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European Scrutiny Committee

Seventeenth Report of Session 2017–19

Documents considered by the Committee on 7 March 2018

Report, together with formal minutes

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Notes

Numbering of documents

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

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

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

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

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

Abbreviations used in the headnotes and footnotes

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

Euros

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

Further information

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

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

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Meeting Summary

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

Brexit-related issues

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

Brexit implications

EU Plastic waste strategy

- The UK will need to give serious consideration to the risks and benefits of aligning with EU plastic waste policy post-Brexit, including the impact on industry of significantly divergent rules on packaging.

Summary

EU Plastic waste strategy

The Commission has proposed a strategy to reduce the amount of plastics in the environment through overarching objectives such as promoting design for recyclability, boosting demand for recycled plastics and reducing single use plastics. The Committee disagrees with the Minister's analysis that there are no Brexit implications, noting that divergent EU and UK rules on, for example, packaging could have an impact on UK industry. The Committee also notes a degree of similarity between the EU's plans and those set out recently by the Government in its 25 Year Environment Plan and therefore asks the Minister if she sees benefit to identifying, and building on, potential synergies.

Not cleared; further information requested; drawn to the attention of the Environmental Audit Committee and the Environment, Food and Rural Affairs Committee.

Banking Reform: risk reduction measures

The Committee has granted a scrutiny waiver to allow the Treasury to approve a compromise legal text on updated EU prudential rules for banks and large investment firms, after receiving reassurance that the Government has secured amendments to new capital requirements affecting non-EU banks with EU operations (such as British banks after Brexit). The new legislation still requires the approval of the European Parliament.

Not cleared from scrutiny; conditional scrutiny waiver granted; drawn to the attention of the Treasury Committee.

Documents drawn to the attention of select committees:

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

Environmental Audit Committee: EU Plastics Strategy [Communication (NC)]

Environment, Food and Rural Affairs Committee: EU Fisheries Control [Special Reports (C)]; EU Plastics Strategy [Communication (NC)]

Committee on Exiting the European Union: The European Police College: the Government's post-adoption opt-in decision [Proposed Regulation (C)]

Home Affairs Committee: The EU's response to the refugee crisis—the creation of "hotspots" [Special Report (C)]; Protecting migrant children [Communication (C)]; The European Police College: the Government's post-adoption opt-in decision [Proposed Regulation (C)]

Joint Committee on Human Rights: Protecting migrant children [Communication (C)]

Public Accounts Committee: Tax avoidance and evasion: disclosure by intermediaries [Proposed Directive (C)]

Transport Committee: International Civil Aviation Organization [Proposed Decision (C)]

Treasury Committee: Tax avoidance and evasion: disclosure by intermediaries [Proposed Directive (C)]; Banking reform: risk reduction measures [(a) and (b) Proposed Directives (NC), (c) Proposed Regulation (NC)]

1 EU Plastics Strategy

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Environmental Audit Committee and the Environment, Food and Rural Affairs Committee
Document details	Commission Communication: A European Strategy for Plastics in a Circular Economy
Legal base	—
Department	Environment, Food and Rural Affairs
Document Number	(39438), 5477/18 + ADDs 1–2, COM(18) 28

Summary and Committee's conclusions

1.1 Global production of plastics has increased twentyfold since the 1960s, reaching 322 million tonnes in 2015. In the EU, the plastics sector employs 1.5 million people. Reuse and recycling of plastics are low, with around 25.8 million tonnes of plastic waste generated in Europe every year. Current practices generate carbon emissions and marine litter while the legislative frameworks fail to promote more innovative approaches.

1.2 To tackle these challenges, the Commission has proposed a plastics strategy with the aim of addressing three aspects in particular: high dependence on virgin fossil feedstock; the low rate of recycling and reuse of plastics; and the significant leakage of plastics into the environment.

1.3 Components of the Commission's vision for 2030 include:

- all plastics packaging placed on the EU market will be either reusable, or recyclable in a cost-effective manner;
- more than half of plastics waste generated in Europe should be recycled; and
- sorting and recycling capacity should have increased fourfold since 2015.

1.4 The proposed areas of action fall under the following key themes:

- improving the economics and quality of plastics recycling—measures to improve design, boost demand for recycled products and improve the separate collection of plastic;
- curbing plastic waste and littering—the Commission is proposing for example to improve access to drinking water in public places in order to cut down on plastic bottles and is considering legislation on single use plastic;
- driving innovation and investment towards circular solutions; and
- harnessing global action.

1.5 Details of the proposed actions are set out below, but notable steps include:

- new legislation on improving facilities at ports to receive waste was proposed on 17 January 2018 and a separate Directive was proposed on 1 February 2018 to improve the quality of, and access to, drinking water—thus reducing the volume of plastic bottles entering the waste stream;
- a legislative proposal on single use plastics later in 2018;
- work on the revision of the Packaging and Packaging Waste Directive;
- preparation of guidelines on separate collection and sorting of waste to be issued in 2019; and
- restrictions on the use of oxo-biodegradable plastics[1] through EU chemical legislation.

1.6 The Parliamentary Under-Secretary of State for the Environment (Dr Thérèse Coffey) provides no detailed analysis nor specific comment on any of the suggestions. She considers the commitments to be helpful and that they "appear to be broadly consistent" with UK ambitions, including the UK objective of zero avoidable plastics waste by 2042. The detail of the proposals needs development, she says, and so it is too early to know exactly how they will fit with the UK's plans.

1.7 Moving forward, the Government will continue to work with the Commission to support the delivery of the strategy and the development of the UK's own Resources and Waste Strategy later in 2018. The Minister insists that there are no specific issues relating to the UK's departure from the EU arising from the strategy.

1.8 In assessing this document and the Government's response, it is constructive to note the Government's recent 25 Year Environment Plan in which the above target to reduce avoidable plastic waste to zero by 2042 was set. Potential actions were broken down by the four stages of the lifecycle (i.e. production, consumption, end-of-use and end-of-life/ management). The broad approach was very similar to that set out by the Commission, although an inventory of planned actions, with dates, was not set out in the Government's document.

1.9 **The Minister says that the Government will continue to work with the Commission to support the delivery of the Strategy. In terms of UK influence in the preparation of the Strategy, we would welcome information on the UK's focus and on any interventions made by UK Ministers when the matter was discussed at the informal Environment Council meeting in April 2017. Looking forward, we ask for detail on what specific areas the Government will focus on during the UK's remaining time as an EU Member State and, in particular, what approach the UK will advocate in each of those specific areas. We also seek clarification on whether any of the measures recommended to national authorities and industry find favour with the Government.**

1.10 **We note the Minister's view that no Brexit issues arise specifically from this strategy. The Minister's assessment is based, we assume, on the fact that this non-**

1 Oxo-degradable plastics are conventional plastics which include additives to accelerate their fragmentation. There is concern that they do not undergo full biodegradation within a reasonable time-frame, thus potentially contributing to the release of microplastics into the marine environment.

legislative document has no substantive effect. While we agree that the strategy is effectively a list of ideas to be taken forward separately, we dispute the contention that there are no Brexit implications. In our view, there are wide-ranging implications for the design of policy in the UK post-Brexit, assuming that at least some of the ideas come to fruition and assuming that some sort of co-operative and trading relationship is maintained between the UK and the EU.

1.11 **There will be areas where the UK will need to give serious consideration to the risks and benefits of close alignment with developing EU policy. This is particularly the case where regulatory changes are proposed, including to existing legislation which would be incorporated into UK law under the EU Withdrawal Bill and which might need to be amended in any case as part of UK plans for the future. The strategy references the following specific pieces of existing EU legislation, all of which will become EU retained law in the UK and all of which may—or will—be amended in the context of this Strategy: the Port Reception Facilities Directive; the Drinking Water Directive; the Packaging and Packaging Waste Directive; the Construction Products Regulation; the End-of-life Vehicles Directive; the Urban Waste Water Treatment Directive and REACH (chemicals legislation).[2] Improved implementation of the following legislation is also referenced: the Marine Strategy Framework Directive, the Waste Framework Directive and the EU Waste Shipments Regulation.**

1.12 **Furthermore, it is inaccurate to say that all of the proposals lack detail. Some details are already available, such as legislative proposals on the Port Reception Facilities (PRF) Directive and the Drinking Water Directive. A Department for Transport Explanatory Memorandum (EM)[3] on the PRF Directive has already acknowledged the direct relevance of the proposal to the UK post-Brexit given that the provisions of the Directive will apply to UK vessels landing at EU ports. The Minister's own EM on the Drinking Water Directive[4] acknowledges that the transposition deadline could fall within any post-Brexit transition period should it be agreed by the end of 2018.**

1.13 **We therefore invite the Minister to re-visit her assessment of the Brexit implications, setting out a headline analysis of the potential implications for the UK post-Brexit as and when the ideas put forward in the paper come to fruition. In doing so, the Minister may wish to reflect on ministerial commitments regarding the UK's post-Brexit environmental ambition, suggestions already made in the 25 Year Environment Plan and the impact on UK industry of significantly divergent rules on, for example, packaging. The Minister may also wish to reflect on explicit linkages made between policy areas, such as between chemicals legislation and waste policy in regard to restrictions on oxo-biodegradable plastics.**

1.14 **We recognise that the future relationship between the UK and EU is under negotiation, and there is particular uncertainty over how close the UK will wish to remain to EU rules—whether voluntarily or as part of the agreement. Regardless of the outcome of the negotiations, though, there are helpful similarities between the emerging EU and UK approaches to plastic waste. We are unclear as to whether the Minister sees the process of developing EU and UK policy as entirely distinct or whether she sees some mutual benefit to identifying, and building on, potential synergies. We**

2 Regulation on the Registration, Evaluation and Authorisation of Chemicals.
3 http://europeanmemoranda.cabinetoffice.gov.uk/files/2018/02/180212_-_Port_Reception_facilities.pdf.
4 http://europeanmemoranda.cabinetoffice.gov.uk/files/2018/02/EM_5846–18_signed_version.pdf.

ask the Minister to clarify and, furthermore, to indicate whether the Government will be consulting UK stakeholders on the Commission's strategy with a view to considering what might be incorporated into the UK's own waste and resources strategy later this year. Changes to packaging to support improved recyclability, greater producer responsibility and initiatives to reduce single use plastic are just three clear examples of where the UK and EU appear to be moving in the same direction.

1.15 **We look forward to responses to our queries by mid-April. The document remains under scrutiny. We draw it to the attention of the Environmental Audit Committee and the Environment, Food and Rural Affairs Committee.**

Full details of the documents

Commission Communication: A European Strategy for Plastics in a Circular Economy: (39438), 5477/18 + ADDs 1–2, COM(18) 28.

Commission Communication

1.16 The Strategy consists of an explanatory document (the Communication), accompanied by a series of Annexes. These list future EU measures (Annex 1), future national and industry measures (Annex 2) and a pledging campaign (Annex 3). The pledging campaign calls on industry stakeholders to come forward with voluntary pledges to boost the uptake of recycled plastics and to support progress in other areas of the strategy, such as design for recyclability.

1.17 The proposed areas of action fall under four key themes.

Improving the economics and quality of plastics recycling.

1.18 This theme proposes actions to:

- promote design for recyclability by revising the Packaging and Packaging Waste Directive, reviewing key incentive schemes such as Extended Producer Responsibility (EPR), harmonising chemicals and waste policy to reduce the use of hazardous chemicals that inhibit recycling, and exploring the use of product standards—such as those within the Ecodesign Directive;

- boost demand for recycled plastics by supporting consumer confidence—working with the European Committee for Standardisation and industry to develop quality standards for sorted plastic waste and recycled plastics; improving the availability of information on the content of plastics; promoting investment in reprocessing through an EU wide Pledging Campaign to ensure that, by 2025, ten million tonnes of recycled plastics are directed into new products; taking specific sectoral action; and reviewing how the Packaging and Packaging Waste Directive can support and reward the use of secondary material inputs and exploring how demand can be supported through public sector procurement rules; and

- promote better and more harmonised separate collection and sorting by issuing new guidance on separate collection and sorting of waste, and supporting the

European Parliament and the Council in their current effort to amend waste rules to ensure better implementation of existing obligations on separate collection of plastics.

Curbing plastic waste and littering.

1.19 This theme proposes actions to:

- prevent plastic waste in the environment by tackling the drivers of single use plastics, for example, by bringing forward the legislative proposal for a revision of the Drinking Water Directive to promote access to tap water for EU citizens, and ensuring that the criteria for the Ecolabel and green public procurement also promote reusable items and packaging—the Commission has also announced a public consultation to determine the scope of a legislative initiative on single use plastics at EU level and will consider possible fiscal measures, and there are also proposals for broader activity to monitor levels of marine litter, enhance public engagement campaigns and tackle littering in ports;
- establish a clear regulatory framework for plastics with biodegradable properties—the Commission will propose harmonised rules for defining and labelling compostable and biodegradable plastics; it will also develop lifecycle assessment to identify the conditions under which the use of biodegradable or compostable plastics is beneficial, and the criteria for such applications; finally, the Commission will seek to restrict the use of oxo biodegradable plastics in the EU; and
- tackle the rising problem of micro-plastics by exploring options to restrict the use of intentionally added micro-plastics, considering measures such as labelling and specific requirements for tyres, better information and minimum requirements on the release of micro-fibres from textiles, and measures to reduce plastic pellet losses. The Commission will also consider the potential for EPR schemes to address this issue.

Driving innovation and investment towards circular solutions.

1.20 The strategy highlights a range of areas where innovation can support greater plastics circularity in terms of new materials, reprocessing technologies and the identification of new, less harmful feedstocks. The Horizon 2020 programme has provided over EUR 250 million (approx. GBP 222 million) to finance research and development in areas of direct relevance to the strategy, and the Commission has announced an additional EUR 100 million (approx. GBP 89,000) focused on this agenda in the run up to 2020. The strategy also discusses the possibility of additional funding at Member State level being made available through new EPR arrangements.

Harnessing global action.

1.21 Finally, the strategy focuses on the importance of fully participating in global initiatives aimed at tackling the causes and impacts of plastics pollution, including supporting the United Nations (UN) Sustainable Development Goals and other key initiatives promoted

by the UN and in other international fora such as the G7 and G20. They also announce the intention to launch a dedicated project to reduce plastic waste and marine litter in East and Southeast Asia in 2018.

The Minister's Explanatory Memorandum of 31 January 2018

1.22 The Minister describes the commitments outlined in the strategy as "helpful". She notes that they still need development and so it "is too early to know exactly how they will fit with our plans." Nevertheless, she says, "they appear to be broadly consistent with achieving the UK's ambition of zero avoidable plastics waste by 2042."

1.23 The Minister adds:

> "We will continue to work with the Commission to support the delivery of the strategy and the development of our own Resources and Waste Strategy which is due to be published later in 2018.
>
> "There are no specific issues relating to the UK's departure from the EU arising from the strategy or accompanying Commission documents."

1.24 The Minister confirms that an initial roadmap for the strategy published in January 2017 was discussed at expert working group meetings throughout 2017 (attended by Defra officials), and it was on the agenda of the April 2017 informal meeting of Environment Ministers in April 2017. Two stakeholder conferences plus targeted consultation were also run by the Commission.

Previous Committee Reports

None.

2 Banking reform: risk reduction measures

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; but scrutiny waiver granted for general approach at the ECOFIN Council of 13 March 2018; drawn to the attention of the Treasury Committee
Document details	(a) Proposed Directive on loss-absorbing and recapitalisation capacity of credit institutions and investment firms; (b) Proposed Directive as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures; (c) Proposed Regulation concerning aspects of capital requirements
Legal base	(a) and (c) Article 114 TFEU, ordinary legislative procedure, QMV; (b) Article 53(1) TFEU, ordinary legislative procedure, QMV
Department	Treasury
Document Numbers	(a) (38300), 14777/16 + ADDs 1–2, COM(16) 852; (b) (38303), 14776/16 + ADDs 1–2, COM(16) 854; (c) (38304), 14775/16 + ADDs 1–3, COM(16) 850

Summary and Committee's conclusions

2.1 The European Commission tabled a technically complex package of proposals in November 2016 to update the EU's capital requirements framework for banks. Known collectively as the "Risk Reduction Measures" (RRM), the proposals would bring the current legal framework—the Capital Requirements Directive and Regulation, and the Bank Recovery & Resolution Directive—in line with the most recent international standards. We set out the substance of the proposals in some details in our previous Reports.[5]

2.2 The Government has been broadly supportive of the package,[6] but in January 2018 the new Economic Secretary to the Treasury (John Glen) informed us that several areas remained outstanding where the UK was seeking changes to the legal texts.[7] Principally, the Government had outstanding concerns over new moratorium powers to suspend a failing bank's payment obligation, and the extent to which some Member States were seeking to water down a new international standard of "bail-inable" capital for systemically-important banks (the TLAC standard).

5 See for example our Reports of 13 November 2017 and 21 February 2018.
6 Explanatory Memorandum submitted by HM Treasury (20 December 2016).
7 Letter from John Glen to Sir William Cash (23 January 2018).

2.3 In addition, the Minister confirmed the Government was actively opposing a proposed new requirement under the Capital Requirements Directive for certain large non-EU banks and investment firms to create an intermediate, independently-capitalised EU-based parent undertaking (IPU) to facilitate group supervision and resolution. Given the dominant position of UK banks within the EU's financial system, the European Commission has linked this part of its proposal explicitly to the EU's "preparedness" for Brexit. However, it was not clear how the UK was seeking to amend this requirement, and what level of support it enjoyed among the other Member States.

2.4 The Committee considered these outstanding areas of concern at its meeting on 21 February 2018, and decided to retain the RRM package under scrutiny in anticipation of further information from the Minister about developments in the negotiations and the potential repercussions for the UK-headquartered financial services firms of becoming facing additional costs and barriers to trade under the IPU requirement.

2.5 By letter of 28 February 2018, the Economic Secretary informed us of progress in the negotiations (see "Background" below for more detail), which we can summarise as follows:

- The Bulgarian Presidency has proposed that EU Finance Ministers should formally endorse a general approach, containing a compromise legal text on all outstanding elements[8] of the RRM package, at the meeting of the ECOFIN Council on 13 March 2018;
- The Government had secured amendments to various elements of the legal text—including on the IPU requirement for non-EU banks, moratorium powers in the event of bank failure, and the use of prudential tools for macro-economic objectives—which meant it was likely to find itself able to support this general approach;
- With respect to the IPU requirement, which will affect certain large UK banks after Brexit, the Minister notes that the Government secured a transition period "to reduce uncertainty and complexity for firms who already must manage challenges with post-Brexit restructuring"; and
- The final text of the general approach is still subject to negotiations at official level, in particular with respect to the legal requirements for the level of "bail-inable" capital that banks should have to avoid the need for a taxpayer bail-out if they are at risk of collapse (MREL), and the incorporation of a new international standard in this area (TLAC) into EU law.

2.6 In his letter, the Minister asked the Committee for a scrutiny waiver to enable the UK to vote in favour of the legal text at the ECOFIN meeting if all the Government's outstanding concerns are addressed in the final text of the General Approach.

2.7 The European Parliament's Economic and Monetary Affairs Committee is due to vote on the RRM proposals in May, which would enable trilogue negotiations between the Council and MEPs to start before the summer recess. It is not yet clear when the proposals

8 Two elements of the RRM package, relating to bank creditor hierarchy and a new accounting standard to calculate bank losses, were fast-tracked and have already been adopted. See our Report of 21 February 2018 for more information.

could be formally adopted, and consequently when they might take effect. As a result, we cannot yet be certain whether the changes to the prudential framework would apply directly in the UK (which would be the case if they become applicable during the post-Brexit transitional period, during which EU law would continue to apply). Conversely, it is also not clear when the IPU requirement would begin applying to banks and investment firms based in the UK as they would not be considered 'third country' institutions for the duration of the transition.

2.8 **Given the importance of speedy incorporation of new international standards into the EU's prudential legislation, and in view of the Government's explanation that most of its concerns about the legal text of the RRM package have been addressed, we are granting the Minister a scrutiny waiver ahead of the proposed agreement of a general approach at the March ECOFIN Council. However, we do so reluctantly, given that we have had little time to scrutinise the implications of the developments described by the Minister in his letter, and not all of the outstanding issues the Government has identified as priorities for the UK have not been entirely resolved (as evidenced by the fact discussions 'continue at a pace').**

2.9 **Therefore, the scrutiny reserve will continue to apply after the March ECOFIN Council, and as a condition of the scrutiny waiver we ask the Minister to write to us no later than 23 March with information on the outcome of that meeting.**

2.10 **We also note the Minister's reference to the need for a "long transition period" with respect to the new IPU requirement for large non-EU banks, which he says was necessary to "reduce uncertainty and complexity for firms who already must manage challenges with post-Brexit restructuring". In light of this, we also ask him to clarify:**

- **How many UK-based firms will be 'caught' by the IPU requirement as redrafted by the Council, and how many already have an established holding company in another EU Member State;**
- **Which "challenges" the Government accepts have arisen as a result of the Article 50 notice for the banking sector that necessitate restructuring; and**
- **How the Government's proposals for a post-Brexit financial services agreement with the EU, would mitigate "uncertainty and complexity", or the likelihood of relocation of banking and investment services activity away from the UK.**

2.11 **More generally, we note that any improvements to the legal texts of the RRM package secured by the Government prior to the ECOFIN Council will also need to have the support of the European Parliament in the next stage of the legislative process. Given the inter-institutional negotiations are unlikely to begin before May, we are concerned that any delays in the process could push back formal adoption of the RRM package until after the UK loses its vote within the Council next year. The Committee expects to be kept informed of the likely timetable for next steps, and will keep a close eye on the extent to which the Government is able to protect any concessions won at this stage as the UK's formal withdrawal from the EU approaches.**

2.12 **Given that substantial questions remain outstanding about the implications of the proposals for the UK banking industry and about the wider impact of Brexit on flows of financial services between the UK and the EU, we draw these developments to the attention of the Treasury Committee.**

Full details of the documents

(a) Proposed Directive on loss-absorbing and recapitalisation capacity of credit institutions and investment firms: (38300), 14777/16 + ADDs 1–2, COM(16) 852; (b) Proposed Directive as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures: (38303), 14776/16 + ADDs 1–2 COM(16) 854; (c) Proposed Regulation concerning aspects of capital requirements: (38304), 14775/16 + ADDs 1–3, COM(16) 850.

Background

2.13 Since November 2016 the EU has been discussing a package of complex technical proposals on risk reduction measures (RRM) for the banking sector. These aim to bring the EU's capital requirements for banks in line with international standards, and update its legal framework for the recovery and resolution of failing banks. The Committee set out the detail of the RRM package in some detail in Reports of November 2017 and February 2018.

2.14 The Government has been broadly supportive of the package, especially where it incorporates global prudential standards into EU law. In January, the Economic Secretary to the Treasury (John Glen) informed us that several areas of contention remained in the negotiations between the Member States in the Council, namely:

- the incorporation of the international TLAC standard of "bail-inable" capital for global systemically-important banks into EU law in case they are at risk of collapse;
- the use of moratorium powers by resolution authorities to suspend a failing bank's contractual payment obligations, especially in the "early intervention" phase when a bank might still remain viable; and
- the new requirement for large non-EU banks which have two or more subsidiaries established in the EU to create an intermediate, independently-capitalised EU-based parent undertaking (IPU) to facilitate group supervision and resolution. Given the dominant position of UK banks within the EU's financial system, the European Commission has linked this part of its proposal explicitly to the EU's "preparedness" for Brexit.

2.15 The Committee retained the proposals under scrutiny, in view of the fact that the UK may have to apply the new banking legislation during the post-Brexit transitional period and given that certain elements apply to British banks with operations within the Single Market when the UK becomes a "third country" vis-à-vis the Single Market. We also

asked the Minister to provide more information on the outstanding areas of contention, and in particular the possible implications of the IPU requirement for the UK financial services industry after Brexit.

The Minister's letter of 28 February 2018

2.16 On 1 March, the Economic Secretary to the Treasury (John Glen) wrote to us[9] to confirm the Bulgarian Presidency was seeking to obtain a general approach at the meeting of the ECOFIN Council on 13 March. He added that, from the Government's perspective, "there is a pathway to reaching a compromise on the outstanding issues that meets our negotiating objectives", namely that:

- the package is consistent with international standards;
- the rules do not disadvantage UK based banks following or during negotiations to withdraw from the EU; and
- supervisors and resolution authorities have necessary powers and flexibility above internationally agreed standards to pre-empt and react to financial stability risks.

2.17 The Minister notes that, as of early March, negotiations at official level "continue at a pace", with the following developments having taken place since his predecessor's letter of 23 January:[10]

Pillar 2 requirements

2.18 Under so-called "Pillar 2" requirements, Member State regulators have the ability to impose additional prudential requirements beyond the statutory minimum (the Pillar 1 requirements). The European Commission had proposed to reduce national flexibility where Pillar 2 were used to achieve macro-economic rather than firm-specific risk management objectives, but the Member States wanted to retain a measure of flexibility. As a result:

- The Minister expects compromise where the loss of Pillar 2 tools for macro-prudential purposes "are appropriately compensated for", having proposed amendments "which will ensure revisions to the macro-prudential toolkit will not materially impair the Financial Policy Committee's ability to promote and enhance UK financial stability";
- In particular, the revised legal text would give the UK's Prudential Regulation Authority (PRA) the legal certainty to apply certain 'non-capital' tools across the market at once, such as loan-to-value (LTV) limits for banks (especially in relation to mortgages), as well as tougher capital buffers to ring fenced banks in line with the recommendation of the Independent Commission on Banking.

9 Letter from John Glen to Sir William Cash (28 February 2018).
10 Letter from John Glen to Sir William Cash (23 January 2018).

Intermediate parent undertakings for non-EU banks

2.19 The Minister says the Government has made "significant progress" with respect to the proposals to require certain large non-EU banks to establish an intermediate parent undertaking (IPU) within the EU (which obviously could affect UK firms after Brexit).

2.20 The UK's concerns related primarily to the "disproportionate impact of these new requirements and the approach taken by the Commission", which did not conduct an impact assessment or "appropriate discussions" with Member States ahead of their publication. In particular, the Government is of the view that the European Commission's initial proposal would have conflicted with third country legal frameworks for banks that require a separation of retail activities from wholesale banking (such as ring fencing in the UK or the Volcker Rule in the US) "and could be impossible, or at least incredibly costly, for firms to meet".

2.21 However, in light of changes to the legal text, the Minister believe the UK will be able to support the outcome of negotiations "in the interest of a balanced overall compromise that delivers appropriate levels of international harmonisation and supervisory flexibility". These changes include:

- the new text prepared by the Presidency increases the thresholds of application, from €30 billion to €40 billion of assets held in EU subsidiaries and branches; does not extend the new requirements to branches;[11] and removes the application to global systemically important institutions (G-SIIs) that fall under that threshold to establish an IPU in the EU. Moreover, it "allows for more efficient structures in the EU (particularly dual hold-cos to reflect foreign regulatory requirements including our own ring-fencing regime post Brexit)", which is where the "greatest costs to industry" would have been felt;

- the compromise text introduces a four-year transition period after the Directive takes effect to reduce uncertainty and complexity for firms who already must "manage challenges with post-Brexit restructuring". In addition, there is a review clause which will require the Commission and the European Banking Authority to assess the implications of the new IPU requirement; and

- overall, however, "the specific impacts on UK based firms […] is very difficult to address at this stage, as the application depends entirely on how those firms will be structuring themselves post Brexit". The Minister says the "primary focus has been on ensuring proportionality, and delaying application to prevent further complexity for firms".

Remuneration requirements

2.22 The Commission had proposed to lift some of the EU's rules on remuneration for bankers, relating to deferral of bonuses and pay-out in instruments, for companies with less than €5 billion (£4.5 billion) in assets or for staff in any firm with relatively low bonus payments. Individual Member States would retain the flexibility to impose the full restrictions if they so choose. The Minister now explains:

11 Branches vs subs.

- in the new text, the UK has managed to maintain proportionality with regards to remuneration in negotiations "by largely retaining the status quo". This means that the prudential approach can be tailored to ensure its effectiveness in respective markets, which will allow the Prudential Regulation Authority to "continue to dis-apply the bonus cap for smaller firms, preventing the creation of a significant administrative burden".[12]

Net Stable Funding Ratio, Leverage Ratio and Market Risk

2.23 With respect to the proposals to update the Capital Requirements Directive and Regulation, the Minister explains that, as the Committee had been previously informed, the Member States are set to endorse bringing EU law in line with new international standards:

- the Government has "largely achieved" its objective on international harmonization, with the current compromise text "generally seeing full Basel implementation (following acceptable transition periods) including the introduction of the Net Stable Funding Ratio (NSFR)";

- regarding the Leverage Ratio, there is "broad consensus" to introduce the international standard of 3%, with an appropriate transition period and the inclusion of Basel's recently agreed. additional buffer for global systemically important banks (G-SIBs); and, finally

- on Market Risk, the Minister "expect[s] an outcome which will commit the EU to full implementation of Basel's revised market risk framework" (as he had indicated previously).

Bank recovery and resolution

2.24 The RRM package also amends the EU's Bank Recovery & Resolution Directive (BRRD).

2.25 The underlying objective of the 2014 Bank Recovery and Resolution Directive is that the cost of bank failures should be borne primarily by shareholders and creditors (a "bail-in"), not taxpayers (a "bail-out"). The Directive therefore established the "Minimum Requirement for [own funds and] Eligible Liabilities" (MREL). This requires national resolution authorities to fix a firm-specific level of liabilities that can be readily "bailed-in", such as deposits, to absorb losses based on their firm-specific risk profile. The RRM package seeks to incorporate into EU law a new international bail-in standard for the largest banks (the TLAC standard).[13]

12 The so-called "bonus cap", which limits bankers' bonuses to 200 per cent of their fixed salary, would not have been affected by this new exemption.

13 The Financial Stability Board (FSB) developed the international Total Loss-Absorption Capacity (TLAC). This sets an 18 per cent minimum proportion of the risk-weighted assets of global systemically-important banks ("G-SIIs") that must be readily bail-inable in the event of bank failure. As TLAC and MERL have the same regulatory objective, the Commission proposed to incorporate the TLAC standard into EU law by requiring EU-based G-SIIs to hold a statutory (Pillar 1) minimum MREL equivalent to the TLAC standard. It would also allow national resolution authorities to impose firm-specific additional (Pillar 2) MREL requirements on G-SIIs. The existing MREL requirements for other (smaller) banks would remain substantially the same.

2.26 The Minister notes that:

- "Several challenges remain" on overall MREL calibration, with negotiations still on-going. He adds that the UK and like-minded Member States continue to advocate full implementation of FSB's TLAC standard for globally systemic banks (G-SIBs) and flexibility for the resolution authority to set an appropriate amount and quality of MREL to support the preferred resolution strategy;

- however, it appears Member States remain divided between those that want to faithfully implement the FSB's TLAC standard and maintain the current MREL standard, and those that want to weaken the standard. The Minister says there has been some progress "in the right direction", as the proposed cap on the amount of 'hard' MREL has been removed to allow resolution authorities to increase the amount of MREL to ensure a bank can command sufficient market confidence to continue to meet the conditions for authorisation following a resolution, and the new concept of 'soft' MREL guidance has been removed;

- however, in the current text, part of a firm's MREL requirement may only be met with subordinated liabilities up to 8% of total liabilities and own funds. This restriction—the Minister explains—is "inconsistent with both the TLAC standard which envisages the full subordination of TLAC, and with the current MREL standard which does not restrict the subordination of MREL". In the Government's view, the ability to subordinate MREL resources is "important to ensure MREL ranks below liabilities related to day-to-day operations and critical economic functions", and can therefore absorb losses and recapitalise the continuing business;

- as the Bank of England's MREL policy requires full subordination of MREL for firms with a bail-in strategy, the Government would support a compromise text for the RRM package which gives "sufficient flexibility for the resolution authority to set an appropriate amount of MREL and require the subordination of MREL as necessary to implement the resolution strategy". Accordingly, the Treasury is seeking to ensure there is not a material cap on the level of MREL subordination the resolution authority can require;[14]

- in addition, there is an outstanding issue with respect to the timing of the reforms. The current text proposes a delay in the deadline for compliance with full MREL requirements until 2024, whereas the Bank of England's MREL policy statement requires banks to meet full MREL requirements in 2022. The Government is therefore seeking to ensure resolution authorities can require full MREL requirements to be met earlier than 2024 if they so wish. There is, in any event, "broad support" for a 'grandfathering' provision which will maintain the legal validity of existing MREL issued by banks before a certain date.

14 The Minister also notes that the level of MREL subordination is separate to the issue of the UK's approach to structural subordination, which was covered in previous correspondence on the Bank Creditor Hierarchy Directive and which the Committee referred to in its recent Banking Reform Report.

Contractual recognition of bail-in

2.27 The requirement for MREL to include contractual recognition of bail-in—i.e. that creditors could face a haircut in the event of a resolution—has been removed, as the Member States considered it "unnecessary and is inconsistent with the broad statutory bail-in power which already exists".

2.28 Similarly, the Minister explains there is "broad consensus" to amend requirements for the contractual recognition of bail-in in contracts governed by non-EU law, "which addresses industry concerns there may be circumstances where compliance is impracticable". The UK is seeking technical amendments to this aspect of the legislation "to ensure operability".

Moratorium powers

2.29 Regarding the introduction of new moratorium powers, which freeze the flow of payment and delivery obligations for a bank, the Minister says the UK has "made progress to reduce economic and financial stability risks […] by limiting the powers":

- the current text limits a new moratorium power to a maximum of 2 business for use by the resolution authority after the failing or likely to fail condition has been met. The resolution authority has the discretion to include deposits in a moratorium;

- in response to the Committee's questions with respect to the new moratorium powers, the Minister notes that some "Member States, and industry, have raised economic and financial stability risks alongside the UK", while others however "have argued for broader moratorium powers to give the authorities more time ahead of a resolution, a position which has been supported by the Single Resolution Board". Overall, he says, the Government would "support an outcome which limits economic and financial stability risks, including the risks to international progress to address the risk of cross-border termination of contracts in resolution, and gives discretion to exempt deposits from a moratorium".

Previous Committee Reports

Twenty-fifth Report HC 71–xxiii (2016–17), chapter 6 (11 January 2017); Thirty-second Report HC 71–xxx (2016–17), chapter 6 (22 February 2017); First Report HC 301–i (2017–19), chapter 19 (13 November 2017); and Fifteenth Report HC 301–xv (2017–19), chapter 1 (27 February 2018).

3 EU Fisheries Control

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Environment, Food and Rural Affairs Committee
Document details	(a) Report from the Commission on the evaluation of Regulation (EC) 1224/2009 establishing a Union control system for ensuring compliance with the rules of the Common Fisheries Policy; (b) European Court of Auditors Special Report No 08/2017 "EU fisheries controls: more efforts needed"
Legal base	—
Department	Environment, Food and Rural Affairs
Document Numbers	(a) (38678), 8375/17 + ADD 1, COM(17) 192; (b) (38830),—

Summary and Committee's conclusions

3.1 Successful fisheries management relies on an effective system of control and enforcement, trusted and respected by all involved. Fisheries control and enforcement aims to ensure the correct application of regulations regarding fisheries and to impose compliance with these rules where necessary.

3.2 The Commission's Report and the Court of Auditors Report found that the current EU and national systems were not entirely fit for purpose. Possible changes to the approach—which would apply to UK vessels fishing in EU waters post-Brexit—are being considered.

3.3 When we first considered these documents, at our meeting of 29 November 2017, we raised a number of issues with the Government, including:

- whether or not the Government intended to engage in discussion on revision of the EU's rules;
- any benefits from the coordination and cooperation work performed by the European Fisheries Control Agency (EFCA) and whether the Government might seek to safeguard any such benefits post-Brexit; and
- a number of control and enforcement weaknesses identified in Scotland, including insufficiently dissuasive sanctions, lack of transparency in the allocation of quota and inconsistency in the recorded fishing capacity of vessels.

3.4 The Minister for Agriculture, Fisheries and Food (George Eustice) has responded, reassuring us that the UK continues to be actively engaged with the ongoing discussions on these matters. Assessing the benefits of the EFCA is an important part of the Department's current work. At present, says the Minister, it seems likely that, post-Brexit, access to or replication of planning and coordination practices would continue to be beneficial. Regarding the weaknesses identified in Scotland, the Minister indicates that resolution to

a number of the issues identified will be straightforward, not least as several matters have been misidentified as problematic, such as the use of different metrics to record fishing capacity.

3.5 **We are reassured that the UK is continuing to engage in EU policy discussions on control and enforcement. We note, too, that the Government is still assessing the degree to which the UK should be involved in EU fishing control planning and coordination practices post-Brexit. This is an area which we will monitor with interest as negotiations progress.**

3.6 **We clear the document from scrutiny and have no outstanding queries. We draw this chapter to the attention of the Environment, Food and Rural Affairs Committee.**

Full details of the documents

(a) Report from the Commission on the evaluation of Regulation (EC) 1224/2009 establishing a Union control system for ensuring compliance with the rules of the Common Fisheries Policy: (38678), 8375/17 + ADD 1, COM(17) 192; (b) European Court of Auditors Special Report No 08/2017 "EU fisheries controls: more efforts needed": (38830),—.

Background

3.7 Full details on the background to, and content of, these documents were set out in our Report of 29 November 2017.[15]

3.8 The Commission's Report (document (a)) assessed the implementation of the current EU system for fisheries control and enforcement. It found that the system was not entirely fit for purpose. In particular, there was a strong call from stakeholders to adapt the control system to the new Common Fisheries Policy, addressing in particular the landing obligation. Among the other conclusions, differential implementation across Member States was identified, hindering the level playing field among operators and therefore their trust in the system.

3.9 The European Court of Auditors (document (b)) highlighted similar concerns. Scotland was included in the audit and was the focus of a number of criticisms, including insufficiently dissuasive sanctions, lack of transparency in the allocation of quota and inconsistency in the recorded fishing capacity of vessels.

3.10 At our meeting of 29 November 2017, we observed the likelihood that the Commission would, as a minimum, propose some changes to the existing legislation. In that context, we noted that the EU's rules will continue to apply to UK vessels fishing in EU waters despite the UK's withdrawal from the European Union. Give that any future development of the EU's approach is therefore of relevance to the UK, we urged the Government to engage in discussions on potential changes to EU rules. We also asked the Minister if the Government had identified any benefits to the coordination and cooperation organised by the European Fisheries Control Agency and, if so, how the Government might seek to safeguard any such benefits post-Brexit. Finally, we asked the Minister to respond to the weaknesses identified in Scotland.

15 Third Report HC 301–iii (2017–19), chapter 7 (29 November 2017).

The Minister's letter of 9 January 2018

3.11 The Minister reassures the Committee that the UK continues to be actively engaged with the ongoing discussions on these matters. For example, in November the UK was an active contributor in the Commission's Expert Group on Fisheries Control, during which Member States were consulted on further measures to simplify and consolidate EU control and enforcement legislation. He adds:

> "Given that coordination between countries is essential to achieving effective control and enforcement of shared and adjacent waters, the UK will continue to prioritise engagement on these matters, both through this and other groups. This engagement will also ensure that UK vessels fishing in EU waters will be fully aware of any amendments to EU legislation which may affect their activities, such that they are able to act in compliance with regulatory requirements, both before and after the UK leaves the EU."

3.12 On the European Fisheries Control Agency (EFCA), the Minister observes that the EFCA has functioned as a useful central contact hub for Member States; contributing to the development of Joint Deployment Plans (JDPs) which have tackled vessels attempting to evade inspection, by coordinating multi-Member State inspection and boarding teams. Anecdotally, he says, evasive activity has significantly declined in response to both bilateral operations (between the UK and other Member States) and the EFCA-coordinated JDPs.

3.13 He goes on to explain that the EFCA also offers access to Vessel Monitoring data submitted by all Member States and administers joint deployments, including providing access to an operations room and resources at EFCA Headquarters in Vigo, as well as operation of a fisheries patrol vessel and surveillance aircraft, that may be deployed for JDPs. However, these surveillance assets have not been known to be deployed for northern Member States' JDPs, or in the North Sea.

3.14 On the benefits of EFCA and future UK engagement, the Minister says:

> "Assessing the benefits of the EFCA (and indeed other similar organisations) is an important part of Defra's current work. It will, however, be important to consider how the current benefits may be realised whilst still ensuring there is no disproportionate cost or burden to the UK. For example, the EFCA currently entails a relatively heavy administrative burden on the UK, from which the production of analysis relevant to the UK is limited.
>
> "At present, it seems likely that after the UK's departure from the EU, access to or replication of planning and coordination practices would continue to be beneficial. It may also be appropriate to consider the benefits of multi or bilateral coordination plans to best effect control and surveillance activities, where mutual benefits can be achieved."

3.15 Turning to the weaknesses identified in the Scottish administration, the Minister reassures the Committee that these matters are undergoing assessment. Indeed, he is pleased to be able to identify that resolution to a number of the issues identified will be straightforward, not least as several matters have been misidentified as problematic. For

example, Scottish officials have advised the Department that the apparent inconsistency in the recorded fishing capacity in vessels arises because of the use of different metrics, rather than an actual failure to comply.

3.16 Similarly, the Minister is advised that as Scottish Producer Organisations (SPOs) are required to submit an annual Production and Marketing Plan at the beginning of each fishing year and Marine Scotland receives and publishes PO management plans which include allocation, production and marketing information, achieving transparency in this matter should be straightforward.

3.17 Further, Marine Scotland will also be able to deliver the more timely exchange of accurate fisheries data following a new IT refresh project which is now underway.

Previous Committee Reports

Third Report HC 301–iii (2017–19), chapter 7 (29 November 2017).

4 International Civil Aviation Organization

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Transport Committee
Document details	Proposal for a Council Decision on the position to be adopted, on behalf of the European Union, in the International Civil Aviation Organization
Legal base	Article 100(2) in conjunction with Article 218(9) TFEU; QMV
Department	Transport
Document Number	(39430), 5261/18 + ADD 1, COM(2018) 19 final

Summary and Committee's conclusions

4.1 To address its concerns about lack of coordination of EU Member States' positions in the International Civil Aviation Organisation (ICAO), the Commission has proposed a Council Decision[16] which would require Member States agree a common position in advance of key decisions being taken.

4.2 A two-tier approach is proposed, whereby a Council Decision sets out the guiding principles and orientations of the Union's position on a multiannual basis, for each ICAO triennium. This would be adjusted thereafter for each ICAO Council session by Commission non-papers to be discussed in the relevant body of the Council of the EU.

4.3 In an Explanatory Memorandum submitted on 22 February 2018,[17] the Minister at the Department for Transport (Baroness Sugg) reports that, following pushback from the Member States, the Commission clarified that:

- the Council Decision will only apply to the ICAO Assembly and the ICAO Council;
- the reference to Article 191 (environment) as one of the legal bases for the proposal has been deleted; and
- the latest draft of the text limits the scope of the proposal to areas where the Union has exclusive competence.

4.4 On this basis the Government concludes that subsidiarity concerns do not arise. The Minister states that there is no immediate time pressure but that the Commission would like the approach to be agreed in time for the next ICAO General Assembly in Autumn 2019.

16 Proposal for a Council Decision on the position to be adopted, on behalf of the European Union, in the International Civil Aviation Organization 5261/18 + ADD 1, COM(2018) 19 final.

17 Explanatory Memorandum from the Minister, DfT (22 February 2018).

4.5 **We note that, in response to Member State concerns, the Commission has clarified that the proposed Decision would apply only to areas in which the Commission has exclusive competence. On that basis we are content to clear the document from scrutiny.**

4.6 **Regarding EU exit, we note that the UK will remain a signatory of the Chicago Convention and member of the International Civil Aviation Organisation ICAO), and will be able to achieve some degree of coordination with EU and other European countries through a wider European Coordination group.**

4.7 **In terms of the implications of Brexit for trade in air transport services, being a member of ICAO does not provide the UK with any traffic rights on which commercial carriers can rely. The UK remaining a signatory of the related IASTA[18] agreement will guarantee *transit rights* (overflying) for carriers in those countries that are also signatories, but traffic rights are reliant on bilateral air service agreements. The intra-EU air transport market is currently the most integrated aviation market in the world that is not a single state.**

4.8 **In terms of the implications of Brexit for trade in aerospace manufacturing, ICAO establishes minimum international standards, which states reference when developing their legally-enforceable civil aviation regulations. The air safety rules of the European Aviation Safety Agency (EASA) and the US Federal Aviation Authority (FAA) are more extensive than ICAO standards and go further in most areas. Membership of ICAO and compliance with its standards would therefore not significantly mitigate the challenges that would arise as a result of the UK leaving EASA, as previously described by this Committee.[19]**

4.9 **We draw this report to the attention of the Transport Select Committee.**

Full details of the documents

Proposal for a Council Decision on the position to be adopted, on behalf of the European Union, in the International Civil Aviation Organization: (39430), 5261/18 + ADD 1, COM(2018) 19 final.

Background

The International Civil Aviation Organisation

4.10 The International Civil Aviation Organisation (ICAO) is a United Nations (UN) body established by the Convention on International Civil Aviation (the "Chicago Convention") in 1947, which works to agree international standards and recommended practices and policies (SARPs) for global civil aviation, which states reference when developing their legally-enforceable civil aviation regulations at national level. ICAO standards form the basis for much EU aviation legislation and some standards, such as environmental standards for aircraft, are taken into EU law without amendment. All EU Member States are signatories ('contracting parties') to the Chicago Convention. The Commission therefore engages in the work of ICAO.

18 International air services transit agreement (7 December 1944).

19 HC 301–xiv (2017–18) chapter 14 (21 February 2018).

Decision-making

4.11 The ICAO work programme is set by contracting parties every three years at the ICAO Assembly (the last being in 2016 and the next due in 2019). During the Assembly the organisation's priorities for the coming three year period are set and work to deliver these priorities is led by ICAO's permanent governing Council.

4.12 The ICAO Council is composed of 36 representatives of the contracting parties, and meets in three 'sessions' per year to take forward this work, supported by various technical committees. The UK has been a member of this Council since its inception, as a 'state of chief importance in air transport'. Other EU Member States who are currently represented on the Council include France, Germany, Italy, Spain, Ireland and Sweden.

4.13 The EU itself only holds observer status, with no formal rights in the decision-making process, however the European Commission maintains a permanent office in Montreal, where ICAO has its headquarters, and acts as a secretariat for coordination processes among the EU members of the ICAO Council. It is also an ad-hoc observer in many ICAO bodies (Assembly and other technical bodies).

Exiting the EU

4.14 The UK is a signatory of the Chicago Convention and as such is a member of ICAO and this will not be affected by the UK's exit from the EU. However, membership of ICAO does not in itself provide significant market access, or traffic rights, for commercial airlines. A separate multilateral agreement—the International Air Services Transit Agreement (IASTA)[20]—provides transit rights, including overflight on an unrestricted basis, although some countries (e.g. Russia) have not signed up to the agreement and charge significant fees to use their airspace. However, the remaining "seven freedoms of the air" on which commercial carriers rely are delivered through bilateral agreements. The EU Single Market in aviation goes further than other bilateral agreements, in that it allows for community carriers to transport passengers or cargo within a foreign country without continuing service to or from one's own country.

4.15 ICAO also develops international standards and recommended practices for global civil aviation which States reference when developing their legally-enforceable civil aviation regulations. These effectively establish minimum standards that people should apply worldwide. For example, EASA rules are more extensive than ICAO standards and go further in most areas. Membership of ICAO would not therefore resolve the challenges that would arise as a result of the UK leaving EASA, outlined in a previous report[21] by this Committee.

The proposal[22]

4.16 The Commission's proposal is intended to improve the current practice for co-ordinating EU positions on topics of EU exclusive competence to be discussed at the ICAO Council. The Commission currently has difficulty in presenting proposed EU positions

20 International air services transit agreement (7 December 1944).

21 HC 301–xiv (2017–18) chapter 14 (21 February 2018).

22 Proposal for a Council Decision on the position to be adopted, on behalf of the European Union, in the International Civil Aviation 5261/18 + ADD 1,COM(18) 19.

for ICAO in good time because the ICAO papers often arrive at short notice before the relevant ICAO Council sessions, and the timeframe between the availability of documents and the beginning of the ICAO Council session does not allow for the preparation and the adoption of a Council Decision.

4.17 The proposal sets out a two-tier approach which would bind all EU Member States to a set of high-level principles and negotiating objectives for each three-year work programme of ICAO. The means to do this would be an EU Council Decision which would be adopted in response to the work programme agreed at each ICAO Assembly. This would then be supplemented by a series of more specific working papers prepared for each session of the Council.

4.18 The latest draft of the text limits the scope of this proposal to areas where the Union already has exclusive competence.

The Minister's Explanatory Memorandum of 22 February 2018[23]

4.19 The Parliamentary Under Secretary of State at the Department for Transport (Baroness Sugg) states that the Government notes the problem that the Commission is seeking to address in its proposal, but had some concerns with the initial proposal about how the mechanism would work in practice, and the practical effect of the mechanism.

4.20 The Minister reports that the proposal has been progressively narrowed in scope during Working Group discussions:

- there has been clarification from the Commission that the Council Decision will only apply to the ICAO Assembly and the ICAO Council, as these are the only two bodies which adopt decisions with legal effect;
- working group discussions have led to an agreement to delete the reference to Article 191 (environment) as one of the legal bases for the proposal; and
- the latest draft of the text limits the scope of the proposal to areas where the Union has exclusive competence.

4.21 The Minister states that the Government has no concerns about subsidiarity or competence, and that the Government is working with like-minded Member States to seek a pragmatic solution, as long as the scope remains limited to areas of current Union exclusive competence and to the ICAO Assembly and Council.

4.22 However, the Minister adds that a concern was raised in the last Working Group regarding the recent ECJ judgement on OTIF[24] that even matters of coordination of positions for adoption of legislation in international fora would constitute a transfer of competence. Member States have indicated they will need to consider the implications of this judgement on this proposal as more information becomes available before moving forward. The Minister does not provide any explanation of whether this development in any way modifies the Government's position.

23 Explanatory Memorandum from the Minister, DfT, (22 February 2018).

24 Case C600/14 Germany v Council (OTIF).

4.23 The timetable for the proposal to be put to the Council of Ministers is not yet known, however there are no immediate time pressures and we do not expect that the proposal will be put to the Council in the near future. The Commission would like the approach to be agreed in time for the next ICAO General Assembly in Autumn 2019.

Brexit implications

4.24 The Minister states that when the UK leaves the EU, it would no longer be bound by any coordinated position that the EU adopted for ICAO negotiations. However, the Minister notes that the UK would remain part of the wider "European Coordination group" in ICAO, under which 44 European members of ICAO aim to present a "common or united front". The Minister states that this will remain a useful mechanism to amplify the UK's voice in negotiations. The UK would also remain a 'state of chief importance in air transport'.

Previous Committee Reports

None.

5 Tax avoidance and evasion: disclosure by intermediaries

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Treasury and the Public Accounts Committees
Document details	Proposal for a Council Directive as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements
Legal base	Article 115 TFEU; Consultation procedure; Unanimity
Department	Treasury
Document Number	(38863), 10582/17 + ADDs 1–3, COM(17) 335

Summary and Committee's conclusions

5.1 In response to the information on tax avoidance and evasion contained in the "Panama Papers", the European Commission in June 2017 tabled a legislative proposal to amend the EU's Directive on Administrative Cooperation (DAC)[25] for consideration by the Member States.[26] The aim of the proposal is to deter aggressive tax avoidance schemes, and to give the authorities access to the right information at an early stage to "make timely and informed decisions on how to protect their tax revenues".

5.2 The current DAC Directive already provides for mandatory automatic exchange of information between EU countries in respect of five categories of income and capital.[27] Information held by each Member State's national tax authorities are automatically shared confidentially between the EU Member States via the secure Common Communications Network (CCN).

5.3 The new amendment would add a new category of information for automatic exchange, by requiring intermediaries, like tax advisors and consultants, to report potentially aggressive cross-border tax planning arrangements for an EU-based client to their national tax authority. Where the intermediary is based outside the EU and thus outside of the reach of the Directive, the disclosure obligation would shift to the taxpayer itself.

5.4 The Committee first considered the proposal in November 2017, and retained it under scrutiny to clarify the Government's position on the substance of the new Directive.[28] We noted that the new legislation would likely have to be implemented in the UK under the terms of the post-Brexit transitional period, during which all EU law will continue to apply as it does at present.

25 Directive 2011/16/EU.

26 As a legislative proposal concerning taxation, the Directive must be agreed unanimously by all Member States and the European Parliament only has a consultative role.

27 The five categories are income from employment, director's fees, certain life insurance products, pensions, and ownership of and income from immovable property.

28 See our Report of 13 November 2017.

5.5 The Committee also sought further information on the Treasury's assessment of the value to the UK concerning exchange of information under the DAC Directive, to ascertain whether the Government would seek continued access to information exchanged under the Directive after the post-Brexit transitional period (during which the UK would be considered a 'Member State' for the purposes of the Directive, and therefore retain its rights and obligations with respect to exchange of information with other EU countries on matters of direct taxation).

5.6 We received an update from the Financial Secretary to the Treasury (Mel Stride) on 23 February 2018.[29] He explained that the Council had reached an agreement on the legal text, making a number of changes compared to the original Commission proposal:

- The list of 'hallmarks' which will be used to identify aggressive tax planning arrangements will be subject to amendment only by the unanimous consent of the Member States, and not by a Commission Delegated Act;
- With the Government's support, substantive changes to the reporting requirement have been made by introducing a "bulk reporting system" whereby—after the initial disclosure of a tax arrangement within the scope of the Directive—the intermediary must periodically report again with updated information; and
- The finalised Directive takes a "top-down approach", meaning the primary reporting obligation falls on the promotor of a tax planning scheme rather than the "numerous clients at the bottom of the chain". This, the Minister says, will "help address concerns about capturing large numbers of unwanted disclosures".

5.7 The Ministers informs us that EU Finance Ministers are due to vote on the agreement reached at the meeting of the ECOFIN Council on 13 March.

5.8 With respect to the Government's post-Brexit access to information on UK taxpayers held by EU countries via the Common Communications Network (CCN), the Minister explained that third country access to information shared via this network is "usually reserved for EFTA members", although others may have "limited access depending on the requirement", which is agreed on a case-by-case basis. However, despite our request, the Minister did not flesh out the Government's proposals for post-Brexit cooperation with the EU on tax avoidance and evasion, or share any details about the possible substance of a new UK-EU agreement that would ensure HMRC's continued access to information on UK taxpayers held by tax authorities in the EU-27.[30]

29 Letter from Mel Stride to Sir William Cash (22 February 2018).

30 We have raised similar concerns about the future of administrative cooperation and exchange of information between HMRC and its European counterparts in the context of indirect taxes such as excise and VAT (given the ambition to obviate the need for VAT import controls at the Irish border), cash controls, and anti-money laundering efforts. The UK will exit the legal frameworks underpinning the exchange of data on all these topics in March 2019, or at the end of the transitional period.

5.9 **In view of the upcoming Council vote on the new Directive, the Minister asked the Committee to clear the document from scrutiny. As the Government has signalled its approval for the outcome of the Council's deliberations, we are content to do so. However, we ask the Minister to share:**

- **his Department's assessment of the added benefit that the new disclosure requirements will yield in terms of reducing tax evasion and aggressive tax avoidance; and**
- **the Government's view on the value of continued UK participation in the wider system of exchange of information created by the DAC Directive after the post-Brexit transition period ends, and how it will seek to secure the desired level of cooperation when it becomes a third country for the purposes of EU law.**

5.10 **We draw these developments to the attention of the Treasury Committee and the Public Accounts Committee.**

Full details of the documents

Proposal for a Council Directive as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements: (38863), 10582/17 + ADDs 1–3, COM(17) 335.

Background

5.11 Tackling tax evasion and avoidance are high on the EU's political agenda. The 2016 leak of the "Panama Papers"—a collection of documents relating to offshore entities often used for tax evasion—centred the EU's attention on the role played by intermediaries such as law firms in facilitating the use of aggressive tax planning structures.

5.12 In response to the revelations, the European Commission in June 2017 tabled a legislative proposal to amend the Directive on Administrative Cooperation (DAC) which would require intermediaries like tax advisors and consultants to report potentially aggressive cross-border tax planning arrangements with which they are involved to their national tax authority. This disclosure obligation would be triggered if a tax planning structure:

- involved at least one EU Member State as well as another country (whether within the EU or outside of it); and
- had one or more of the "hallmarks" of facilitating tax avoidance or evasion. Any disclosures made would be shared by the receiving tax authority with all other Member States through the European Commission's common communications network (CCN) for taxation and customs.

5.13 The overall aim of the proposal is to give tax authorities access to the right information at an early stage, allowing them to "make timely and informed decisions on how to protect their tax revenues" and prevent aggressive tax planning arrangements from being implemented. The Commission also expected the disclosure requirement to have a deterrent effect, dissuading intermediaries from designing and marketing such schemes.

In the medium-term, it says, this will "increase taxes collected both in and outside the EU". As a legislative proposal concerning taxation, the Directive must be agreed unanimously by all Member States and the European Parliament only has a consultative role.

5.14 The Financial Secretary to the Treasury (Mel Stride) submitted an Explanatory Memorandum on the proposal in July 2017.[31] The Minister was cautiously positive about the objective and contents of the new Directive, saying it "may help to address these concerns" about the purpose of certain cross-border tax arrangements, and that "there may be value in tax authorities sharing information". He also noted the Directive would need to be refined further to limit the potential for multiple disclosures relating to the same arrangement, and to ensure the list of hallmarks which would trigger the disclosure obligation are "focussed and clear". The Government also wanted the 'hallmarks' to reflect a new OECD standard on cross-border tax arrangements, which is still in development.

5.15 The Commission's aim was for the new Directive to be implemented in all Member States by early 2019. The Member States have postponed it until 1 January 2020. This means that, if the post-Brexit transitional arrangement is agreed, the UK would be under a legal obligation to implement its provisions even after its formal withdrawal from the EU.

5.16 The Committee first considered the proposal in November 2017, noting that the Government appeared to be cautiously optimistic about the potential added value of the new reporting requirements for intermediaries.[32] We retained it under scrutiny to obtain further information from the Minister about both the substance of the Directive, and the implications of Brexit for UK cooperation with EU Member States on tackling tax avoidance and evasion.

5.17 The Financial Secretary informed the Committee in February 2018 that the Member States had reached agreement on the text of the new Directive.[33] They made a number of substantive changes to the legal text, including by refining the scope of the reporting requirement to avoid duplicate or unwanted disclosures and limiting the powers of the European Commission to change the list of "hallmarks" of aggressive tax planning arrangements at a later stage.

5.18 The Government intends to support the amended legal text when it goes to Council for a formal vote on 13 March 2018, and requested the Committee clear it from scrutiny.[34] We have done so, but press the Minister again for substantive detail about the Government's view of the implications of Brexit for exchange of information with the EU on matters of direct taxation and cross-border cooperation to address avoidance and evasion.

Previous Committee Reports

First Report HC 301–i (2017–19), chapter 21 (13 November 2017).

31 Explanatory Memorandum submitted by HM Treasury (6 July 2017).
32 See our Report of 13 November 2017.
33 Letter from Mel Stride to Sir William Cash (22 February 2018).
34 The European Parliament has adopted a non-binding opinion on the proposal, clearing the way for formal adoption of the Directive by the Council.

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

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

Summary and Committee's conclusions

6.1 This Regulation sets out changes to the structure and governance of the European Police College ("CEPOL"), an EU Agency based (since September 2014) in Budapest which provides training on the European dimension of policing. The UK has participated in CEPOL since its inception in 2000.[35] The Regulation repeals and replaces a 2005 Council Decision on which CEPOL was previously based. The UK did not opt into the Regulation when it was proposed in 2014 as it considered that it would extend CEPOL's mandate and "limit the flexibility for Member States to decide how police and other border and law enforcement training should be delivered".[36] The Government confirmed that the UK would nonetheless continue to be bound by the 2005 CEPOL Decision, adding:

> "The UK would be working with CEPOL according to the old Council Decision, while other Member States work according to the new Regulation.
>
> "Practically speaking, this may not be impossible, especially if the new Regulation does not significantly alter the focus of CEPOL. However, if the Commission considers that UK non-participation makes CEPOL inoperable, it could seek to have us ejected from CEPOL (from the 2005 Decision) through the provisions set out in Article 4a(2) of Protocol 21 of the JHA opt-in Treaty.
>
> "Clearly, this depends on a number of questions that are currently hypothetical: whether we opt in post-adoption; and whether, if we do not,

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

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

> the Commission seeks to trigger the ejection mechanism. However, should we reach that stage, it would be important to note that the Protocol sets a very high threshold for ejection. It requires the measure to be 'inoperable'—not merely inconvenient or difficult to operate. And it must be inoperable for the other Member States, not just for the UK. These are tough tests for the Commission to meet. But we are a long way from that point at the moment."[37]

6.2 Our predecessors noted that there was some uncertainty as to the political and practical feasibility of remaining part of CEPOL on the basis of the 2005 Council Decision and made clear that they expected the Government to provide "a detailed analysis of the options available to the UK to continue to participate in, or otherwise cooperate with CEPOL, once the draft Regulation has been adopted and the question of a possible post-adoption opt-in arises."[38]

6.3 The Regulation was formally adopted in November 2015.[39] The changes to CEPOL's mandate and governance took effect on 1 July 2016. The Minister for Policing and the Fire Service (Mr Nick Hurd) informed us in July 2017 that the Government was "not minded" to opt into the Regulation post-adoption. Although the College of Policing for England and Wales was continuing to engage with CEPOL, the Minister anticipated that the Commission might seek to initiate the procedure set out in Article 4a of the UK's Title V (justice and home affairs) opt-in Protocol to eject the UK from CEPOL. He added:

> "If the Commission does start ejection proceedings, I do not intend to challenge the inoperability decision in this case—although we would want to ensure the correct process is followed. The Government accepts that the differing management board roles, responsibilities and voting rights in this Regulation compared to the 2005 Decision could make CEPOL 'inoperable for other Member States or the Union'."[40]

6.4 In our earlier Reports (listed at the end of this chapter), we said it was difficult to see why the Commission had not already taken steps to eject the UK from CEPOL if that was its intention, given that the Regulation had been in force since July 2016. Nor was it clear that the Commission had any incentive to act, given that the UK would be leaving the EU in March 2019. Unless there was a change in the Commission's position, we noted that the CEPOL Regulation would become part of retained EU law under the European Union (Withdrawal) Bill, even though the Government has no wish to participate in CEPOL. In these (far from hypothetical) circumstances, we said that the Minister's unwillingness to indicate whether it would be appropriate to use the correcting powers conferred on Ministers by clause 7 of the European Union (Withdrawal) Bill was disappointing. So, too, was his reluctance to confirm (as we requested) that UK policing supported the Government's decision not to participate in the CEPOL Regulation.

37 See the letter dated 12 March 2015 from the then Minister for Policing (Mike Penning) to the Chair of the European Scrutiny Committee.
38 See the Committee's Thirty-seventh Report HC 219–xxxvi (2014–15), chapter 3 (18 March 2015).
39 See Regulation (EU) 2015/2219.
40 See the Minister's letter of 20 July 2017 to the Chair of the European Scrutiny Committee.

6.5 We noted that, when the Minister wrote to us in December 2017, he indicated that the Government was "content not to participate in CEPOL" and had "not therefore been exercising its rights under the 2005 Decision to participate in CEPOL".[41] By contrast, he told us in earlier correspondence that:

> "The College of Policing currently acts as the CEPOL co-ordinator for the UK and is *obliged* to participate in CEPOL's Governing Board" (our emphasis)."

He also said that the College of Policing was "still engaging with CEPOL".[42]

6.6 We asked him to clarify the UK's current level of engagement with CEPOL. We also reiterated our request for some indication of the Government's plans (if any) for future cooperation with CEPOL once the UK leaves the EU and has third country status, adding:

> "We do not consider the Minister's general observation that any future agreement between the EU and the UK 'will be designed to enable the relationship we agree with the EU to operate effectively' constitutes a meaningful response."[43]

6.7 In his latest letter, the Minister tells us that it had been wrong to suggest that the UK was obliged to participate in CEPOL's Management Board. Under the new Regulation, the UK "can be invited as observers" but is not obliged to attend and has chosen not to participate. He declines to provide further information on UK cooperation with CEPOL after the UK leaves the EU, again reiterating that the UK's future relationship with the EU on security, law enforcement and criminal justice post-exit will focus on "areas of cooperation that deliver the most significant operational benefit".

6.8 **In another elliptical response, the Minister tells us that the Government intends to seek a future relationship with the EU on security, law enforcement and criminal justice cooperation which "provides for multilateral cooperation through EU agencies" without indicating whether this will include CEPOL. The fact that the UK has not opted into the CEPOL Regulation and has chosen not to participate in CEPOL Management Board meetings as a non-voting observer suggests that the Government attaches little importance to sustaining a close working relationship with CEPOL post-exit. If that is the case, we do not understand why the Minister cannot say so.**

6.9 **The CEPOL Regulation is now in force and has been cleared from scrutiny. We have no further questions to raise. We draw this chapter to the attention of the Home Affairs Committee and the Committee on Exiting the European Union.**

Full details of the documents

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

41 See the Minister's letter of 7 December 2017 to the Chair of the European Scrutiny Committee.
42 See the Minister's letter of 20 July 2017 to the Chair of the European Scrutiny Committee.
43 See our Ninth Report HC 301–ix (2017–19), chapter 11 (10 January 2018).

Background

6.10 Our earlier Reports listed at the end of this chapter set out the protracted scrutiny of the CEPOL Regulation, the Government's reasons for not opting in and its position on current and future cooperation with CEPOL.

The Minister's letter of 9 February 2018

6.11 The Minister first seeks to clarify the UK's current relations with the European Police College since the new CEPOL Regulation took effect on 1 July 2016:

> "I wish to reiterate to the Committee that the UK has not been excluded from participating in College activities but we are no longer routinely sending delegates to training courses. I apologise that our assertion in the July letter on the Government's post-adoption opt-in decision that the UK is obliged to participate in CEPOL's Management Board was erroneous. Under the terms of the new Regulation, we can be invited as observers to the CEPOL Management Board, but we are not obliged to attend. The 'Governing Board' set up by the 2005 Council Decision, has been replaced by the current 'Management Board', with a different remit and voting rights. As the Government have previously stated, this could make UK participation in CEPOL by way of the 'Governing Board' inoperable. The UK has therefore not been participating in CEPOL 'Management Board' meetings."

6.12 Turning to the Government's plans (if any) for future cooperation with CEPOL once the UK leaves the EU and has third country status, the Minister tells us:

> "[…] the details of our future cooperation in relation to security, law enforcement and criminal justice measures will be agreed in negotiations. The future partnership paper on security, law enforcement and criminal justice that the Government published in September 2017 set out our intention to seek a relationship that provides for multilateral cooperation through EU agencies, as well as providing for practical operational cooperation and facilitating data-driven law enforcement. The exact contours of that relationship will be a matter for negotiation, but the Government have been clear that the focus should be on the areas of cooperation that deliver the most significant operational benefit."

Previous Committee Reports

Ninth Report HC 301–ix (2017–19), chapter 11 (10 January 2018), First Report HC 301–i (2017–19), chapter 43 (13 November 2017), Thirty-seventh Report HC 219–xxxvi (2014–15), chapter 3 (18 March 2015), Twenty-first Report HC 219–xx (2014–15), chapter 1 (19 November 2014) and Ninth Report HC 219–ix (2014–15), chapter 5 (3 September 2014).

7 Protecting migrant children

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee and the Joint Committee on Human Rights
Document details	Commission Communication: *The protection of children in migration*
Legal base	—
Department	Home Office
Document Number	(38665), 8297/17 + ADD 1, COM(17) 211

Summary and Committee's conclusions

7.1 The EU's five-year *Action Plan on Unaccompanied Minors* expired at the end of 2014, shortly before the refugee and migration crisis in Europe reached its peak. The purpose of this non-binding Communication (published in April 2017) is to set out a series of actions to support and protect migrant children which address the root causes of their flight from home, the dangers they face on their journey to Europe, and their protection needs once within the European Union. Our earlier Report (listed at the end of this chapter) provides a detailed overview of the actions proposed in the Communication.

7.2 In its Explanatory Memorandum on the Communication, the Government described the measures it has taken to meet the needs of refugee and migrant children in the UK, but had little to say on the specific actions proposed by the Commission. Given that these actions are, in any case, non-binding, we asked whether this was an area in which the Government intended to remain in lockstep with policy guidance issued by the Commission until Brexit day or to pursue a different path in areas where the UK is not constrained by EU law. The Immigration Minister (Caroline Nokes) responds:

> "The Government is clear that while the UK remains a member of the EU, with all the rights and obligations that membership entails, we will continue to remain fully engaged in EU discussions on asylum and migration, and continue work to implement our priorities."

7.3 She also responds to our request for more detailed comments on:

- the Commission's intention to publish EU guidance on "best interests of the child" and age assessments, as well as on reception conditions;
- UK participation in an EU-wide network of legal guardians;
- the creation of a repository of data on all children in migration, including those who go missing from reception facilities;
- the Government's policy on the administrative detention of refugee or migrant children;

- transfers of unaccompanied children to the UK under section 67 of the Immigration Act and under the family reunification provisions of the EU's Dublin Regulation; and
- the contribution EU funds make to the protection of EU refugee and migrant children in the UK.

7.4 **We welcome the publication last November of the Government's *Safeguarding Strategy for Unaccompanied Asylum Seeking and Refugee Children* which seeks to address the specific vulnerabilities and needs of unaccompanied children in the UK, whether they have arrived through a legal pathway or clandestinely.**

7.5 **We consider that the Minister has addressed most of our questions and are content to clear the Communication from scrutiny. In doing so, however, we ask the Minister to provide a more precise response to two matters. First, we asked whether the Government would support a more uniform (EU-wide) methodology for collecting data on refugee and migrant children within the EU, including data on those who go missing from reception facilities. We understand that the Commission has launched a consultation and would like to hear how the Government has responded.**

7.6 **Second, we draw attention to the Written Statement issued by the Home Secretary (Amber Rudd) on 19 January 2018 in which she announced:**

> **"France, Greece and Italy will now be able to refer unaccompanied children who arrived in Europe before 18 January 2018 to the UK under section 67 of the Immigration Act 2016. The Government had previously insisted on the previous eligibility date of 20 March 2016 to avoid establishing an open-ended relocation scheme from Europe, as this would increase the pull factor that puts children's lives at risk. After extensive discussion with France, Greece and Italy, we have agreed to amend the eligibility date on an exceptional basis to ensure we can transfer the circa. 260 remaining unaccompanied children and meet our obligation under section 67 of the Immigration Act 2016."**[44]

7.7 **The Minister says that the Government's Safeguarding Strategy includes a commitment to publish data regularly on transfers of unaccompanied children from elsewhere in the EU to the UK, but the Strategy does not indicate how frequently this data will be published. We ask her to clarify when the next set of data will be published—her letter says "next year"—and to provide us with details once they are available. We draw this chapter to the attention of the Home Affairs Committee and the Committee on Exiting the European Union.**

Full details of the documents

Commission Communication: *The protection of children in migration*: (38665), 8297/17 + ADD 1, COM(17) 211.

44 See Hansard, 27–29WS, 19 January 2018.

The Minister's letter of 22 January 2018

7.8 We set out in the following paragraphs the questions raised in our earlier Report and the Minister's response.

EU guidance

7.9 We noted that the Commission intends to produce further guidance on how to carry out assessments of "the best interests of the child" which will be supplemented by specific guidance from the European Asylum Support Office on reception conditions for unaccompanied children and on age assessment procedures. We asked how much importance the Minister attached to EU-level guidance in these areas and how likely it was to be consistent with standards and procedures applied in the UK. The Minister responds:

> "The Government welcomes further EU-level guidance in this area, but we are undecided on whether it will be consistent with standards and procedures applied in the UK. The Home Office takes its responsibility for the welfare of children very seriously and there are stringent statutory and policy safeguards in place for all child welfare—regardless of a child's immigration status. Unaccompanied asylum-seeking children (UASC) are looked after by local authorities in keeping with the arrangements under the Children Act 1989 (and equivalent legislation in Northern Ireland, Scotland and Wales) for all looked after children. As part of this support, UASC are provided with a professional social worker and will also have an Independent Reviewing Officer to oversee their care arrangements. UASC are also entitled to legal assistance in pursuing their asylum claim.
>
> "In addition, the Home Office has a statutory duty to promote and safeguard the welfare of a child, including ensuring children's best interests are a primary consideration in decisions affecting them.
>
> "The provisions governing this are a matter of primary legislation and set out in Section 55 of the Borders, Citizenship and Immigration Act 2009: '[t]o ensure that immigration, asylum, nationality and customs functions are discharged having regard to the need to safeguard and promote the welfare of children in the UK'. All UASC in England are also referred to the Refugee Council Children's Panel. The role of the panel is to advise and assist unaccompanied children through the asylum process, and to support them in their interactions with the Home Office and other central and local government agencies (such as local authorities). In Scotland, upon referral to the Scottish Guardianship Service, unaccompanied children are appointed a guardian.
>
> "On 1 November, the Government published a *Safeguarding Strategy for Unaccompanied Asylum Seeking and Refugee Children* (Safeguarding Strategy) which sets out the additional actions the Government will take to safeguard and promote the welfare of unaccompanied asylum seeking

> and refugee children, in recognition of the increasing numbers and specific needs of unaccompanied children already in the UK, those arriving through a legal pathway and those arriving clandestinely."[45]

7.10 The Minister adds that the Home Office "also has clear guidance on age assessments".

UK participation in an EU guardianship network

7.11 We noted the Government's reservations about the Commission's advocacy of legal guardians as a means of safeguarding the interests of unaccompanied children and its preference for the UK model in which each local authority's children's services has formal responsibility for the welfare of unaccompanied children. We asked whether the Minister nonetheless considered that it would be feasible and beneficial for the UK to participate in the guardianship network which the Commission intends to set up later this year as a forum for sharing best practice.

7.12 Whilst recognising the important role that guardians play in some EU Member States and welcoming the creation of a network, the Minister says that the UK will not participate "as we consider the extensive children's legislation we have in place that allows local authority children's services to take formal responsibility for unaccompanied children, to provide sufficient protection".

Data on refugee and migrant children in the UK

7.13 In its Communication, the Commission highlighted the lack of precise data on the number of refugee and migrant children who go missing from reception facilities once they have reached Europe and said it intended to establish a repository of data on all children in migration and launch a consultation on the methodology for collecting the data. We asked whether the UK had reliable data on the number of refugee and migrant children who go missing from local authority care and whether the Government supported a more uniform methodology for collecting such data. The Minister tells us:

> "The Department for Education's statutory guidance *Children who run away or go missing from home or care* makes clear that each local authority is responsible for collecting, sharing and analysing data for the children in their care, including those that go missing once, or go missing more frequently. The Government publishes data on looked after children who go missing on an annual basis, but we do not provide a more detailed breakdown. We routinely review the way in which data is collected and made available to ensure that it is used effectively."[46]

Detention of refugee and migrant children

7.14 We noted that the Commission Communication does not exclude the possibility that children may be accommodated in closed reception facilities but makes clear that detention should be "a last resort" and used only in "exceptional circumstances, where strictly necessary".[47] We asked whether this was consistent with the Government's policy on administrative detention and sought some indication of the numbers of refugee or

45 See the Government's Safeguarding Strategy for Unaccompanied Asylum-Seeking and Refugee Children.
46 See the Government's guidance on missing children.
47 See p.9 of the Communication.

migrant children held in detention since the beginning of 2015. The Minister explains that children will only be held in administrative detention "in exceptional circumstances—normally for safeguarding reasons". She continues:

> "The Immigration Act 2014 restricts an unaccompanied child's detention to a short-term holding facility, not an immigration removal centre, and to a maximum period of 24 hours, subject to certain other conditions being met. The Government publishes regular detention data, but we do not provide a breakdown of the reasons why individuals have been detained."

She adds:

> "Home Office policy is that no unaccompanied child or young person will be removed from the UK unless the Secretary of State is satisfied that safe and adequate reception arrangements are in place in the country to which the child is to be removed. In addition, the decision to return must be consistent with the Government's duties under Section 55 of the Borders, Citizenship and Immigration Act. In relation to accompanied children, the Government's policy is not to separate children from their parents wherever possible during the removals process. A family returns process has been developed which begins with a conference with the family in order to provide support. If a family is to be detained prior to departure, detention is in specially designed pre-departure accommodation, with self-contained units for each family and with welfare support available on the premises."

Transfers of unaccompanied children to the UK

7.15 In our earlier Report we cited UNICEF estimates that around 25,800 unaccompanied or separated children arrived in Italy by sea in 2016,[48] with data for the first quarter of 2017 suggesting an even higher number in 2017.[49] We asked how many unaccompanied children had been transferred to the UK from Italy and Greece under section 67 of the Immigration Act 2016 and under the family reunification provisions of the Dublin Regulation since the peak of the migration and refugee crisis in Europe in 2015. The Minister responds:

> "The Government is fully committed to implementing section 67 of the Immigration Act 2016 (the 'Dubs Amendment') up to the specified number of 480. On 30 November, we published data on the number of children transferred to the UK following the clearance of the Calais camp in October 2016."[50]

7.16 The Minister says that further children have been transferred to the UK this year and that "more eligible children will be transferred under the scheme in due course", adding:

> "We committed in the Safeguarding Strategy to regularly publish data on transfers of unaccompanied children from Europe and more data will be published next year."

48 See UNICEF's press notice of 13 January 2017.

49 See the Quarterly Overview of Trends on refugee and migrant children in Europe covering the period January to March 2017 published by UNHCR, UNICEF and IOM.

50 See the data published in November 2017 on transfers of children to the UK from the Calais camp clearance in October 2016. These indicate that 769 children were transferred between 1 October 2016 and 15 July 2017. Of these, 220 were transferred under the 'Dubs amendment'.

EU funding for refugee and migrant children in the UK

7.17 We requested some indication of the contribution made by EU funds to support the various policy measures described in the Government's Explanatory Memorandum on the Commission Communication and how the Government intended to compensate for their loss post-Brexit. The Minister comments:

> "EU funds have not been used to establish the Independent Child Trafficking Advocates (ICTAs) service, the Child Trafficking Protection Fund (CTPF) or Section 67 of the Immigration Act 2016."

Previous Committee Reports

Second Report HC 301–ii (2017–19), chapter 21 (22 November 2017).

8 The EU's response to the refugee crisis—the creation of "hotspots"

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Home Affairs Committee
Document details	Court of Auditors Special Report: *EU response to the refugee crisis: the 'hotspot' approach*
Legal base	—
Department	Home Office
Document Number	(38687), Special Report No. 6 2017,—

Summary and Committee's conclusions

8.1 The EU has invested heavily in "hotspots"—frontline registration and reception centres established in Greece and Italy—as a tangible expression of solidarity with countries bearing the brunt of the migration and refugee crisis in the Mediterranean. This Special Report by the Court of Auditors (agreed in March 2017) examines the EU's role in developing and implementing hotspots from their inception in 2015 to the end of summer 2016. It acknowledges the "difficult and volatile" operating environment but concludes that hotspots have made an important contribution in managing migratory flows by increasing reception capacity, improving registration procedures and strengthening coordination amongst the different actors. The Court makes a number of recommendations (all of which the Commission accepts) to expand capacity, improve the treatment of unaccompanied children, ensure the more effective deployment of national experts and clarify responsibilities, structures and operating procedures within the hotspots. It invites the Commission and EU agencies to undertake a full evaluation of hotspots by the end of 2017.

8.2 Whilst noting the Government's support for "the principle of hotspots" and welcoming the assistance provided by the UK to improve their functioning and to address the wider refugee and migration crisis in the Mediterranean, we were disappointed that the Government had little to say on the Court's main findings and recommendations, particularly those concerning the serious shortcomings in reception capacity and facilities (especially for unaccompanied children and other vulnerable migrants), the appointment of a child protection officer within each hotspot or at every site receiving migrants, the shortfall in national experts deployed to hotspots and the bottlenecks in asylum procedures (particularly in Greece). We asked whether the Government agreed with the Commission that the Court had produced "a well-balanced analysis" and what it considered to be the most urgent priorities in refining the hotspot approach. We also asked the Government to:

- explain why there appeared to have been a delay in agreeing Council Conclusions on the Court's report; and

- provide further information on Member States' reactions to a Commission Action Plan presented in July 2017 in response to increased migratory pressures in the Central Mediterranean (including an Italian initiative for a Code of Conduct for NGOs involved in search and rescue operations in the Mediterranean).

8.3 The Immigration Minister (Caroline Nokes) agrees that the Court of Auditors report provides a balanced view of hotspots, setting out "positive findings, but also suggesting areas for further reflection and improvement". She considers that appointing a child protection officer for each hotspot or site receiving migrants is the most pressing issue. The Minister does not expect the Council to agree Conclusions on the Court's report ("Member States could not agree on the text"). She notes that there has been a 32% drop in the number of migrants crossing the Central Mediterranean to Italy in 2017, compared with 2016, easing some of the pressure on hotspots in Italy.[51] She does not consider that there is a need to increase the capacity of existing hotspots in Italy or create new ones but will "keep this under review". The Minister says that the Action Plan presented by the Commission last July forms part of a wider implementation plan linked to the Malta Declaration (agreed in February 2017) which seeks to manage migratory flows across the Central Mediterranean route.[52] The immediate and short-term actions set out in the implementation plan "have had effect", not least in the substantial reduction in the numbers reaching Italian hotspots. Commenting on the Code of Conduct for NGOs, she notes that it is intended to "improve the coordination and effectiveness of life saving research and rescue operations" but adds: "It is important that whilst doing this, humanitarian space is protected and that life-saving activity can continue".

8.4 **We thank the Minister for the additional information she has provided and clear the Court of Auditors' Special Report from scrutiny. The Council's inability to agree Conclusions on the main findings and recommendations made by the Court suggests that the EU's approach to the migration and refugee crisis remains a highly contested and divisive issue for Member States. We trust that this will not impede the Commission in carrying out a full evaluation of hotspots, not least to take account of the rapidly evolving situation in the Mediterranean and Aegean since the end of summer 2016 which is not captured in the Court's Special Report. We draw this chapter to the attention of the Home Affairs Committee.**

Full details of the documents

Court of Auditors Special Report: *EU response to the refugee crisis: the 'hotspot' approach*: (38687), Special Report No. 6 2017,—.

Background

8.5 Our earlier Report, listed at the end of this chapter, describes the main findings and recommendations made by the Court of Auditors and the Government's view.

51 See UNHCR's Monthly Report on Europe (published on 14 February 2018) for an overview of recent developments.

52 See the Malta Declaration.

The Minister's letter of 22 January 2018

The Government's assessment of the Court of Auditors report

8.6 We asked whether the Government agreed with the Commission's assessment that the Court of Auditors had provided "a well-balanced analysis" and what it considered to be the most urgent priorities in refining the hotspot approach. The Minister responds:

> "[…] the report is balanced in terms of providing positive findings, but also suggesting areas for further reflections and improvement. The Government agrees that particular areas of focus should include addressing reception capacity and facilities (particularly for unaccompanied children, which could be addressed through the appointment of a child protection officer within each hotspot or site) and more efficient asylum processing, whether to the Member State's asylum system, to relocation, or to return procedures (for example to Turkey in the case of Greece). Of these areas of focus, we believe the issue of the appointment of a child protection officer for every hotspot or site to be the most pressing."

8.7 The Minister notes that the Court has invited the Commission and EU agencies to undertake a full evaluation of hotspots by the end of 2017 and says she will "revert with further analysis if such a report is provided".

Council Conclusions

8.8 We asked whether the apparent delay in agreeing Conclusions on the Court of Auditors report reflected divisions within the Council on the substance of the Court's recommendations and how likely these were to be resolved. The Minister tells us that "Member States could not agree on the text of the Council Conclusions" and that "the Presidency does not intend to proceed with them".

Migratory pressures in the Central Mediterranean

8.9 We noted that the Court of Auditors report did not address the impact of increased migratory pressures in the Central Mediterranean in the early part of 2017 on the operation of hotspots in Italy. We asked whether the Minister considered that increased capacity in the existing hotspots, or the creation of new hotspots, would be needed to manage the flows and, if so how, how should this be funded.

8.10 The Minister tells us that figures published by the Italian Interior Ministry show that (by 5 December 2017) there had been a 32% drop in the number of migrant arrivals in Italy. She continues:

> "In light of that, the Government does not see any reason to increase the capacity of the existing hotspots or [to] create new hotspots at this time. We will nevertheless keep this under review."

8.11 We also requested further information on Member States' response to the Action Plan presented by the Commission at the informal meeting of Justice and Home Affairs

Ministers in July 2017 which set out a number of measures to support Italy.[53] We asked whether the package of measures was likely to be sufficient to ease pressures on Italian hotspots. The Minister responds:

> "The Commission reviewed the impact of the Malta Declaration and the related Implementation Plan (which now includes the Action Plan on immediate actions to support Italy) during the mid-term review of the European Agenda on Migration ahead of the October Justice and Home Affairs Council.
>
> "Member States agreed with the Commission that stabilisation measures—including the immediate and short-term actions in the Implementation Plan—have had effect. Indeed, there had been an overall 32% drop in the number of migrants crossing the Central Mediterranean in 2017 so far compared to the same period in 2016, which in turn has seen significantly lower numbers of migrants arriving at Italian hotspots."

8.12 The Minister says that there was further discussion of the Malta Declaration at the Central Mediterranean Contact Group's third meeting which took place last November in Bern, Switzerland. She continues:

> "At this meeting, the group's EU members (Austria, France, Germany, Italy, Malta and Slovenia) reaffirmed their support for the Malta Declaration approach and their work with key African partners to deliver its objectives. The UK continues to support Italy, including by: deploying six expert staff to the European Asylum Support Office (EASO) in 2016; providing debriefers and nationality screeners to Frontex Operation Triton; sharing our returns expertise and facilities; working upstream to reduce unsafe, irregular journeys towards Libya; and coordinating a new £75m humanitarian programme for the Central Mediterranean routes. This comprehensive approach should assist in reducing pressures on Italian hotspots."

8.13 We drew attention to an initiative by the Italian authorities (also included in the Action Plan) to draw up a Code of Conduct for NGOs involved in search and rescue operations in the Mediterranean. We asked whether the Government considered that the Code of Conduct was likely to ensure better coordination or result in more deaths at sea if NGO vessels involved in search and rescue were refused access to Italian ports. The Minister responds:

> "The Government notes that the EU Action Plan, proposed on 4 July [2017] by the Commission in response to Italian requests, aims to increase action to tackle flows on the Central Mediterranean route. It includes proposals for better coordination of maritime activities (including a Code of Conduct for NGOs); stepping up returns and relocations; and further support to Italy. We welcome attempts to improve the coordination and effectiveness of life saving search and rescue operations. It is important that whilst doing this, humanitarian space is protected and that life-saving activity can continue."

Previous Committee Reports

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

53 See the Action Plan on measures to support Italy, reduce pressure along the Central Mediterranean route and increase solidarity, SEC(2017) 339, 04.07.2017.

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

Department for Business, Energy and Industrial Strategy

(39495) 6043/18 COM(18) 40	Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Implementation of the Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law (2013/396/EU).

Cabinet Office

(39327) 15599/17 + ADD 1 COM(17) 738	Report from the Commission on the application in 2016 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents.
(39427) 16004/17 —	Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No. 1141/2014 of the European Parliament and the Council of 22 October 2014 on the statute and funding of European political parties and European political foundations Opinion of the European Court of Auditors.

Department for Culture, Media and Sport

(39471) 5702/18 COM(18) 43	Communication from the Commission to the European Parliament and the Council Stronger protection, new opportunities—Commission guidance on the direct application of the General Data Protection Regulation as of 25 May 2018.

Department for Education

(39486) 5820/18 COM(18) 50	Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Mid-term evaluation of the Erasmus+ programme (2014–2020).

Department for Environment, Food and Rural Affairs

(39482) 5798/18 COM(18) 48	Report from the Commission to the European Parliament and the Council on the implementation of the Common Monitoring and Evaluation System for the European Maritime and Fisheries Fund.
(39444) 5424/18 COM(18) 35	Report from the Commission to the European Parliament and the Council on the impact of the use of oxo-degradable plastic, including oxo-degradable plastic carrier bags, on the environment.

Department for International Development

39492 — —	European Court of Auditors Assistance Myanmar/Burma.

Foreign and Commonwealth Office

(39491) 5947/18 + ADD1 COM(18) 65	Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A credible enlargement perspective for and enhanced EU engagement with the Western Balkans.
(39514) — —	Council Decision (CFSP) 2017/… of [dd/mm/2017] amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.
(39515) — —	Council Implementing Regulation (EU) 2017/… of [dd/mm/2017] amending Implementing Regulation No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

HM Revenue and Customs

39462 5658/18 COM(18) 39	Report from the Commission to the European Parliament and the Council on the implementation of the Union Customs Code and on the exercise of the power to adopt delegated acts pursuant to Article 284 thereunder.

HM Treasury

(39384) 15943/17 COM(17) 776	Report from the Commission to the European Parliament and the Council: European Union Solidarity Fund Annual Report 2016.

Formal Minutes

Wednesday 7 March 2018

Members present:

Sir William Cash, in the Chair

Steve Double	Kelvin Hopkins
Richard Drax	Darren Jones
Marcus Fysh	David Jones
Kate Green	Michael Tomlinson
Kate Hoey	Dr Philippa Whitford

4. 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 9 read and agreed to.

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

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

[Adjourned Wednesday 14 March at 1.45pm.

Standing Order and membership

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

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

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

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

The expression "European Union document" covers—

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

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

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

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

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

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

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

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

Current membership

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

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

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

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

Richard Drax MP (*Conservative, South Dorset*)

Mr Marcus Fysh MP (*Conservative, Yeovil*)

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

Kate Hoey MP (*Labour, Vauxhall*)

Kelvin Hopkins MP (*Independent, Luton North*)

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

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

Stephen Kinnock MP (*Labour, Aberavon*)

Andrew Lewer MP (*Conservative, Northampton South*)

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

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

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