft Withdrawal Agreement. As a document published after the draft Withdrawal Agreement (on 6 March 2019), the Government's text on workers' rights mirrors the categories of rights detailed in the non-regression clause. This is reproduced almost verbatim and details the same groups of rights in almost identical order (occupational health and safety is moved from second place in the draft Withdrawal Agreement text to fifth place in the Government's commitment). At the very least, this similarity implies sympathetic drafting or, more likely, consideration by the Government of the areas that both sides have agreed constitute workers' rights.

8.26 The practical implications of this symmetry are unclear, however, it could be that the Government's commitment was drafted with the backstop in mind. In the event that the backstop did enter into force, the rights falling under the Government's consultation commitment would—aside from the definitional issues raised above—map over neatly onto those standards considered necessary for the effective functioning of the single customs territory. Although Article 4 of Annex 4 does not require 'dynamic' alignment between EU and UK standards—i.e. where the UK would have to give effect to new EU laws whilst in the backstop—the Government may wish to replicate new standards if it believes doing so is necessary or beneficial.[73] On the former point, this could be as a consequence of a strict(er) interpretation of non-regression prevailing than that posited here or, on the latter, where non-regression is viewed as the foundation for a close future economic partnership (which would more than likely require alignment of social as well as economic standards). On both counts, the Government's commitment would provide a mechanism for reporting to, and consulting, the House and trade unions and employers' associations on relevant new EU laws.

8.27 **We thank the former Minister for her letter of 9 January 2019 and the detailed responses she provided to our questions and requests for further information. On the substance of the proposal, we support the Minister's decision not to vote in favour of adoption on the grounds that the addition of an 'occupational exposure limit value' for Diesel Engine Exhaust Emissions (DEEEs) was not appropriate given that due process had not been followed, specifically, that the usual process for assessing and setting limit values was not undertaken.**

73 Article 4 to Protocol 4 states that "… the Union and the United Kingdom shall ensure that the level of protection provided for by law, regulations and practices is not reduced below the level provided by the common standards applicable within the Union and the United Kingdom *at the end of the transition period* in the area of labour and social protection…" (Committee's own emphasis added). By way of explanation, dynamic alignment is commonly understood as requiring new standards—in addition to those initially agreed by parties to an agreement—to be added as and when they come into effect. Whilst in the backstop, dynamic alignment would mean that the UK would be required to implement new EU laws (versus only those EU laws adopted up to the end of the implementation period as per the current arrangements provided for under the draft Withdrawal Agreement).

8.28 **On this point, we recognise the Government's efforts to promote alternative arrangements during trilogue negotiations (that would have brought DEEEs within the scope of the Directive but without setting a limit until this process was completed). As highlighted in previous correspondence from the Minister, DEEEs and exposure to these emissions have been subject to controls in the UK for over 20 years.**

8.29 **In terms of the Government's plans for the transposition of the Directive, we previously queried whether, if invoked, the Directive would fall within the scope of 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 of protection provided for by the common standards applicable within the Union and the United Kingdom at the end of the transition period"). We appreciate the former Minister's honesty on this point, specifically, that the Protocol is not clear on those standards that would fall within its scope. We note, however, her statement that, should the backstop be invoked, "the Directive would be considered as part of the applicable 'common standards' [under the backstop]".**

8.30 **This point has potentially significant implications for our understanding of the scope of the non-regression commitment on labour and social standards. The former Minister's comments on the operation of the backstop imply a broad understanding of non-regression: not only would fundamental social and employment standards be included but, notwithstanding the importance of the Directive under scrutiny, also more ancillary concerns. Of course, further evidence should be sought to support this assessment, however, the Minister's comments are most instructive in this regard.**

8.31 **Since the Committee last wrote to the former Minister (on 12 December 2018), the Government has committed to bring forward legislation that would place a duty on Government to report to Parliament on future changes to EU law covering workers' rights. This commitment would take the form of a statutory consultation with workers' and employers' representatives followed by a report to Parliament. With regard to the Directive under consideration, its transposition date—of early 2021—takes it outside of the proposed transitionary period under the draft Withdrawal Agreement (ending on 31 December 2020) but means that it would fall within the scope of the Government's consultation commitment.**

8.32 **As such, we request answers to the following questions:**

i) **In line with its command paper of 6 March 2019, will the Government consult on bringing forward legislation—or by other means giving effect to—the changes under consideration (the phase II amendments to the Carcinogens and Mutagens Directive);**

ii) **On what basis will the decision to consult be made, in particular, how will the category of 'health and safety at work' be defined; and**

iii) **By way of explanation, will it be at the absolute discretion of the Government to define what falls within the scope of this category or, alternatively, will specific criteria be set. For future EU health and safety laws, will all acts adopted pursuant to Article 153 TFEU be consulted on.**

8.33 **Given the clear political importance of these questions, we request a response by no later than 22 April 2019. We retain the Directive under scrutiny.**

8.34 **We draw this report to the attention of the Business, Energy and Industrial Strategy Committee, the Health and Social Care Committee, and the Work and Pensions Committee.**

Full details of the documents

Proposal for Directive amending Directive 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens or mutagens at work (Phase II): (38447), 5251/17 + ADDs 1–3, COM(17) 11.

Previous Committee Reports

Thirty-first Report HC 71–xxix (2016–17), chapter 9 (8 February 2017); Fortieth Report HC 71–xxxvii (2016–17), chapter 16 (25 April 2017); First Report HC 301–i (2017–19), chapter 29 (13 November 2017); Twelfth Report HC 301–xii (2017–19), chapter 9 (31 January 2018); and Twenty-seventh Report HC 301–xxvi (2017–19), chapter 6 (9 May 2018).

Government's 'minute statement'

STATEMENT FROM THE UNITED KINGDOM on the Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens or mutagens at work (2nd Batch)

The United Kingdom strongly supports Directive 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens or mutagens at work and the Commission limit setting process, which involves a thorough assessment process to consider scientific, technical and socio-economic factors and the views of stakeholders, including the social partners.

The United Kingdom recognises the legitimate concerns that exist regarding exposure to diesel engine exhaust emissions and exposure to these emissions has been subject to controls in the UK for over 20 years. Binding occupational exposure limits should only be included in the Carcinogens and Mutagens Directive, once they have successfully completed the limit setting process. The UK regrets that this process was not followed in setting a binding occupational exposure limit for elemental carbon as a marker for diesel engine exhaust emissions. Whilst the UK continues to support action to tackle exposure to diesel engine exhaust emissions, we cannot support the way in which this limit has been set and therefore cannot support this change to the Directive.

9 Online platforms

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny
Document details	Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services
Legal base	Article 114 TFEU; Ordinary Legislative Procedure; QMV
Department	Business, Energy and Industrial Strategy
Document Number	(39665), 8413/18 + ADDs 1–3, COM(18) 238 final

Summary and Committee's conclusions

9.1 Trilogue negotiations between the European Parliament and the Council of the European Union on the European Commission's proposed Platform-to-business Regulation have concluded with political agreement on a compromise text, which is expected to be adopted by the co-legislators in the coming weeks. The Minister requests clearance to support the adoption of the proposal for a Regulation. The written procedure will be used in the Council.

9.2 As set out in the Committee's first report on this proposal on 18 July 2018,[74] this draft Regulation seeks to promote fairness and transparency for business users of online intermediation services by establishing a range of regulatory requirements applicable to multi-sided e-commerce marketplaces, app stores, social media, and search engines. In its first consideration of the proposal, the Committee took the view that the level of intervention proposed by the Regulation was generally light-touch, with the focus being on improving transparency in these markets.

9.3 On 9 August 2018[75] the Minister (Lord Henley) wrote to the Committee to inform it that he accepted that the text appeared to "recognise the importance of adopting a proportionate approach, that takes into account both innovation and addressing unfair business practices". In a further update,[76] he noted that the Presidency of the Council had prepared a compromise text which made the proposal more proportionate on a number of sensitive points: for example, it removed the obligation for search engines to disclose the reasons for the relative importance of ranking criteria. The Minister requested a waiver to participate at Competitiveness Council on 29/30 November, at which a General Approach was subsequently agreed which was in line with the UK position.

9.4 Trilogue negotiations with the Parliament were somewhat more contentious. The Minister wrote to the Committee on 4 February 2019 to inform it about the key points of disagreement which had not yet been resolved in negotiations. These included the

74 Thirty-sixth Report HC 301–xxxv (2017–19), chapter 2 (18 July 2018).
75 Letter from the Minister to the Chair of the European Scrutiny Committee (9 August 2018).
76 Letter from the Minister to the Chair of the European Scrutiny Committee (5 November 2018).

question of whether the scope of the Regulation should be widened to include operating systems (the Government was against their inclusion), whether platforms should be able to suspend business users immediately where appropriate (the Government thought that platforms should retain this ability), and whether differentiated treatment should be banned or simply be subject to transparency requirements (the Government preferred the latter approach).

9.5 In its report on 6 February 2019[77] the Committee granted the Minister a waiver to support the proposal provided that it aligned with the UK position, while noting that, contrary to the Government's position, there could be a case for the proportionate inclusion of operating systems within the Regulation's scope.

9.6 In his latest update to the Committee, dated 5 March 2019,[78] the Minister states that the compromise text was endorsed by Deputy Permanent Representatives on Wednesday 20 February and by the lnternal Market Committee of the European Parliament on Thursday 21 February. The text was formally approved by MEPs at the March plenary session, and the Minister states that it will be adopted by the Council via written procedure at the next possible occasion.

9.7 The Minister provides an overview of the late stage changes to the compromise text in the three areas where the Minister was concerned that the final text could be disproportionate:

- platforms can immediately suspend or restrict services to businesses, allowing them to instantly protect themselves, other businesses and consumers from businesses which breach terms and conditions;
- platforms are required to be transparent about any differentiated treatment they offer but are not banned from showing preferential treatment to in-house products and services or those offered by linked businesses; and
- operating systems are included within the transparency requirements applicable to differentiated treatment, which means that platforms will be unable to use operating systems to circumvent their obligation to be transparent about differentiated treatment offered, but the scope of the Regulation more widely is not expanded to include operating systems. The first Commission review of the Regulation's implementation and effects will also assess any possible imbalances in the relationships between providers of operating systems and businesses.

9.8 The Minister also provides a helpful consolidated summary of the main provisions of the proposed Regulation in its final form, which is reproduced below.

9.9 As adopted, the main elements of the proposed Regulation oblige platforms to:

- Give businesses a notice period which is 'reasonable and proportionate' before any changes to terms and conditions. It should be at least 15 days, but longer if businesses need more time to make technical or commercial changes. The 15-day notice period is waived if a business submits new goods or services to the platform. The notice period is not waived when businesses have a notice period

77 Fifty-fourth Report HC 301–liii (2017–19), chapter 2 (6 February 2019).
78 Letter from the Minister to the Chair of the European Scrutiny Committee (5 March 2019).

of longer than 15 days. A notice period is not needed if the platform has a legal or regulatory obligation to modify its terms and conditions, or if modifications are necessary to address an unforeseen and imminent danger to the platform, businesses or consumers.

- Give businesses a statement of reasons if they wish to restrict, suspend or terminate their services, unless the action is due to a legal or regulatory obligation or the business is a repeat-offender. 30 days' notice is required before termination, but restrictions and suspensions can be carried out immediately.
- Be transparent about how businesses can terminate the contract, who has access to business and customer data, and if the platform maintains use of the data when the contract expires.

9.10 The proposed Regulation obliges platforms and search engines to:

- Set out the main parameters which determine ranking. They are not required to disclose algorithms.
- Be transparent about differentiated treatment, including access to data, preferential ranking and renumeration.

9.11 The proposed Regulation also obliges platforms to have a free, internal complaints procedure. They must include details on access to and functioning of the complaints system in their terms and conditions, and publish data on its functioning and effectiveness, including the number of complaints lodged, the average time to process them, and aggregated information on the outcome.

9.12 Platforms must also nominate two or more mediators with whom they would be willing to work. Small enterprises are exempt from this obligation. The proposed Regulation also sets out the rules for organisations and associations to pursue judicial proceedings on behalf of a business user and sets out enforcement obligations for Member States. The Regulation will apply 12 months after the publication date.

9.13 **We thank the Minister for his thorough update regarding the outcome of trilogue negotiations regarding the proposal for a Platforms-to-Business Regulation. The Minister reports that the final text is acceptable to the UK, as the European Parliament has been willing to compromise and accept more proportionate provisions on key aspects of the text which were of particular concern to the Government.**

9.14 **Under the proposed Regulation, platforms within its scope (multi-sided e-commerce marketplaces, app stores, social media, and search engines) will retain the power to suspend or restrict access to their services where this is necessary to protect themselves, consumers and other businesses from businesses which breach terms and conditions. Differentiated treatment will continue to be permitted but subject to transparency requirements. Operating systems will be included within the transparency requirements applicable to differentiated treatment, but only to the extent required to prevent platforms from circumventing the rules about differentiated treatment via their operating systems.**

9.15 **As the compromise text strikes an acceptable balance between the need to protect businesses which are dependent on online platforms against unfair treatment and the need to promote innovation in the digital economy by avoiding creating disproportionate obligations on online platforms, which is in line with the UK position on this issue, we now clear this document from scrutiny.**

Full details of the documents

Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services: (39665), 8413/18 + ADDs 1–3, COM(18) 238 final.

Previous Committee Reports

Fifty-fourth Report HC 301–liii (2017–19), chapter 2 (6 February 2019); Forty-fourth Report HC 301–xliii (2017–19), chapter 1 (14 November 2018); Thirty-sixth Report HC 301–xxxv (2017–19), chapter 2 (18 July 2018).

10 EU safeguard measures on steel imports

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; further information requested; drawn to the attention of the International Trade Committee
Document details	Commission Implementing Regulation (EU) 2019/159 of 31 January 2019 imposing definitive safeguard measures against imports of certain steel products
Legal base	Article 16 of Regulation (EU) 2015/478, Article 13 of Regulation (EU) 2015/755, Article 8 of Regulation (EU) No 654/2014 and Articles 3 and 5 of Regulation (EU) No 182/2011
Department	International Trade
Document Number	(40380),—

Summary and Committee's conclusions

10.1 On 1 February 2019, the EU adopted definitive safeguard measures on certain categories of steel imports to protect EU steel producers from an unforeseen and sudden surge in steel imports as a result of the US's imposition of 25% tariffs on steel and 10% on aluminium in 2018 (leading to a diversion of steel trade flows into the EU market).

10.2 The definitive measures replace temporary safeguard measures imposed in July 2018. They take the form of tariff rate quotas (TRQs) for each of the 28 steel import categories concerned, with quotas set at the average quantity imported into the EU between 2015 and 2017, plus 5 per cent each year (i.e. 105 per cent in 2019, 110 per cent in 2020 and 115 per cent in 2021). Once these quotas are filled, 25 per cent tariffs apply (regardless of country of origin, but subject to certain exemptions—see background for further information). The 5 per cent increase in quotas each year is intended to address concerns by the car industry and other users about higher steel prices.

10.3 In his Explanatory Memorandum of 21 February 2019, the Minister of State for Trade Policy (George Hollingbery MP) states that the "Government supported the EU imposing definitive safeguard measures" as they "are a proportional and justified response to US tariffs on steel". He welcomes the inclusion of a review clause, which allows producers and importers "the possibility to seek adjustments" in the level or allocation of the TRQs in certain circumstances.

10.4 On the Brexit implications of the proposal, he states that:

- in the event of no deal (the UK leaving the EU without a negotiated deal on exit day) the government's priority is to "ensure UK industry retains appropriate trade remedy protections on exit, and so we are committed to carrying across existing measures [on exit] where there is a UK interest, and then reviewing them to make them UK specific"; and

- in the event of a negotiated withdrawal and transition period, "the transition policy will be … the UK will only be able to impose UK-specific tariffs when it is no longer bound by the Common External Tariff, and provided that the EU measures have not been revoked".

10.5 **We note that the proposed measures were adopted by the Commission on 1 February 2019 (following a qualified majority for their implementation by Member States, including a vote in favour by the UK, at the Safeguards Committee on 16 January 2019). The document was deposited on 11 February 2019 and the Minister issued his Explanatory Memorandum on 21 February 2019. While the Scrutiny Reserve Resolution does not apply to Commission Implementing Acts, we remind the Minister that we had explicitly requested the timely deposit of all documents relating to US tariffs, given their clear political importance.**[79]

10.6 **We clear the document from scrutiny, but ask the Minister to expand on the Brexit implications of the proposal.**

10.7 **First, in the event of a no deal exit from the EU on exit date:**

- **does the Government intend to fully replicate these safeguard measures (including all product categories) and, if so, how would such UK-specific TRQs be calculated and what is the likelihood or risk of these new measures being challenged in the WTO?;**
- **will the UK Trade Remedies Investigations Directorate (or Trade Remedies Authority, if the Trade Bill is passed in time for a no-deal Brexit) have the resource and expertise to review all transitioned trade remedies and implement new steel safeguards?; and**
- **is the UK likely to be subjected to the EU's safeguard measures (noting, for example, that EEA members have been exempted from the definitive measures, but Switzerland, despite its close ties with the EU, has not)?**

10.8 **Second, how is the continued application of, or divergence from, trade remedies applied by the EU (particularly in response to additional tariffs imposed by the US) expected to affect future trade negotiations with the EU and US respectively post-exit?**

10.9 **In the meantime, we draw our conclusions to the attention of the International Trade Committee**.

Full details of the documents

Commission Implementing Regulation (EU) 2019/159 of 31 January 2019 imposing definitive safeguard measures against imports of certain steel products: (40380),—.

79 See Report chapter 'EU countermeasures to US tariffs on steel and aluminium' dated 18 July 2018.

Background

US additional tariffs on certain imports of steel and aluminium from the EU

10.10 On 8 March 2018, the US announced its intention to impose additional 25% tariffs on steel imports and 10% duties on aluminium imports to protect US national security. It granted the EU a time-limited exemption from these tariffs, but applied the extra steel and aluminium duties on EU imports on 1 June 2018.

10.11 While the US argues that the tariffs fall outside the remit of the World Trade Organisation (WTO), on the basis that they have been imposed in the interests of US national security, the EU is treating them as safeguard measures that are intended to protect US industry from foreign competition for commercial reasons.

10.12 The WTO Agreement on Safeguards allows for the imposition of countermeasures to the equivalent value of the damage caused by safeguards. The Commission estimates that the US tariffs would have affected at least €6.41 billion (£5.62 billion) worth of EU imports into the US in 2017.

10.13 In May 2018, the EU adopted Implementing Regulations to apply countermeasures to US tariffs on steel and aluminium, with the first set of countermeasures coming into force on 20 June 2018.

10.14 The US disagrees with the basis of the countermeasures and initiated dispute settlement proceedings by requesting consultations with the EU on these measures on 19 July 2018.

The Commission Implementing Regulation

10.15 On 26 March 2018, the Commission opened an investigation into a defined number of steel product categories following evidence that imports of those products might cause or threaten to cause serious injury to EU producers.

10.16 On 18 July 2018, the Commission imposed provisional safeguard measures on imports of 23 categories of steel imports.

10.17 Following its investigation, the Commission proposed definitive measures on imports of 28 categories of steel products that increased the quota by 5 per cent yearly to accommodate demands by the car industry and other users. The measures were notified and made publicly available to WTO partners on 4 January 2019. The Commission's proposal was supported by a qualified majority of Member States in the Safeguard Committee on 16 January 2019 and entered into force on 2 February 2019, thereby replacing the provisional safeguard measures (until 4 February 2019). The new measures can remain in place until July 2021.

10.18 The Minister's Explanatory Memorandum sets out the coverage of the definitive safeguard measures as follows:

Definitive measures imposed by this Regulation are in the form of separate tariff rate quotas (TRQs) for each product category. Quota allocations are on a first come first served basis, and a 25% tariff will be imposed on any imports that fall outside of the quotas.

There are specific allocations for each TRQ for certain exporting countries ("country specific TRQ"), e.g. China, India and Russia, except for one product category (non-alloy and other alloy hot-rolled sheets and strips) as a significant amount of trade is affected by existing EU anti-dumping measures. Country specific TRQs operate on a yearly basis.

There are also TRQs for other countries not allocated a specific TRQ ("global TRQ"). Global TRQs are divided on a quarterly basis. Any unused amount of a global TRQ will be carried over to the next quarter, unless that quarter falls in the next year, i.e. quarters starting on 1 July 2019 and 1 July 2020. Where a country specific TRQ has been exhausted, exporters from those countries can access the global TRQ, but only in the last quarter of each year.

Measures will be in place for three years (including the period of provisional measures) and will expire on 30 June 2021. Measures will be progressively liberalised over the period of their application in that the free of duty quota will be increased by 5% after each year, with the first increase taking place on 1 July 2019.

Safeguard measures shall apply to products originating in a developing country member of the WTO as long as its share of imports of that product into the EU does not exceed 3%, provided that developing country members of the WTO with less than a 3% import share, collectively account for not more than 9% of total imports of the product concerned. European Economic Area countries (Norway, Iceland and Liechtenstein) are exempt from the measures, and certain countries with which the EU has signed an Economic Partnership Agreement (Botswana, Cameroon, Fiji, Ghana, Lesotho, Mozambique, Namibia, South Africa and Eswatini) are also excluded from the measures in order to comply with bilateral obligations.

Annex III sets out the list of developing country members of the WTO and the list of product categories originating in these countries to which the measures do apply. Annex IV to this regulation sets out the volumes of the TRQs for specific countries and all other countries in more detail.

Previous Committee Reports

None.

11 Brexit: coordination of social security and access to healthcare

Committee's assessment	Politically important
Committee's decision	(a) Cleared from scrutiny; (b) Cleared from scrutiny (decision reported on 6 March 2019); drawn to the attention of the Health and Social Care Committee, the Joint Committee on Human Rights and the Work and Pensions Committee
Document details	(a) Proposal for a Regulation amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004; (b) Proposal for a Regulation on establishing contingency measures in the field of social security coordination following the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union
Legal base	(a) and (b) Article 48 TFEU; ordinary legislative procedure; QMV
Department	Work and Pensions
Document Numbers	(a) (38400), 15642/16 + ADDS 1–8, COM(16) 815; (b) (40347), 5949/19, COM(19) 53

Summary and Committee's conclusions

11.1 To facilitate the free movement of people, and workers in particular, the EU's Member States have put in place a elaborate legal system for the coordination of social security benefits.[80] EU rules determine, for example, which national government is responsible for the payment of benefits for EU residents who move between different Member States, like unemployment benefit or maternity pay.[81] It is also the legal framework that currently allows British pensioners in the EU to access healthcare free of charge locally, and have the costs reimbursed by the UK Government.[82]

11.2 In December 2016, the European Commission tabled a complex and lengthy legislative proposal to amend the relevant EU legislation (Regulation 883/2004 and its Implementing Regulation).[83] This would change the allocation of responsibilities between Member States for the payment of unemployment benefit to a mobile EU worker, and how long a person can claim the benefit in one EU country after having moved to another to look for work; to

80 The effects of the legislation have also been extended to the four EFTA countries (Iceland, Norway, Liechtenstein and Switzerland), which accept the legislation in its entirety.

81 It determines for example at which point an EU national employed in the UK is entitled to child benefit (and allows the cash to be 'exported' to another EU country if that's where the child lives).

82 More concretely, Regulation 883/2004 allows many of the 190,000 British pensioners living in other EU countries to access healthcare locally on the same basis as citizens of that country, and to have the costs of their care reimbursed by the Government using a so-called S1 form issued by the UK. The underlying logic is that the Member State of last employment pays for social security, including access to healthcare, even when they move to another Member State without taking up employment (i.e. pensioners).

83 The implementing legislation is Regulation 987/2009.

clarify the rules for determining which EU country is responsible for payment of benefits and under what conditions non-contributory benefits can be claimed; and to make smaller changes to the provisions of the Regulation on access to salary-related family benefits and long-term care benefits.

11.3 As part of his efforts to renegotiate the terms of the UK's EU membership, former Prime Minister David Cameron in February 2016 also secured an agreement in principle for an amendment to Regulation 883/2004 which would allow Member States to reduce payments of child benefit which are 'exported' to a child living in an EU country where the costs of living are lower.[84] The Commission proposal did not contain such a change because the new UK-EU settlement lapsed automatically when the UK voted to leave the Union on 23 June 2016.[85]

11.4 Negotiations on the amendments to Regulation 883/2004 have been on-going in Brussels for over two years, and reached their final phase in January 2019 with in-depth talks between the European Parliament and the Romanian Presidency of the Council on behalf of the Member States. On 26 March 2019, following over two years of negotiations, the Minister for Employment (Alok Sharma) informed us that the European Parliament and the Member States had reached agreement on the draft legislation. They have agreed to a number of substantial changes to the original Commission proposal. Once formally adopted and entered into force, some of the key changes contained in the new Regulation include the following:

- how EU workers who find work in another Member State can access unemployment benefit in their new country of employment will change. In particular, the Regulation introduces a one-month qualifying period of employment before a worker can use ('aggregate') periods of residence or insurance contributions accrued in other EU countries towards the qualifying criteria for unemployment benefit (like contributory Jobseekers' Allowance) if they subsequently lose their job;

- workers would be able to continue drawing their unemployment benefit ('exporting' it) for 6 months when moving to another EU Member State to look for work; and

- frontier workers would have to claim unemployment benefit in the country where they work for fifteen months (rather than where they live, which is what European rules dictate at present). Consequently, the complex frontier worker reimbursement system that operates currently—where the cost of unemployment benefit is paid by the Member State of residence, but recouped from the Member State of employment—will be abolished.

11.5 We have set out the details of the new Regulation more expansively in the 'Background' section of this chapter.

84 Regulation 883/2004 requires Member States to pay child benefit to EU workers even where the child lives in another Member State.

85 The Decision of the European Council in which the EU-UK settlement was contained would "take effect on the same date as the Government of the United Kingdom informs the Secretary-General of the Council that the United Kingdom has decided to remain a member of the European Union".

11.6 The Minister for Employment (Alok Sharma MP) informed the Committee of the substance of the new legislation by letter dated 26 March 2019. He also expressed the Government's support for the compromise legal text, because it was considered "preferable for the file to be concluded whilst the UK retains a seat at the negotiating table and on a text which it had helped shape" even if it did not support all of the legal changes.[86] Should the revised Regulation apply in the UK (see below), the Government is of the view that the financial impact of extending access to unemployment benefit payments is expected to be "limited" because of the "stringent contribution conditions attached to contributory Jobseeker's Allowance" in the UK.[87] The Minister therefore asked the Committee to clear the proposal from scrutiny, which would enable the Government to vote in favour of the Regulation if it is presented to the Council of Ministers while the UK is still an EU Member State. (We understand that the UK holds a key vote under the Council's Qualified Majority voting rules, given the strength of opposition to the new Regulation from six other Member States.)

11.7 The new Social Security Coordination Regulation is likely to be relevant for the UK even after it leaves the European Union. Under the draft Withdrawal Agreement governing the UK's exit from the EU, extensive terms would be laid down for both the UK and the EU-27 with respect to the rights of the other side's citizens who exercised their Treaty rights before the UK ends freedom of movement. As part of this, the Social Security Coordination Regulation would continue to cover both British and European citizens in scope of the exit treaty—and their dependents—indefinitely. Crucially, the relevant articles of the Withdrawal Agreement are dynamic, meaning that the UK would have to implement future changes to the Regulation—including those described above—with respect to that group of citizens as and when they take effect in the EU (even if the UK was not involved in the legislative process for drafting and approving future amendments).

11.8 Put differently, if the Withdrawal Agreement is ratified, the UK will have to apply the new Regulation—and its rules on access to unemployment benefits—to EU nationals who took up employment or residence in Britain before the end of the post-Brexit transitional period.

11.9 In a 'no deal' scenario, where the Withdrawal Agreement is not ratified, the legal status of UK nationals in the EU and vice versa would change considerably overnight on the date the UK's withdrawal took effect.[88] They would automatically fall out of the reciprocal coordination systems for social security and healthcare created by Regulation 883/2004. To mitigate the worst disruption this would entail, both the UK and individual EU countries have implemented emergency measures to preserve the status quo to some extent even in a 'no deal' scenario. In addition, the EU has adopted a contingency Social Security Regulation to preserve the validity of national insurance contributions built up

86 In particular, the UK opposed the statutory six-month exporting period for unemployment benefit if a jobseeker moves to another EU country, and a new requirement for Member States to be informed in advance of all workers being sent there from another Member State.

87 The Minister's letter notes that many EU applicants will not qualify for contributory Jobseekers Allowance under the new rules because their contribution record in other EU countries will be insufficient to meet the threshold. He added that, in the case of frontier workers, this is the same cohort of individuals for whom the UK currently reimburses other Member States for unemployment benefits which they have paid out but where the claimant previously worked and contributed in the UK. The change to 15 months for frontier workers is also irrelevant to the UK since contributory Jobseeker's Allowance, whether for UK citizens or EU nationals, is only payable for a maximum of 6 months.

88 This is currently scheduled to happen on 12 April 2019, or 22 May 2019 if the House of Commons approves the Withdrawal Agreement.

by EU citizens in the UK prior to exit if they seek to access the benefits system of one of the remaining Member States in the future. To a limited extent, this would also preserve some of the social security entitlements of UK nationals living in the EU (but with major exceptions, for example relating to the exportability of benefits and access to in-kind medical care). The Minister provided further information on the extent and limitations of this contingency Regulation in a separate letter, also dated 26 March 2019.

11.10 Although the House of Commons—in the so-called 'Costa amendment' of 27 February 2019—instructed the Government to seek a separate Citizens Rights Agreement with the EU if the overall Withdrawal Agreement is not ratified, this was formally rejected by the Union in late March. Echoing some of the practical concerns that we raised in our Report of 6 March 2019, the EU's Chief Brexit Negotiator (Michel Barnier) noted that it would be "far from straightforward to identify which provisions [of the Withdrawal Agreement] would need to be 'carved out' as part of the ring-fencing exercise proposed by the House of Commons". However, it remains a possibility that the UK and the EU, following a 'no deal' withdrawal, could reach a new agreement on citizens' rights which wholly or partially reflects the relevant provisions of the defunct Withdrawal Agreement. However, such a treaty would need to be approved by the EU side with a different legal basis because the wide horizontal competence under Article 50 TEU to conclude withdrawal arrangements with a departing Member State would no longer apply. Such a post-exit agreement would likely be 'mixed', meaning it would need to be ratified by the remaining Member States individually (and making the process longer and more unpredictable).

11.11 With respect to the UK's domestic preparations for 'no deal' and its implications for EU nationals living here, we have repeatedly raised concerns about the removal of the 'equal treatment' principle for EU nationals in the UK from Regulation 883/2004 as it would be retained in domestic law in a 'no deal' scenario under recent Statutory Instruments.[89] The Minister's latest letter notes that "the principle of equal treatment will be incorporated into domestic law under the European Union (Withdrawal) Act 2018" and that "the removal of the specific provision of [the principle] from the retained Regulation 883/2004 will not therefore have any impact on the rights of EU nationals who wish to access the UK's social security schemes". However, if that is the case, the Minister has not explained why the Government therefore felt it was still necessary to remove the equal treatment principle from the text of the Regulation as it would apply in the UK as a matter of domestic law.

11.12 The Government has also engaged in limited bilateral discussions with individual EU countries to provide a social security safety net in a 'no deal' scenario, offering to "maintain existing [access to] healthcare arrangements". It has also identified 17 pre-existing Social Security Treaties with other Member States, which are being assessed on a "case-by-case basis as to whether they are capable of revival, for both legal and administrative operability reasons".[90] However, the Minister for Employment has explained that "EU Member States have refrained from openly discussing no deal contingency arrangements with the UK" and instead have focussed on ratification of

89 The equal treatment principle in Regulation 883/2004 means that, by law, EU Member States have to provide nationals of other Member States with the same access to their social security systems—i.e. in terms of benefits available and the size of any payments—as their own citizens.

90 There are no pre-existing Social Security agreements between the UK and 10 EU countries, most of which acceded to the EU relatively recently: Bulgaria, the Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia.

the overall Withdrawal Agreement. In addition, because social security coordination is a competence shared between the EU and national governments, individual EU countries have to consider what they are legally permitted to agree with the UK on a bilateral basis.[91]

Our conclusions

11.13 **We thank the Minister for Employment for his latest updates on the negotiations to amend the EU's Social Security Regulation and the EU's 'no deal' contingency proposals in this area. As is clear from our assessment, there are two separate but linked EU policy measures that could affect the entitlement of UK nationals in the EU (and vice versa) to access social security and healthcare services after Brexit:**

- **if the Withdrawal Agreement is ratified, the UK would be legally required to continue applying the Social Security Coordination Regulation to many millions of UK and EU nationals who exercised their free movement rights before the end of the post-Brexit transitional period. That would include any future changes to the Regulation adopted by the EU without UK involvement, as well as the amendments which have been discussed since December 2016 and now await formal adoption by the Council of Ministers; and**

- **in a 'no deal' scenario, UK nationals in the EU would no longer be covered by the harmonised system of Regulation 883/2004—as and when amended—or the grandfathering provisions of the Withdrawal Agreement. This would disrupt their entitlement to key social security benefits and local healthcare provision, and in addition to Member State-specific emergency measures the EU as a whole has also adopted an emergency Social Security Regulation that will preserve some of the rights of British citizens in the EU to access social security once they become 'third country' nationals.[92]**

11.14 **Should the Withdrawal Agreement be ratified, or some other future UK-EU agreement take effect which effectively replicates the provisions of the Citizens' Rights section of that Agreement, the amendments to Regulation 883/2004 would remain directly relevant for both the EU and UK nationals who made use of freedom of movement before it is ended in and to the UK. It would also impact on the Exchequer insofar as it alters how and when the UK has to pay for the social security benefits of UK and EU nationals who have exercised their free movement rights (and by extension it is of concern to the British taxpayer).**

11.15 **However, given that the new legislation has now been agreed between the Parliament and Council, and is awaiting formal adoption, we clear the document from scrutiny. We draw the attention of the House to the potential ramifications for the UK's social security system if the Regulation has to be applied here, particularly with respect to access to unemployment benefit.**

91 Letter from Alok Sharma MP to Sir William Cash MP (26 March 2019).

92 We note in this context that the Government's Social Security and Healthcare Bills are not solutions that would prevent disruption from the UK's abrupt exit from the system created by Regulation 883/2004. They would only provide the statutory basis for the Government to fund new arrangements with the EU and other countries in this area. A continuation of the status quo for UK nationals living in the European Union would require an agreement, which by definition in a 'no deal' scenario would not exist. Moreover, neither of the Bills to facilitate the UK's domestic implementation of any such new arrangement has yet received Royal Assent.

11.16 **With respect to the UK's domestic preparations for a 'no deal withdrawal from the EU on citizens' rights, we remain concerned about the removal of the 'equal treatment' principle from the retained version of Regulation 883/2004 under Statutory Instruments laid by the Department for Work & Pensions in January 2019, and how this affects the Government's assurance that EU nationals lawfully resident in the UK on 30 March 2019 would retain their current access to UK social security and healthcare system (although "subject to any future domestic policy changes which [also] apply to UK nationals").[93] The Minister's latest letter does not explain why it was felt necessary to remove the principle from the text of the Regulation or what the intended effect of this amendment is supposed to be, if it has no impact on the rights of EU nationals. We are therefore not persuaded by this argument, and consider this is a matter the Work & Pensions may wish to pursue further as a matter of domestic scrutiny.**

11.17 **We draw these developments, and our conclusions, to the attention of the Joint Committee on Human Rights, the Work & Pensions Committee and the Health & Social Care Committee.**

Full details of the documents

(a) Proposal for a Regulation amending Regulation (EC) No 883/2004 on the coordination of social security systems and regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004: (38400), 15642/16, COM(2016) 815; (b) Proposal for a Regulation on establishing contingency measures in the field of social security coordination following the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union: (40347), 5949/19, COM(2019) 53.

Background

11.18 As part of the free movement of people, the EU's Member States have put in place a system for the coordination of social security benefits.[94] This system determines, for example, which national government is responsible for the payment of benefits for EU residents who move between different Member States.[95] It is also the legal framework that currently allows British pensioners in countries like Ireland, Spain and France to access healthcare free of charge locally, and have the costs reimbursed by the UK Government.[96]

11.19 In December 2016, after the Brexit referendum but before the Government's formal notification of the UK's withdrawal from the EU, the European Commission tabled a legislative proposal to amend the relevant EU legislation (Regulation 883/2004 and its Implementing Regulation).[97] The purpose of its proposal was to modify when a Member

93 The Social Security Coordination (Regulation (EC) No 883/2004, EEA Agreement and Swiss Agreement) (Amendment) (EU Exit) Regulations 2018. Schedule 1 would replace Title 1 of Regulation 883/2004 as it applies in the UK in a 'no deal' scenario, and includes the removal of Article 4 on equal treatment.

94 The effects of the legislation have also been extended to the four EFTA countries (Iceland, Norway, Liechtenstein and Switzerland), which accept the legislation in its entirety.

95 It determines for example at which point an EU national employed in the UK is entitled to child benefit (and allows the cash to be 'exported' to another EU country if that's where the child lives).

96 More concretely, Regulation 883/2004 allows many of the 190,000 British pensioners living in other EU countries to access healthcare locally on the same basis as citizens of that country, and to have the costs of their care reimbursed by the Government using a so-called S1 form issued by the UK. The underlying logic is that the Member State of last employment pays for social security, including access to healthcare, even when they move to another Member State without taking up employment (i.e. pensioners).

97 The implementing legislation is Regulation 987/2009.

State has to pay unemployment benefit to a mobile EU worker, and how long a person can claim the benefit in one EU country after having moved to another to look for work; to clarify the rules for determining which EU country is responsible for payment of benefits and under what conditions non-contributory benefits can be claimed; and to make smaller changes to the provisions of the Regulation on access to salary-related family benefits and long-term care benefits.

11.20 As part of his efforts to renegotiate the terms of the UK's EU membership, former Prime Minister David Cameron in February 2016 also secured an agreement in principle for an amendment to Regulation 883/2004 which would allow Member States to reduce payments of child benefit which are 'exported' to a child living in an EU country where the costs of living are lower.[98] The Commission's eventual legislative proposal did not contain such a change, because the new UK-EU settlement lapsed automatically when the UK voted to leave the Union on 23 June 2016.[99] It was not reintroduced during subsequent legislative negotiations at the request of any other Member State.

11.21 As we describe in more detail in paragraphs 27 to 42 below, the revision of Regulation 883/2004 could still be of importance to the UK despite its exit from the European Union, because the draft Withdrawal Agreement provides for the continued application of the Regulation—including any future amendments decided without the UK—to British and EU nationals who exercised their freedom of movement rights before Britain leaves the Single Market.[100]

11.22 The Member States in the Council of Ministers established their 'general approach' on the draft legislation in stages between 2017 and 2018.[101] The UK Government has been broadly supportive of the proposed amendments to the Commission proposal sought by the Member States, which would change the conditions for mobile EU nationals accessing—and 'exporting'—unemployment benefit when they have worked in another Member State. We have discussed the Council's position and the Government's views on the negotiations in more detail in our previous Reports.[102] Under the ordinary legislative procedure, the Member States have to jointly agree on the legal changes to Regulation 883/2004 with the European Parliament.[103] The Minister for Employment (Alok Sharma) told us in January 2019 that negotiations between the two institutions were due to start that month, although the time needed to negotiate an agreement on the final legislation was unclear.[104]

98 Regulation 883/2004 requires Member States to pay child benefit to EU workers even where the child lives in another Member State.

99 The Decision of the European Council in which the EU-UK settlement was contained would "take effect on the same date as the Government of the United Kingdom informs the Secretary-General of the Council that the United Kingdom has decided to remain a member of the European Union".

100 Under the Withdrawal Agreement, even after the UK ceases to be a Member State of the EU it would remain part of the Single Market for a transitional period until at least 31 December 2020. UK and EU citizens—and their dependents—who exercise their free movement rights before that cut-off date will be 'grandfathered' into Regulation 883/2004, meaning the UK will have to apply it for as long as those citizens are alive.

101 See our Report of 23 May 2018 for more information.

102 See 'Previous Reports' hereafter.

103 The European Parliament's Employment & Social Affairs Committee, which acts as the Parliament's negotiator on matters relating to EU social security legislation, adopted its position on the proposal in November 2018.

104 The Minister told us that "main points of difference" between the European Parliament and the Member States were on the chapters concerning applicable legislation (that is to say, which Member State is responsible for the payment of social security entitlements to a specific worker) and access to unemployment benefits, with a "number of mainly minor and cosmetic" differences on the remaining chapters (long-term care allowances, family benefits, and equal treatment on access to benefits for nationals of a Member State and those of another EU country).

11.23 On 26 March 2019, the Minister informed us that the Parliament and Council had reached agreement on the new Social Security Coordination Regulation at a final trilogue meeting earlier that month. Under the political agreement, Regulation 883/2004 would be amended substantially in a number of ways:

- with respect to **access to unemployment benefit**, workers would normally have to have been employed for at least a month in a Member State before they could access local unemployment benefit (like contributory Jobseeker's Allowance in the UK) based on aggregated national insurance contributions paid in all EU Member States up to that point. At present, the qualifying period is a single day of employment.[105] If the duration of employment were less than a month, the previous Member State where the person worked would have to provide the unemployment benefit.[106] (This is a less drastic change than the original Commission proposal, which would have required three months of employment in a specific Member State before a worker could claim unemployment benefit in that country);[107]

- as regards the **'exportability' of unemployment benefit**, individual EU countries would have to set the minimum statutory period during which a worker can export their UB while looking for work in another Member State to six months, as proposed by the Commission;[108]

- the new Regulation also makes significant changes to the **provision of unemployment benefit to frontier and cross-border workers** (where the rules about the Member State which must provide the benefit are complex and currently subject to reimbursements from the country of employment to the country of residence, which typically pays the benefit).[109] In cases where they have worked in a particular Member State for at least 6 months while living

105 More concretely, the current coordination rules require that the Member State where a worker was last employed (and thus made national insurance contributions) is responsible for the payment of unemployment benefit (UB), starting on the very first day of their employment in a particular country. Moreover, social security contributions made in other EU countries have to be taken into account when determining if someone meets the national criteria for entitlement to UB. This means, for example, that social security contributions made in another EU country count towards the contributory Jobseeker's Allowance (JSA) entitlement in the UK, as long as someone had been employed in the UK for at least a day. The European Parliament wanted to maintain the one-day qualifying period but in the end accepted the Council's proposal to extend it to one month.

106 Provided the period of employment in the previous Member State was one month or longer. If it was not, the Member State of last employment would remain responsible for payment of unemployment benefit (i.e. there would be no requirement to check employment records further back to identify if a period of employment of more than a month took place in any other Member State).

107 The Government accepted the one-month qualifying period rather than the longer three-month period, because of the increased administrative burden of the latter since it would involve more onerous checks of a person's employment history to ascertain the Member State required to provide the unemployment benefit.

108 This was a concession to the European Parliament, as the Member States had set the minimum export period at three months. There will be a separate provision for unemployment benefit for frontier workers who live in a different Member State to the one in which they last worked. In cases where they have worked in the Member State for at least 6 months they will be able to claim unemployment benefit from that Member State (rather than the Member State of residence) for up to 15 months.

109 Regulation 883/2004 currently means that in certain cases the country of residence provides the unemployment benefit even though any social security contributions would have been made in the country of employment. To compensate the Member State of residence, the rules provide for a reimbursement of benefits paid for the first three months or five months.

in another EU country, they will be able to claim unemployment benefit from the Member State of employment for up to 15 months.[110] The State-to-State reimbursement provisions in the existing Regulation will be abolished;[111]

- at the Parliament's insistence, the Member States have also accepted amendments to the provisions on "**applicable legislation**" (i.e. which Member State is responsible for the benefits of a given EU citizen). A new requirement will be introduced for competent authorities of Member States to be informed in advance about workers being sent to work in another Member State.[112] In addition, the location where the majority of work is carried out by the workers of an undertaking will carry more weight for the purposes of deciding the applicable legislation for workers who work in more than one Member State;[113] and

- finally, the Parliament and Council have rejected the Commission's proposed codification of European Court of Justice case law relating to the additional **'right of residence' test** to assess unemployed EU nationals' right to receive certain non-contributory benefits.[114] (The practical impact of this decision in the UK is limited, as the Court's case law allows the Government to continue applying the test for as long as the Regulation has effect here.)[115]

110 The Member States had initially pushed for the Member State of employment to become responsible for the payment of unemployment benefit to frontier workers after three months, rather than six. The European Commission had proposed to make the Member State of residence responsible for unemployment benefit until a frontier worker had worked in another Member State for at least 12 months.

111 The Government has welcomed the proposed abolition of the reimbursement provisions (which the Government said "were cumbersome to administer and a source of disagreement between the UK and other Member States"). MEPs had wanted frontier workers to be able to choose in which country to claim unemployment benefit. (The Government "does not support this" as it would lead to increased claims in those EU countries with "more generous social security systems".) The Minister's letter also notes the proposal would increase the administrative burden of implementing the system, and entail the reintroduction of reimbursement provisions to ensure fair burden-sharing between those Member States who have had the national insurance and taxes of workers and those paying the benefits. One of the objectives of the proposal to amend Regulation 883/2004 was to abolish that reimbursement procedure.

112 Initially, the Parliament wanted to include tighter operational deadlines on the processing of documents for posted workers and communicating with other Member States. The UK opposes this "as it would introduce added burden on administrations". Similarly, the Government has objected to a parliamentary amendment that would require employers to notify the competent authority of another Member States before it sends its employees to work there, unless they are on a business trip. Currently, portable documents certifying where a worker is insured can be issued after a worker is sent to another Member State, allowing for flexibility. The Parliament has also proposed the imposition of a fine on the sending Member State in instances of non-notification of a worker being sent to another EU country, and reduces the maximum duration of a posting (a worker being sent to another Member State to carry out work there without its country of national insurance changing) from 24 to 18 months.

113 This is meant to addresses concerns voiced by the European Parliament that a worker being simply subject to the legislation of the Member State where an employer is registered often means that contributions are paid in a country where little or no actual work is carried out.

114 The "right of residence" test means that to qualify for certain benefits, an unemployed EU national must be actively looking for employment, or be able to financially support themselves and have comprehensive sickness insurance. 80% of non-economically active mobile EU citizens derive either residence rights or entitlements to social security through working family members with whom they reside and so automatically qualify.

115 As confirmed in the letter from Damian Hinds MP to Sir William Cash MP (14 December 2017). The proposed codification was dropped because Member States could not agree on the scope of the codification (and in particular access to which types of benefits could be restricted under the judgement delivered in Commission v United Kingdom). The Court of Justice ruled in 2016 that the right to equal access to non-contributory benefits for mobile EU nationals can be made subject to "right of residence" test (see previous footnote). As a result, Member States can refuse to grant non-contributory cash benefits to mobile citizens who are economically inactive, and who do not have a legal right of residence under the Free Movement Directive (although which specific non-contributory benefits are caught by this exemption is still a matter of contention).

The Government's position

11.24 The UK supports the final legal text to amend Regulation 883/2004, with the Minister noting in his latest letter that "since the Government considered that it was preferable for the file to be concluded whilst the UK retains a seat at the negotiating table and on a text which it had helped shape, the UK offered some flexibility" with respect to the changes sought by the European Parliament (for example on the export of unemployment benefits and the administrative formalities for workers being sent to another Member State).[116]

11.25 Should the revised Regulation apply in the UK (see paragraphs 27 to 42 below), the Minister argues the financial impact of extending access to unemployment benefit payments is expected to be "limited" because of the "stringent contribution conditions attached to contributory Jobseeker's Allowance" (which means that many EU applicants will not get it because their contribution record will be insufficient).[117] With respect to the determination of which Member State's social security legislation applies to a given worker, the Government's main priority has been to "ensure that the text is clear and unambiguous and to prevent changes that would introduce loopholes or unwanted business burdens". According to the Minister, "such unwarranted changes have been avoided and the Council position has largely been maintained", citing for example, failed attempts to limit the duration of postings of workers or impose unjustified and disproportionate penalties for national authorities were seen off as was the introduction of sectoral exemptions.

Next steps in the legislative process

11.26 The overall compromise on amending Regulation 883/2004, since it relates to access to benefits, is controversial, and we understand a number of Member States do not support it (although not enough to prevent the necessary Qualified Majority from being reached in the Council of Ministers). The new Regulation was informally approved at a meeting of Member State ambassadors in Brussels on 29 March 2019, with formal adoption to take place at some point in April.[118]

11.27 Given the UK's support for the amendments, the Minister has asked the Committee to "waive or lift its scrutiny of this file to allow the UK to signal its support of the text in Council". He also notes that, given the opposition to the Regulation from some Member States, "on this occasion it is likely that the UK's full support will be needed in order to secure a Qualified Majority in favour of the proposal". The UK will have a vote in

116 When the Minister sent his letter on 26 March 2019, the full revised legal text of the Regulation was not yet available.

117 The Minister explained that, in the case of frontier workers, this is the same cohort of individuals for whom the UK currently reimburses other Member States for unemployment benefits which they have paid out but where the claimant previously worked and contributed in the UK. The change to 15 months for frontier workers is also irrelevant to the UK since contributory Jobseeker's Allowance, whether for UK citizens or EU nationals, is only payable for a maximum of 6 months.

118 The European Parliament has indicated it hopes to formally approve the new legislation at its final plenary session in April 2019, before the Parliament is dissolved ahead of the EU elections the following month.

the Council if the legal text is presented for adoption while it is still a Member State.[119] It is unclear whether the Regulation will still command the necessary majority among Member States if the vote is held after the UK's exit.[120]

11.28 The new Regulation, if adopted, is expected to take effect in 2022.

Social security coordination and access to healthcare for UK nationals in the EU under the Withdrawal Agreement

11.29 As we have noted in several of our previous Reports, the proposed changes to Regulation 883/2004 are relevant to the UK despite its planned exit from the EU in 2019: under the Withdrawal Agreement, the Regulation would continue to have legal force in the UK for some considerable time afterwards, subject to certain qualifications with respect to its personal scope.

11.30 In summary, the Regulation—including the proposed amendments—would continue to apply to EU nationals for whom the UK is the responsible Member State in terms of social security, meaning the UK is the current or last country of employment, and vice versa for UK nationals in the EU. Family members of workers and certain other categories of people who have the necessary links to the UK under the Agreement would also continue to be covered by the Regulation for their lifetime. The aim of this is to ensure that social security entitlements that are available to those UK and EU nationals, who exercise their freedom of movement rights prior to the end of the post-Brexit transitional period, are retained for them under Regulation 883/2004 after it would otherwise cease to apply to the UK. It also means that UK pensioners already resident in countries like Spain or France would remain able to access healthcare locally without needing to purchase private health insurance, and have their costs reimbursed by the British Government.

11.31 The social security provisions of the Withdrawal Agreement are 'dynamic', meaning they are drafted to ensure the UK continues to apply the Social Security Coordination Regulation to citizens within the scope as amended and updated by the remaining Member States, even *after* the UK has ceased to be a Member State and therefore did not have a voice in the negotiations or a vote over the outcome. It will also apply to the amendments to the Regulation now agreed between the Council and the European Parliament after they formally take effect in 2022.[121]

119 At present, the UK's EU membership is due to end on 12 April 2019, or 22 May 2019 if the House of Commons approves the Withdrawal Agreement.

120 Under the Council's Qualified Majority voting rules, a QMV majority requires the support of at least 55% of Member States representing 65% of the EU's population. After the UK's exit, the absolute majority of countries necessary will stay the same (at 15) but the 65% population threshold will decrease from 334 million to 291 million, which has the effect of increasing the weighted voting powers of the largest remaining Member States (Germany and France).

121 More specifically, under Article 31 of the Withdrawal Agreement, the UK will be required to apply any amendments to Regulation 883/2004 to persons in scope even if these are adopted or take effect after the end of the transitional period, i.e. without any formal UK input or vote. While Article 31(2) of the Agreement theoretically allows the UK not to apply such amendments if they relate to the inclusion of new types of benefits; the making of a non-exportable cash benefit exportable (or vice versa), or when changes are made the time limits for such 'exportability', disapplication by the UK in such cases could only take place with the EU's consent (and therefore not unilaterally at the UK's discretion).

11.32 Under the Withdrawal Agreement, the Regulation would not apply to UK residents who move to the EU or vice versa after 'exit day',[122] unless such an arrangement was agreed between the UK and the EU or individual Member States as part of the future partnership. The purpose of the Immigration & Social Security Bill and the Healthcare (International Arrangements) Bill is to give the Government the power to fund social security and healthcare arrangements with other countries after Brexit. Given the reciprocity inherent in such mechanisms, it would require agreement with the EU or with specific EU Member States for the current arrangements enjoyed by UK nationals in countries like France and Spain to be continued. The need for reciprocity creates immediate problems in the event of a 'no deal' scenario, as described below.

Social security coordination between the UK and the EU in a 'no deal' scenario

11.33 As discussed, if the Withdrawal Agreement is ratified, Regulation 883/2004 would continue to apply to many UK and EU nationals indefinitely (provided they exercised their free movement rights before the end of the post-Brexit transitional period). However, in a 'no deal' scenario, the Regulation would immediately cease to apply to UK nationals in the EU and vice versa on 'exit day' when the UK's membership of the EU ends.

11.34 Given that social security coordination is an inherently cross-border problem that the UK cannot solve unilaterally, the Committee has repeatedly pressed the Government on the consequences of 'no deal' for both UK nationals in the EU and EU nationals in the UK. The treatment of UK nationals by the 27 remaining Member States for the purposes of accessing social security or healthcare on the same terms as EU nationals would undoubtedly be affected. The precise rights and entitlements they would continue to enjoy (or not, as the case may be) would likely vary by Member State in a 'no deal' Brexit.

11.35 In such a scenario, 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),[123] 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 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.[124] The position of British citizens who have lived in the EU for five years or more can in certain cases 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".[125] However, not all UK nationals living in the EU on Brexit day will meet the criteria for long-term residence under this legislation.

122 Exit day would be the day the UK fully leaves the Single Market, i.e. on 12 April 2019 in a 'no deal' scenario or by the end of the post-Brexit transition period if the Withdrawal Agreement is ratified.

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

124 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.

125 Directive 2003/109/EC, as amended.

11.36 In January 2019, the European Commission also published a Brexit-related proposal for an emergency Social Security Regulation.[126] This would provide for limited continuity in the application of Regulation 883/2004 for both UK and EU nationals seeking to access social security in one of the remaining 27 Member States after the UK's 'no deal' exit, 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".[127] 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'.[128] The Regulation was formally adopted by the Council of Ministers on 19 March 2019.

11.37 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 to make use of the benefits system of that country.[129] 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.[130]

11.38 While the proposal means EU nationals would largely retain their current rights, inclusive of periods of work and residence in the UK before its withdrawal,[131] the implications for UK nationals in the EU are less beneficial because they lose their overall free movement rights in the remaining Member States.

126 The EU's approach to providing some level of continuity in social security rights for other 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. By November however, 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".

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

128 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. Similarly, 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).

129 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).

130 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.

131 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. 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).

11.39 As we discussed in more detail in our Report of 6 March 2019, the EU proposal explicitly excludes the continued application of the "applicable legislation" rules which provides legal certainty about which Member State must provide social security benefits to UK nationals.[132] It also precludes British nationals from 'exporting' benefits like child or unemployment benefit to the UK and does not cover 'in-kind' arrangements that, for example, allow UK pensioners in the EU to access healthcare locally free of charge. There is also a question of the application of the contingency Regulation to those who cross the border between Spain and Gibraltar for work.[133] It is also unclear what administrative arrangements would be necessary between UK and European public authorities to exchange information necessary to make the contingency measures operate in practice.[134]

11.40 In its Explanatory Memorandum on the Commission's contingency proposal, the Department for Work and Pensions reiterated 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. In subsequent correspondence, the Minister for Employment clarified that in a 'no deal' scenario situations could arise where neither the UK nor an EU Member State assume responsibility for the payment of social security to a particular British citizen, where Regulation 883/2004 would previously have allocated such responsibility clearly and definitively.[135]

11.41 The Government also stated in January 2019 that it had "informally approached other Member States and are prioritising those that are the major pensioner, worker and tourist destinations" for UK nationals. Countries like Spain, France and the Netherlands have announced unilateral contingency measures on residence and social security. These 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.[136]

132 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

133 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.

134 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.

135 The Minister's letter also clarified that the EU had not given a written guarantee that it shares the Government's interpretation that the contingency Social Security Regulation also applies to situations involving Gibraltar.

136 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.

11.42 With respect to the social security rights of EU nationals in the UK, the Government's own 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". It added, however, that these entitlements "will be subject to any future domestic policy changes which apply to UK nationals". However, under Statutory Instruments laid by the Department for Work & Pensions before Parliament in December 2018 to address the implications of a 'no deal' Brexit on the system of social security coordination with other EU countries, 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 the equal treatment principle.

11.43 On 27 February 2019 the Government also accepted the 'Costa' amendment, which required 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". There appeared to be no appetite on the part of the EU to split the Agreement in this way, which was confirmed by a letter from EU Chief Negotiator Michel Barnier dated 25 March 2019 citing various political, legal and practical obstacles to such an approach.

11.44 In the absence of a ratified agreement with the EU on citizens' rights, the Government has also engaged in limited bilateral discussions with individual EU countries to provide a socials security safety net in a 'no deal' scenario, offering to "maintain existing [access to] healthcare arrangements". It has also identified 17 pre-existing Social Security Treaties with other Member States, which are being assessed on a "case-by-case basis as to whether they are capable of revival, for both legal and administrative operability reasons".[137] However, the Minister for Employment has explained that "EU Member States have refrained from openly discussing no deal contingency arrangements with the UK" and instead have focussed on the need for ratification of the overall Withdrawal Agreement. In addition, because social security coordination is a competence shared between the EU and national governments, individual EU countries have to consider carefully what they are legally permitted to agree with the UK on a bilateral basis to mitigate the effects of a 'no deal' Brexit on each other's citizens.[138]

11.45 In the context of the UK's withdrawal from the EU, the cumulative effect of the various legislative and political developments described above is that the position of UK nationals already living in the EU in the short-term is currently highly uncertain. Their social security entitlements, and access to healthcare services, could change drastically, if not immediately following Brexit then in the coming years (except if the Withdrawal Agreement is ratified and Regulation 883/2004 continues to apply). We have therefore drawn these developments to the attention of the House, and of the Work & Pensions Committee, the Health & Social Care Committee and the Joint Committee on Human Rights in particular.

137 There are no pre-existing Social Security agreements between the UK and 10 EU countries, most of which acceded to the EU relatively recently: Bulgaria, the Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia.

138 Letter from Alok Sharma to Sir William Cash (26 March 2019).

Previous Committee Reports

For the amendments to Regulation 883/2004, see: Thirty-first Report HC 71–xxix (2016–17), chapter 8 (8 February 2017); First Report HC 301–i (2017–19), chapter 15 (13 November 2017); Fourth Report HC 301–iv (2017–19), chapter 8 (6 December 2017); Twenty-ninth Report HC 301–xxviii (2017–19), chapter 6 (23 May 2018); and Fifty-third Report HC 391–lii (2017–19), chapter 6 (30 January 2019).

For the EU's contingency Brexit proposal on social security, see: (40347), 5949/19, COM(19) 53: Fifty-seventh Report HC 301–lvi (2017–19), chapter 13 (6 March 2019).

12 Recast of the Brussels IIa Regulation

Committee's assessment	Legally important
Committee's decision	Cleared from scrutiny; further information requested, drawn to the attention of the Justice Committee
Document details	Proposal for a Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility; and on international child abduction (recast)
Legal base	Article 81(3) TFEU; special legislative procedure; unanimity
Department	Ministry of Justice
Document Number	(37909), 10767/16 + ADDs 1–2, COM(16) 411

Summary and Committee's conclusions

12.1 Regulation 2201/2003 (the Brussels IIa Regulation) sets out rules of private international law relating to cross-border matrimonial matters, parental responsibility and international child abduction (which includes wrongful removal or retention of a child). This includes rules for deciding (a) which court has jurisdiction, (b) the extent to which a judgment given by the court of one Member State must be recognised by the court in another, (c) the enforcement of judgments in another Member State, and (d) cooperation between Central Authorities designated in each Member State to co-ordinate the handling of child abduction cases.

12.2 This proposed recast focusses on the child abduction aspects of this Regulation. The first report to the Committee in September 2016 drew attention to a number of legal and policy issues that were of concern to the Government. The UK opted in and so participates in the Brussels IIa Regulation.

12.3 The Lord Chancellor and Secretary of State for Justice (Rt Hon. David Gauke MP) wrote to the Committee on 12 December 2018 explaining that the General Approach had been agreed and the recitals to the recast were to be finalised. At that point the Committee decided to grant a scrutiny waiver. The Minister now writes again to confirm that the recitals have been finalised and that the Presidency intends to refer them with the General Approach text to Committee of Permanent Representatives in the European Union (COREPER) in early-April.

12.4 The Minister sets out that one of the UK's priorities has been to ensure that the new provision on the hearing of the child (Article 20) respects national practices. The Minister explains that the text of the General Approach went a long way to achieving this and that a recital to the proposed Regulation sets out that the question of who will hear the child, and how the child is heard, will be determined by national law and procedure. The recital will also make the point that hearing a child is not an absolute obligation but instead that any decision on that point should be assessed, taking into account the best interests of the child.

12.5 The Minister notes that the recast Regulation proposes a distinction in how decisions of courts are recognised: all decisions will be capable of automatic recognition but the procedure for privileged decisions (orders for contact with children and orders in custody decisions that entail the return of an abducted child) will differ where a decision has been made without hearing the child.

12.6 The Minister explains that the Government would have preferred a consistent approach to all cases but considers that any difference in interpretation is unlikely to have a significant effect and "all decisions from one Member State will still be able to be enforced in another".

12.7 **We thank the Minister for his letter of 27 March 2019 and the information provided therein. We also thank the Minister for the clear request for the proposal to be cleared from scrutiny in advance of an anticipated Coreper meeting in early-April 2019.**

12.8 **On the basis of the information provided the Committee is content to clear the matter from scrutiny. The Committee does however ask the Minister to update the Committee following the Coreper meeting and the anticipated adoption of the proposal. At this point we ask the Minister to confirm that the proposal is updated in its current form. In the alternative, if the proposal is not approved at Coreper, we ask the Minister to inform us of that fact.**

12.9 **We request an update with this information as soon as practically possible in the context.**

12.10 **We draw this chapter to the attention of the Justice Committee.**

Full details of the documents

Proposal for a Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility; and on international child abduction (recast): (37909), 10767/16 + ADDs 1–2, COM(16) 411.

Previous Committee Reports

Tenth Report HC 71–viii (2016–17), chapter 7 (7 September 2016); Forty-sixth Report HC 301–xlv (2017–19), chapter 18 (28 November 2018).

13 Documents not raising questions of sufficient legal or political importance to warrant a substantive report to the House

Department for Environment, Food and Rural Affairs

(40429) 7128/19 + ADD 1 COM(19) 190	Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of the Circular Economy Action Plan.
(40432) 7121/19 + ADD 1 SWD(19) 91	Commission Staff Working Document Sustainable Products in a Circular Economy—Towards an EU Product Policy Framework contributing to the Circular Economy.
(40441) 7337/19 + ADD 1 COM(19) 111	Proposal for a Council Decision concerning the position to be taken on behalf of the European Union in the International Commission for the Conservation of Atlantic Tunas and repealing Decision 10974/1/14 REV 1.
(40442) 7335/19 + ADD 1 COM(19) 115	Proposal for a Council Decision concerning the position to be taken on behalf of the European Union in the Inter-American Tropical Tuna Commission and the Meeting of the Parties to the Agreement on the International Dolphin Conservation Programme and repealing Decision 10126/14.
(40443) 7334/19 + ADD 1 COM(19) 114	Proposal for a Council Decision concerning the position to be taken on behalf of the European Union in the Extended Commission of the Convention for the Conservation of Southern Bluefin Tuna (CCSBT) and repealing Decision 10125/14.
(40444) 7333/19 + ADD 1 COM(19) 112	Proposal for a Council Decision concerning the position to be taken on behalf of the European Union in the General Fisheries Commission for the Mediterranean and repealing Decision 9389/1/14 REV 1.

(40445) 7331/19 + ADD 1 COM(19) 109	Proposal for a Council Decision concerning the position to be taken on behalf of the European Union in the Commission for the Conservation of Antarctic Marine Living Resources and repealing Decision 10840/14.
(40446) 7330/19 + ADD 1 COM(19) 108	Proposal for a Council Decision concerning the position to be taken on behalf of the European Union in the annual Conference of the Parties to the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea and repealing Decision 9782/17.
(40447) 7321/19 + ADD 1 COM(19) 102	Proposal for a Council Decision concerning the position to be taken on behalf of the European Union in the Northwest Atlantic Fisheries Organisation and repealing Decision 9449/1/14 REV 1.
(40448) 7320/19 + ADD 1 COM(19) 101	Proposal for a Council Decision concerning the position to be taken on behalf of the European Union in the Western and Central Pacific Fisheries Commission and repealing Decision 10124/1/14 REV 1.
(40449) 7233/19 + ADD 1 COM(19) 104	Proposal for a Council Decision concerning the position to be taken on behalf of the European Union in the North-East Atlantic Fisheries Commission and repealing Decision 9451/1/14 REV 1.
(40450) 7229/19 + ADD 1 COM(19) 103	Proposal for a Council Decision concerning the position to be taken on behalf of the European Union in the North Atlantic Salmon Conservation Organisation (NASCO) and repealing Decision 9450/1/14 REV 1.
(40451) 7224/19 + ADD 1 COM(19) 99	Proposal for a Council Decision concerning the position to be taken on behalf of the European Union in the South East Atlantic Fisheries Organisation and repealing Council Decision 10127/14.
(40452) 7218/19 + ADD 1 COM(19) 98	Proposal for a Council Decision concerning the position to be taken on behalf of the European Union in the Indian Ocean Tuna Commission and repealing Decision 9398/1/14 REV 1.

(40453) 7217/19 + ADD 1 COM(19) 97	Proposal for a Council Decision concerning the position to be taken on behalf of the European Union in the South Pacific Regional Fisheries Management Organisation and repealing Decision 9784/17.
(40454) 7214/19 + ADD 1 COM(19) 96	Proposal for a Council Decision concerning the position to be taken on behalf of the European Union in the Meeting of the Parties of the Southern Indian Ocean Fisheries Agreement and repealing Decision 9767/17.
(40464) 7459/19 COM(19)134	Proposals for Council Decisions on the signing and provisional application of a sustainable fisheries partnership agreement between the EU and the Republic of The Gambia and of the implementation protocol thereto
(40465) 7458/19 COM(19)132	Proposal for a Council Regulation concerning the allocation of fishing opportunities under the Protocol to the sustainable fisheries partnership agreement between the EU and the Republic of The Gambia
(40466) 7457/19 COM(19)135	Proposal for a Council Decision on the conclusion of a Sustainable Fisheries Partnership Agreement between the European Union and the Republic of The Gambia and of the Implementation Protocol thereto
(40472) 7543/19 COM(19)137	Proposal for a Council Decision on the conclusion of the Protocol on the implementation of the Fisheries Partnership Agreement between the European Community and the Republic of Cape Verde
40473 7541/19 COM(19)130	Proposal for a COUNCIL REGULATION on the allocation of fishing opportunities under the Protocol on the implementation of the Fisheries Partnership Agreement between the European Community and the Republic of Cape Verde
40474 7540/19 COM(19)129	Proposal for a COUNCIL DECISION on the signing, on behalf of the Union, and provisional application of the Protocol on the implementation of the Fisheries Partnership Agreement between the European Community and the Republic of Cape Verde

Department for Transport

(40433) 7328/19 + ADDs 1–2 COM(19) 122	Proposal for a Council Decision on the position to be taken by the European Union within the Bilateral Oversight Board under the Agreement between the United States of America and the European Community on cooperation in the regulation of civil aviation safety, concerning the addition of an Annex 4 to the Agreement.
(40434) 7323/19 + ADDs 1–2 COM(19) 121	Proposal for a Council Decision on the position to be taken by the European Union within the Bilateral Oversight Board under the Agreement between the United States of America and the European Community on cooperation in the regulation of civil aviation safety, concerning the addition of an Annex 3 to the Agreement.

HM Treasury

(40456) 7436/19 + ADD 1 COM(19) 152	Report from the Commission to the Council Progress report on the implementation of the Council Recommendation of 20 September 2016 on the establishment of National Productivity Boards.

Home Office

(40406) 6801/19 + ADD 1 COM(19) 90	Proposal for a Council Decision on the conclusion of the Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro.
(40407) 6799/19 + ADD 1 COM(19) 89	Proposal for a Council Decision on the signing, on behalf of the Union, of the Status Agreement between the European Union and Montenegro on actions carried out by the European Border and Coast Guard Agency in Montenegro.
(40425) 7036/19 + ADD 1 COM(19) 110	Proposal for a Council Decision on the conclusion of the Agreement between the European Union and Bosnia and Herzegovina on actions carried out by the European Border and Coast Guard Agency in Bosnia and Herzegovina.

(40426) 7035/19 + ADD 1 COM(19) 107	Proposal for a Council Decision on the signing, on behalf of the Union, of the Agreement between the European Union and Bosnia and Herzegovina on actions carried out by the European Border and Coast Guard Agency in Bosnia and Herzegovina.
(40435) 7296/19 C0M(19) 126	Communication from the Commission to the European Parliament, the European Council and the Council Progress report on the Implementation of the European Agenda on Migration.

Office for National Statistics

(40457) 7422/19 COM(19)113	Report from the Commission on the implementation of Regulation (EC) No 450/2003 of the European Parliament and of the Council concerning the labour cost index (LCI)

Formal Minutes

Wednesday 3 April 2019

Members present:

Sir William Cash, in the Chair

Martyn Day	Mr David Jones
Richard Drax	Michael Tomlinson

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 13 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Sixty-second Report of the Committee to the House.

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

[Adjourned till Wednesday 24 April 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*)