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European Scrutiny Committee

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Documents considered by the Committee on 16 May 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/.

Staff

The staff of the Committee are Dr Philip Aylett (Clerk), Kilian Bourke, Alistair Dillon, Leigh Gibson, Foeke Noppert and Sibel Taner (Clerk Advisers), Arnold Ridout (Counsel for European Legislation), Françoise Spencer (Deputy Counsel for European Legislation), Joanne Dee (Assistant Counsel for European Legislation), Mike Winter (Second Clerk), Sarah Crandall (Senior Committee Assistant), Sue Beeby, Rob Dinsdale and Beatrice Woods (Committee Assistants), Ravi Abhayaratne and Paula Saunderson (Office Support Assistants).

Contacts

All correspondence should be addressed to the Clerk of the European Scrutiny Committee, House of Commons, London SW1A 0AA. The telephone number for general enquiries is (020) 7219 3292/5465. The Committee's email address is escom@parliament.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:

- **Government opposition to new food supply chain fairness rules, which will probably need to be transposed before 31 December 2020.**
- **Equal Pay and the Gender Pay Gap: Commission Action Plan and Report**

Summary

Unfair trading practices in the food supply chain

The Commission proposes legislation to protect SMEs in the food supply chain against unfair trading practices by large buyers. The legislation goes beyond the existing provisions in the UK under the Groceries Supply Code of Practice, which applies to the ten largest retailers in the UK and is enforced by the Groceries Code Adjudicator. The Government is opposed to the legislation, arguing that such action is best taken at the national level and expressing concern at the potential cost, given that the scope would extend to the whole supply chain, including food processing and food service. The Government does recognise, though, that the legislation could benefit UK SMEs supplying to EU buyers, even post-Brexit. We encourage the Government to engage positively and request information on: the potential benefits to UK suppliers; the volume of buyers to which the proposal would extend coverage; and the impact of the proposed 30 day payment limit. On Brexit, we note that the UK is likely to need to transpose the legislation into UK law during the post-Brexit implementation period (i.e. before 31 December 2020) and therefore seek clarification on the Government's transposition plans in the light of its antipathy towards the legislation.

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

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

After some initial delays in replying to our first Report on these documents, the new Minister for Women (Victoria Atkins) answers our questions about the Government's commitment to eliminating the Gender Pay Gap. In particular, she explains what the Government approach will be in terms of maintaining that commitment after 31 December 2020. This includes amendments agreed by the House to the European Union (Withdrawal) Bill which relate to the provision of equality impact statements by

Ministers when making secondary legislation under the Bill. The Minister also refers to the Government commitment to extend that requirement to other Brexit-related primary legislation.

Cleared from scrutiny; drawn to the attention of the Women and Equalities Committee.

EU-ACP partnership

We have expressed concern about the Government's 'wait and see' approach to deciding on the best structure for a new UK partnership with 78 developing countries in Africa, the Caribbean and the Pacific (ACP), which appear dependent on the outcome of the EU's own negotiations with those states over the coming years, but with no fall-back option in place once the UK leaves trade and political framework put in place by the current EU-ACP Agreement. We have also taken note of the Government's renewed offer to continue making a UK financial contribution to the EU's development policy programmes.

Cleared from scrutiny; further information requested; drawn to the attention of the Foreign Affairs and International Development Committees.

Banking reform: risk reduction measures

We have granted the Government permission to support a compromise legal text on a series of new prudential requirements for banks in the EU, ahead of negotiations with the European Parliament on the new legislation. Despite the UK's opposition, the reforms are likely to include a requirement for 'third country' banks—like the UK when it leaves the Single Market—with substantial operations in the EU to establish a costly new intermediate parent undertaking (IPU) for their EU activities to assist in their supervision and, if necessary, resolution. However, the Government has secured a 7-year transitional period before this new IPU requirement would take effect.

Not Cleared; further information requested.

Law enforcement access to electronic evidence

The Commission has put forward two proposals to make it easier and quicker for law enforcement authorities to obtain electronic evidence (such as e-mails, text messages and photos) for a criminal investigation. They would only apply where the data or the service provider are in a different Member State. The first, a proposed Regulation, would introduce a European Preservation Order to prevent information being altered or erased and a European Production Order requiring the information to be produced within 10 days (or 6 hours in an emergency). The second, a proposed Directive, would require online service providers offering services within the EU to designate a legal representative in the EU responsible for ensuring compliance with European Preservation and Production Orders or other law enforcement requests for evidence needed for criminal proceedings.

Whilst supporting efforts to make cross-border access to data within the EU more efficient, the Policing Minister (Mr Nick Hurd) questions whether additional tools are needed. He sets out the factors which will inform the Government's opt-in decision on the proposed Regulation, a criminal law measure, and says the Government is considering whether the legal base for the proposed Directive (a non-criminal law measure) is appropriate. This is

significant as the UK's opt-in only applies to the proposed Regulation. We ask the Minister to clarify the Government's position on the need for further EU legislation, to flesh out the factors informing the Government's opt-in decision on the proposed Regulation and to indicate whether the opt-in should also apply to the proposed Directive. As the proposals are relevant to the UK's wider relationship with the EU on security, law enforcement and criminal justice cooperation post-exit, we also ask the Minister to explain what progress has been made in negotiations to shape the UK's future relationship with the EU in this area.

Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee, Justice Committee and Committee on Exiting the European Union.

Documents drawn to the attention of select committees:

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

Exiting the European Union Committee: EU Trade Defence Instruments [(a) Communication (C), (b) Proposed Regulation (C)]; Law enforcement access to electronic evidence [(a) Proposed Regulation (NC), (b) Proposed Directive (NC)]

Environment, Food and Rural Affairs Committee: Unfair trading practices in the food supply chain [Proposed Directive (NC)]

Foreign Affairs Committee: New EU Partnership with Africa, the Caribbean and the Pacific [Proposed Decision (C)]

Home Affairs Committee: Law enforcement access to electronic evidence [(a) Proposed Regulation (NC), (b) Proposed Directive (NC)]

International Development Committee: New EU Partnership with Africa, the Caribbean and the Pacific [Proposed Decision (C)]

International Trade Committee: EU Trade Defence Instruments [(a) Communication (C), (b) Proposed Regulation (C)]

Justice Committee: Law enforcement access to electronic evidence [(a) Proposed Regulation (NC), (b) Proposed Directive (NC)]

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

1 Unfair trading practices in the food supply chain

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Environment, Food and Rural Affairs Committee
Document details	Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain
Legal base	Article 43(2) TFEU, QMV, Ordinary legislative procedure
Department	Environment, Food and Rural Affairs
Document Number	(39625), 7809/18 + ADDs 1–3, COM(18) 173

Summary and Committee's conclusions

1.1 With the aim of improving farmers' and other small and medium sized enterprises' (SMEs) position in the food supply chain, the European Commission has proposed new legislation on unfair trading practices (UTPs), which are business-to-business practices that deviate from good commercial conduct and are contrary to good faith and fair dealing.

1.2 The Commission believes that the food supply chain is particularly vulnerable to UTPs due to stark imbalances between small and large operators. Often farmers and small operators in the food supply chain do not have sufficient bargaining power to defend against UTPs. While some countries—including the UK through its Groceries Code Adjudicator—already have systems in place to guard against such UTPs, others do not and so the Commission proposal aims to ensure a standard level of protection across the EU. Even where there are policies in place, differences exist. While some apply to the whole chain, they do not in the UK and elsewhere.

1.3 The proposed directive applies to sales of food by any SME[1] supplier to any non-SME buyer. Suppliers may be based anywhere in the world, but buyers should be based in the EU.

1.4 The Commission proposes to ban some of the most common UTPs, such as:

- late payments for perishable food products (30 day limit);
- last minute order cancellations;
- unilateral or retroactive changes to contracts; and
- a requirement for the supplier to pay for the wastage of food products not caused by the negligence or fault of the supplier.

1 A "Small and Medium-Sized Enterprise" which employs fewer than 250 persons and has an annual turnover not exceeding €50 million and/or an annual balance sheet total not exceeding €43 million.

1.5 While exceptions from the ban on the above UTPs cannot be negotiated through contracts, a number of other UTPs are prohibited unless agreed in clear and unambiguous terms at the conclusion of the supply agreement. In addition, the European Commission proposes that each Member State designate a competent authority to enforce the new rules, and sets out the minimum enforcement powers of such authorities. These include the power to apply an "effective, proportionate and dissuasive" fine. Enforcement authorities will be obliged to cooperate with each other, meeting once per year and providing mutual assistance in investigations that have a cross-border dimension. Member States may provide for more stringent rules to combat UTPs as long as they are compatible with the internal market.

1.6 The UK's Groceries Code Adjudicator has the power to investigate UTPs by the ten largest retailers[2] in their relationships with their direct suppliers and has the ultimate power to fine retailers (up to a level of 1% of their annual UK turnover). The key difference between the GCA and the proposed model is that the Commission's model would apply throughout the supply chain and to buyers not currently covered, including those within the food processing and food service sectors. It should also be noted that the GCA's remit includes all groceries and so is not restricted to food.

1.7 Turning to the UK's withdrawal from the European Union, the legislation would need to be applied in national law 12 months after entry into force[3] and so could potentially apply to the UK before the end of the post-Brexit implementation period. Regardless of that requirement, it would in any case apply to UK suppliers to EU buyers. UK domestic rules, though, would continue to apply to EU and non-EU suppliers to UK buyers.

1.8 The Minister for Agriculture, Fisheries and Food is unsupportive of the proposal, arguing that such initiatives are best delivered by national legislation. He points in his Explanatory Memorandum to the UK's existing GCA and to the Government's Call for Evidence in October 2016 on the case for extending the GCA's remit. The Government is particularly concerned that extension of the remit, as proposed by the Commission, would be very expensive and believes that other approaches are more appropriate to tackle challenges throughout the supply chain. The Minister further clarified his position in evidence to the Environment, Food and Rural Affairs Committee on 2 May 2018, explaining that the UK is likely to abstain on the basis that the UK will not stand in the way of an initiative that is unlikely to affect the UK.

1.9 **The Minister's approach appears to be based on two key concerns: the importance of Member State flexibility to make arrangements most appropriate to its market; and the cost of the increased remit of the regulator.**

1.10 **On the desirability of taking action at the national level, we note that the European Commission assessed progress in 2016 and made a number of recommendations which, if they had been delivered, may have precluded the need for regulatory action. This included the suggestion that national UTP provisions apply to the whole supply chain.**

1.11 **In his evidence to the Environment, Food and Rural Affairs Committee on 2 May, the Minister said that it was most appropriate for Member States to legislate in a way**

2 Aldi, Asda, Co-operative, Iceland, Lidl, Marks and Spencer, Morrison's, Sainsbury's, Tesco, and Waitrose.

3 The EU legislation should be transposed into national law six months after its entry into force.

that works for their own supply chain. We would welcome a view on the extent to which the Minister considers the UK's food retail market to consist of a homogeneous supply chain across the UK and to be largely isolated from the EU market. It would also be helpful to be clear to what extent a UK-only model is helpful to those trading with buyers in other EU countries. We note that Northern Irish farming representatives are supportive of the proposal and observe that this may be related to the relevance of the cross-border market. How sympathetic is the Minister to the potential benefits of a coherent EU approach to those UK suppliers trading with buyers elsewhere and what engagement has the Government had with such suppliers in formulating its position on this proposal? To what extent is there a risk that a more stringent EU approach would divert trade from UK buyers to EU buyers?

1.12 **On the Minister's concern about the budgetary implications of a remit that extends to the whole supply chain rather than the more restricted UK approach, we would encourage the Government to engage constructively with other Member States. As the Minister notes, the proposal could prove contentious with other Member States and there is therefore a strong likelihood that the proposal will in any case be amended before adoption. It may be, for example, that there is shared appetite either to restrict the scope or to phase-in the arrangement, with steps built in to assess progress. Equally, the UK might gain some traction in sharing the responses that it received in its response to the Call for Evidence on extending the remit of the GCA.**

1.13 **Turning to the scope of the proposal, we would welcome clarification of what is proposed to be covered. As we understand the proposal, it would apply to all non-SME buyers, including those outside the retail sector such as food service and food processing. Compared to coverage by the UK's existing Code, what information does the Government have on the volume of buyers and trading relationships to which the proposal would extend coverage?**

1.14 **As regards what is covered, the proposed legislation as drafted would require suppliers to be paid no later than 30 calendar days after receipt of the supplier's invoice or after the date of delivery. No such fixed limit currently applies in the UK. To what extent might application of such a limit be helpful in the UK?**

1.15 **On transposition, we note the six-month transposition deadline, with a further six months to apply the transposed legislation, and therefore that the UK is likely to need to transpose the legislation during the implementation period. Given the Government's antipathy towards the legislation, we ask whether the UK: would be likely to amend its rules for several months and then revert to the status quo; would amend its rules and retain them post-implementation period; or whether the UK will push instead for a longer transposition period closer to the more standard two years and thus avoid the transposition requirement.**

1.16 **Finally, the Minister's core concern—that matters such as this are most appropriately regulated at the national level—suggests that the Minister considers that the proposal breaches the principle of subsidiarity (whereby action should only be taken by the EU where it is better placed to act than Member States). Regrettably, the section of the EM on subsidiarity simply replicates the Commission's justification. We would welcome a comprehensive subsidiarity analysis from the Minister.**

1.17 **We retain the proposal under scrutiny and draw it to the attention of the Environment, Food and Rural Affairs Committee. We expect to receive a response within ten working days.**

Full details of the documents

Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain: (39625), 7809/18 + ADDs 1–3, COM(18) 173.

Background

1.18 The European Commission sets out the impact of unfair trading practices (UTPs) on suppliers in the following terms:

> "When occurring, UTPs can put operators' profits and margins under pressure, which can result in a misallocation of resources and even drive otherwise viable and competitive players out of business. For example, retroactive unilateral reductions of the contracted quantity for perishable goods equates to income foregone for an operator who may not easily find an alternative outlet for these goods. Late payments for perishable products after they are delivered and sold by the buyer constitute extra financial cost for the supplier. Possible obligations for suppliers to take back products not sold by the buyer after the suppliers and buyer may constitute an undue transfer of risk to suppliers that has repercussions on their security of planning and investment. Being forced to contribute to generic in-store promotional activities of distributors without drawing a commensurate benefit may unduly reduce a supplier's margin."

1.19 The European Commission has been looking into UTPs in the food supply chain for several years already. In January 2016, the Commission took note in a specific report[4] of positive developments to address unfair trading practices in the sector, both at national level and in the form of the voluntary Supply Chain Initiative (SCI) initiated by the private sector. At the time, the need for EU legislation in this area was considered unnecessary but the Commission committed nevertheless to re-assess that need in the light of subsequent developments before the end of its mandate.

1.20 In terms of the current approach, including developments since the Commission's Report in 2016, the Commission notes that 20 Member States have adopted rules on UTPs, but that the approach is diverse and there is very little coordination among Member States' enforcement authorities. While the SCI has helped raise awareness, it is voluntary and does not cover all operators in the supply chain.

1.21 Further background to the Commission's proposal is set out in the factsheet that it published alongside the proposal.

4 Report from the Commission on unfair business-to-business trading practices in the food supply chain, COM(16) 32.

Current UK approach—the Groceries Code Adjudicator

1.22 The Groceries Code Adjudicator was created under the Groceries Code Adjudicator Act 2013 to oversee and enforce the pre-existing Groceries Supply Code of Practice (the Code). The Code is set out in Schedule 1 to the Groceries (Supply Chain Practices) Market Investigation Order 2009. The 2009 Order applies to ten 'designated retailers', as set out in Schedule 2 to the Order, with the power for the Competition and Markets Authority to designate in writing as a 'designated retailer' any groceries retailer with a turnover exceeding £1 billion in the UK. It governs their commercial relationships with their direct suppliers who supply groceries for resale in the UK.

1.23 The Code covers the following areas:

- principle of fair dealing;
- variation of Supply Agreements and terms of supply;
- changes to supply chain procedures;
- no delay in Payments;
- no obligation to contribute to marketing costs;
- payments for shrinkage;
- payments for wastage;
- payments as a condition of being a supplier;
- compensation for forecasting errors;
- no tying of third party goods and services for payment;
- payments for better positioning of goods unless in relation to promotions;
- promotions;
- due care to be taken when ordering for promotions;
- no unjustified payment for consumer complaints; and
- duties in relation to de-listing.

Explanatory Memorandum of 3 May 2018[5]

1.24 The UK's overarching approach is set out in the following terms:

> "The UK broadly supports initiatives designed to promote a fairer, more transparent food supply chain. However, the UK Government believes these initiatives are best delivered by national legislation."

5 Explanatory Memorandum dated 3 May 2018.

1.25 While the above approach implies an objection on the grounds of subsidiarity (i.e. the objective is best achieved by action at the national level), the Minister's subsidiarity assessment is restricted to a simple repetition of the Commission's view:

> "The Commission believes that the EU proposal in question complies with the principle of subsidiarity as set out in Article 5 of the TEU. The Commission considers that Community action is justified as the proposed directive seeks to provide for a minimum European standard of protection by approximating or harmonising Member States' diverging UTP measures."

1.26 The Minister notes that the issue of UTPs in the agri-food supply chain is widely acknowledged, and remains a concern for the majority of Member States. The Government, he says, recently published the results of a public consultation on the case to extend the remit of the Groceries Code Adjudicator, and the evidence gathered revealed instances of unfair behaviour among operators in the UK food supply chain.

1.27 The findings of the consultation indicated there was insufficient evidence to justify an extension of the GCA's remit. Instead the Government proposed a suite of targeted measures to address specific issues raised through the call for evidence. The Government has also committed to launch a call for evidence on how unfair payment practices for small businesses can be eliminated. This should provide evidence on the need to build on the Government's existing late payment policies to drive an end to unfair payment practices experienced by small businesses.

1.28 There are also a number of measures the Government is taking to tackle the late payment culture across all sectors, including the appointment of the Small Business Commissioner in October 2017 to help small businesses prevent or resolve payment issues.

1.29 In formulating its position, the Government has consulted with the Devolved Administrations. The Minister notes that Northern Ireland farming stakeholders have welcomed the Commission proposals as a useful basis upon which to build and they will be monitoring progress of the draft directive closely.

1.30 The Minister explains that the proposed directive was prompted by the conclusions of the Agricultural Markets Task Force. He summarises the outcome of the task force as concluding that any measures proposed by the Commission were to avoid anything which would cut across the operations of existing domestic regulators functioning in this space.

1.31 Turning to the Government's concerns and observations about the proposed Directive, the Minister says:

> "If this directive is required to be transposed before the end of the EU exit transition period then we will be required to create an enforcement authority. The body would regulate any business relationship between an SME and a non-SME operating in the food supply chain, and subject to further analysis would likely demand a significant resource burden.
>
> "If the directive was transposed as drafted, the new UTP rules would enable third country suppliers to rely on them if confronted with UTPs by buyers

> situated in the EU. This would have implications for UK producers who sell into the EU once we have left, as they would have recourse to these laws should they encounter UTPs in their dealings with EU based buyers."

1.32 Regarding impact assessments, the Minister indicates that the Government has not undertaken one, noting that the data gathered by the Government's earlier call for evidence suggests that greater value for money is available through targeted measures aimed at specific problems.

1.33 The Commission's impact assessment estimates that the proposals will have overall economic benefits for small operators in the food chain who will be protected through UTP legislation. This will increase their businesses efficiency and should result in positive economic impacts on society. Social and environmental impacts are expected to be neutral or even positive.

1.34 The Government is still analysing the details of the Commission's impact assessment, but makes the following preliminary observations:

> "The Commission impact assessment estimates that administrative costs to Member States will be limited, although highest in Member States where there are no current anti-UTP regimes.
>
> "We have not conducted a formal assessment of financial implications, but are sceptical of the Commission's assertion that 'where there already exists specific legislation on UTPs, already covering the UTPs identified in the preferred option, and with an existing public competent authority with effective enforcement powers, additional costs from EU action are expected to be negligible'.
>
> "We are still considering options for potential enforcement bodies, and expect that there will be significant administrative costs."

1.35 On timing, the Minister notes that the timetable for adoption is unclear. He adds that this is a controversial area for a number of Member States, which means that it is likely that the proposed directive will take some time to go through the ordinary legislative process.

1.36 Turning to possible transposition before the end of the post-Brexit implementation period on 31 December 2020, the Minister observes that the proposed directive has an unusually short transposition period of six months, with a further six months before the transposed laws must be applied. There is therefore what the Minister describes as a "medium to high risk" that the UK would have to implement the directive before the end of the transition period. On the other hand, there is a "low risk" of a requirement to transpose if the UK withdraws from the EU on 29 March 2019 with no transition period.

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 25 May 2018
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[6] and Regulation,[7] and the Bank Recovery & Resolution Directive[8]—in line with the most recent international standards. We set out the substance of the proposals in some details in our previous Reports.[9]

2.2 The Government has been broadly supportive of the package of reforms,[10] but it has sought to use the legislative deliberations among Member States within the Council to address 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).

6 Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.
7 Regulation 575/2013 on prudential requirements for credit institutions and investment firms.
8 Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms.
9 See for example our Reports of 13 November 2017 and 21 February 2018.
10 Explanatory Memorandum submitted by HM Treasury (20 December 2016).

2.3 In the context of the UK's exit from the EU, the Government has also actively opposed a proposed new requirement for large non-EU banks and investment firms with operations in more than one Member State to create an intermediate, independently-capitalised EU-based parent undertaking (IPU) to facilitate group supervision and resolution.[11] This would have a direct impact on UK banks, whose operations within the Single Market would require a larger (and therefore more costly) presence in the EU after the UK loses its 'passporting' rights for financial services when it becomes a "third country" (either on 29 March 2019 or at the end of the post-Brexit transitional period).

2.4 We last considered the RRM package in March, when the Bulgarian Presidency had hoped to broker a general approach among Member States at the ECOFIN Council.[12] Such agreement did not in the end materialise because "further work was needed" to overcome the remaining areas of contention, namely:[13]

- the framework for setting the EU's Minimum Requirement for Own Funds and Eligible Liabilities (MREL), which is 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. While the UK wants to give resolution authorities "sufficient flexibility" to set the amount of MREL a bank must hold, some other Member States had wanted to impose a cap. The most recent compromise text "proposes caps at levels which would be acceptable to the UK as it would enable the Bank of England to continue its current MREL policy";[14]

- secondly, with respect to prudential requirements to cover market risk,[15] the Member States discussed the delays in the adoption of new international standards (the Basel Committee's Fundamental Review of the Trading Book, or FRTB). The Minister says it is likely the Council will make a commitment to incorporate the new standards into EU law in the future;

- thirdly, the list of banks exempted from the Capital Requirements Directive. Some Member States, notably Germany, have requested additional exemptions;[16] and

- with respect to the IPU requirement affecting UK banks after Brexit, the Minister had already informed us previously that the Government has secured a "long transition period"[17] before the new requirements take effect to "reduce uncertainty and complexity for firms who already must manage challenges with post-Brexit restructuring" (but it has not been able to remove the proposals from the legal text altogether).

2.5 By letter of 2 May 2018, the Economic Secretary (John Glen) informed us that the Bulgarian Presidency of the Council is again seeking adoption of a general approach at

11 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.
12 See our Report of 7 March 2018.
13 See letter from John Glen to Sir William Cash (21 March 2018).
14 The Bank of England currently requires full subordination of MREL for firms with a bail-in resolution strategy.
15 Market risk prudential requirements mean banks have to hold more regulatory capital to compensate for any substantial exposure to securities and derivatives.
16 In the UK, exempted institutions include credit unions and municipal banks. The current discussions do not affect the existing derogations so the impact on the UK is minimal.
17 The transition period would grant affected non-EU banks seven years after the Directive comes into force before the IPU requirement becomes binding. So the IPU requirement would become effective in early 2026.

the next meeting of EU Finance Ministers (on 25 May 2018) pending full resolution of the outstanding matters described above.[18] From his letter, it is clear that the above issues mostly remain to be resolved, and as a result negotiations within the Council working party are likely to continue right up to the ECOFIN meeting:

- the Bulgarian Presidency continues to work towards a compromise on MREL insubordination,[19] and the deadline for banks to meet the new capital requirements, which is acceptable to all Member States. The Economic Secretary writes the UK will "continue to make the case for a compromise which would enable the Bank of England to maintain its current MREL policy";

- with respect to the implementation of the Basel Committee's Fundamental Review of the Trading Book (FRTB), as well as the exemptions from the scope of the CRD, the Minister says "these remaining issues [are] to be discussed in the last official level working group in early May followed by a meeting of Permanent Representatives to resolve outstanding matters prior to the ECOFIN meeting"; and

- as regards the requirement for certain UK banks to establish new intermediate parent undertakings in the EU once the UK leaves the Single Market, Treasury research has shown that "16 to 17 UK-based banking groups, based on their existing structures, would be caught under the current IPU proposal as drafted" and "roughly half of these UK-based banking groups already have an established holding company in another EU Member State".[20]

2.6 The Minister has also again asked the Committee for a scrutiny waiver to enable the Government to vote in favour of a legal text at the ECOFIN meeting which "meets UK objectives", as he believes "there is a pathway to reaching a compromise on these outstanding issues that meets our negotiating objectives". The European Parliament's Economic and Monetary Affairs Committee is due to vote on the RRM proposals in June, which would enable trilogue negotiations between the Council and MEPs to start shortly before or just after the 2018 summer recess. It is not yet clear when the proposals could be formally adopted, and consequently when they might take effect, but the Minister has previously told he is "confident that formal adoption of the Risk Reduction Measures package will be met before the UK's withdrawal from the EU".

2.7 Once the finalised RRM package is published in the Official Journal, it will be possible to assess whether the new legislation, or parts thereof, will take effect during the post-Brexit transitional period (during which EU law would continue to apply in the UK). Under the current draft of the Article 50 Withdrawal Agreement, this transition is due to last until 31 December 2020 (just after the date when all Member States would have had to have transposed the new Capital Requirements Directive into domestic law under the current timetable).[21]

18 Letter from John Glen to Sir William Cash (2 May 2018).

19 MREL subordination enables 'bail-inable' resources of a bank to rank below (and therefore absorb losses before) liabilities related to day-to-day operations and critical economic functions of a bank in the case of its insolvency. The Bank of England currently requires full subordination of MREL for firms with a bail-in resolution strategy.

20 However, the Minister notes that UK banks with existing holding companies in the EU may not "necessarily structure themselves under those holding companies to meet an IPU requirement".

21 The transposition date would be 18 months after formal adoption of the Directive, which would be in early 2019. That puts the deadline for transposition into domestic law in late 2020.

2.8 By extension, until the amendment to the Capital Requirements Directive is formally adopted, it is also unclear when exactly non-EU banks within the scope of the new IPU requirement (including the 17 UK banks and investment firms identified by the Treasury) would have to establish a holding company within the EU: under the terms of the Council's approach, this would not become a binding obligation until seven years after the new legislation is adopted.[22]

2.9 **In light of the Minister's assurance that the EU Finance Ministers are expected to agree on the incorporation of new international prudential standards into EU law—in line with the UK's objectives as set out in his letters of 28 February[23] and 21 March 2018[24]—and given the seven-year transitional period before the IPU requirement would concretely affect UK banks as 'third country' firms after the RRM package is formally adopted,[25] we are content to grant him a scrutiny waiver ahead of that ECOFIN Council meeting on 25 May 2018. This will allow the Government to endorse the Member States' common position if it considers it appropriate to do so.**

2.10 **The long transitional period for the entry into force of the IPU requirement notwithstanding, we remain concerned about its costs for the UK banks within its scope after our exit from the Single Market (either on 29 March 2019 or at the end of any subsequent transitional period). The precise impact of this new obligation on the British banking industry cannot be known, as it is inextricably tied to the wider uncertainty around bilateral access for UK and EU financial services providers to each other's markets after the UK becomes a 'third country' for the purposes of EU law. As we have described in our other recent Reports on EU financial services policy,[26] a severe reduction in cross-border market access for UK firms to the EU market is the default result of the UK's exit from the Single Market. There is no indication that the remaining Member States are willing to consider the Government's proposal of market access based on mutual recognition of regulatory standards, but without a common rulebook or enforcement structures.**

2.11 **In light of this, the default presumption must be that UK banks will be treated as 'third country' institutions from the moment of our exit from the Single Market. That underlines the importance of the Government maximising its input into the RRM package while it still retains representation within the EU institutions. The Minister's reassurances about the speedy adoption of the legislation notwithstanding, we are concerned that any delays in the process could push back formal adoption of the RRM legislation until after the UK loses its vote within the Council in March 2019. The Committee will therefore keep a close eye on the likely timetable for formal adoption of the RRM package and the extent to which the UK's priorities for this file are preserved**

22 The transitional period before the IPU requirement takes effect still needs to be agreed with the European Parliament. The impact the IPU obligations could have on British banks will also depend on the precise relationship between UK and EU banking legislation after the end of the transition, which remains to be negotiated as part of the broader UK-EU trade agreement.

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

24 Letter from John Glen to Sir William Cash (21 March 2018).

25 Any future UK-EU agreement on financial services which may exempt UK institutions from this requirement notwithstanding. This is the Government's objective, but there has been no indication the EU is willing to concede such status for a financial services industry not bound by the EU's financial services rulebook, regulatory oversight and jurisdiction of the Court of Justice of the EU.

26 See for example our recent Reports on delegation in the asset management industry; prudential requirements for investment firms; and the Crowdfunding Regulation.

in the Presidency's negotiations with the European Parliament on the final legal texts. In light of this, we emphasise that the scrutiny reserve will continue to apply after the May ECOFIN Council.

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.

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); Fifteenth Report HC 301–xv (2017–19), chapter 1 (27 February 2018); and Seventeenth Report HC 301–xvii (2017–19) chapter 2 (7 March 2018).

3 Law enforcement access to electronic evidence

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee, the Justice Committee and the Committee on Exiting the European Union
Document details	(a) Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters (b) Proposal for a Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings
Legal base	(a) Article 82(1) TFEU, ordinary legislative procedure, QMV (b) Articles 53 and 62 TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Number	(a) (39631), 8110/18 + ADDs 1–3, COM(18) 225; (b) (39630), 8115/18 + ADDs 1–2, COM(18) 226

Summary and Committee's conclusions

3.1 The proliferation of electronic means of communication in the digital age presents a challenge for law enforcement authorities. According to the European Commission, more than half of criminal investigations have a cross-border dimension because electronic evidence (information stored electronically) which can help to identify a criminal suspect or prove involvement in criminal activity is stored in remote servers hosted on the Internet (the "cloud") or held on a server or by a service provider located in a different jurisdiction. The Commission considers that current procedures for obtaining this type of evidence are too slow, given that data can be altered, transferred or deleted at the click of a mouse. It is therefore proposing new rules to make it easier and quicker for law enforcement authorities to secure and obtain electronic evidence stored in another EU Member State or outside the EU.

3.2 A new fast-track procedure would enable the judicial authorities in the Member State investigating criminal activity to serve a European Preservation Order and/or a European Production Order *directly* on a service provider (or legal representative) offering services within the EU but based in a different jurisdiction. Other instruments for obtaining evidence within the EU (principally the European Investigation Order—"EIO") or from a third country (under mutual legal assistance mechanisms) require the involvement of judicial and law enforcement authorities in the investigating country *and* the country in which the service provider is based and so take longer to execute (up to 120 days for

the EIO and even longer under other mutual legal assistance arrangements). Under the proposed Regulation—document (a)—a service provider would be required to preserve the electronic data specified in the European Preservation Order (regardless of where they are stored) and to produce them within 10 days of receiving a European Production Order (or six hours in emergency cases). These Orders would only be available in cases where there is a cross-border dimension, not for purely domestic situations where the service provider is based or represented in the Member State carrying out the criminal investigation.[27]

3.3 The proposed Regulation builds on the principle of mutual recognition and depends on "a high level of mutual trust" between Member States.[28] It incorporates important safeguards, requiring European Preservation and Production Orders to be validated by a judicial authority, and is underpinned by EU legislation establishing minimum standards on procedural rights in criminal proceedings, EU data protection laws and the EU Charter of Fundamental Rights. As the proposal is a criminal law measure, it is subject to the UK's Title V (justice and home affairs) opt-in Protocol, meaning that it will only apply to the UK if the Government decides to opt in.

3.4 The Commission has put forward a separate but related proposal which would require online service providers offering services within the EU to designate a legal representative in the EU responsible for ensuring compliance with European Preservation and Production Orders or other law enforcement requests for evidence needed for criminal proceedings. The proposed Directive—document (b)—is not a criminal law measure as its principal objective, according to the Commission, is to remove obstacles to the provision of services within the EU by establishing "a level playing field for all companies offering the same type of services in the EU, regardless of where they are established or act from".[29]

3.5 The Commission anticipates that both proposals will take effect six months after they have been adopted and entered into force. Even if negotiations are not concluded before 29 March 2019, the date when the UK is expected to leave the EU, the proposals are likely to be adopted and take effect within the transition/implementation period agreed as part of the UK's exit negotiations. Under the draft Withdrawal Agreement setting out the terms on which the UK will leave the EU, most EU laws will continue to apply to the UK as if it were a Member State until the transition/implementation period ends on 31 December 2020.[30] However, new EU laws in the justice and home affairs field which are not "binding upon and in the UK" on exit day will not apply during the transition/implementation period unless they "amend, build upon or replace" an existing measure in which the UK participates. This means that the proposed Directive (which is not a justice and home affairs measure) almost certainly will have to be implemented into UK law during the transition/implementation period, but the proposed Regulation may not apply if adopted after 29 March 2019.

3.6 The Minister for Policing and the Fire Service (Mr Nick Hurd) says that the Government supports efforts to make cross-border access to data within the EU more efficient and less burdensome and time-consuming for law enforcement authorities. He adds, however, that the UK has "a mature domestic system in place for accessing cross-

27 See the Commissions infographic—*Security Union: facilitating access to electronic evidence.*
28 See recital (11) of the proposed Regulation.
29 See p.3 of the Commission's explanatory memorandum accompanying the proposed Directive.
30 See Article 122 of the draft Withdrawal Agreement.

border e-evidence" and has cautioned against further EU legislation, "given that there are existing tools both within the EU and being developed internationally to tackle similar issues". The Government will examine the benefits of participating in the proposed Regulation and evaluate whether it would "provide the UK with additional tools to support criminal investigations" or provide greater access to data than existing domestic capabilities.

3.7 The Minister expects negotiations on both proposals to progress rapidly. He anticipates that the three-month deadline for opting into the proposed Regulation is likely to expire around 22 August. The Government is considering whether the legal base for the proposed Directive is appropriate but accepts that the UK will be bound unless it is amended to include a Title V (justice and home affairs) legal base. Both measures would require changes to UK law.

3.8 **It is difficult to gauge from the Minister's Explanatory Memorandum how the Government intends to approach negotiations on the proposed Regulation and Directive. We ask him to clarify the Government's position on the need for further EU legislation, the legal base for the proposed Directive, the factors informing the Government's opt-in decision on the proposed Regulation, and the wider Brexit implications.**

The need for further EU legislation

3.9 **Given the Government's "cautious" approach to new legislation in this area, we are disappointed that the Minister's Explanatory Memorandum does not include a subsidiarity assessment setting out the Government's position on the need for further legislative action at EU level. We ask the Minister whether he considers that the proposed Regulation and Directive would "add value" and meet the threshold for the EU to act instead of Member States.**

3.10 **We would welcome further information on the Government's evaluation of existing tools and mechanisms—whether domestic, EU or international—for obtaining electronic evidence which is stored in a different jurisdiction. We ask the Minister whether he shares the Commission's view that they are too slow and too fragmented to be effective or, conversely, whether he is confident that electronic evidence can be preserved and obtained under these mechanisms within the timescales envisaged in the proposed Regulation.**

Legal base and application of the UK's justice and home affairs opt-in

3.11 **We infer from the Minister's Explanatory Memorandum that the Government is considering whether the proposed Directive—document (b)—should cite a Title V (justice and home affairs) legal base, giving the UK the option of deciding whether it wishes to participate. We ask the Minister for his views on the following matters:**

- **whether the proposed Directive includes JHA (justice and home affairs) content;**
- **whether any JHA content is the primary purpose of the proposal or can be regarded as ancillary;**

- **whether any provisions impose obligations in the justice and home affairs field;**
- **whether the proposed Directive should cite a Title V legal base; and**
- **whether (with or without a Title V legal base), the Government considers that UK's Title V opt-in applies.**

3.12 **If the legal base remains unchanged, the UK will be bound by the proposed Directive but may decide not to participate in the proposed Regulation. We ask the Minister to explain the practical implications of being bound only by the Directive and how this might affect requests for electronic evidence made under other EU criminal law instruments in which the UK participates, such as the European Investigation Order. Would these requests also have to be addressed in the first instance to the service provider's designated legal representative in the EU?**

3.13 **The Minister sets out the factors which will inform the Government's opt-in decision on the proposed Regulation—document (a). We would welcome further information on the progress made in negotiating a UK-US Data Access Agreement, its main provisions, and how UK participation in the proposed Regulation might affect the operation of the Agreement.**

Brexit implications

3.14 **The Minister indicates that one factor weighing on the Government's opt-in decision will be the impact of the proposals "on wider law enforcement and national security Brexit negotiations". We ask the Minister to explain what progress has been made on these wider negotiations and how significant opt-in decisions taken in the months remaining until exit day are likely to be in shaping the UK's future relationship with the EU in this area.**

3.15 **Under Article 122(1)(a) of the draft Withdrawal Agreement, only EU justice and home affairs laws that are "binding upon and in the UK" by the date on which the Withdrawal Agreement enters into force—expected to be 29 March 2019—will apply to the UK during a post-exit transition/implementation period. We ask the Minister whether "binding upon and in the UK" means that these laws will only apply during this period if:**

- **they have been formally adopted before the date on which the UK leaves the EU; or**
- **they have been formally adopted *and* entered into force before the date on which the UK leaves the EU; or**
- **the UK has notified the Council Presidency of the UK's intention to take part before the date on which the UK leaves the EU, given that this notification cannot be revoked and is binding on the UK.**

3.16 **Pending further information, the proposed Regulation and Directive remain under scrutiny. We ask the Minister to confirm the three-month deadline for opting into the proposed Regulation at the earliest opportunity and to provide regular**

updates on the progress of negotiations. We draw this chapter to the attention of the Home Affairs Committee, the Justice Committee and the Committee on Exiting the European Union.

Full details of the documents

(a) Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters: (39631), 8110/18 + ADDs 1–3, COM(18) 225. (b) Proposal for a Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings: (39630), 8115/18 + ADDs 1–2, COM(18) 226.

Background

Existing procedures for securing evidence in another country

3.17 The European Investigation Order is the principal mechanism for obtaining evidence (including electronic evidence) needed for a criminal investigation from another EU Member State.[31] Under the EIO, a request for evidence must be validated by a judicial authority before it is transmitted to the law enforcement authorities in the Member State where the evidence is located. These authorities are responsible for executing the request and should give the EIO the same priority as a similar request in a domestic case. An EIO should be executed "without delay" and not take longer than 120 days. There is no provision for third (non-EU) countries to participate in the EIO.

3.18 Member States depend on Mutual Legal Assistance agreements to obtain evidence from countries outside the EU. The EU has only concluded two Mutual Legal Assistance agreements—with Japan and with the United States. The agreement with Japan stipulates that requests for mutual assistance should be executed "promptly" without specifying any deadlines. Under both agreements, requests have to be channelled through a central coordinating authority in the issuing (EU) country and executing country (Japan or US) before being transmitted to the judicial or law enforcement authority responsible for taking the action requested. The Commission estimates that a typical request to obtain electronic evidence from a service provider in the US takes on average ten months.[32] Because of these delays, law enforcement authorities have sought to establish voluntary cooperation arrangements with service providers based in the US (the country hosting the main service providers). The Commission considers that the absence of a clear legal framework undermines transparency and accountability and creates uncertainty.

The proposed Regulation

3.19 The proposed Regulation is a criminal law measure based on Article 82(1) of the Treaty on the Functioning of the European Union (TFEU) concerning judicial cooperation in criminal matters. It would operate alongside the European Investigation Order but is narrower in scope.[33] Whilst the EIO establishes a procedure for requesting a wide range

31 See Directive 2014/41/EU regarding the European Investigation Order in criminal matters. Member States had to implement the Directive by 22 May 2017.

32 See the Commission's fact sheet, *New rules to obtain electronic evidence*.

33 See recital (61) and Article 23 of the proposed Regulation.

of investigative measures, the proposed Regulation would apply only to requests for electronic evidence (evidence stored in electronic form). The Commission identifies four types of data covered by the proposal:

- "subscriber data" which contain information identifying an individual, such as name, date of birth, address, billing and payment data;
- "access data" which are insufficient in themselves to identify an individual but provide useful information to aid identification, such as an IP address allocated to the user of an online service, date and time of use or log-in and log-out details;
- "transactional data" which provide contextual information that may help to establish the contacts or whereabouts of the user of a service, such as the source and destination of a message and data on the location of a device; and
- "content data" which comprise any stored data in digital format which do not fall within the other three categories, such as text and voice messages, e-mails, videos and photographs.

3.20 The Commission describes the first three categories as "non-content data", an important distinction as the current legal framework in the US and in many EU Member States allows service providers to share non-content data with foreign law enforcement authorities on a voluntary basis.[34]

Scope of application

3.21 The proposed Regulation would apply to the providers of electronic communications or information society services as well as the providers of internet infrastructure (such as IP addresses and domain name registries) who offer services within the EU and have "a substantial connection" to one or more Member States, regardless of the place where the data are stored.[35] Factors demonstrating a substantial connection include establishment within the EU, a significant number of users, or the targeting of services towards one or more Member States.[36] The Commission emphasises that the storage of data must be "a defining component" or "main characteristic" of the services provided.[37] The proposed Regulation would not create a general obligation to retain data or authorise the interception of data.[38]

European Preservation Orders

3.22 A European Preservation Order may be issued for any criminal offence. Its purpose is to preserve electronic evidence by preventing a service provider from removing, deleting or altering data pending a further request to produce the evidence.[39] If issued by an investigating authority, it must be validated by a judge or prosecutor.

34 See recital (20) of the proposed Regulation.
35 See Articles 1, 2(3) and (4) and 3.
36 See recital (28) of the proposed Regulation.
37 See p.14 of the Commission's explanatory memorandum accompanying the proposed Regulation.
38 See recital (19) of the proposed Regulation.
39 A follow-up request to produce the evidence may take the form of mutual legal assistance, a European Investigation Order or a European Production Order.

3.23 The European Preservation Order should be sent directly to the service provider (via a designated legal representative in the EU) and the electronic evidence specified in it preserved for 60 days (or longer if a request to produce the evidence has been initiated before the 60 days expire).

European Production Orders

3.24 The purpose of a European Production Order is to compel a service provider outside the jurisdiction of the investigating state to produce electronic evidence. It may be issued for any criminal offence if the evidence sought concerns subscriber or access data and must be validated by a judge or prosecutor. A higher threshold applies for transactional or content data—the Order must be validated by a judge and concern more serious crimes (those punishable by a maximum custodial sentence of at least three years), or certain other cyber-related or cyber-enabled crimes or terrorism.[40] Unlike the European Preservation Order, a European Production Order may only be issued if a similar measure would be available for the same criminal offence in a comparable domestic case (where there is no cross-border dimension).[41]

3.25 The European Production Order should be sent directly to the service provider (via a designated legal representative) and the evidence disclosed within 10 days—or six hours in emergency cases where there is "an imminent threat to the life or physical integrity" of an individual or to critical infrastructure.

Enforcement procedures

3.26 The proposed Regulation seeks to reduce the time taken to obtain electronic evidence by providing for the direct transmission of European Preservation and Production Orders to service providers (via their designated legal representatives in the EU). Should they fail to comply with an Order, the issuing authority may transfer responsibility for enforcing the Order to the Member State in which the service provider's designated legal representative is based. The usual rules on mutual recognition would apply, meaning that the Order would be recognised and enforced "without further formalities" unless one of a limited number of grounds for opposing enforcement applies. They include:

- the data requested are protected by immunity or privilege or their disclosure may affect national security, defence or other fundamental interests of the Member State in which the Order is to be enforced;
- procedural errors in issuing or validating the Orders;
- manifest errors in the Orders or the Orders themselves are "manifestly abusive";
- the data requested are not stored by the service provider so the Order cannot be executed; and
- manifest violations of the EU Charter of Fundamental Rights.[42]

40 Certain offences relating to fraud and counterfeiting of non-cash means of payment, child pornography and the sexual abuse of children, attacks against information systems and terrorism may fall below the threshold (a maximum custodial sentence of at least three years) but would still be covered by the proposed Regulation.

41 See Article 5(2) of the proposed Regulation.

42 See Article 14 of the proposed Regulation.

Resolving conflicts with the laws of a third country

3.27 As the proposed Regulation would apply to service providers offering services in the EU, even though they may be established or the data stored outside the EU, compliance with a European Production Order could give rise to conflicts of law. The proposal therefore includes a review procedure (involving the courts of the Member State that has issued the Order) to establish whether the law of a third country applies in the specific circumstances of the case and whether that law would prohibit the disclosure of the data requested. There are three possible outcomes:

- the court finds that there is no conflict (because the third country law does not apply or does not prohibit disclosure of the data requested) and upholds the Order;
- the court finds that there is a conflict, and that the third country law prohibiting disclosure is necessary to protect fundamental rights or fundamental national interests relating to national security or defence—in these circumstances, the third country is entitled to object to the Order and prevent its execution; and
- the court finds there is a conflict on other grounds (not engaging fundamental rights or fundamental national interests)—the proposal sets out the factors to be considered in determining whether to uphold or withdraw the Order.[43]

Remedies

3.28 The proposed Regulation requires Member States to ensure that effective remedies are available to individuals whose data have been obtained under a European Production Order. The right to an effective remedy must be exercised in the court of the Member State issuing the Order.

The proposed Directive

3.29 The Commission notes that there is no general requirement for online service providers offering services in the EU to establish a physical presence within the EU. Nor are there harmonised rules determining how service providers should handle requests for information made by law enforcement or judicial authorities responsible for investigating and prosecuting crime. This has led to divergent national approaches and fragmentation which, the Commission believes, "creates legal uncertainty for those involved and can put service providers under different and sometimes conflicting obligations and sanctioning regimes […], depending on whether they provide their services nationally, cross-border within the Union or from outside the Union".[44] It says that harmonised rules are needed to reduce obstacles to the freedom to provide services and "ensure a better functioning of the internal market in a way which is coherent with the development of an area of freedom, security and justice".[45]

43 See Article 16 of the proposed Regulation. Relevant factors include the degree of connection to each jurisdiction, the third country's interest in preventing disclosure, the degree of connection between the service provider and third country, the interest of the investigating country in obtaining the evidence (including the gravity of the offence) and any sanctions that may be imposed on the service provider for complying with a European Production Order.

44 See p.3 of the Commission's explanatory memorandum accompanying the proposed Directive.

45 See p.4 of the Commission's explanatory memorandum accompanying the proposed Directive.

3.30 The proposed Directive would require Member States to ensure that online service providers offering services in the EU designate at least one legal representative within the EU to receive and act on decisions or orders issued by national law enforcement or judicial authorities for the purpose of gathering evidence for criminal proceedings. The designated legal representative must be based either in the Member State in which the online service provider is established or in a Member State in which the services are offered. Often, the decisions or orders issued by national law enforcement or judicial authorities will be based on EU criminal law judicial cooperation instruments in which not all Member States participate (Denmark has a general opt-out and the UK and Ireland are only bound by the instruments they have opted into). The proposed Directive therefore requires that, for these instruments, the service provider's designated legal representative must be based in a participating Member State.

The Minister's Explanatory Memorandum of 3 May 2018

The proposed Regulation—document (a)

3.31 The Minister supports the EU's efforts to improve cross-border access to data, "particularly where this can improve security cooperation, prevent crime and terrorism, and close legal gaps", as well as the safeguards included in the proposed Regulation which reflect "the different levels of intrusiveness of the measures imposed in relation to the data pursued."[46] He notes that the UK participates in the European Investigation Order and in other EU mutual legal assistance measures, but adds:

> "However, as the EIO, a measure which seeks to tackle a similar issue, has only been operating for nine months in the UK and is yet to be implemented by all relevant Member States, its effectiveness cannot be fully evaluated yet.
>
> "In addition, the UK already has a mature domestic system in place for accessing cross-border e-evidence. Our approach to this work stream previously has been to caution against EU legislation, given there are existing tools both within the EU and being developed internationally to tackle similar issues.
>
> "We will examine any benefits to the UK in participating in this measure, and in particular whether it would provide the UK with additional tools to support criminal investigations, whether it could provide for greater access to data beyond what our domestic capabilities offer, including through evaluating this measure against existing tools such as the EIO and MLA. In addition, we will assess the likely level of usage of the new system by UK law enforcement agencies."[47]

3.32 The Minister is unable at this stage to confirm when the three-month deadline for deciding whether to opt into the proposed Regulation will expire but anticipates that it is likely to be around 22 August.[48] He reiterates the Government's position that all opt-in decisions are taken "on a case-by-case basis, putting the national interest at the heart of the decision-making process" and says that relevant factors include:

46 See para 21 of the Minister's Explanatory Memorandum.

47 See paras 23–5 of the Minister's Explanatory Memorandum.

48 This is based on the last language version of the proposed Regulation being published on 23 May.

- the impact on the UK's ability to progress the UK-US Data Access Agreement;
- the costs and potential savings, as well as any efficiency gains;
- the impact on "wider law enforcement and national security Brexit negotiations"; and
- the type of framework the Government will wish to put in place post-Brexit.

The proposed Directive

3.33 The Minister confirms that the proposed Directive will be legally binding on the UK as it "does not trigger the opt-in". It would require changes to UK law:

> "[…] to impose an obligation on services providers established in the UK or offering services here to create the necessary legal presence in the Union (whether in the UK or elsewhere). For cases where, under the Directive, a service provider has decided to appoint a legal representative in the UK, changes to UK law would be necessary to create a mechanism for ensuring the legal representative complies with orders when required to do so."[49]

3.34 The Government will "analyse what impact the Directive is likely to have on UK service providers operating in the EU and what enforcement mechanism the UK will need to put in place to ensure compliance with the Directive".[50]

Previous Committee Reports

None on this document.

49 See paras 11 and 18 of the Minister's Explanatory Memorandum.

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

4 New EU partnership with Africa, the Caribbean and the Pacific

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; further information requested; drawn to the attention of the Foreign Affairs and the International Development Committees
Document details	Recommendation for a Council Decision authorising the opening of negotiations on a Partnership Agreement between the European Union and countries of the African, Caribbean and Pacific Group of States
Legal base	Articles 218(3) and (4) TFEU; QMV or unanimity depending on final content of the agreement
Department	International Development
Document Number	(39367), 15720/17 + ADD 1, COM(17) 763

Summary and Committee's conclusions

4.1 The EU maintains a special economic and political relationship with countries in Africa, the Caribbean and the Pacific (ACP) which have former colonial links to its Member States. Forty-one ACP countries are also members of the Commonwealth. Currently, the bilateral EU-ACP relationship is governed by the Cotonou Partnership Agreement (CPA), which was signed in 2000 and expires in 2020.[51] It creates the framework for political dialogue and cooperation on a range of issues, including trade and economic development,[52] climate change, and food security. The Agreement also requires the EU to provide funding for development assistance projects in ACP countries via the European Development Fund (EDF), which currently runs from 2014 to 2020 and amounts to €30.5 billion (£27 billion).[53]

4.2 As the Cotonou Agreement expires in 2020, the EU has been engaged in a process of reflection on the options for the future of the EU-ACP relationship since 2015.[54] In December 2017 the European Commission formally submitted a proposal for the EU's input into the negotiations with the ACP bloc on a successor agreement (in the form of a Council Decision containing a formal mandate for the Commission, which would negotiate on the EU's behalf). The Commission proposes the creation of three "Regional Compacts" with the African, Caribbean and Pacific groupings of the ACP bloc respectively,

51 The Agreement is available in full on EurLEX.

52 After the EU's unilateral trade preferences for ACP countries were ruled in contravention of WTO rules, it has been negotiating Economic Partnership Agreements (EPAs) with regional groupings of ACP states which are based on reciprocal trade preferences. The UK is discussing the continuation of the EPAs in place with the countries concerned after the UK leaves the EU.

53 The UK is a major contributor to the EDF, having agreed to provide nearly 15 per cent (£3.2 billion) of its budget over the 2014–2020 period. Under the terms of the Withdrawal Agreement, it would honour these commitments in full despite its exit from the EU.

54 European Commission consultation, "Towards a new partnership between the EU and the ACP countries after 2020" (October 2015).

to reflect regional priorities more easily in the bilateral relationship.[55] A proposal for the next European Development Fund, which would finance development assistance in ACP states as part of the EU's engagement under post-Cotonou, is due in June 2018.

4.3 The Government is broadly supportive of the proposed regional approach to the EU's partnership with the ACP.[56] The Minister for International Development (Lord Bates) told us in January 2018 that the Government would remain actively engaged in the discussions among Member States on the EU's position for the negotiations, but was unable to clarify the Government's preferred outcome with respect to the UK's position in the new framework after Brexit (i.e. full participation by the UK, or a supporting role as part of an entirely new partnership by the UK with ACP countries bilaterally).

4.4 After we first considered the proposed negotiating mandate for the new EU-ACP Agreement in January 2018,[57] we retained the proposed Council Decision under scrutiny because the Minister had been unable to articulate in any more detail the Government's approach as regards the level of the UK's proposed involvement in the EU-ACP relationship after Brexit. We asked him to clarify the UK's position on potentially seeking accession to the post-Cotonou treaty as a non-EU, non-ACP member (and similarly whether the Government would want to stay embedded in the next European Development Fund to maximise the economies of scale and increased coherence of offering overseas aid collectively with the EU-27 after the end of the post-Brexit transitional period).[58]

4.5 We received two letters from the Minister with respect to the EU-ACP negotiations in April[59] and May 2018.[60] These firstly summarise the status of the deliberations between the Member States on the Commission's proposal of December 2017:

- with respect to the involvement of non-signatory parties in the work of the proposed 'Regional Compacts', the latest version of the negotiating mandate text merges the statuses of 'enhanced observer' and 'observer' into just one option (which the Minister calls a "streamlined and clearer approach"). The exact terms of the relationship with each observer should be defined in a separate annex to the agreement, and "leaves open options for future UK collaboration at a strategic and political level"; and

- although the thematic priorities for the regional 'Compacts' with Africa, the Caribbean and the Pacific respectively have remained largely unchanged from the original Commission proposal,[61] there will be a simplified procedure for

55 For example, the African 'Compact' would focus on democratic governance and conflict resolution; the Caribbean Compact would focus assistance on the region's environmental and disaster resilience; and the Pacific Compact would similarly focus on climate change and fisheries.

56 Explanatory Memorandum submitted by the Department for International Development (11 January 2018).

57 See for more information the Committee's Report of 31 January 2018.

58 Because it is currently constituted by a separate Treaty outside of the EU institutional and legal framework, the European Development Fund could theoretically accommodate a non-EU country more easily in its governance structures (as, indeed, the UK will have during the post-Brexit transitional period in a way that it will not for any of the programming committees for funding instruments within the EU framework). Such flexibility is unlikely to be on offer if the next European Development Fund, as the Commission is proposing, becomes formally part of the EU budget and institutional structures.

59 Letter from Lord Bates to Sir William Cash (18 April 2018).

60 Letter from Lord Bates to Sir William Cash (3 May 2018).

61 The Minister notes that the UK has been able to secure "stronger references to gender equality and inclusion of people with disabilities, in line with the UK's strong leadership on the 'Leave No-One Behind' agenda and commitment to prioritise disability inclusion".

adjusting the political priorities and functioning of the Compacts to respond to new political or economic developments (and thereby avoid the need for formal ratification of amending treaties by the contracting parties). However, the exact mechanism for such amendments will not be defined until the negotiations with the ACP bloc get underway.

4.6 Given the Committee's questions about the future of the UK's relationship with the ACP bloc after Brexit, the bulk of the Minister's letters focus on the question of the UK's potential participation in the institutional architecture of the post-Cotonou Agreement. The Minister firstly explains that the new treaty, if it enters into force during the post-Brexit transitional period, will form part of the body of EU law in the same way as existing agreements and the Government "would expect the terms of the agreement to apply to and in the UK for this time limited period".

4.7 As regards the UK's engagement in the EU-ACP framework *after* the end of the transitional period, the Minister notes that Brexit will not prevent the UK from "work[ing] with the EU where we choose to, and where it is in our mutual interests" and also allow it to "tailor our relationships to our UK priorities from January 2021". Any partnership between the UK and the EU-ACP, he says, should be on an "opt-in basis at a strategic level, with clear governance arrangements".

4.8 The Minister's letters therefore reiterate that the Government remains "fully engaged in discussions around the successor to the Cotonou Agreement and on the shape of the future financial instruments […] with a view to what will allow greatest flexibility for potential UK participation in the future". While he has welcomed the proposed ability for non-EU, non-ACP countries to seek either observer status or full membership under the Agreement, he adds that the Government does not yet have a policy position on whether to make use of either option because "it would be premature to do so until we have a clearer understanding of the possible terms of such engagement" and of the "corresponding rights and obligations" (i.e., until there is a finalised text on which both the EU and ACP are agreed).

4.9 With respect to the potential contributions by the UK to the EU's funding instrument for development assistance projects in the ACP (the successor to the current European Development Fund), the Minister says that he will provide an update on the Government's position when negotiations on the next Multiannual Financial Framework—the EU's long-term budget for the 2021–2027 period—are underway. However, the Government's own policy paper on the "Framework for the UK-EU Security Partnership"—published on 9 May—explicitly calls on the UK and the EU to "explore a mechanism" for cooperation on development policy that could include the UK making "a [financial] contribution to an EU programme or instrument" in return for "an appropriate role in the relevant decision-making mechanisms".[62]

4.10 The Member States will be asked to approve the negotiating mandate at the Foreign Affairs Council on 28 May 2018, allowing for formal talks between the European Commission and the ACP bloc to begin after the summer recess.

62 See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705687/2018–05–0_security_partnership_slides__SI__FINAL.pdf.

4.11 **We thank the Minister for the information he has provided about the finalisation of the EU's position for negotiations on the next framework for the Union's relations with the ACP states, and the Government's thinking about how the UK will fit into this framework after it ceases to be an EU Member State. In our previous Report, we attempted to elicit further information from the Minister about the Government's view on:**

- **whether it would seek to accede to the EU-ACP agreement as a full member (likely requiring continued contributions to the successor programme to the European Development Fund); or**
- **limit the UK's objectives to achieving observer status in the new EU-ACP institutions, and negotiate a new framework for political and trade relations with all or some of the ACP states bilaterally.**

Potential UK accession to the new EU-ACP Agreement

4.12 **It is clear to us the Government, for better or worse, is not in a position to give a clear answer at present about the preferred status for the UK under the EU's new treaty with the ACP. To a certain extent, this is understandable as the legal framework that would underpin the UK's accession or observer status within the EU-ACP partnership has not yet been established.**

4.13 **However, we remain concerned about the apparent lack of a strategic vision for the continuity in the UK's relations with the ACP bloc after the end of the post-Brexit transitional period (especially given that the Government will not be represented in the existing EU-ACP institutions during that period). It appears the Government will not decide on its approach to the post-Brexit relationship with the 79 ACP countries on matters currently covered through the UK's EU membership—including institutional mechanisms for political dialogue and the way in which the UK's current contributions to the European Development Fund will be deployed by the Department for International Development[63]—until well into 2019, when there is more clarity about the outcome of the EU-ACP and UK-EU negotiations.**

4.14 **There is also the broader issue of the refocusing of the EU's external priorities with the loss of the UK as a member. While the countries with historical links to the UK will still be covered by the successor to the Cotonou Agreement, they are losing the most influential supportive voice on the EU side when the UK ceases to be represented in the EU institutions. That makes the Government's plans for the future of its relationship with the forty-one Commonwealth nations that are also members of the ACP bloc all the more pressing.**

4.15 **Overall, the Committee remains concerned that the 'wait and see' approach adopted by the Government could complicate efforts to establish an alternative to participation in the EU-ACP framework after the end of the transitional period. Negotiations on the new EU-ACP treaty are due to begin in August this year, and the timetable for their completion is not yet clear (although the aim is to have them finalised before May 2020, when the Cotonou Agreement expires). That may leave very little time for the**

63 I.e., either via a continued contributions the EU, or by increasing the responsibilities of the Department for International Development to manage the current contributions to the EDF bilaterally.

Government to negotiate a bilateral alternative with ACP countries (either as a bloc, individually or in groupings), risking either a disruption in the bilateral relationship when the UK ceases to be covered by the EU's international agreements or effectively force the Government's hand in seeking accession to the new EU-ACP agreement to avoid such an outcome.[64]

Potential UK contributions to the next European Development Fund

4.16 **The Minister's Explanatory Memorandum did not confirm whether the Government will seek to remain a contributor to the successor to the current European Development Fund. It is a substantial contributor to the 2014–2020 Fund (due to pay in £2.7 billion to cover EU funding commitments made to the ACP bloc over that period), raising the prospect of either managing this expenditure domestically or seeking an agreement with the EU on a continued financial contributions to its collective development policy.**[65] **With respect to the latter option, the Government's new policy paper on the future UK-EU partnership on security and foreign affairs (published after we received the Minister's Memorandum) explicitly makes the offer of continued UK contributions to the EU's development assistance instruments in return for an "appropriate" (but unspecified) "role in the relevant decision-making mechanisms".**

4.17 **We note in this respect that the European Commission has announced that it wants to make the European Development Fund for the 2021–2027 period fully part of the EU's legal, institutional and budgetary framework.**[66] **This would be a radical departure from the approach since 1957, under which successive Funds have been established by separate treaty between the Member States and funded directly by their national Exchequers (rather than via the general EU budget). Moreover, the Commission has proposed the merger of the current EDF with the Development Cooperation Instrument and the European Neighbourhood Instrument (which act as the EU's development assistance funds for non-ACP developing countries and countries in the EU's eastern and southern 'neighbourhood' respectively) into a single funding instrument called the "Neighbourhood, Development and International Cooperation Instrument" (NDIC Instrument).**

4.18 **This new budgetary and governance approach, if accepted by the Member States, would complicate the UK's ability as a 'third country' to participate in, and contribute to, the management of EU development assistance projects for the ACP states (and notably those with which the UK maintains the closest ties, i.e. Commonwealth nations). Depending on the design of the new NDIC instrument, UK participation could present the Government with the option of participating in the entire Instrument (i.e. including channelling some of its development funding for non-ACP countries via the EU as well) or not at all. Moreover, the EDF's integration into the EU's legal structures (and therefore the general institutional limitations of its Treaties) would**

64 It should also be borne in mind that negotiating bandwidth to establish any new bilateral approach on both sides will already be stretched by the UK's and ACP's discussions with the EU on their respective future relationships.

65 The UK could potentially seek to make a contribution to the successor to the current European Development Fund irrespective of its choice on participation of the EU-ACP agreement as a whole (although, should the UK seek accession to the EU-ACP agreement as a third party, it would most likely have to make financial contribution to the EU's development assistance to the ACP in any event).

66 See Commission document COM(2018) 321, p. 80.

almost certainly rule out any possibility of a UK vote over country-specific work programmes and funding decisions under the new European Development Fund. We will revisit our conclusions on this point after we receive the Government's Explanatory Memorandum on the European Commission's formal proposal for the NDIC Instrument this summer.

4.19 **While we now clear the proposed mandate for negotiations between the European Commission and the ACP states from scrutiny, enabling the Minister to support the final text at the meeting of the Foreign Affairs Council later this month, we do so on the condition that we continue to receive updates on developments in the negotiations as they progress (and how this affects the Government's evolving position on what role the UK should play, if any, in the new EU-ACP framework as a 'third country'). We also ask the Minister to confirm by what legal mechanism the effects of the new EU-ACP Agreement would be extended to the UK during the transition, as it will never have been a party to the treaty—either independently or by virtue of its EU membership—if it enters into force after 29 March 2019.**

4.20 **We will similarly continue to press the Minister for more detailed information about the Government's position on the possibility of continued financial contributions to the EU's development policy instruments after 2020. We expect his Explanatory Memorandum on the forthcoming European Commission proposal for the NDIC Instrument to contain an initial assessment of any 'third country' provisions in that draft Regulation from the UK's post-Brexit perspective, and to define more precisely what would be an "appropriate" role for the UK in the governance structures of the NDICI if it decided to offer financial contributions to the Instrument from 2021 onwards.**

Full details of the documents

Recommendation for a Council Decision authorising the opening of negotiations on a Partnership Agreement between the European Union and countries of the African, Caribbean and Pacific Group of States: (39367), 15720/17 + ADD 1, COM(17) 763.

Previous Committee Reports

Twenty-eighth Report HC 71–xxvi (2016–17), chapter 5 (25 January 2017).

5 EU Trade Defence Instruments

Committee's assessment	Politically important
Committee's decision	Previously cleared from scrutiny (on 28 March 2018); drawn to the attention of the International Trade Committee and the Committee on Exiting the European Union
Document details	(a) Communication on Modernisation of Trade Defence Instruments: Adapting Trade Defence Instruments to the current needs of the European Economy; (b) Proposal for a Regulation amending Council Regulation (EC) No 1225/2009 on protection against dumped imports from countries not members of the European Community and Council Regulation (EC) No 597/2009 on protection against subsidised imports from countries not members of the European Community[67]
Legal base	(a)— (b) Article 207 TFEU; ordinary legislative procedure; QMV
Department	International Trade
Document Numbers	(a) (34838), 8493/13, COM(13) 191; (b) (34863), 8495/13 + ADDs 1–2, COM(13) 192

Summary and Committee's conclusions

5.1 In April 2018, the Council voted in favour of a Commission proposal on modernising the EU's trade defence instruments, aimed at levelling the playing field for EU industry from unfairly dumped or subsidised imports. The most controversial amendment was to the application of the so-called 'lesser duty rule',[68] which would enable the EU to impose higher duties on dumped or subsidised imports in cases where raw material prices have been distorted past a certain threshold. The UK was one of only three Member States to vote against the proposal, arguing that the previous lesser duty rule provided producers in the steel and other sectors with the protection they need, without placing disproportionate costs on consumers or downstream users.

5.2 As the Regulation is expected to come into force at the end of May, it will impact the UK whilst a member of the EU and during the transition/implementation period (scheduled between 29 March 2019 and 31 December 2020, as the UK will abide by EU trade rules over this time). It also has implications for UK trade remedies after the end of the implementation/transition period (scheduled for 31 December 2020), to the extent that UK divergence from the EU trade defence regime impacts future trade patterns (if it

67 Council Regulation (EC) No 1225/2009 and (EC) No 597/2009 were re-codified in 2016 under EU Regulation 2016/1036 and EU Regulation 2016/1037.

68 The lesser duty rule means that the EU imposes trade defence duties that are sufficient to remove the injury to EU industry (at the 'injury margin'), which may be below the actual dumping margin. The lesser duty rule is recommended under WTO rules, but many of the EU's trade partners do not apply it. It therefore compensates producers for the harm caused by unfair trade (to allow them to make a reasonable profit) rather than for the actual amount of dumping.

deflects 'dumped' goods to the UK away from the EU) or influences wider trade relations (for example, potential partners whom the UK seeks to negotiate a trade agreement with may view the UK's relatively more liberal approach to the application of trade defence rules either positively or negatively).

5.3 At its meeting of 28 March 2018, the Committee cleared the documents from scrutiny, but asked the Minister of State for Trade Policy (Greg Hands) to inform the Committee of the outcome of the Council meeting on this important dossier and provide the Committee with a detailed update on the work that the Government is undertaking on the UK's future trade remedies regime after the end of the implementation/transition period. The Minister has addressed the Committee's questions in his letter of 17 April 2018.

5.4 **In response to the Committee's question on what objectives or criteria the Government is using to determine the future UK trade remedies framework, the Minister states that "[t]he trade remedies framework that we are setting up through the Taxation (Cross-Border Trade) Bill will be designed on the following criteria: impartiality, proportionality, efficiency and transparency".**

5.5 **The Minister does not specify how (in addition to the application of the lesser duty rule) the UK is intending to diverge from the EU trade defence regime after 31 December 2020. He simply notes that the future UK trade remedies regime will deploy the "full suite of tools permitted under the WTO in order to tackle injury to UK industry caused by unfair trading practices", and that it "will include many similar features to the EU".**

5.6 **In response to the Committee's question on how divergence from the EU trade defence regime is expected to impact future UK trade patterns, in particular unfair trade deflection (where, for example, higher EU27 duties relative to UK duties on dumped imports leads to the deflection of 'dumped' goods away from the EU27 and into the UK), the Minister states that the Government has "not found evidence of significant deflection" in cases where the EU has imposed lower duties relative to the US. The Minister considers that "injury-based duties" that "will take account of the specific circumstances prevailing in the UK market" would normally be sufficient.**

5.7 **In response to the question of what specific measures the UK's new Trade Remedies Authority (TRA) would take to tackle unfair trade deflection, if more unfair imports do enter the UK market and the duties imposed prove to be inadequate to prevent injury to UK industry, the Minister states that the TRA would have the power to review and adjust duties "swiftly" if they were not effective. We note that the Minister does not elaborate on surveillance mechanisms or safeguard measures to tackle unfair trade diversion (as the EU is currently considering, further to the imposition of US tariffs on aluminium and steel).**

5.8 **The Committee also raised the question of how divergence from the EU trade remedies regime might influence wider trade relations and the negotiation and conclusion of future trade agreements, including i) the future EU-UK relationship and ii) other trade agreements. The Minister considers that the UK's divergence from the EU's lesser duty rule will not impact wider trade negotiations, on the basis that the "[t]he UK will have a WTO compliant trade remedies framework in place on exiting the EU, which is standard and accepted practice amongst trade partners". We**

consider that this statement avoids the political realities of trade negotiations, as the application of trade defence measures are highly politically sensitive (as evidenced by global reactions to the US imposition of tariffs on steel and aluminium, and certain countries' objections to the EU's new trade defence rules).

5.9 **We draw the Minister's responses to the attention of the Committee on Exiting the EU and the International Trade Committee, which will no doubt wish to probe the Government further on its developing plans on trade remedies after 31 December 2020.**

Full details of the documents

(a) Communication on Modernisation of Trade Defence Instruments: Adapting Trade Defence Instruments to the current needs of the European Economy: (34838), 8493/13, COM(13) 191; (b) Proposal for a Regulation amending Council Regulation (EC) No 1225/2009 on protection against dumped imports from countries not members of the European Community and Council Regulation (EC) No 597/2009 on protection against subsidised imports from countries not members of the European Community: (34863), 8495/13 + ADDs 1–2, COM(13) 192

Background

5.10 On 16 April 2018, the Council adopted the proposed Regulation by a qualified majority (the UK and Sweden voted against it, and Ireland abstained). The European Parliament is expected to vote in plenary on the final text of the regulation in May. Entry into force of the Regulation is expected in late May.

5.11 The previous Committee's Reports, listed at the end of this chapter, provide further details of the draft Regulation, the Government's position and related background.

Previous Committee Reports

Twenty-second Report HC 301–xxi (2017–19), chapter 7 (28 March 2018); Third Report HC 83–iii (2013–14), chapter 6 (21 May 2013).

6 Equal Pay and the Gender Pay Gap

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Women and Equalities Committee
Document details	(a) Commission report on the implementation of the Commission Recommendation on strengthening the principle of equal pay between men and women through transparency; (b) Commission Communication: EU Action Plan 2017–19 Tackling the gender pay gap.
Legal base	—
Department	Home Office (Government Equalities Office)
Document Numbers	(a) (39236), 14735/17, COM (17) 671; (b) (39246), 14733/17 + ADD 1, COM (17) 678

Summary and Committee's conclusions

6.1 Equal Pay and tackling the Gender Pay Gap (GPG) is a topic of considerable public interest currently in the UK. This is mostly because of the interesting GPG data emerging as a result of the requirement for employers of more than 250 employees to submit GPG data to the Government's designated portal.[69] Certain public authorities are also subject to this requirement.[70]

6.2 On 10 January we considered a Commission Report—document (a) and Action Plan document (b)—addressing how to tackle the GPG across the EU.

6.3 In our Report of the same date,[71] we asked questions about:

- whether and how the UK will maintain its own commitment after 31 December 2020 (assuming an implementation period) to eliminating the GPG, in default of EU initiatives, supervision and enforcement mechanisms on equal pay—including whether there is any intention on the part of the Government to amend relevant "EU retained law" once the UK is no longer subject to EU law; and
- recent press reports of persistent GPGs in both private and public sectors, with focus on some Government departments including the Department for Exiting the EU (DExEU).

6.4 These questions are of wider interest across the House, given the Report of the previous Women and Equalities Committee on the GPG[72] and the BBC Pay inquiry of the Digital, Culture, Media and Sport Committee.[73]

69 The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017.
70 The Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017.
71 Ninth Report, HC 301–ix (2017–19), chapter 3 (10 January 2018).
72 Second Report, Women and Equalities Committee, HC 582 (2014–15).
73 BBC Pay Inquiry launched 9 January 2018.

6.5 Given the above and our own interest in this topical area, we wrote to the new Minister for Women (Victoria Atkins) on 28 March 2018,[74] chasing the Government's response to our Report. We now report her response to us in a letter of 24 April 2018.[75] In that letter, the Minister:

- apologises for the delay in her response and promises to respond in a timelier fashion in future scrutiny in the equalities field;
- explains that both the Government's plans for tackling the GPG as underpinned by the Equality Act 2010 and domestic initiatives referred to in the Action Plan will continue and be unaffected by the implementation period;
- states that the UK "has never relied in EU regulation to set high standards on promoting gender equality", giving the example of how the equal pay provision in the Equality Act 2010 had their origins in the Equal Pay Act 1970 and how the current "ground-breaking" UK equal pay regulations go beyond EU law;
- concludes from this that the UK's exit from the EU will not undermine the Government's commitment to eliminating the GPG;
- refers to the Prime Minister's commitment to preserving workers' rights under EU law through the EU (Withdrawal) Bill, including on equal pay;
- recalls that the Government has published an Equality Analysis[76] to show how the delegated powers in the Withdrawal Bill will "only be used to make technical changes to equality legislation to remove redundant references and correct other deficiencies, to ensure that the legislation continues to work as intended";
- assesses that technical changes will need to be made to the Equality Acts 2006 and 2010 (the Equality Acts) or corresponding secondary legislation;
- adds that a Government amendment to the Withdrawal Bill, agreed by the House, will provide further transparency on how delegated powers will be used in relation to the Equality Acts as it requires the Government to provide equality impact statements[77] to Parliament before delegated legislation is laid—the statement would have to include an explanation of each amendment and an affirmation that the relevant Minister has "had due regard to the need to the eliminating discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010";
- clarifies that the Government has made a commitment to include a requirement for such equality impact statements in other primary legislation needed to enable the UK's exit from the EU;
- considers that all these actions demonstrate the Government's "clear resolve" to maintain the UK's "world class record" on equalities, including on equal pay and gender pay gaps"; and
- confirms that the Government did not formally consult the devolved administrations on these documents as they do not require further action—

74 The text of this letter will be loaded shortly here on our Committee's website.
75 Letter from the Minister for Women (Victoria Atkins) to Sir William Cash, 24 April 2018.
76 Equality Analysis, EU (Withdrawal) Bill published by the Department for Exiting the EU in July 2017
77 The amendment now appears at paragraph 22 of Schedule 7 of the EU (Withdrawal) Bill as introduced to the Lords on 18 January 2018.

despite acknowledging that equal opportunities is devolved to Northern Ireland and there are some limited devolved competences on pay transparency for the Scottish and Welsh Governments.

6.6 Next, the Minister responds to our questions about the Government's own commitment as an employer to eliminate the GPG, referring to the example we had highlighted at the Department for Exiting the EU (DExEU). She says the Government prefers to use the "median gender pay gap" (8.9% at DExEU, much lower than the national median at 18.4%)), rather than the "mean" figure at DExEU (15.26%) because the latter is "less likely to be affected by a small number of high earners and best represents the 'typical' pay difference in an organisation". She adds that the Government is taking a number of steps as an employer to minimise the gender pay gap in the civil service: more diverse recruitment and promotion and more flexible working arrangements, with the ultimate goal of being the most inclusive UK employer by 2020.

6.7 **We thank the Minister for her response. We are now content to clear these non-legislative documents from scrutiny but draw this chapter to the attention of the Women and Equalities Committee.**

6.8 **However, we would observe that we are unconvinced by the Government's reasoning for wanting to refer to the "median pay gap" rather than the "mean". We think that what the Government perceives to be the distorting nature of the "small number of higher earners" in the "mean" figures tells its own story about not enough women being appointed to the highest earning positions. Such an added dimension to GPG data should not be discounted for data which makes for more comfortable reading for the Government as an employer itself. On that note, we are glad to see that Government is taking steps to "achieve a more diverse Civil Service at the senior grades".**

Full details of the documents

(a) Commission report on the implementation of the Commission Recommendation on strengthening the principle of equal pay between men and women through transparency: (39236), 14735/17, COM (17) 671; (b) Commission Communication: EU Action Plan 2017–19 Tackling the gender pay gap: (39246), 14733/17+ ADD 1, COM (17) 678.

Previous Committee Reports

Ninth Report, HC 301–ix (2017–19), chapter 3 (10 January 2018).

7 European Agency for Safety and Health at Work

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; further information requested
Document details	Proposal for a Regulation establishing the European Agency for Safety and Health at Work (EU-OSHA), and repealing Council Regulation (EC) 2062/94.
Legal base	Article 153(2)(a) TFEU, QMV, ordinary legislative procedure
Department	Health and Safety Executive
Document Number	(38025), 11531/16, COM(16) 528

Summary and Committee's conclusions

7.1 The European Agency for Safety and Health at Work (EU-OSHA) collects, analyses and disseminates technical, scientific and economic information on occupational safety and health, such as identifying practical solutions to improving health and safety in small and medium enterprises. The Agency has no regulatory powers. In 2016, the Commission proposed to update the Agency's objectives and tasks in the light of changing circumstances and changes that have been agreed for all EU agencies under the Common Approach to EU Decentralised Agencies.[78]

7.2 The Minister of State for Disabled People, Health and Work (Sarah Newton) explains that negotiations on this proposal had been delayed in order to align the outcome with parallel proposals on other agencies (European Foundation for the Improvement of Living and Working Conditions and the European Centre for the Development of Vocational Training), as well as the more recent proposal on the European Labour Authority. Negotiations between the EU institutions have recently begun and agreement could be swift, as the institutions are broadly aligned. Differences that remain to be resolved concern a proposed extension of the Agency's remit to include a policy role and a more prescriptive approach to gender representation on the management board. Concerning future UK engagement in the Agency, the Minister notes that the approach to agencies forms part of the ongoing negotiations regarding UK withdrawal, but she observes that the regulation allows for cooperation agreements with third countries.

7.3 **We note that the differences between the institutions are relatively minor and, as such, we are content to clear the proposal from scrutiny on the understanding that the Minister will keep us updated as negotiations progress.**

Full details of the documents

Proposal for a Regulation establishing the European Agency for Safety and Health at Work (EU-OSHA), and repealing Council Regulation (EC) 2062/94: (38025), 11531/16, COM(16) 528.

78 Common Approach to EU Decentralised Agencies, 19 July 2012.

Background

7.4 Background to the Agency and further information on the proposal were set out in our Report of 14 September 2016.

7.5 When our predecessors first considered the proposal, they raised issues about the legal base, the size of the management board, the timing and nature of an evaluation, the implications of Brexit and the progress of negotiations. These issues have largely been resolved as set out in our Report of 7 December 2016 and the most recent letter from the Minister. A letter was also received from the then Minister (Penny Mordaunt) on 31 August 2017,[79] noting that there was little to report since she wrote in advance of the December 2017 Council meeting.

The Minister's letter of 3 May 2018[80]

7.6 The Minister explains that trilogue negotiations between the EU institutions began on 24 April. The delay from the adoption of the European Parliament's first position in July 2017 was due in part, she says, to the consolidation of the trilogue process for the current proposals on three EU agencies[81] and the interaction with the recently published European Labour Authority proposal.

7.7 The Minister expects the trilogues on EU-OSHA to be uncontentious given the similar positions of the institutions and could be completed before the summer, but notes that a few differences remain to be resolved:

> "The European Parliament position promotes a policy role for the EU agency, which is an expansion of its remit and could distract from its primary research and information dissemination role. The UK also supports a voluntary approach to gender representation on the agency's management board over the more prescriptive approach favoured by the European Parliament. My officials will keep these matters under review during trilogues in close collaboration with the UK permanent representation to the EU."

7.8 Regarding Brexit, the Minister confirms that the UK's approach to future membership of EU agencies is subject to the ongoing negotiation on the withdrawal agreement, but she notes that the EU-OSHA regulation will permit a cooperation agreement with third countries in future, subject to the agreement of both parties.

7.9 The Minister concludes by setting out the timetable. She warns that a swift outcome is possible and requests that the Committee waive scrutiny in case the proposal moves to a vote in Council before she is able to update the Committee again.

Previous Committee Reports

Twenty-second Report HC 71–xx (2016–17), chapter 6 (7 December 2016); Eleventh Report HC 71–ix (2016–17), chapter 4 (14 September 2016).

79 Letter from Penny Mordaunt to the Chair of the European Scrutiny Committee dated 31 October 2017
80 Letter from Sarah Newton to Sir William Cash dated 3 May 2018.
81 EU-OSHA, European Foundation for the Improvement of Living and Working Conditions (Eurofound) and the European Centre for the Development of Vocational Training (Cedefop).

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

Department for Environment, Food and Rural Affairs

(39642) 8164/18 COM(18) 199	Proposal for A Regulation of the European Parliament and of the Council amending Regulation (EC) No 110/2008 as regards nominal quantities for placing on the Union market of single distilled shochu produced by pot still and bottled in Japan.

Foreign and Commonwealth Office

(39644) 8077/18 SWD(18) 150	Commission Staff Working Document Montenegro 2018 Report accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2018 Communication on EU Enlargement Policy.
(39645) 8083/18 SWD(18) 156	Commission Staff Working Document Kosovo* 2018 Report accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2018 Communication on EU Enlargement Policy.
(39656) 8078/18 SWD(18) 151	Commission Staff Working Document Albania 2018 Report accompanying the Document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2018 Communication on EU Enlargement Policy.
(39657) 8079/18 SWD(18) 152	Commission Staff Working Document Serbia 2018 Report accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2018 Communication on EU Enlargement Policy.
(39659) 8081/18 SWD(18) 154	Commission Staff Working Document The former Yugoslav Republic of Macedonia 2018 Report accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2018 Communication on EU Enlargement Policy.
(39660) 8082/18 SWD(18) 155	Commission Staff Working Document Bosnia and Herzegovina 2018 Report accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2018 Communication on EU Enlargement Policy.

HM Revenue and Customs

(39620)
7935/18
COM(18) 178

Report from the Commission to the European Parliament and the Council on the IT strategy for customs.

HM Treasury

(39556)
7125/18
+ ADD 1
COM(18) 118

Report from the Commission to the Council and the European Parliament on the effects of Articles 199a and 199b of Council Directive 2006/112/EC on combatting fraud.

(39613)
7798/18
+ ADD 1
COM(18) 172

Report from the Commission to the European Parliament and the Council on Effects of Regulation (EU) 575/2013 and Directive 2013/36/EU on the Economic Cycle.

Home Office

(39647)
8160/18
COM(18) 211

Communication from the Commission to the European Parliament, the European Council and the Council Fourteenth progress report towards an effective and genuine Security Union.

Formal Minutes

Wednesday 16 May 2018

Members present:

Sir William Cash, in the Chair

Mr Marcus Fysh	Mr David Jones
Kate Green	Stephen Kinnick
Kate Hoey	Andrew Lewer
Kelvin Hopkins	Michael Tomlinson
Darren Jones	Dr Philipa Whitford

2. 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 8 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Twenty-eighth Report of the Committee to the House.

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

[Adjourned till Wednesday 23 May 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*)