House of Commons

European Scrutiny Committee

Twenty-ninth Report of Session 2017–19

Documents considered by the Committee on 23 May 2018 including the following recommendations for debate:

Exchanging data with non-EU countries

EU Trade Agreements: EU-Japan Economic Partnership Agreement

Report, together with formal minutes

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Notes

Numbering of documents

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

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

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

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

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

Abbreviations used in the headnotes and footnotes

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

Euros

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

Further information

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

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

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Meeting Summary

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

Brexit-related issues

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

- **Exchanging data from non-EU countries: Commission Communication**
- **EU-Japan Economic Partnership Agreement**

We urgently seek further information from the Government on the continuity of EU-Japan trade relations after UK exit from the EU, the implications of this agreement for the future UK-EU relationship, and the transparency and scrutiny of trade negotiations (both while the UK is a member of the EU and once it is able to operate its own independent trade policy). Key questions include:

  - whether Japan has confirmed that it would be prepared to agree to apply the EU-Japan EPA to the UK during any transitional/implementing period (scheduled between 29 March 2019 and 31 December 2020);
  - whether the UK will be seeking to negotiate a similar or more ambitious agreement with Japan bilaterally during any transitional/implementing period;
  - whether the negotiations for a future UK-Japan FTA will run in parallel to or take place after the negotiation of the future UK-EU relationship, and (if the former) what the legal and practical considerations of running parallel negotiations are;
  - whether this agreement could serve as a model for future UK-EU trade relations, particularly in view of the EU's Chief Brexit negotiator's (Mr Barnier's) suggestion that the trade element of the future relationship should be based on a CETA-style deal;
  - what steps the Government is taking to ensure that Parliament will be able to engage more effectively in scrutiny of EU exclusive agreements while we remain a Member of the EU (until 29 March 2019) and during any transition or implementation period (scheduled until 31 December 2020); and
  - whether Parliament will enjoy an equivalent or better level of transparency with regard to the UK's FTA negotiations after UK withdrawal from the EU on 29 March 2019.

- **Immigration—Preventing document fraud and identity theft**

Once the UK has left the EU, EU citizens whose rights are protected by the Withdrawal Agreement (setting out the terms on which the UK will leave the EU) will retain the right

to use their national identity cards rather than a passport to enter and leave the UK. Post-exit, how will border control authorities be able to differentiate between EU citizens who are entitled to travel to and from the UK on their national identity cards and those who will need to travel with a passport? What impact would there be on movement across the Gibraltar/Spain border if the authorities in Gibraltar do not implement the changes to national identity cards envisaged by the Commission?

- **Security—Tightening EU rules on explosives precursors**

In light of the Government's concern that changes proposed by the Commission raise questions about "where the balance between security and individual freedom lies", is this an area in which the Government might wish to diverge from EU rules post-transition and what might the consequences be for the UK's future trade and security partnerships with the EU?

Summary

Exchanging data from non-EU countries: Commission Communication

This Commission Communication is highly relevant to EU-UK data sharing after the end of the proposed transition/implementation period. Recent developments, including the publication by the Commission of horizontal clauses for the inclusion of personal data flows in international free trade agreements between the EU and third countries, have heightened the Brexit relevance of this document. It is relevant that personal data flows were not included in the EU-Japan trade negotiations because of the Commission's view expressed in this Communication that negotiations on trade and personal data adequacy decisions should be kept separate. For this reason, we recommend this document for debate together with the EU-Japan Economic Partnership Agreement documents.

Not cleared from scrutiny; recommended for debate together with the EU-Japan Economic Partnership Agreement documents; drawn to the attention of the Digital, Culture, Media and Sport Committee, the International Trade Committee, the Business, Energy and Industrial Strategy Committee, the Science and Technology Committee and the Exiting the EU Committee.

Composition of the European Parliament: Proposed European Council Decision

This European Council Decision would reduce the number of MEP seats for the elections in June 2019, partly reflecting the vacation of UK MEP seats because of Brexit. As the UK will no longer be taking part in EP elections, it is not affected by the proposal. It is possible that agreement will be sought on 24 May by written procedure for the proposal to be sent to the EP. The Government is expected to abstain. The EP plenary vote on consent is expected on 11 June. Provided the EP gives consent, formal adoption is expected at the 28 June European Council. We clear the proposal from scrutiny now that the Minister has clarified that the UK does not intend to use its veto as leverage in the Article 50 negotiations. The chapter also highlights some interesting correspondence between the Government and the House of Lords EU Select Committee on the question of how EU citizens resident in the UK will vote in EP elections after Brexit.

Cleared from scrutiny; further information requested.

EU-Japan Economic Partnership Agreement

The EU-Japan Economic Partnership Agreement is the biggest trade deal ever negotiated by the EU and has major implications for the UK, both whilst a Member of the EU and after the UK's withdrawal on 29 March 2019. We recommend the document for urgent debate on the floor of the House for the following reasons:

- the EU-Japan EPA raises complex legal and policy issues for the UK, both while it is a Member of the EU and after its withdrawal from the EU, which the Government must address before the agreement's expected adoption by the Council on 26 June 2018;
- as this is an EU-only trade agreement (that does not require ratification by individual Member States in accordance with their own domestic procedures), such a debate would provide the only opportunity for the House of Commons as a whole to scrutinise and have a say on the Government's position on the EU-Japan trade agreement before it is signed and concluded; and
- the need to understand what steps this Government will take to ensure more transparency in and scrutiny of trade negotiations, both as a member of the EU and after UK withdrawal (when it is able to operate an independent trade policy) is fundamental to ensuring the democratic accountability of trade deals that the UK is or intends to become party to.

Not cleared; recommended for debate on the floor of the House; drawn to the attention of the Committee on Exiting the EU and the International Trade Committee.

Preventing document fraud and identity theft

The European Commission has proposed a Regulation to strengthen the security features of national identity cards as well as residence documents issued to EU citizens living in a different Member State and their third country family members. The Regulation is expected to take effect after the UK has left the EU but during the transition/implementation period in which EU laws will continue to apply to the UK. EU citizens whose rights are protected under the draft Withdrawal Agreement (which sets out the terms on which the UK will leave the EU) will retain the right conferred by EU law to use their national identity cards to enter and leave the UK long after the UK has ceased to be a member of the EU. The UK therefore has a clear interest in ensuring that national identity cards are as secure as possible, even after Brexit. We ask the Government how border control authorities will be able to differentiate between EU citizens who are entitled under the Withdrawal Agreement to use their national identity cards to travel to and from the UK and those who are not and will need to travel with a passport. We also ask whether the proposed Regulation would necessitate changes to the UK's Biometric Residence Permit when issued to third country family members of an EU citizen resident in the UK. We note that Gibraltar issues identity cards and request further information on the impact that issuing non-compliant identity cards after 2025 (the date by which the new, more secure identity cards must be phased in) would have on movement across the Spain/Gibraltar border.

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

Tightening EU rules on explosives precursors

The European Commission has proposed a Regulation that would update EU rules on explosives precursors—chemical substances used in home-made explosives—to keep pace with the evolving security threat whilst also maintaining "a level playing field" for legitimate trade. The changes proposed would further restrict access to these substances by ordinary members of the public, tighten up the licensing regime, and strengthen point of sale checks on "professional users" who need the substances for their trade or craft. The Government broadly welcomes the changes but says that some of the new restrictions could have "a significant impact on a small number of members of the public who would be prevented in some cases from being able to participate in their hobbies" and raise questions about "where the balance between security and individual freedom lies". The European Scrutiny Committee notes that the UK is likely to have to apply the Regulation during a transition/implementation period under the terms of the draft Withdrawal Agreement. The Government is asked to: provide further information on the impact of the legislation in the UK; explain whether this is an area in which the Government might wish to diverge from EU rules post-transition and what the consequences might be for the UK's future trade and security partnerships with the EU; and indicate whether the Government is satisfied that the checks on prospective customers at the point of sale are sufficiently robust to establish that an individual is a professional user rather than an ordinary member of the public.

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

Insolvency, Restructuring, Second Chances for Business Entrepreneurs

The proposed Directive represents a significant, first attempt by the EU to partly harmonise national insolvency laws. It is unlikely that the UK would be legally obliged to implement it before the end of the expected transition/implementation period (31.12.20). Nevertheless, the Government is working to achieve a favourable text and wishes to support a partial general approach expected to be agreed at the JHA Council meeting of 4–5 June. This would exclude the main substantive part of the proposal on restructuring procedures. We grant a scrutiny waiver as the Government is content with what is proposed and a UK-friendly text may facilitate future EU-UK trade after the transition/implementation period. However, we ask the Government to fully update the Committee on the outcome of the Council meeting as set out in the conclusions.

Not cleared from scrutiny; scrutiny waiver granted for partial general approach; drawn to the attention of the Business, Energy and Industrial Strategy Committee

Documents drawn to the attention of select committees:

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

Business, Energy and Industrial Strategy Committee: Insolvency, Restructuring and Second Chances for Business and Entrepreneurs [(a) Proposed Directive (NC), (b) Opinion (NC)]; Exchanging data with non-EU countries [Communication (NC)]

Digital, Culture, Media and Sport Committee: Exchanging data with non-EU countries [Communication (NC)]

Environmental Audit Committee: Port reception facilities for waste from ships [Proposed Directive (NC)]

Environment, Food and Rural Affairs Committee: Port reception facilities for waste from ships [Proposed Directive (NC)]

Exiting the European Union Committee: Exchanging data with non-EU countries [Communication (NC)]; EU Trade agreements: EU-Japan Economic Partnership agreement [(a) Proposed Decision (NC), (b) Proposed Decision (NC)]

Foreign Affairs Committee: EU enlargement: status of candidate countries [(a) Communication (C), (b) Working document (C)]

Home Affairs Committee: Preventing document fraud and identity theft [Proposed Regulation (NC)]; Tightening EU rules on explosives precursors [Proposed Regulation (NC)]

International Trade Committee: Exchanging data with non-EU countries [Communication (NC)]; EU Trade agreements: EU-Japan Economic Partnership agreement [(a) Proposed Decision (NC), (b) Proposed Decision (NC)]

Science and Technology Committee: Exchanging data with non-EU countries [Communication (NC)]

Transport Committee: Port reception facilities for waste from ships [Proposed Directive (NC)]

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

1 Exchanging data with non-EU countries

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; recommended for debate on the floor of the House together with the proposed Council Decisions on the signing and conclusion of the EU-Japan Economic Partnership Agreement; further information requested; drawn to the attention of the Digital, Culture, Media and Sport Committee, the International Trade Committee, the Business, Energy and Industrial Strategy Committee, the Science and Technology Committee and the Exiting the EU Committee
Document details	Communication from the Commission to the European Parliament and the Council on Exchanging and Protecting Personal Data in a Globalised World
Legal base	—
Department	Digital, Culture, Media and Sport
Document Number	(38493), 5191/17, COM(17) 7

Summary and Committee's conclusions

1.1 This Commission Communication is significant in highlighting the approach of the EU to the exchange of data with third countries for trade and other purposes in a way which adequately protects EU citizens. As such, it is highly relevant to the UK at the end of the proposed transition/implementation period, scheduled to be 31 December 2020. The background to the Communication and a detailed summary of its content are set out in our previous Report of 8 March 2017.[1]

1.2 The Government said in their Future Partnership Paper on the "Exchange and Protection of Personal Data"[2] that the UK:

> "…wants to explore a UK-EU model for exchanging and protecting personal data, which could build on the existing adequacy model, by providing sufficient stability for businesses, public authorities and individuals, and enabling the UK's Information Commissioner's Office (ICO) and partner EU regulators to maintain effective regulatory cooperation and dialogue for the benefit of those living and working in the UK and the EU after the UK's withdrawal."

1.3 The predominant view amongst commentators and others[3] has been that a Commission adequacy decision would be the best option for the UK to share data with the

1 Thirty-fourth Report HC 71–xxxii (2016–17), chapter 5 (8 March 2017).
2 Published by DEXEU on 24 August 2017.
3 See for example "Brexit: the EU data protection package", 3rd Report of Session 2017–19, 18 July 2017, HL Paper 7, Summary of conclusions and recommendations, paragraph 2.

EU after the end of the implementation period. In brief, to obtain an adequacy decision the UK would have to demonstrate equivalent legal protections for EU citizens and their personal data to those of EU data protection and e-privacy rules. The Government says in its Future Partnership Paper that the UK's new Data Protection Bill "… will implement the EU's new data protection framework in our domestic law. At the point of our exit from the EU, the UK's domestic data protection rules will be aligned with the EU data protection framework".[4]

1.4 It is worth noting for the purposes of the conclusions to this Report chapter that the Government also adds in the Future Partnership Paper that it is:

> "…essential that as part of the UK's future partnership with the EU, we agree arrangements that allow for free flows of data to continue, *based on mutual trust in each other's high data protection standards*" [our emphasis].

1.5 Despite the prevalent emphasis on the option of an adequacy decision, there have been three recent developments which raise the question of whether an international agreement could be the preferred vehicle for an EU-UK data-sharing arrangement instead:

i) In an oral evidence session on 9 May with the Exiting the EU Committee,[5] experts including the Information Commissioner agreed the preferred mechanism for future EU-UK data sharing would be a bespoke data-sharing treaty, rather than an adequacy decision, which could also provide for a role for the Information Commissioner's office.

ii) In the presentation produced by the UK negotiating team "Framework for the UK-EU Security Partnership" and published on 9 May,[6] the UK refers to its intention to seek a "separate UK-EU agreement on the exchange and protection of personal data" consisting of a "bespoke UK-EU model for exchanging and protecting personal data which builds on the existing adequacy model".[7]

iii) In February the Commission proposed some "non-negotiable" horizontal clauses for trade deals to govern the inclusion of personal data flows.[8]

1.6 This Report chapter focuses on the last of these three developments. When we last wrote to the Government on 29 March 2017,[9] we highlighted the Commission's previous position on data flows in trade agreements, as set out in this Communication. The Commission considered that trade negotiations and dialogue concerning a Commission

4 The implementation date for the Law Enforcement Data Directive was 6 May. The General Data Protection Regulation (GDPR) is applicable to the UK from the 26 May. The Bill completed its Third Reading on 9 May and "Ping Pong" in the Lords is scheduled for 14 May.

5 Oral Evidence Session, 9 May 2018, "The progress of the UK negotiations on UK withdrawal, HC 372, Q1563–1566.

6 "Framework for the UK-EU Security Partnership" May 2018, HM Government.

7 See page 25 of the Presentation.

8 Cover note from the Commission to "Delegations" of 1 March enclosing a letter from the Commission to the Chair of the DAPIX Working Group in the European Council and appending "Horizontal Provisions for cross-border data flows and for personal data protection". When these clauses were produced, they were classified as "Limité" but that classification has now been lifted.

9 Letter from the former Minister for Digital and Culture at the Department for Digital, Culture, Media and Sport (Matt Hancock) to Sir William Cash as Chairman of the European Scrutiny Committee, 16 March 2017 and letter from Sie William Cash as Chair of the European Scrutiny Committee to the former Minister for Digital and Culture at the Department for Digital, Culture, Media and Sport (Matt Hancock), 29 March 2017.

adequacy decision would need to take place separately on parallel tracks. This was because the Commission considered that the EU personal data protection rules could not be the subject of a negotiation, nor was it procedurally compatible to include an adequacy decision which is a unilateral implementing act (a form of EU tertiary legislation) following its own distinct legal process within a trade deal. We asked the Government to keep us updated on this issue, especially in the context of the EU-Japan trade deal.

1.7 The horizontal clauses relating to data flows in trade agreements (paragraph 5(iii) above) are appended to a letter from the Commission to the Chair of the Data Working Group (DAPIX) at the European Council dated 9 February 2018. They are referred to as " horizontal provisions for cross-border data flows and for personal data protection in EU trade and investment agreements". A summary of the letter and the provisions appears at paragraphs 1.13–1.14 below.

1.8 We note that since these clauses were produced, it has been reported that they were due to be considered at an informal meeting of national trade representatives on May 8.[10] However, subsequent reports have indicated that the Bulgarian Presidency does not intend to present the clauses for formal consideration by the Council and certainly not at the Council meeting of 22 May.[11] On 14 May, a Commission spokesman has been reported as saying that no decision has been taken to use the clause in any specific trade or investment negotiations and that if the Commission were to consider tabling the clauses in the context of a specific trade negotiation it would consult the Council and inform the European Parliament in line with EU Treaty requirements for negotiating trade deals.[12] Nevertheless, draft Council conclusions on clauses have also made their way unofficially into the public domain .[13] The leaked draft document includes draft conclusions that the Council considers that:

- the protection of personal data and privacy is a "fundamental right and as such non-negotiable" and that nothing in trade deals should stop the EU or Member States from regulating "in accordance with international obligations" in that field; and
- "adequacy decisions constitute an essential mechanism" for sharing data with a third country and that "the inclusion of horizontal provisions" in free trade agreements "should be complementary to the adoption of mutual adequacy decisions with negotiating partners" and that the two processes should follow separate but parallel tracks.

1.9 **This Communication raises important issues for the UK's future data-sharing relationship with the EU which have been heightened by recent developments. These include the question of whether an international agreement, bespoke or part of a wider trade deal, could be the vehicle for future EU-UK data-sharing arrangements. The proposed horizontal clauses on data flows produced by the Commission are particularly significant because the Commission has insisted in this Communication that dialogues on an adequacy decision for sharing personal data and trade negotiations should be kept separate. It is for this reason that provision for personal data flows was not made**

10 See Informal Trade Committee Experts Meeting (Services and Investments), ECOFIN of 8 May, listed on Bulgarian Presidency website.

11 See meeting of the Foreign Affairs Council (Trade), 22 May 2018.

12 "Data Flows—Draft Conclusions raise pressure on Commission", Politico Pro [Pay Wall] 15 May 2018.

13 "EU Presidency floats draft conclusions on data flows, Politico Pro [Pay Wall], 14 May 2018.

in the EU-Japan Economic Partnership Agreement.[14] We therefore recommend this document for debate on the floor of the House together with the proposed Council Decisions on the signing and conclusion of the EU- Japan Economic Partnership Agreement.

1.10 **The proposed horizontal clauses for cross-borders flows have not been deposited by the Government as they are not clearly subject to mandatory deposit under our Standing Orders. However, we request the Government to deposit them with us voluntarily together with an EM, as envisaged by our Standing Order 143 (1)(vi)[15] and preferably before the debate is scheduled. We note that the Government has recently deposited with us the proposed Regulation on horizontal clauses on safeguards[16] together with its Explanatory Memorandum. We understand that the form of document containing the horizontal data clauses is different and that there is uncertainty about whether it will be considered by the Council at all. Nevertheless, we are confident that the Government will appreciate how important it is for us to have as much scrutiny oversight as possible over such an important potential component of future trade deals, including between the EU and the UK.**

1.11 **Before the debate is held, we would like the Government to answer the following questions:**

a) **Regardless of press reports, have these horizontal clauses on data flows in trade agreements been discussed informally or formally in Coreper or the Council yet? If so, what is the view of the UK and other Member States? If not, what is the Commission's intention in producing the clauses?**

b) **What does Article B achieve, legally-speaking, in terms of personal data flows? Does it provide for data exchange based on mutual trust and mutual recognition by the EU and the third country in question of each other's data protection standards? If so, would the clause satisfy the UK's aspirations for a future data-sharing arrangement based on mutual trust as set out in its Future Partnership Paper?[17]**

1.12 **We draw this chapter and document to the attention of the Digital, Culture, Media and Sport Committee, the International Trade Committee, the Business, Energy and Industrial Strategy Committee, the Science and Technology Committee and the Exiting the EU Committee.**

Full details of the document

Communication from the Commission to the European Parliament and the Council on Exchanging and Protecting Personal Data in a Globalised World: (38493), 5191/17, COM (17) 7.

14 39640,7959/18 and 39639, 7960/18: Proposed Council Decisions on the signing and conclusion on behalf of the EU of the Economic Partnership Agreement between the EU and Japan.

15 See Standing Order 143 (1(vi): The expression "European Union" document means "any other document relating to European Union matters deposited in the House by a Minister of the Crown".

16 (39641), 8141/18: Proposed Regulation implementing the safeguard clauses and other mechanisms allowing for the temporary withdrawal of preferences in certain agreements concluded between the European Union and certain third countries.

17 "The exchange and protection of personal data—A Future Partnership Paper", August 2017.

Summary of the Commission's letter and horizontal clauses for data flows and personal data protection

1.13 In this summary, any reference to a trade agreement should also be taken as including investment agreements. In the covering letter to the draft provisions, the Commission says:

- The "preferred avenue" for data-sharing with third countries remains "adequacy decisions";
- That dialogues on data protection (i.e. on an adequacy decision) and negotiation of trade/investment agreements should follow separate tracks as is the case for the current Japan and South Korea negotiations;
- However, there will be times where the "adequacy decision" cannot be realistically adopted in time for the completion of the trade negotiations;
- It is important to have provisions on cross-border data flows to avoid protectionist barriers such as the forced data localisation within a party's territory, prohibition on processing or storing data in another party's territory, the requirement to make cross-border transfers dependent on using certified computing facilities within a party's territory;
- To address this problem, the team within Commission has produced a "stand-alone chapter on cross-border data flows" to be included in trade agreements "in full compliance with and without prejudice to the EU's data protection and data privacy rules";
- The Commission has endorsed these "non-negotiable" horizontal provisions and will defend them as such in trade negotiations with third countries; and
- The provisions are non-negotiable because the protection of personal data is non-negotiable so trade agreements cannot include any deviation from the provisions proposed.

1.14 It then appends the wording of Articles A, B and X,[18] together with the following explanation:

- Article A "Cross-border data flows" is a horizontal clause covering all economic sectors and covering both personal and non-personal data—it addresses the protectionist barriers to data flows listed in the fourth bullet point of paragraph 1.9 above, with an in-built three-year review clause;
- Article B "Protection of personal data and privacy" which the Commission describes as a clause "to fully safeguard the EU's right to regulate in the field of personal data protection and comprising the following elements:
  - An explicit recognition that high standards and rules on privacy and personal data are fundamental;

18 Accessible also from the link provided at footnote 3.

- A "whole agreement" clause allowing parties to adopt and maintain safeguards for privacy and personal data protection, including on cross-border transfers of data;
- A "without prejudice" provision clarifying that the agreement does not affect the provision of protection of personal data and privacy as guaranteed by the parties' laws;
- A definition of "personal data" to avoid circumventing the EU's acquis; and
- A clarification that the horizontal provisions would not be subject to the Investment Court system.

- Article X "Cooperation on regulatory issues with regard to digital trade" which clarifies that privacy and personal data issues cannot be included in dialogues on future regulatory cooperation.

Previous Committee Reports

Thirty-fourth Report HC 71–xxxii (2016–17), chapter 5 (8 March 2017).

2 EU Trade Agreements: EU-Japan Economic Partnership Agreement

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; recommended for debate (on the floor of the House), to take place before 26 June 2018; drawn to the attention of the International Trade Committee and the Committee on Exiting the EU
Document details	(a) Proposal for a Council Decision on the signing, on behalf of the European Union, of the Economic Partnership Agreement between the European Union and Japan; (b) Proposal for a Council Decision on the conclusion of the Economic Partnership Agreement between the European Union and Japan
Legal base	Articles 91, 100(2), 207 and 218(11) (in accordance with Opinion 2/15 of the Court of Justice of the EU issued on 16 May 2017), in conjunction with 218(5) (on signing) and 218(6) and 218(7) TFEU (on conclusion)
Department	International Trade
Document Numbers	(a) (39640), 7959/18 + ADDs 1–11, COM(18) 193; (b) (39639), 7960/18 + ADDs 1–11, COM(18) 192

Summary and Committee's conclusions

Overview

2.1 The Commission describes the EU-Japan Economic Partnership Agreement (the EU-Japan EPA) as "the biggest trade agreement ever done between two countries".[19] It was negotiated alongside the EU-Japan Strategic Partnership Agreement (considered in a separate chapter of this Report) and is expected to be agreed at the EU-Japan Summit in July 2018, following Council agreement on 26 June and European Parliament approval thereafter.

2.2 The EU-Japan EPA is significant in several respects:

- first, for its economic significance and potential impact on the UK as Japan is a major trading partner; however, it has not generated the levels of political and public controversy witnessed during the negotiation and conclusion of CETA (which previously held the spot of "the most ambitious external trade agreement ever negotiated by the EU");[20]
- second, as one of the first 'EU only' trade agreements to be presented by the Commission as part of its new approach to the 'architecture' of free trade

19 See Commission press release of 18 April 2018.
20 See Commission press release of 5 July 2016.

agreements (FTAs),[21] following the Court of Justice judgment of 16 May 2017 on the balance of competences in the EU FTA with Singapore.[22] The Commission's aim is to separate out the 'exclusive EU'[23] competence provisions of external agreements from the 'mixed' competence elements.[24] As EU-only agreements do not require formal ratification by individual Member States, the Commission hopes that this will avoid the delays recently seen in the implementation of mixed agreements such as CETA, where national or regional parliament have a direct veto. The EU-Japan EPA therefore excludes provisions on non-direct foreign (portfolio) investment and investment dispute mechanisms (mixed competence elements), in line with the Commission's new approach (which will be negotiated under a separate mixed investment agreement); and

- third, in the context of the UK's exit from the EU, the extent to which it may serve as a post-Brexit trade model for the UK and/or act as the basis for a future UK-Japan trade deal after the UK withdraws from the EU.

The Government's position

2.3 The Minister of State for Trade Policy (Greg Hands) sets out the Government's position on the EU-Japan EPA in his Explanatory Memorandum of 3 May 2018. He notes the following economic benefits for the UK: "The [EU-Japan EPA] will enable UK firms to export and import at a lower cost and give more opportunity for UK businesses to bid for public procurement contracts in Japan. Furthermore, the [EU-Japan EPA] will increase the welfare of UK households by lowering the price of final goods and services and increase consumer choice due to greater competition."

2.4 On the implications of the agreement in the wider context of the UK's exit from the EU, the Minister notes that "… the EU set out in the draft Withdrawal Agreement that the UK should be treated as a Member State for the purposes of international agreements during the IP, including the [EU-Japan EPA]" and that the Government will continue to work with the Japanese Government "on securing continuity of the [EU-Japan EPA]".

2.5 The Minister also updates the Committee on the EU's approach to the architecture of FTAs in his letter of 2 May 2018. He notes that "concluding FTAs as EU-only agreements will have implications for the involvement of the UK Parliament in concluding EU FTAs, with formal scrutiny ahead of the Council Decisions on signature and conclusion no longer accompanied by a domestic ratification process". The Minister considers that it "would not be appropriate for the UK to seek to fundamentally influence the core debate on competence architecture at this stage", but will seek to ensure it "reflect[s] the correct legal position" and "recognises the importance of involving national parliaments, civil society and citizens in the development of EU trade agreements". He commits to working with both Houses to "ensure that opportunities for scrutiny remain" and to debate this agreement, as well as the EU-Singapore FTA in both Houses "should this be of interest", as well as to "appear before the Committees if this is requested".

21 See draft Council conclusions on the negotiation and conclusion of EU trade agreements of 8 May 2018.
22 See the Minister's summary of the Court of Justice Opinion in his letter of 13 July 2017.
23 EU external competence can be 'exclusive', in which case only the EU can exercise the competence and Member States may not.
24 A mixed agreement means that there are parts for which the EU is exercising competence and other parts for which Member States are exercising their competence. Mixed agreements must be agreed by each Member State, creating a requirement for consensus. They must also be ratified by each Member State.

The Committee's conclusions and questions to the Government

2.6 **We note the potential benefits of the EU-Japan EPA to the UK economy and that the Government considers the agreement ready for signature and conclusion. However, important policy and legal issues remain unclear.**

2.7 **We ask the Minister to address each of the questions below and, in doing so, to clearly set out the Government's assessment on the implications of this trade agreement for the UK a) whilst a member of the EU (until 29 March 2019); b) during any implementation/transition period (scheduled between 29 March 2019 and 31 December 2020) and c) after 31 December 2020.**

Expected impact on the UK

2.8 **The Minister states that the Government is preparing its own analysis of the agreement, which it will "make available to Parliament as soon as possible".**

2.9 **We remind the Minister of the urgency of sharing this analysis with Parliament (which should be no later than 4 June 2018), in view of the fact that a vote on this agreement in the Council is expected to take place on 26 June 2018. This should:**

- **explain what consultations the Government has undertaken or is undertaking in its assessment of the EU-Japan EPA's likely impact on the UK a) whilst a member of the EU, b) during any transition/implementation period (particularly if the UK must assume the obligations but does not receive the benefits; also see below), and c) after 31 December 2020; and**
- **provide a clear breakdown of how different UK sectors and stakeholders are expected to win or lose from the agreement.**

2.10 **We also ask the Minister to confirm whether he is content with the proposed provisions enabling governments to regulate public services.**

Mode 4 provisions (temporary movement of skilled personnel)

2.11 **We note that the EU-Japan EPA contains Mode 4 provisions on the temporary movement of skilled personnel between the EU and Japan, which the Commission describes as "the most advanced provisions on movement of people for business purposes that the EU has negotiated so far, as it includes newer categories such as short-term business visitors and investors" and allows spouses and children to accompany those covered by Mode 4 provisions. Yet the Minister does not mention these provisions in his Explanatory Memorandum or set out the Government's position on their inclusion. We consider this a significant oversight on his part.**

2.12 **Notwithstanding the expected divergence of opinion between the Government and the Committee on the need to 'opt in' to these provisions (in view of the absence of a Title Five of Part Three of the TFEU legal basis, the Committee considers that these provisions automatically apply to the UK), we ask the Minister to:**

- **set out the Government's analysis on how these Mode 4 provisions differ from predecessor Mode 4 provisions in external agreements negotiated by the EU;**

- **explain whether the Government considers that the UK opt-in is engaged and, if so, whether it is minded to opt in and on what basis (for example, what impact on immigration to the UK will there be from these provisions, and are they in line with commitments the UK has already given within the WTO)?; and**
- **share its analysis, however preliminary, on whether the Government is minded to preserve these provisions after the end of any implementation/transition period (scheduled for 31 December 2020)?**

Continuity of trade relations with Japan after UK exit from the EU and implications of the EU-Japan EPA for the future UK-EU relationship

2.13 **In view of the Government's stated aim "for international agreements (to which the UK is a party by virtue of EU membership) to continue to apply to the UK as now" (after 29 March 2019), we ask the Minister to set out:**

- **whether the UK needs to secure the explicit agreement of third countries in order to secure the benefit of EU bilateral agreements during the transition/implementation period, notwithstanding the provision in the Withdrawal Agreement that the UK is to be treated as a Member State for the purposes of international agreements during the transition/implementation period;**
- **whether Japan has confirmed that it would be prepared to agree to apply the EU-Japan EPA to the UK during any transitional/implementing period;**
- **what practical effect there would be if the UK met all EU obligations under the agreement without being able to benefit from it;**
- **whether Japan has indicated that it would be willing to accept continuity of effect of the agreement beyond the transition/implementation period;**
- **whether the UK will be seeking to negotiate a similar or more ambitious agreement with Japan bilaterally during any implementation/withdrawal period (scheduled between 29 March 2019 and 31 December 2020) and if so, what provisions, if any, the Government might seek to alter to reflect UK interests;**
- **whether the negotiations for a future UK-Japan FTA will run in parallel to or take place after the negotiation of the future UK-EU relationship, and (if the former) what the legal and practical considerations of running parallel negotiations are; and**
- **whether the Government has combined its consultation with UK stakeholders on this EU-Japan EPA with any consultations on a potential bilateral FTA with Japan after the end of any transition/implementation period.**

2.14 **We also ask the Minister to share the Government's analysis on whether this agreement could serve as a model for a future UK-EU relationship, particularly in view of the EU's Chief Brexit negotiator's (Mr Barnier's) suggestion that the trade element of the future relationship should be based on a CETA-style deal.**[25]

Investment negotiations with Japan whilst a member of the EU and after UK withdrawal

2.15 **We note that the EU-Japan EPA has been presented as a 'standalone' EU-only agreement with a view to securing its "swift and smooth conclusion",**[26] **and that the Commission will continue to negotiate a separate mixed investment agreement with Japan.**

2.16 **In light of draft Council Conclusions**[27] **(expected to be adopted by Trade Ministers on 22 May 2018) stating that "EU investment agreements, where deemed necessary, should in principle be negotiated in parallel to FTAs", do you consider that the EU's negotiating leverage on investment issues with Japan has diminished as a result of it not concluding an investment agreement at the same time as the EU-Japan EPA?**

2.17 **Does the Government intend to negotiate the UK's future trade and investment relationship with Japan at the same time, as one agreement, as it will not be constrained as the EU now appears to be (to separate areas of 'exclusive' and 'mixed' competence)? Or will the separate EU-only trade agreement constrain the UK's ability to negotiate and conclude an integrated trade and investment agreement?**

Transparency and scrutiny of trade negotiations

2.18 **The Minister reiterates the Government's position on the importance of continued scrutiny by national parliaments of external trade agreements.**

2.19 **What steps is the Government taking to ensure that Parliament will be able to engage more effectively in scrutiny of EU exclusive agreements while we remain a Member of the EU (until 29 March 2019) and during any transition or implementation period (scheduled until 31 December 2020)?**

2.20 **It remains unclear how parliamentary scrutiny of UK trade negotiations (after 29 March 2019) will function, or what specific undertakings the Government will undertake to ensure a meaningful and transparent scrutiny framework.**[28] **Can the Minister confirm that Parliament will enjoy an equivalent or better level of transparency with regard to the UK's FTA negotiations after UK withdrawal from the EU on 29 March 2019 (for example, by publishing its negotiating mandates for future trade and investment agreements)?**

2.21 **We recommend these documents for an urgent debate on the Floor of the House (to take place before 26 June 2018) for the following reasons:**

25 See Commission PowerPoint slide of 15 May 2018, 'EU/UK Possible Framework for the Future Partnership Discussions', presented to the General Affairs Council meeting on Monday.

26 See Commission press release of 18 April 2018.

27 See draft Council conclusions on the negotiation and conclusion of EU trade agreements of 8 May 2018.

28 The Government's command paper, Preparing for our future UK trade policy, published on 9 October 2017, states that the Government will "continue to respect the role of Parliament…in preparing for and giving effect to an independent UK trade policy".

- **the EU-Japan EPA raises complex legal and policy issues for the UK, both while it is a Member of the EU and after its withdrawal from the EU, which the Government must address before the agreement's expected adoption by the Council on 26 June 2018 (as set out in paragraphs 2.7 to 2.20 above);**
- **as this is an EU-only trade agreement (that does not require ratification by individual Member States in accordance with their own domestic procedures), such a debate would provide the only opportunity for the House of Commons as a whole to scrutinise and have a say on the Government's position on the EU-Japan trade agreement before it is signed and concluded; and**
- **the need to understand what steps this Government will take to ensure more transparency in and scrutiny of trade negotiations, both as a member of the EU and after UK withdrawal (when it is able to operate an independent trade policy) is fundamental to ensuring the democratic accountability of trade deals that the UK is or intends to become party to.**

2.22 **In the meantime, we retain these documents under scrutiny and draw them to the attention of the International Trade Committee and the Committee on Exiting the EU.**

Background

2.23 Negotiations between the EU and Japan on this trade deal began in March 2013 (based on the negotiating directives adopted by the Council in November 2012, which were eventually made public in September 2017). Political agreement was reached at the EU-Japan Summit in July 2017. The proposed Decisions on the signature and conclusion of the agreement were presented to the Council on 18 April 2018. The Council is expected to approve the proposed Decisions on 26 June 2018. The Agreement will then be sent to the European Parliament for approval.

Objective and scope of the EU-Japan EPA, including potential impact on the UK

2.24 The agreement is expected to boost bilateral trade and economic growth in both countries, eliminating most tariffs as a result of progressive and reciprocal liberalisation of trade in goods (including EU 'offensive' agricultural interests), services and public procurement, and enhanced regulatory convergence in various areas.

2.25 A summary of the expected key benefits of the agreement is set out below, including the Minister's assessment of the expected impact of the agreement on the UK.

Trade in goods

2.26 Tariffs on 91% of the EU's exports to Japan will be eliminated at entry into force of the EU-Japan EPA, increasing to 97% at full implementation, with the remaining tariff lines subject to partial liberalisation through tariff rate quotas or tariff reductions. Over time, around 85% of agri-food products exported by the EU will enter Japan duty-free. The EU estimates this will save its exporters €1billion (£870million) in customs duties per year. Over time, the EU will open its markets to Japanese cars and car parts.

2.27 The Minister states:

> "From the UK perspective, priority areas such as agricultural products, processed foods, beer, wine, and whisky exports will enjoy lower tariffs. In the automotive sector, Japan and the EU agree to follow the United Nations Economic Commission for Europe standards on product safety and the protection of the environment. The deal includes a seven-year staged elimination of EU import tariffs on cars and car parts, a key EU concession in exchange for Japanese concessions on agricultural imports."

2.28 On customs processes, the Minister notes that there is "a dedicated Chapter aimed at the modernisation and simplification of rules, requirements, formalities and procedures related to import, export and other regimes, including transit, in order to ensure efficiency and proportionality".

Trade in services, procurement and geographical indications (GIs):

2.29 The agreement is intended to make it easier for EU companies to provide services on the Japanese market, while safeguarding the right to protect public services. The Minister states that for the UK, "…the agreement secures fairer treatment of UK service suppliers operating in Japan so that it is comparable to that of Japanese suppliers. This includes UK priority sectors such as finance, postal, telecommunications, and maritime. The agreement also preserves the UK's right to regulate and protect its public services".

2.30 On Mode 4 provisions on the temporary movement of company personnel, the Commission notes that this covers traditional categories such as intra-corporate transferees, business visitors for investment purposes, contractual service suppliers and independent professionals, as well as newer categories such as short-term business visitors and investors. The EU and Japan have also agreed to allow spouses and children to accompany service suppliers covered by Mode 4 provisions.

2.31 On procurement, Japan has committed to open up government contracts to EU companies in 48 large Japanese cities under a non-discriminatory regime, and allow the EU greater access to railway procurement at a national level.

2.32 The EU-Japan EPA covers more than 200 European geographical indications (GIs) on the Japanese market. The Minister notes that this includes Scotch Whisky for the UK.

Investment

2.33 Investment liberalisation includes market access provisions for investors, standards of treatment, and the prohibition of performance requirements and restrictions on senior managers and boards of directors. Investment protection and associated dispute settlement provisions are being negotiated under a separate mixed investment agreement.

2.34 Other chapters cover sanitary & phytosanitary (SPS) measures, sustainable development (including a commitment to the Paris climate agreement), technical barriers to trade (involving greater reliance on international standards), dispute settlement, competition policy, state-owned enterprises, corporate governance and data protection.

Council discussions on the future architecture of trade agreements

2.35 On 8 May 2018, Permanent Representatives to the EU (Ambassadors) agreed draft Council Conclusions on the future architecture of trade deals, which is scheduled to be formally signed off by Member States' Trade Ministers on 22 May 2018.[29]

2.36 The draft Conclusions approve the Commission's plans to propose negotiating directives for EU-only trade deals separately from mixed competence investment agreements "with a view to strengthening the EU's position as a negotiating partner".

2.37 However, Member States stress that, "it is for the Council to decide whether to open negotiations on this basis [… and] it is equally for the Council to decide, on a case-by-case basis, on the splitting of trade agreements". Referring explicitly to the EU's ongoing trade talks with Mercosur, Mexico and Chile, the draft Conclusions state that those deals "will remain mixed agreements".

2.38 Furthermore, the Council also stresses that national parliaments and civil society must "be kept duly informed" and that the Council will "continue endeavouring to obtain, to the greatest extent possible" a consensus that reflects all Member States' interests.

Full details of the documents

(a) Proposal for a Council Decision on the signing, on behalf of the European Union, of the Economic Partnership Agreement between the European Union and Japan: (39640), 7959/18 + ADDs 1–11, COM(18) 193; (b) Proposal for a Council Decision on the conclusion of the Economic Partnership Agreement between the European Union and Japan: (39639), 7960/18 + ADDs 1–11, COM(18) 192.

Previous Committee Reports

None.

29 Draft Council conclusions on the negotiation and conclusion of EU trade agreements.

3 Insolvency, Restructuring and Second Chances for Business and Entrepreneurs

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; scrutiny waiver granted for a partial general approach on 4–5 June; further information requested; drawn to the attention of the Business, Energy and Industrial Strategy Committee
Document details	(a) Proposed Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU; (b) Opinion of the European Central Bank on proposal (a).
Legal base	(a) Articles 53 and 114 TFEU; ordinary legislative procedure; QMV;(b)—
Department	Business, Energy and Industrial Strategy
Document Numbers	(a) (38313), 14875/16 + ADDs 1–2, COM(16) 723; (b) (38828), 10182/17

Summary and Committee's conclusions

3.1 This proposed Directive (document a) aims to harmonise aspects of insolvency laws across the EU to support business rescue and afford a second chance to entrepreneurs. It is a significant first attempt by the EU to harmonise national insolvency laws, with previous insolvency measures providing for mutual recognition and judicial cooperation on cross-border insolvency proceedings.[30]

3.2 The full background to this proposal, a summary of its provisions and how these have changed during negotiations in the Council can be found in our previous Reports on this proposal.[31]

3.3 As the Minister for Small Business, Consumers and Corporate Responsibility (Andrew Griffiths) now confirms,[32] it is unlikely that the UK would be required to implement the proposed Directive before the end of the proposed transition/implementation period (31 December 2020). He explains that the initial Government view to this effect is further supported by the revision of the text during the 2017 Estonian Presidency to allow Member States three years before having to implement the proposal (once adopted) into national law. So even if the proposal was adopted at the end of this year, it would not have to be

30 Most of the provisions in the 2015 recast EU Regulation 2015/848 on Insolvency Proceedings started to apply to Member States from 26 June 2017.

31 See paragraphs 3.1-.5 of this Report.

32 Letter from Andrew Griffiths to Sir William Cash of 9 May 2018

implemented until 2021. This would be after the transition/implementation period, when EU law would no longer apply to the UK under the terms of the proposed Withdrawal Agreement.[33]

3.4 He also now writes to update us on the Council negotiations and to seek a scrutiny waiver for a partial general approach (PGA) at the JHA Council of 4 and 5 June. He explains:

- The PGA would cover Title III (Discharge of debt qualifications), Title IV (Measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge) and Title V (Monitoring of procedures concerning restructuring, insolvency and discharge of debt).
- With reference to improvements in those areas of the text, the Government is broadly content with:
  - Title III which proposes a three-year discharge period for insolvency (with derogations for longer discharge periods) as it broadly fits with the UK's own approach to personal insolvency;
  - Title IV which covers matters such as training and regulation of the insolvency profession given that the corresponding UK system is already "robust" and also now includes a five-year implementation period in relation to requirements for electronic communications, easing the Government's previous reservations; and
  - a more proportionate approach to monitoring and data collection provisions in Title V.
- Further discussions before the JHA Council are expected and so further improvements could be made to the text in the interim.

3.5 The Minister also informs us that the most substantive part of the proposal on restructuring procedures will not be included in any partial general approach. There was some progress on this during the 2017 Estonian Presidency. This partly met UK concerns about greater flexibility and the need to better balance creditor and debtor interests whilst facilitating business rescue. However, there has been little discussion to date during the current Bulgarian Presidency of restructuring procedures, though these are now expected to commence in Council Working Groups.

3.6 **We thank the Minister for advance notice of the potential agreement of a partial general approach at the meeting of the JHA Council of 4 and 5 June. We also note his further clarification of the Government's view that the UK is unlikely to be under a legal obligation to implement the proposed Directive into national law before the end of the proposed transition/implementation period.**[34]

3.7 **We turn to his request for a scrutiny waiver for that Council meeting. We appreciate that it may well be in the UK's interests to support a favourable EU text aligned to a UK approach to business rescue. This might facilitate future EU-UK**

33 Draft Withdrawal Agreement, 19 March 2018

34 The proposed transition/implementation period is scheduled to end on 31 December 2020, as per the 19 March text of the proposed Withdrawal Agreement.

trade once the UK is no longer subject to EU law.[35] We are therefore content to grant a scrutiny waiver to allow the Government to support a partial general approach in line with the Government's views set out in the Minister's letter of 9 May.[36]

3.8 **We request the Minister to update us promptly on the outcome of that Council meeting, and to provide us with a copy of any resulting text. We would expect that update to:**

- **make references to that text;**
- **explain where document (b) has been influential at all;**
- **anticipate what the next focus of negotiations will be before matters can progress to the agreement of a Council general approach; and**
- **cover any possible Brexit implications, including potential links with a future EU-UK relationship and any intention on the part of the Government to align voluntarily with the proposal.**

3.9 **In the meantime, we retain both documents under scrutiny and draw these documents to the attention of the Business, Energy and Industrial Strategy Committee.**

Full details of the documents

(a) Proposed Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU: (38313), 14875/16 + ADDs 1–2, COM(16) 723; (b) Opinion of the European Central Bank on proposal (a): (38828), 10182/17.

Previous Committee Reports

(a) and (b): Twelfth Report HC 301–xii (2017–19), chapter 2 (31 January 2018); First Report HC 301–i (2017–19), chapter 2 (13 November 2017); (a) Thirty-fourth Report HC 71–xxxii (2016–17), chapter 2 (8 March 2017); Twenty-sixth Report HC 71–xxiv (2016–17), chapter 2 (18 January 2017).

35 See footnote 3.

36 As reported in this chapter. See link to this letter provided at footnote 1.

4 Mutual recognition of goods

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; Scrutiny Waiver granted; further information requested
Document details	Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of goods lawfully marketed in another Member State
Legal base	Article 114 TFEU; ordinary legislative procedure; QMV
Department	Business, Energy and Industrial Strategy
Document Number	(39393), 15965/17 + ADDs 1–6, COM(17) 796

Summary and Committee's conclusions

4.1 As part of its wider Goods Package, the Commission has published a proposal for a regulation on the mutual recognition of goods. The proposed new Regulation will replace the current Mutual Recognition Regulation (764/2008), which has not been fully effective in enforcing the Mutual Recognition Principle.

4.2 The Government indicated in its Explanatory Memorandum that the proposal would continue to benefit the UK after it has withdrawn from the EU, as businesses would continue to be able to use the mutual recognition principle once goods were placed on the market of one EU Member State. In its first report, the Committee acknowledged that the proposed Regulation was beneficial and sought further information from the Government about EU Mutual Recognition Agreements (MRAs) and Agreements on Conformity Assessment and Acceptance of Industrial Products (ACAAs).

4.3 The Parliamentary Under Secretary of State at the Department of Business, Energy and Industrial Strategy (Lord Henley) has now written an update to the Committee. He notes that his officials have carried out engagement with a range of affected businesses and that "Those businesses expressed unanimous support for the proposal and their priorities were consistent with the UK's objectives set out above."

4.4 The Minister states that the Government's objectives in Council Working Parties have been to ensure that:

- the new regulation does not introduce disproportionate new administrative burdens for businesses and that the administrative provisions are implemented in a clear and business-friendly manner; and that
- the new regulation does not alter the existing balance between facilitating trade in non-harmonised goods while preserving Member States' right to regulate nationally in certain circumstances.

4.5 The Minister states that, by working with like-minded Member States, the UK has been able to ensure that:

- the voluntary mutual recognition declaration is clear, easy to use and that the circumstances in which the Member States' market surveillance authorities can request additional information from businesses who are seeking to sell on their market under the Mutual Recognition Principle are limited and proportionate;
- the latest text clarifies the Commission's role in the problem-solving procedure and includes a requirement for the Commission to respond to requests for its opinion within six weeks; and
- businesses who have not submitted a voluntary mutual recognition declaration are provided with the opportunity to do so before a national authority begins its assessment of whether their products have been lawfully marketed in another Member State.

4.6 The Minister indicates that the Presidency intends to seek a General Approach at the Competitiveness Council on 28–29 May. As the Government has secured the improvements to the text that it sought, and most other Member States share the Government's views, he can envisage few circumstances in which the UK would not be able to support the text when it is put to a Council vote. He therefore asks the Committee to clear the proposal from scrutiny or to grant the Government a waiver to participate at Council.

4.7 **We note the Minister's comments that the Government has consulted with businesses and found "unanimous support for the proposal", and that the Government has succeeded in securing the improvements which it sought to the draft Regulation. We therefore grant the Government a scrutiny waiver to support the adoption of a General Approach regarding this proposal at Competitiveness Council on 28–29 May.**

4.8 **In the meantime, we retain the proposal under scrutiny pending a response to the questions in our previous report on this proposal. As previously noted, we ask to receive this response by 13 June 2018.**

Full details of the documents

Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of goods lawfully marketed in another Member State: (39393), 15965/17 + ADDs 1–6, COM(17) 796.

Background

4.9 The Mutual Recognition Principle (MRP) establishes that goods that have been lawfully marketed in one Member State can be lawfully marketed in any other Member State without needing to comply with any additional rules in the importing market. While this principle applies to all goods, in practice it relates to goods that are not already subject to specific EU harmonisation legislation.

4.10 The MRP means that, in theory, a manufacturer whose furniture is being sold in France can sell the same product in Poland without needing to meet any additional

requirements of Polish legislation. However, importing Member States can restrict the sale of goods on the basis of additional national rules. These rules need to be justified on a limited number of permissible grounds, e.g. to protect public safety.

4.11 Despite the existing Regulation, businesses continue to face practical barriers when trading in these non-harmonised goods, with many adapting their products to meet different national requirements rather than trying to rely upon the Mutual Recognition Principle.

4.12 The proposed Regulation aims to address this through:

- *The introduction of a voluntary mutual recognition declaration.* This declaration would include set information about the product being marketed, such as a description of the good and the applicable regulation in the Member State where it is lawfully marketed. The declaration should be accepted by a competent authority as sufficient to demonstrate that the goods are lawfully marketed in another Member State;

- *The introduction of a problem-solving procedure* which will apply if an economic operator is affected by an administrative decision to suspend the availability of their good on the domestic market of a Member State. This procedure would permit the home SOLVIT Centre to ask the Commission to give an opinion to assist in solving the case. The Commission's opinion will identify concerns and make recommendations to assist in solving the case, and be taken into account in the SOLVIT procedure. If the Commission identifies systemic problems with application of the principle, it retains the option of using its existing enforcement powers to initiative infringement proceedings under Article 258 TFEU.

- *Provisions to strengthen the role of Member State Product Contact Points (PCPs).* The proposal further specifies the roles of PCPs in facilitating the application of the mutual recognition principle by explicitly requiring them to provide online information on its application in their territory, and the remedies available in case of a dispute. The proposal also calls for administrative cooperation between national authorities and PCPs of different Member States, with information being relayed through the 'Union information and communication support system'.

Previous Committee Reports

Twenty-seventh Report HC 301–xxvi (2017–19) chapter 1 (9 May 2018).

5 Port reception facilities for waste from ships

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; but scrutiny waiver granted; drawn to the attention of the Transport Committee, Environmental Audit Committee and Environment, Food and Rural Affairs Committee
Document details	Proposal for a Directive of the European Parliament and of the Council on port reception facilities for the delivery of waste from ships, repealing Directive 2000/59/EC and amending Directive 2009/16/EC and Directive 2010/65/EU
Legal base	Article 100(2) TFEU; ordinary legislative procedure; QMV
Department	Transport
Document Number	(39447), 5454/18 + ADDs 1–4, COM(18) 33

Summary and Committee's conclusions

5.1 As part of its approach to tackling marine litter, the European Commission proposed to overhaul existing legislation on port reception facilities (PRF) to collect waste from ships. This will align the PRF Directive with the latest MARPOL (International Convention for the Prevention of Pollution from Ships) requirements. The transposition date for the Directive is 31 December 2020, which is the final day of the proposed post-Brexit implementation period.

5.2 The proposals include amended requirements on cost recovery, which are extended to fishing vessels. Under the proposals, vessels will pay a flat "indirect" fee to the port/harbour irrespective of whether they deliver any waste or not. This would include passively-fished waste.

5.3 The Parliamentary Under Secretary of State (Ms Nusrat Ghani) has written to update the Committee on progress in the areas of greatest concern to the UK: the introduction of an indirect fee for garbage; issue of a waste delivery receipt (WDR); separate collection of waste from ships in port; and delivery of passively-fished waste. Details of her response are set out below.

5.4 In summary, the Government has made some progress in relation notably to the issuing of a Waste Delivery Receipt and to the separate collection of waste from ships in port. Thus far, the Government has met some resistance regarding changes to the indirect fee for garbage, including passively-fished waste. One obstacle to securing amendments has been the distinct structure of UK ports, with a large percentage of privately-owned ports. The Government hopes to be able to negotiate further improvements in advance of possible agreement to a General Approach at the 7 June Transport Council. The Minister

asks the Committee to consider waiving the scrutiny reserve to allow the Government to signal its support for a "balanced" General Approach should that be the negotiated outcome.

5.5 **We appreciate that, due to the upcoming parliamentary recess, it was necessary to write to request a scrutiny waiver before negotiations were at an advanced stage. Given the helpful information provided by the Minister, we are content to waive the scrutiny reserve in order that the Government may signal its support for a balanced General Approach at the 7 June Transport Council. We expect the Government to seek an outcome which is workable for the UK's model of largely privately-owned ports and which does not disproportionately affect the fishing industry.**

5.6 **We look forward to information on the outcome of the Council. The proposal remains under scrutiny. We draw this chapter to the attention of the Transport Committee, Environmental Audit Committee and Environment, Food and Rural Affairs Committee.**

Full details of the documents

Proposal for a Directive of the European Parliament and of the Council on port reception facilities for the delivery of waste from ships, repealing Directive 2000/59/EC and amending Directive 2009/16/EC and Directive 2010/65/EU: (39447), 5454/18 + ADDs 1–4, COM(18) 33.

Background

5.7 Full background to, and content of, the proposal were set out in our Report of 28 February.

5.8 In her original Explanatory Memorandum, the Minister signalled the Government's support for the overall approach and principles of the proposal. She was concerned about a number of aspects of the proposal as reiterated in her letter of 4 May (see below). On Brexit, the Minister noted that the proposal would affect third countries using EU and EEA (European Economic Area) ports, thus clarifying that the legislation would remain relevant to the UK post-Brexit. She added that, post-Brexit, the UK would continue to play an important role in the international organisations that regulate shipping and would continue to work with other European countries on matters of common interest, such as the exchange of information on the safety of shipping and on pollution.

5.9 At our meeting of 28 February, we asked the Minister:

- to set out the instances where the proposal goes beyond MARPOL requirements;
- for information on the current approach to collection of marine litter by the fishing industry, including the work of voluntary initiatives such as Fishing for Litter;
- to reflect on an approach which would be supportive of the Commission's objectives, but leaves the detail of cost recovery to each Member State; and
- for an update on the Government's position and any indication of the positions to be taken by other Member States.

Ministerial letter of 4 May 2018[37]

5.10 The Minister sets out progress in relation to the four areas of particular concern to the UK.

5.11 On the **introduction of an indirect fee for garbage**, the Government's original concern was that a fixed fee may have the unintended consequence of introducing additional burdens for more specialist waste streams such as. hazardous waste and passively-fished waste. The Minister reports that this concern was echoed by several other Member States. Following discussions, the Presidency's suggested compromise would allow the indirect fee to be differentiated or, in certain cases, subsidised using waste revenues from waste management schemes and funds. While the Commission has indicated that some Member States currently operate such schemes, the UK considers that this compromise does not sufficiently address the concerns.

5.12 Regarding the **issuing of a Waste Delivery Receipt (WDR)**, the Government had concerns over the burden and practicalities of such a system—i.e. the need for a licensed waste operator to receive and verify waste from an individual ship before issuing a receipt, adding time and cost to the delivery process, and the difficulties of accurately identifying the quantity/volume of waste to be recorded for the issue of a receipt for waste delivered. On progress, the Minister says:

> "There was sympathy among some Member States for our position. However, due to the differences in set up and operation between UK and European ports (primarily due to the large percentage of privately owned ports in the UK), other Member States' views are different to ours; therefore they do not share our concerns about this element of the proposal and it is unlikely that the requirement will be wholly removed. Nonetheless, we have achieved some improvement and the Presidency's suggested compromise would remove the need for a waste operator to issue the waste receipt, which would reduce some of the burden."

5.13 Concerning the **separate collection of waste** from ships in port, the Government was originally concerned about the practical effect of the proposal, particularly on smaller ports where it may be impractical to permit the separate collection of wastes due to the limited/restricted size or access of the port. Progress is described in the following terms:

> "Again, the UK gained some support from Member States who shared our concerns, and negotiations have proved successful in that further clarification has been added that port reception facilities will not be required to have separate collections for each of the different waste streams defined in the International Convention for the Prevention of Pollution from Ships ('the MARPOL Convention'). We will continue to push for further clarification as to how many separate collections will be required under the EU waste legislation, to ensure that this is kept to the minimum."

5.14 On the **delivery of passively-fished waste**, the Government was concerned that the fishing industry is likely to bear the greatest proportion of the cost burden for the passively-

37 Letter from Nusrat Ghani to Sir William Cash dated 4 May 2018.

fished waste they deliver—even where they are not responsible for the waste. This is due to the nature of the fishing sector, which has fishing-specific ports whose fees will reflect the quantities of passively-fished waste received. The Minister sets out the following progress:

> "Some Member States shared the UK's concerns about this, but there remains a reluctance to remove passively-fished waste from the indirect fee. The Presidency has suggested including text to enable funding for such treatment and disposal of passively-fished waste to be subsidised through waste revenues from waste management schemes and funds; however, we consider that this compromise does not sufficiently address concerns raised and we are continuing to seek further amendments.
>
> "Negotiations have proved successful in that further clarification has been added to remove passively-fished waste from the definition of waste from ships, to a separate definition to differentiate it as a different waste stream to that of the MARPOL Convention."

5.15 Turning to the specific points raised by the Committee, the Minister has identified only one aspect of the proposal which goes beyond MARPOL requirements—the introduction of a mandatory requirement for a Waste Delivery Receipt (see above).

5.16 Responding to the Committee's request for information on the current approach to collection of marine litter by the fishing industry, including the work of voluntary initiatives such as Fishing for Litter (FFL), the Minister understands that currently there are only two FFL project areas currently in the UK, one in Scotland and the other in the South-West of England. FFL Scotland started in 2005 with 15 participating harbours. FFL South West started in 2009 and has 12 participating harbours. In addition, there are four affiliated stand-alone FFL projects in Holderness, Northern Ireland, the Republic of Ireland and North Devon. Participating vessels in the FFL initiative collect marine litter that is caught in their nets during their normal fishing activities and fill the provided bags. These bags are deposited in participating harbours on the quayside where they are moved by harbour staff to a dedicated skip or bin for disposal. The FFL projects provide the bags and cover the treatment and disposal costs.

5.17 Regarding flexibility for Member States to design their own cost recovery approaches, the Minister says that the UK has made it clear that the current cost recovery system as set out in the existing Directive allows flexibility for the differing port infrastructure and operation in Member States.

5.18 The Minister goes on to summarise the Government's stakeholder consultation exercise, which was undertaken with organisations representing key stakeholders across ports, harbour masters, fishing vessels, recreational craft and merchant ships. The main feedback from the UK Chamber of Shipping was from the short sea sector, which expressed the view that generally port reception facilities in the UK and Europe do not serve the short sea sector well, as the sector's operations frequently involve very short and/or tidal constrained vessel turnarounds. In response to this, many operators have set up private arrangements at additional cost. They are concerned that the WDR proposal will make things more difficult for short sea operators. The Cruise Lines International Association

(CLIA) welcomed the proposal and was pleased to note the increased alignment with MARPOL requirements, but considered that a clearer link is needed to MARPOL discharge provisions and requirements, together with clear Port State Control.

5.19 The Minister concludes with an update on timing. The Bulgarian Presidency is now seeking to agree a General Approach at the 7 June Transport Council. Negotiations will continue in the meantime and the Government hopes to achieve further improvements to the text. The Minister asks the Committee to consider waiving the scrutiny reserve to allow the UK to support a "balanced" General Approach at the Council. The European Parliament is also considering this proposal and is currently expected to reach its first reading position in October.

Previous Committee Reports

Sixteenth Report HC 301–xvi (2017–19), chapter 6 (28 February 2018).

6 Coordination of social security systems

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; scrutiny waiver granted for the Employment, Social Affairs Council on 22 June 2018; further information requested; drawn to the attention of the Work and Pensions Committee
Document details	Proposal for a Regulation amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004
Legal base	Article 48 TFEU; QMV, ordinary legislative procedure
Department	Work and Pensions
Document Number	(38400), 15642/16 + ADDs 1–8, COM(16) 815

Summary and Committee's conclusions

6.1 As part of the free movement of people, the EU has created a system for the coordination of social security benefits for EU residents who move between different Member States.[38] This system determines, for example, which national government is responsible for the payment of unemployment benefits or child benefit for mobile EU citizens.[39] It is also the legal framework that allows, for example, UK pensioners in Spain and France to access healthcare free of charge locally and have the costs reimbursed by the Department for Work & Pensions.

6.2 In December 2016, the European Commission tabled a legislative proposal to amend the relevant legislation (Regulation 883/2004 and its Implementing Regulation).[40] The purpose of its proposal was to bring the Regulations in line with the case law of the European Court of Justice on access to benefits for unemployed EU citizens; to clarify the rules for determining which EU country is responsible for payment of benefits; and to amend the provisions of the Regulation on access to unemployment benefit, salary-related family benefits and long-term care benefits.

6.3 The Committee has set out the details of this proposal in some detail in previous Reports in February and November 2017.[41] It has retained it under scrutiny because of its political importance: the provisional Withdrawal Agreement on the UK's EU exit foresees the continued application of social security rights derived from the Regulation (including the proposed amendments) for UK citizens already resident in the EU and vice versa on the

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

39 The EU's social security coordination system also applies in the other countries to which freedom of movement has been extended, namely Norway, Iceland, Switzerland and Liechtenstein.

40 Regulation 987/2009.

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

date the UK actually leaves the Single Market.[42] The aim is to ensure that social security entitlements that are available to those UK and EU nationals who exercise their freedom of movement rights prior to that date are retained for them under Regulation 883/2004 after it ceases to apply to the UK. In the draft Withdrawal Agreement published on 19 March 2018, the provisions relating to social security coordination are shaded in green: this indicates the Government has accepted them, subject to minor technical redrafting.[43]

6.4 The European Parliament and the Member States in the Council are yet to formally agree on the legal changes to Regulation 883/2004. The Member States have already established their 'general approach'[44] on most elements of the draft legislation, namely non-discrimination between EU nationals, the determination of the appropriate national social legislation, long-term care and child-rearing benefits. We discussed these developments in our Reports of 13 November and 6 December 2017.

6.5 The UK Government has been broadly supportive of the proposed amendments, confirmed by the then Minister for Employment (Mr Damian Hinds) in December 2017,[45] and supported the substance of the Council's earlier partial general approaches.[46] However, the Minister has consistently felt unable to provide any detailed information on the Government's contingency planning for if the agreement on grandfathering the social security rights of UK nationals already living in the EU is, for whatever reason, not ratified through the Withdrawal Agreement by March 2019.[47]

6.6 In June 2018, EU Employment Ministers are due to agree their common position on the final provisions of the Commission proposal not covered by their previous general approaches (namely those dealing with unemployment benefit). According to the Minister for Employment,[48] negotiations between national officials have led to a compromise where a worker would normally have to have been employed for at least a month in a Member State before they could count social security contributions paid in another EU country towards the local unemployment benefit entitlement.[49] Member States have also agreed to abolish a reimbursement mechanism between themselves for unemployed workers who live in one EU country while working in another.[50]

6.7 The Government is confident that Employment Ministers will endorse the compromise brokered at official level at their meeting on 21 June 2018. The Minister has said that the UK "has thus far secured many of its objectives for the package of reforms", and has asked

42 Under a (provisional) transitional arrangement, the UK would stay in the Single Market until the end of 2020. Even if it formally leaves the EU on 29 March 2019, free movement rights for UK and EU-27 nationals would continue until the end of the transition, and the 'grandfathering' provisions of the Social Security Coordination Regulation would take effect afterwards.

43 DExEU, "Draft Withdrawal Agreement—19 March 2018".

44 A 'general approach' is the collective position of the EU's Member States on new legislation proposed by the European Commission. It includes substantive amendments to proposals for negotiation with the European Parliament.

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

46 The Government abstained from the vote on the partial general approach covering on 7 December 2017, after the Committee refused to grant a scrutiny waiver.

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

48 Letter from Alok Sharma (24 April 2018).

49 If they had not been employed in a new Member State for at least a month, unemployment benefit would be the responsibility of the previous Member State where the worker was employed (provided it was for a month or more). If neither the worker was not employed for at least a month in either of the last two Member States of employment, unemployment benefit would remain the responsibility of the last Member State where social security contributions were made (as is the case under the current Regulation).

50 See "Background" for more information on the changes to access to unemployment benefit being considered.

the Committee to clear the proposal from scrutiny so that the Government can give its political support at the Council meeting. Negotiations with the European Parliament on the final legal text of the amendments to Regulation 883/2004 are due to follow later this year. If the Withdrawal Agreement is ratified by both the UK and the EU before the end of the Article 50 period on 29 March 2019, the changes to Regulation 883/2004 are likely to apply in full to the UK between their date of application and the end of the transition, and thereafter only to citizens in the scope of the Withdrawal Agreement.[51]

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

6.9 **We thank the Minister for his latest update on the proposed changes to the 'unemployment benefit' chapter of Regulation 883/2004, and note that the Government is likely to support a compromise text at the June 2018 EPSCO Council based on the current direction of travel in the negotiation between the Member States. He has specifically cited the loss of the UK's institutional representation in March 2019 as one of the drivers for the Government's willingness to compromise on amendments to the social security rules that it considers less than ideal, notably those allowing frontier workers to choose which Member State—that of employment or of residence—should pay their unemployment benefit. We accept that no Member State is likely to achieve all of their objectives in this legislative process, given their competing interests, and that a compromise is therefore the only way to modernise the Social Security Regulation.**

6.10 **More generally however, we remain concerned about the lack of information about the Government's planning for the eventuality that the Withdrawal Agreement (and its Citizens' Rights chapter) is not ratified in time for the UK's exit from the EU on 29 March 2019. As we have noted repeatedly, failure to 'grandfather' existing EU social security rights, for those who have already exercised their freedom of movement before Brexit, would have serious consequences for many thousands of people. In the absence of a legally-binding Agreement, the rights UK nationals in the EU derive from Regulation 883/2004 to access, aggregate and export social security entitlements (including access to non-emergency healthcare) would disappear, and it is not clear whether there would be a unified EU-wide response to address the resulting legal uncertainty for UK nationals.**

6.11 **Similarly, although there have been press reports about the UK's offer for a "labour mobility partnership" with the EU after it leaves the Single Market, the Government has not published any detailed prospectus for the future of the UK's approach to immigration from and emigration to the EU-27 when current free movement rights are due to come to an end in December 2020. With respect to social security rights in particular, the Government has been unable to explain if it intends to seek a new social security arrangement with the EU after Brexit, for citizens of both sides who want to move between the two *after* the UK's withdrawal from the EU and are therefore outside the scope of the Withdrawal Agreement.**

51 The Government has not been able to provide any clarity about its intentions for a long-term agreement on social security coordination with the EU after the end of the transition. Where the EU has reached agreement with other countries previously (for example with Norway and Switzerland), it has required the latter's wholesale implementation of Regulation 883/2004 and its Implementing Regulation. However, it has always been accompanied by a broader agreement on the free movement of workers.

6.12 **Given the proposal remains under discussion, and in view of the uncertainties triggered by Brexit, we retain the proposal under scrutiny. However, we are content to grant the Minister a scrutiny waiver to support a general approach on the remaining elements of the proposed Regulation at the June EPSCO Council meeting. We emphasise, however, that the scrutiny reserve will continue to apply thereafter and ask for further information on developments in any future trilogue negotiations between the incoming Austrian Presidency of the Council and the European Parliament.**

6.13 **We also draw these developments to the attention of the Work and Pensions Committee.**

Full details of the documents

Proposal for a Regulation amending Regulation (EC) No 883/2004 on the coordination of social security systems and Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004: (38400), 15642/16 + ADDs 1–8, COM(16) 815.

Background

6.14 Regulation 883/2004 determines which EU Member State is responsible for the calculation and payment of social security benefits for mobile EU citizens who move within the Union. Such citizens are, in principle, entitled to use the local benefits system on the same basis as nationals of their host Member State, including unemployment benefit.

6.15 In December 2016, the European Commission tabled a legislative proposal to amend Regulation 883/2004. Among other things, this proposal would bring the legislation in line with the case law of the European Court of Justice on access to benefits for unemployed EU citizens and amend the rules determining which Member State was responsible for paying them. Although the amendments to the Regulation are unlikely to apply before the UK is due to withdraw from the EU in March 2019, the Government has agreed to maintain the effects of the Regulation (as amended) for resident EU nationals who had accrued social security entitlements in the UK and vice versa before the UK leaves the Single Market as part of any Withdrawal Agreement.[52]

6.16 The EU Member States in the Council have already established their position on most elements of the proposed Regulation, which relate to general access to benefits, long-term care and family-related benefits. We have discussed these aspects of the proposal in a series of previous Reports.[53] The final aspect on which Member States must agree relates to access by EU nationals to unemployment benefit in another Member State, after which the Presidency of the Council can initiate negotiations with the European Parliament on the final legal text of the amendments.

6.17 The coordination rules for unemployment benefits under Regulation 883/2004 deal with three different areas, namely:

- the **aggregation of periods of national insurance contributions** completed by mobile workers when moving between different Member States (i.e. using periods of work in another Member State 'A' to count towards an unemployment benefit entitlement in Member State 'B');

52 In addition, the Government has negotiated a post-Brexit transitional period, during which Regulation 883/2004 would continue to apply as it did while the UK remained a Member State.

53 See for example our Reports of 10 January 2018 , 6 December 2017, 13 November 2017 and 8 February 2017.

- the **export of unemployment benefits** paid by Member State 'A' to an unemployed person who moves to another Member State 'B' for the purpose of seeking employment there; and
- the **determination of the Member State which is competent for providing unemployment benefits** for frontier and other cross-border workers, where their habitual residence and employment take place in different countries.

6.18 The Commission proposal sought to amend the Regulation to modify when a Member State has to pay unemployment benefit to a mobile EU worker, and how long a person can claim the benefit in one EU country after having moved to another:

- the current coordination rules require that the Member State where a worker was last employed (and thus made national insurance contributions) is responsible for the payment of unemployment benefit (UB), starting on the very first day of their employment in a particular country. Social security contributions made in other EU countries have to be taken into account when determining if someone meets the national criteria for entitlement to UB.[54] The Commission's proposal would change this, so that the Member State of last employment would *only* become responsible for unemployment benefit after a worker has paid into its national insurance system for at least three months. Until then, the Member State where the worker was previously employed would remain responsible; and
- as regards export of unemployment benefit to another EU country, the proposal would extend the minimum permitted period during which a worker could claim unemployment benefit while already having moved to another Member State from three to six months. Individual Member States would be free to allow export to take place for as long as an entitlement to unemployment benefit from their public purse exists; and
- as regards the provision of unemployment benefit to frontier and cross-border workers,[55] Regulation 883/2004 currently means that in certain cases the country of residence provides the unemployment benefit even though any social security contributions would have been made in the country of employment. To compensate the Member State of residence, the rules provide for a reimbursement of benefits paid for the first three months or five months. The Commission has proposed to make the Member State of most recent employment of a frontier worker responsible for the payment of unemployment benefits if the frontier worker has worked there *for at least 12 months*. Otherwise, that responsibility would lie with the country of residence, and the reimbursement procedure would be abolished.[56]

54 This means, for example, that social security contributions made in another EU country count towards the contributory Jobseeker's Allowance (JSA) entitlement in the UK, as long as someone had been employed in the UK for at least a day.

55 Under Regulation 883/2004, 'frontier worker' means any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he/she returns as a rule daily or at least once a week.

56 This option was preferred to the alternatives considered of either providing a choice for frontier workers as to where to claim unemployment benefits or making the Member State of most recent employment responsible for the payment of unemployment benefits in all cases.

The Member States' position on access to, and export of, unemployment benefits

6.19 On 24 April 2018, the Minister provided an update on the Council's deliberations on changing the provisions of Regulation 883/2004 relating to unemployment benefits, which govern EU nationals' access to contributory Jobseeker's Allowance in the UK.[57] The Minister states the Government's efforts have focussed on ways to "limit the Commission's proposals on extending the period during which [unemployment benefit] may be exported to another Member State, and reduce the administrative burden surrounding the proposals". In particular, with respect to aggregation of contributions, the Government has "supported a longer waiting period than the current one day" before a claimant can use contributions paid in another Member State to qualify for Jobseeker's Allowance in the UK.

6.20 As a result of discussions between Member States, the Minister explains, the Commission proposals on unemployment benefit have been substantially amended:

- the Council is likely to seek to retain the current three month statutory period during which a worker can 'export' their unemployment benefit while looking for work in another Member State, and discard the extension to six months as proposed by the Commission (although individual Governments would be free to permit 'export' to take place for longer);
- the Member States have also compromised on the minimum qualifying period before national insurance contributions paid in another Member State can be 'aggregated', and therefore count towards an unemployment benefit entitlement after a period of employment in another Member State. Rather than allowing 'aggregation' after just one day of employment in an EU country (as at present) or after three months (as proposed by the Commission), the qualifying period would be set at one month;[58] and
- as regards frontier workers, the Government has welcomed the proposed abolition of the reimbursement provisions (which the Government said "were cumbersome to administer and a source of disagreement between the UK and other Member States"). While not reinstating the reimbursement procedure, the Council is likely to reduce the one-year rule proposed by the Commission (i.e. the threshold for deciding whether the country of residence or the country of last employment has to pay unemployment benefit) to six months.[59] However, in cases where the UB is provided by the country of last employment, frontier workers can choose to 'export' it to their Member State of residence.

57 Letter from Alok Sharma to Lord Boswell (24 April 2018).

58 Moreover, while the Commission proposal could have required governments to look back through a worker's employment history in multiple countries to find the most recent period of three months of employment in one country (which would then become responsible for unemployment benefit), the Minister explains that the Council's amendments would "simplif[y] the process for looking back at work history elsewhere where the claimant has not completed one month in the most recent job" in the new Member State. As a result, officials would only have to examine a worker's record in the penultimate country of employment.

59 In cases where a claimant is subject to the legislation of the Member State where they previously worked and must make themselves available for work there in order to receive unemployment benefit, they can opt instead to seek work in the country of residence and receive the benefit from where they last worked in the Member State of residence. However, the reimbursement provisions would remain abolished.

The Government's view

6.21 The Minister concludes his letter by saying that, although the unemployment benefit provisions are "not finalised", the Council's position "is not expected to change substantially before the June [2018] EPSCO" Council meeting. He notes that the UK "has thus far secured many of its objectives for the package of reforms".

6.22 Although the Government "would have preferred not to see the introduction of new circumstances in which individuals may opt to receive benefit paid by one [EU country] in another" (as is the case for frontier workers, see paragraph 6.20 above), the Minister adds "the instances of this will be limited in circumstance and duration and be subject to the individual meeting the national entitlement conditions".[60] Moreover, he notes that any attempt by the UK to unpick the current compromise would most likely lead to the limitations on the export of unemployment benefit, which are one of the Government's objectives, "to be lost" because "most [Member States] see the UB provisions as a package".

6.23 Accordingly, the Minister says the Government would be able to support the Council's position if it is "similar to that which is currently on the table", especially given it is in the UK's interest that the changes to these regulations "are agreed sooner rather than later while we continue to have a seat at the Council negotiating table" in view of the continued application of Regulation 883/2004 to large numbers of UK and EU citizens even after Brexit under the terms of the draft Withdrawal Agreement. The letter therefore requests the Committee clear the proposal from scrutiny to enable the Minister to vote in favour of the compromise legal text in June 2018.

6.24 The European Parliament's Employment & Social Affairs Committee, meanwhile, is also due to propose amendments to the draft Regulation at its meeting on 19 June. It is therefore likely the Member States and MEPs will negotiate the final legal text of Regulation 883/2004 after the summer recess, with adoption to follow by the end of 2018. The changes would then take effect in 2020, during the post-Brexit transitional period.[61] If the Withdrawal Agreement is ratified by both the UK and the EU before the end of the Article 50 period on 29 March 2019, the changes to Regulation 883/2004 would apply in full to the UK between their date of application and the end of the transition, and thereafter only to citizens in scope of the Withdrawal Agreement.[62]

Previous Committee Reports

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

60 With respect to access to JSA in the UK, the Minister says: "Given the stringent contribution conditions attached to UK contributory Jobseeker's Allowance many potential applicants are likely to be ineligible to receive it."

61 According to the Minister, "the expectation in the draft Council text, based on previous amendments to these regulations, is that the changes will enter into force between six months and one year after they are adopted into EU law".

62 The Government has not been able to provide any clarity about its intentions for a long-term agreement on social security coordination with the EU after the end of the transition. Where the EU has reached agreement with other countries previously (for example with Norway and Switzerland), it has required the latter's wholesale implementation of Regulation 883/2004 and its Implementing Regulation. However, it has always been accompanied by a broader agreement on the free movement of workers.

7 Preventing document fraud and identity theft

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee
Document details	Proposal for a Regulation on strengthening the security of identity cards of EU citizens and of residence documents issued to EU citizens and their family members exercising their right of free movement
Legal base	Article 21(2) TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Number	(39646), 8175/18 + ADDs 1–2, COM(18) 212

Summary and Committee's conclusions

7.1 According to the European Commission, identity cards and residence documents "have an intrinsic European dimension" because they are instrumental in exercising free movement rights within the EU. They are also "a key element in the fight against terrorism and organised crime"—many of the EU's security measures, such as enhanced checks at the EU's external border, depend on secure travel and identity documents.[63]

7.2 Twenty-six EU Member States issue identity cards to their nationals. These can be used instead of a passport to travel within the EU as well as to enter the EU from a third (non-EU) country. Under the EU Free Movement Directive, EU citizens who are not nationals of the Member State in which they live ("mobile EU citizens") may be required to register with the authorities in their host Member State and will be issued with a registration certificate. They are entitled to obtain a permanent residence document after five years of continuous lawful residence. Family members of mobile EU citizens who are not themselves EU citizens must obtain a residence card to prove that they have a right to live in the host Member State. These residence documents cannot be used as travel documents, but a residence card used with a passport gives a third country family member the right to enter the EU without a visa when accompanying or joining an EU citizen.[64]

7.3 The absence of common EU-wide standards on the format and security features of national identity cards and residence documents issued by Member States in accordance with the EU Free Movement Directive has resulted in significant differences and, the Commission believes, increased the risk of falsification and identity fraud. It has therefore proposed a Regulation which seeks to make them less susceptible to fraud, close security gaps within the EU and create the trust needed to underpin free movement. The proposal would:

63 See pp 1 and 5 of the Commission's explanatory memorandum accompanying the proposed Regulation.

64 See Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

- introduce minimum security features for national identity cards based on the International Civil Aviation Organisation's standards for machine-readable travel documents (ICAO Document 9303);
- make the inclusion of biometric identifiers—a facial image and two fingerprints—mandatory for Member States that issue identity cards;[65]
- specify the information that Member States must, as a minimum, include in residence documents issued to mobile EU citizens; and
- require Member States to issue residence cards for third country family members of mobile EU citizens in a uniform format.

7.4 Identity cards and residence cards issued to the family members of mobile EU citizens that do not meet the new standards would be phased out over a five-year period (two years for the least secure documents). This should reduce the cost for Member States as, in most cases, the timetable for implementing the new requirements would coincide with the natural replacement cycle of existing identity and residence documents.

7.5 The proposed Regulation is based on Article 21(2) of the Treaty on the Functioning of the European Union (TFEU), a default legal base to be used when EU action is necessary to facilitate the free movement of EU citizens within the EU but the EU Treaties have not provided the necessary powers. It would apply to all Member States but the Commission makes clear that the Regulation would not require them to introduce identity cards or residence documents where they are not provided for in national law, nor would it introduce a uniform EU identity card.[66] The Regulation would apply in Member States 12 months after the date on which it enters into force.[67]

7.6 In her Explanatory Memorandum, the Immigration Minister (Caroline Nokes) says that the Government supports measures to strengthen the external EU border and make travel documents and identity cards more secure. She agrees with the Commission's assessment that better document security will yield "direct savings and a reduced administrative burden for citizens and their family members, public administrations and public and private service operators", as well as contribute to a reduction in document fraud and identity theft and improved security within the EU and at its external borders. She accepts that a common approach "would be better achieved through action at EU level than by Member States acting alone".

7.7 The Minister confirms that the proposed new requirements for national identity cards would not apply to the UK as the UK does not issue identity cards. They would, however, apply to Gibraltar which does operate an identity card system. Gibraltar's identity cards are not compliant with the proposed standards as they do not contain an ICAO-compliant biometric chip. The Minister says the Government is "exploring what this might entail for Gibraltar".

7.8 Residence documents issued to EU citizens in the UK already conform to the proposed standards. Residence cards issued to the non-EU family members of EU citizens use the current format for a Biometric Residence Permit. The Minister anticipates that

65 Children under the age of 12 would not be required to give fingerprints.
66 See recital (6) of the proposed Regulation.
67 The Regulation will enter into force 20 days after its publication in the EU Official Journal.

negotiations on the proposed Regulation are likely to conclude before the end of the year. Whether the UK will be bound by the proposed changes to residence documents and cards will be:

> "[…] dependent on negotiations around the implementation period which is due to end 31 December 2020, with a grace period of a further six months. The soonest the Regulation as drafted could be operational is late 2019, with non-compliant documents phased out by late 2024."

7.9 The Minister notes that the requirement for identity cards to include biometric information will assist with the implementation of the Withdrawal Agreement which will set out the terms on which the UK will leave the EU. The draft agreed by EU and UK negotiators in March stipulates that, five years after the end of the transition/implementation period, the UK and other Member States may decide only to accept the use of a national identity card as a travel document if it includes an ICAO-compliant chip containing biometric identifiers.[68] The Minister explains: "If the Regulation as drafted becomes operational as expected, all EU identity cards will meet this requirement by 2025".

7.10 **We agree with the Minister that efforts to strengthen the security of documents linked to the free movement of EU citizens and their families should be supported, but would welcome further information on the impact on the UK and on Gibraltar during and after the transition/implementation period.**

Impact on the UK

7.11 **Most Member States issue identity cards to their nationals. The UK has a clear interest in ensuring that national identity cards are as secure as possible, even after Brexit. This is because EU citizens whose rights are protected under the Withdrawal Agreement will retain the right to use their national identity cards to enter and leave the UK long after the UK has ceased to be a member of the EU. We ask the Minister whether the changes proposed to national identity cards would make them as secure as passports. We also ask the Minister to explain how border control authorities will be able to differentiate between EU citizens who are entitled, under the Withdrawal Agreement, to use their national identity cards to travel to and from the UK and those who are not and will need to travel with a passport.**

7.12 **We ask the Minister to clarify whether the proposed Regulation would necessitate changes to the UK's Biometric Residence Permit when issued to third country family members of EU citizens.**

Impact on Gibraltar

7.13 **We note that identity cards issued by the Government of Gibraltar can be used to travel within the European Economic Area. We would welcome further information on the Government of Gibraltar's position on the proposed Regulation, including its assessment of the impact that issuing non-compliant identity cards after 2025 would have on movement across the Spain/Gibraltar border.**

68 See Article 13(1) of the draft Withdrawal Agreement.

The transition/implementation period

7.14 **The Minister expects the proposed Regulation to become operational (meaning that it would have to be applied by Member States) during the transition/implementation period and says this period is "due to end [on] 31 December, with a grace period of a further six months". We understand the "grace period" to mean the six-month period after the end of the transition/implementation during which EU citizens in the UK whose EU citizenship rights are protected by the Withdrawal Agreement can apply for settled status.[69] We ask the Minister whether she means that the proposed Regulation would also apply during this "grace period", unlike other EU laws which would cease to apply at the end of the transition/implementation period.**

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

Full details of the documents

Proposal for a Regulation on strengthening the security of identity cards of EU citizens and of residence documents issued to EU citizens and their family members exercising their right of free movement: (39646), 8175/18 + ADDs 1–2, COM(18) 212.

Previous Committee Reports

None on this document.

69 See Article 17(1)(b) of the draft Withdrawal Agreement.

8 Tightening EU rules on explosives precursors

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee
Document details	Proposal for a Regulation on the marketing and use of explosives precursors
Legal base	Article 114 TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Number	(39653), 8342/18 + ADDs 1–3, COM(18) 209

Summary and Committee's conclusions

8.1 Home-made explosives have been used in many terrorist attacks in the EU. In 2013 the EU put in place rules to restrict public access to chemical substances that can be used in the manufacture of home-made explosives—"explosives precursors"—and to report suspicious transactions.[70] As these substances can also be used for legitimate purposes, the aim was to strike a balance between freedom of movement within the internal market and public safety and security.

8.2 The threat posed by homemade explosives has not diminished and terrorists have developed new bomb-making techniques to circumvent existing controls. The Commission considers that significant differences in the way that EU rules on explosives precursors are applied by Member States have created uncertainty for economic operators, barriers to trade and security gaps which terrorists can exploit. It has therefore proposed a Regulation which seeks to strengthen the existing rules and ensure they are applied more consistently. The proposal would further restrict access to dangerous substances that can be used in homemade explosives ("restricted explosives precursors") and clarify the rights and obligations of those involved in the supply chain. It would distinguish between ordinary members of the public, who would require a licence to purchase restricted explosives precursors at or above a certain concentration limit, "professional users" who need the substances for their own trade, craft or profession, and "economic operators" who trade in them. Professional users and farmers would not require a licence but would have to provide their name and address when acquiring restricted explosives precursors and state the purpose for which they are to be used. This information would be available to national law enforcement and inspection authorities.

8.3 Other changes proposed by the Commission would:

- add two chemical substances—sulphuric acid and ammonium nitrate—to the list of substances that cannot be supplied to ordinary members of the public at concentrations at or above certain limit values unless they hold a licence (but with an exception for ammonium nitrate used by farmers in fertilisers);

70 See Regulation (EU) 98/2013 on the marketing and use of explosives precursors.

- tighten the licensing rules by reducing the number of substances above a specified concentration limit that can be supplied to ordinary members of the public holding a licence and setting an upper limit for those still available on licence;
- require a criminal background and other checks on individuals applying for a licence;[71]
- introduce a standard form for licences (to facilitate the mutual recognition of licences amongst Member States that apply a licensing regime);
- abolish the existing registration scheme (considered by the Commission to be too weak as it only requires proof of identity to obtain certain restricted explosives precursors);
- improve the flow of information on restricted explosives precursors throughout the supply chain, including at the point of sale;
- introduce compulsory checks at the point of sale to verify the identity of the purchaser and the validity of their licence or (for those who do not need a licence) their entitlement to purchase restricted explosives precursors;
- stipulate a 24-hour deadline for reporting suspicious transactions and require national contact points to be available around the clock (24/7);
- make clear that the rules and restrictions apply equally to online sales;
- require Member States to provide training for law enforcement, emergency and customs personnel on the substances used in restricted explosives precursors; and
- require Member States to have adequately resourced national inspection authorities to ensure that the proposed Regulation is properly enforced.

8.4 Member States would be able to take more restrictive measures—lowering the concentration limits at which explosives precursors can be made available to the general public or extending restrictions to substances not covered by the proposed Regulation—but must notify the Commission and may be asked to withdraw them if it decides they are not justified.

8.5 In his Explanatory Memorandum, the Security Minister (Mr Ben Wallace) "broadly welcomes" the changes proposed by the Commission and considers that they could "add value in terms of improving minimum standards and creating greater harmonisation to make it easier for businesses to comply across borders". He supports:

- the Commission's efforts to clarify the legal obligations and responsibilities of those involved in the supply chain so that suppliers know who can (and cannot) access restricted substances without a licence;
- the inclusion of sulphuric acid in the list of restricted explosives precursors (this is consistent with changes already made to UK law);

71 This would include details of convictions given in another Member State by exchanging information through the European Criminal Records Information System (ECRIS).

- the removal of the option for Member States to establish a registration regime as "this will increase minimum security standards across the European Economic Area (EEA), and therefore the UK, while introducing no burdens within the UK";
- the strengthening of licensing controls—"the UK already applies a robust due diligence process to licence decisions, including full criminal and mental health background checks";
- clearer obligations on those involved in the supply chain—"consultation with retailers suggests that identification of in scope products is one of the biggest problems encountered" in applying existing EU rules on explosives precursors;
- the introduction of explicit checks at point of sale to prevent members of the public from acquiring restricted explosives precursors by claiming to be a professional user; and
- the powers given to the Commission to review and bring new substances within the scope of the proposed Regulation to keep pace with "constantly evolving threats".

8.6 The Minister indicates that the Government is still considering certain elements of the proposed Regulation, including lowering the concentration limit for nitromethane, introducing maximum concentration limits for certain restricted substances and reducing the number that can be supplied to a licence-holding member of the public if they exceed a specified concentration limit. He anticipates that these changes would have "a significant impact on a small number of members of the public who would be prevented in some cases from being able to participate in their hobbies" and involve "a decision about where the balance between security and individual freedom lies". The Government is preparing an Impact Assessment which will examine the benefits and burdens of the proposed Regulation for the UK. Whilst the Minister expects there to be additional costs and burdens for business and Government, he notes that the proposal would "increase standards in other Member States" and "reduce the threat to the UK".

8.7 The Commission is aiming to reach a formal agreement on the proposed Regulation by February 2019. Member States would have to apply the Regulation 12 months after it has been adopted and entered into force.[72] The Minister anticipates that changes to the Poisons Act 1972 (which establishes a licensing and suspicious activity reporting regime applicable in England, Wales and Scotland) are likely to be necessary.

8.8 **Under the draft Withdrawal Agreement setting out the terms on which the UK will leave the EU, the UK will be required to implement EU laws adopted before exit day or during a transition/implementation period ending on 31 December 2020.[73] We ask the Minister whether the negotiating timetable envisaged by the Commission appears realistic and, if so, whether he accepts that the UK will be required to amend domestic law to comply with the changes to EU law on explosives precursors, even though the UK will have left the EU.**

72 The proposed Regulation will enter into force 20 days after publication in the EU's Official Journal.

73 See Article 122 of the draft Withdrawal Agreement.

8.9 **We note the Minister's concern that some of the changes proposed by the Commission would affect "the balance between security and individual freedom" and may have "a significant negative impact on a small number of members of the public who use substances in hobbies or household activities". We ask him to share with us the main findings of the Government's Impact Assessment and to indicate how many individuals and which types of activity are likely to be affected. If the Government concludes that some provisions of the Regulation would infringe individual freedom to an unacceptable degree, does the Minister consider that the UK would nonetheless be duty-bound to apply them, at least until the end of the transition/implementation period? Is this an area in which the Government might wish to diverge from EU rules post-transition and what might the consequences be for the UK's future trade and security partnerships with the EU?**

8.10 **The Minister supports the distinction made between ordinary members of the public who would require a licence to obtain restricted explosives precursors and "professional users" who would not. We ask him to explain why a separate category is needed for farmers, given that they seem to meet the criteria for a professional user, and whether he is satisfied that the checks on prospective customers at the point of sale are sufficiently robust to establish that an individual is a professional user or farmer rather than an ordinary member of the public.**

8.11 **Pending further information, the proposed Regulation remains under scrutiny. We ask the Minister to provided regular progress reports on negotiations. We draw this chapter to the attention of the Home Affairs Committee.**

Full details of the documents

Proposal for a Regulation on the marketing and use of explosives precursors, amending Annex XVII to Regulation (EC) No 1907/2006 and repealing Regulation (EU) No 98/2013 on the marketing and use of explosives precursors: (39653), 8342/18 + ADDs 1–3, COM(18) 209.

Previous Committee Reports

None on this document.

9 Composition of the European Parliament

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; further information requested
Document details	European Parliament proposal for a European Council Decision establishing the composition of the European Parliament
Legal base	Article 14(2) TEU; EP consent; unanimity
Department	Exiting the European Union
Document Number	(39497), 6031/18,—

Summary and Committee's conclusions

9.1 This European Council Decision is proposed by the European Parliament (EP). The next EP elections are due to take place in June 2019 after the UK leaves the EU as a Member State (29 March 2019) and will no longer take part in EP elections. This proposal seeks to take account of the loss of UK MEPs and to improve the efficiency of the EP. It provides for:

- a reduction in the total number of MEPs by 45—from 750 to 705; and
- a reallocation of those seats among the remaining Member States according to their population.

9.2 The European Council needs to vote on the proposal (unanimously) by June 2018 in order for the text to be forwarded to the EP for its consent. As the UK will no longer have MEPs after 29 March 2019, the Government recognises that the proposed Decision is primarily a matter for the other Member States and the EP.

9.3 The full background and details relating to this proposal are set out in our last chapter.[74] In that chapter we recognised that the UK had little interest itself in the proposal. However, there had been press reports indicating that the UK might threaten to veto the proposal as leverage in the Article 50 TEU withdrawal negotiations. We asked for clarification on this.

9.4 On 3 May[75] the Minister for Exiting the EU (Lord Callanan) responded and confirmed that: "The UK will continue to be a constructive partner in these discussions but will not stand in the way of unanimity or progress on this file".

9.5 The Minister has written again to us now[76] on 17 May to tell us that:

- the Presidency has launched a written procedure for the approval of this file with a deadline of 24 May and the Government intends to abstain;

74 Twenty-First Report HC 301–xx (2017–19), chapter 3 (21 March 2018).

75 Letter from the Minister for Exiting the EU (Lord Callanan) to the Chairman of the European Scrutiny Committee (Sir William Cash) dated 3 May 2018.

76 Letter from the Minister for Exiting the EU (Lord Callanan) to the Chairman of the European Scrutiny Committee (Sir William Cash) dated 17 May 2018.

- the EP plenary vote on consent is expected in the week commencing 11 June, after consideration by the AFCO[77] Committee; and
- provided the EP gives consent, formal adoption is expected at the 28–29 June European Council.

9.6 In considering this document, we also note with interest the correspondence between the Government and the Chairman of the European Union Committee in the House of Lords (Lord Boswell) on a related file which we have already cleared from scrutiny: the proposed Council Decision on reforming the EU electoral law.[78] This is on the question of how EU citizens resident in the UK after 29 March 2019 will vote in EP elections. We therefore reproduce the Government's view here for the wider interest of the House.

9.7 The Minister for the Constitution (Chloe Smith) says in her letter of 14 May to Lord Boswell[79] that:

> "EU citizens resident in the UK after Brexit will still be able to vote in elections to the European Parliament in their home country, if that country provides for overseas voting. It will be for the Member States concerned to communicate with their citizens in the UK as they see fit and provide them with opportunities to cast a ballot according to their own laws and practices."

9.8 She adds:

> "Once we have left the EU the Government will have no legal responsibility to facilitate the exercise of EU citizens' democratic rights in relation to the elections to institutions of which the UK is not a member. The UK Government does not provide assistance to foreign nationals living here to vote in elections overseas. Nor do we hinder those foreign nationals from participating in those polls."

9.9 **We thank the Minister for his further letters and clarifications. We also note with interest the correspondence between the Minister for the Constitution and the Chairman of the European Union Committee of the House of Lords referred to in paragraphs 9.7—9.9 above.**

9.10 **We are now content to clear this proposal from scrutiny. But we ask the Minister to confirm the outcome of the written procedure if it is used on 24 May and how the Government voted. We would also be grateful if he could let us know in due course whether and when:**

- **the EP gives it consent; and**
- **the proposal has been formally adopted in the European Council.**

77 Constitutional Affairs Committee

78 Proposal for a Council Decision adopting the provisions amending the Act concerning the election of members of the European Parliament by direct universal suffrage: 37395 and 37431,—.

79 Letter from the Minister for the Constitution (Chloe Smith) to the Chairman of the European Union Committee in the House of Lords, dated 14 May 2018.

Full details of the documents

European Parliament proposal for a European Council Decision establishing the composition of the European Parliament: (39497), 6031/18,—.

Previous Committee Reports

Twenty-first Report HC 301–xx (2017–19), chapter 3 (21 March 2018).

10 Pilot fitness

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny
Document details	COMMISSION REGULATION (EU) No …/.. of XXX amending Regulation (EU) No 965/2012, as regards technical requirements and administrative procedures related to introducing support programmes, psychological assessment of flight crew, as well as systematic and random testing of psychoactive substances to ensure medical fitness of flight and cabin crew members, and as regards equipping newly manufactured turbine-powered aeroplanes with a maximum certified take-off mass of 5 700 kg or less and approved to carry six to nine passengers with a terrain awareness warning system.
Legal base	Article 100(2) of the Treaty on the Functioning of the European Union and Regulation 216/2008; QMV;
Department	Transport
Document Number	(39615), 7555/18

Summary and Committee's conclusions

10.1 Following recommendations by the French air accident investigation body (*the Bureau d'Enquêtes et d'Analyses pour la sécurité de l'aviation civile*) in the aftermath of the Germanwings incident and further work undertaken by the European Aviation Safety Agency (EASA), the European Commission has proposed a draft implementing regulation which would introduce additional requirements on pilot fitness, with the intention of protecting against the possibility of crew members operating commercial air transport flights while under the influence of psychoactive substances (alcohol or drugs).

10.2 There are four main elements to the requirements on pilot fitness:

- a requirement for airlines to establish policies and procedures to detect and prevent the misuse of psychoactive substances by air crew and other safety sensitive personnel, which will bring airlines into line with practices in the rail industry where rail operators have long had similar measures to meet the requirements of the Transport and Works Act 1992;
- a requirement for airlines to ensure aircrew with problems relating to the use of alcohol or drugs have access to support programmes to help address those problems before they have an impact on the safety of operations. Such programmes should be proactive and non-punitive, but crew seeking help can be taken off operational duties while the problem is addressed;

- a requirement for an element of random alcohol testing to be included in the programme of ramp inspections conducted by Member States in accordance with the Air Operations Regulation; and
- a requirement on operators to ensure that flight crew undergo a psychological assessment before commencing line flying.

10.3 The fitting of terrain awareness warning systems (TAWS) is also extended to aircraft under 5,700 kg (maximum certified take-off mass) to bring them into line with Annex 6 to the Convention on International Civil Aviation (the Chicago Convention).

10.4 In the Government's Explanatory Memorandum, the Parliamentary Under Secretary of State at the Department for Transport (Baroness Sugg), states that the Government welcomes the requirements being placed on airlines to put in place policies and procedures to prevent the misuse of alcohol and drugs by aircrew and other safety critical personnel and to provide support programmes for flight crew. In light of the Germanwings incident, the Government also agrees that requiring airlines to ensure that flight crew are subject to a psychological assessment before commencing unsupervised line flying is a sensible measure.

10.5 The Government supports the proposed update to the requirements of the Air Operations Regulation regarding the fitting of TAWS on certain aircraft under 5,700 kg MCTM, which is necessary to bring the Air Operations Regulation into line with a recent amendment to Annex 6 to the Chicago Convention which sets the international standards for civil aircraft operations.

10.6 The Minister reports that the draft Commission Regulation has been considered at a meeting of Member State experts in the Commission's European Aviation Safety Agency (EASA) Committee on 21 February, where it received unanimous support. The Minister does not expect that the Council will oppose the draft Regulation, and anticipates that a decision not to oppose will be adopted in late May. She therefore asks that the Committee clear the proposal from scrutiny.

10.7 **We note the Government's support for the proposed measure which will improve passenger safety by requiring airlines to establish procedures to detect misuse of psychoactive substances by personnel, and to ensure that flight crew undergo a psychological assessment before commencing unsupervised line flying. We now clear this document from scrutiny.**

Full details of the documents

COMMISSION REGULATION (EU) No …/.. of XXX amending Regulation (EU) No 965/2012, as regards technical requirements and administrative procedures related to introducing support programmes, psychological assessment of flight crew, as well as systematic and random testing of psychoactive substances to ensure medical fitness of flight and cabin crew members, and as regards equipping newly manufactured turbine-powered aeroplanes with a maximum certified take-off mass of 5 700 kg or less and approved to carry six to nine passengers with a terrain awareness warning system: (39615), 7555/18.

Previous Committee Reports

None.

11 EU enlargement: status of candidate countries

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Foreign Affairs Committee
Document details	(a) Communication on EU Enlargement Policy 2018; (b) Commission Staff Working Document: Turkey 2018 Report
Legal base	—
Department	Foreign and Commonwealth Office
Document Numbers	(a) (39643), 8076/18 + ADD 1, COM(18) 450; (b) (39658), 8080/18, SWD(18) 153

Summary and Committee's conclusions

11.1 Under Article 49 of the Treaty on European Union, any "European State" which upholds the Treaty's foundational values[80] can apply to become a Member State. A decision on the accession of a third country to the Union must be taken by the existing Member States unanimously, and with the consent of the European Parliament. Any resulting Act of Accession, which modifies the Treaties to take into account the entry of the new Member State,[81] has to be ratified by the EU's Member States in accordance with their respective constitutional requirements.[82]

11.2 Since the accession of Croatia in July 2013 and Iceland's withdrawal of its accession application in March 2015, there are five official candidate countries for entry into the EU:[83] Albania, the Former Yugoslav Republic of Macedonia (FYROM), Montenegro, Serbia and Turkey. Out of these, formal accession negotiations—structured around the various 'chapters' of the EU *acquis*—have begun with Montenegro, Serbia and Turkey.[84] In addition, Bosnia & Herzegovina and Kosovo[85] are considered 'potential candidates': they are not formal candidates, but have—in the EU's jargon—a "European perspective". They EU already has an extensive framework for bilateral cooperation with these countries in

80 These are listed in Article 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

81 For example with respect to its institutional representation within the Council or the European Parliament, or amending specific pieces of EU legislation where reference needs to be made to the new Member State.

82 This may involve approval by national and/or regional parliaments of Member States.

83 'Candidate' and 'potential candidate' status are not derived from the Treaty on European Union, but structuring the accession process in this way has become the norm. A decision to award 'candidate' status is made by conclusions of the General Affairs Council subject to approval by the European Council (i.e. the EU's Heads of State and Government). Unlike the formal Council Decision on the accession of a new country, awarding candidate status is done by means of Council conclusions.

84 Formal accession talks are structured in a 'chapter by chapter' manner covering the different areas of the EU acquis.

85 Kosovo has no immediate prospect of becoming a formal candidate country because its independence is not recognised by five EU Member States: Spain, Greece, Romania, Slovakia and Cyprus.

place to prepare the conditions for their accession (notably the free trade and regulatory alignment provisions within the Stabilisation & Association Agreement, which in Turkey's case also includes a partial customs union with the EU).[86]

11.3 Each year, the European Commission publishes a set of reports for each candidate and potential candidate country, charting progress or setbacks in their respective discussions with the EU on formal accession. In April 2018, it published the latest set of reports. We have not summarised these in detail, as they are publicly available, but the main conclusions drawn by the Commission are:

- reform in the areas of the rule of law, fundamental rights and good governance remains "the most pressing issue for the enlargement countries";
- in light of progress made, the Commission has invited the existing Member States on the Council to open formal accession negotiations with Macedonia and Albania this year; and
- the report on Turkey is extremely critical of the political situation in the country, which it says has been "moving away from EU standards, in particular in the areas of the rule of law and fundamental rights". The country's EU accession process has been in limbo for some time, with the Commission Report concluding that "the continuing negative trend in these areas do not justify the opening of new negotiating chapters in the accession process".[87] While no formal accession negotiations have taken place since the summer of 2016, the Turkish Government recently reiterated its ambition of securing accession to the EU.[88]

11.4 The Minister for Europe (Sir Alan Duncan) submitted an Explanatory Memorandum with the Government's views on the latest enlargement reports in May 2018.[89] In addition to summarising the various country reports, the Minister notes that the priorities identified by the Commission—in particular political reform, respect for the rule of law, tackling organised crime, and addressing migration flows—are also those of the UK Government for its engagement with the Western Balkans and Turkey. More generally, "the Government remains of the view that the accession process is important for delivering security, stability and prosperity and will continue to support countries committed to the accession process in meeting the necessary requirements". It will, rather incongruously, host a summit in London with the Western Balkan accession countries in July this year.[90]

11.5 **The Committee has taken note of the European Commission progress reports on the candidates and potential candidates for EU membership. As recently as February 2018, the European Commission stated that Montenegro and Serbia have the prospect of taking their seats on the Council of the EU by 2025 (subject to meeting all the relevant criteria). Concrete accession prospects for Albania and Macedonia would be given new**

86 The EU-Turkey customs union does not cover agricultural products, which remain subject to tariffs when traded between the two parties.

87 Turkey's bid to join the European Union would in any event require the resolution of its dispute with the Republic of Cyprus. As an EU Member State, Cyprus can veto Turkey's accession and several negotiating chapters of the accession process will not even be opened until the conflict is resolved.

88 Turkey's bid to join the European Union would in any event require the resolution of its dispute with the Republic of Cyprus. As an EU Member State, Cyprus can veto Turkey's accession and several negotiating chapters of the accession process will not even be opened until the conflict is resolved.

89 "Turkish FM calls on EU to continue enlargement policy" (accessed 9 May 2018).

90 https://www.gov.uk/government/topical-events/western-balkans-summit-london-2018.

impetus by the start of formal negotiations on the alignment of their domestic policies and structures with those of the EU *acquis*. Given the need for unanimity among the existing Member States on opening accession talks, any decision by the Council to open formal negotiations with Macedonia will hinge largely on the resolution of its naming dispute with neighbouring Greece.

11.6 **The question of future enlargement of the European Union, and the possible implications for UK immigration policy, played a prominent role in the 2016 Brexit referendum. Following any transitional arrangements, such as those in place in for existing Member States prior to the 2004, 2007 and 2013 rounds of enlargement to Eastern and Central Europe,[91] the citizens of any new EU Member States would be covered by the right to free movement within the EU and EFTA. We consider therefore that the effective suspension of the EU's accession negotiations with Turkey, by far the largest of the accession countries in terms of population, may be of particular interest to Members across the House.**

11.7 **When it ceases to be a Member State, the UK Government (and Parliament, which at present has to ratify any Act of Accession) will, naturally, lose their veto over the extension of the EU's membership. However, the UK's exit from the EU does not in itself mean that any future enlargement of the Union will not have a domestic impact. Given its geographical and economic proximity to the UK, the EU's economic and trade policies will continue to have an impact; and few developments affect the policy direction of the EU as much as the composition of its membership. We consider that Parliament, even after Brexit, will therefore want to remain aware of developments in the accession process of the five candidate countries and two potential candidate countries.**

11.8 **In addition, there will also be a direct impact on the UK, as a 'third country', resulting from the accession of new countries to the EU: any enlargement would most likely alter the scope of future UK-EU agreements, for example on trade or security. When a new country joins the EU, the European Commission enters into talks with non-EU countries to extend the scope of their existing bilateral or multilateral agreements to the new Member States.**

11.9 **In the case of the UK, for example, that could include the extension of an EU-UK agreements on facilitating labour mobility[92] or trade to additional countries. As such, the implications of further accessions to the EU for the UK (as and when those actually take place) are diluted by the UK's exit, but not altogether eliminated. The case of Switzerland's participation in the EU's Framework Programme for Research (Horizon 2020) is instructive in this regard: the initial Swiss decision not to extend its existing agreement with the EU on free movement of people to Croatia—the last country to join the EU, in 2013—led to its suspension from the Programme until free movement rights to and within Switzerland were extended to Croatian nationals. Similar issues could arise in UK-EU relations following the putative accession of Montenegro and Serbia**

91 Transitional measures on the free movement of workers are still permitted vis-à-vis Croatian nationals until June 2018. Austria, Malta, the Netherlands, Slovenia and the UK are the only Member States to have them in force at present. Switzerland also applies them, as permitted by its free movement agreement with the EU.

92 The Government is reportedly considering such a 'labour mobility partnership' as an offer in the discussions with the EU on the 'framework for future relations', which have recently begun in Brussels.

in the next decade (and of the other candidate countries at a later stage), although the precise implications will depend of course on the scope and depth of the new UK-EU bilateral relationship and the substance of the treaties that will underpin it.

11.10 **In addition, the UK must also replicate or replace the current bilateral agreements[93] it has with the candidate and potential candidates via its EU membership. That includes the 1970 Association Agreement with Turkey (which includes a customs union and social security arrangements),[94] and the EU's more recent Stabilisation & Association Agreements with the Western Balkan countries. While it seems likely the effects of those treaties will be maintained for the UK during the post-Brexit transition, should the Withdrawal Agreement be ratified in time, their status afterwards remains unclear. They would need substantial redrafting to make them fit for a bilateral partnership between the country concerned and the UK rather than with the EU as a whole.[95]**

11.11 **We are content to now clear the 2018 Enlargement Package from scrutiny and report these developments to the House. However, we ask the Minister to confirm in due course if the Council decides to open formal accession talks with Albania and Macedonia as recommended by the European Commission, and to indicate whether the Government supported those decisions or abstained from offering formal support in view of the UK's exit from the EU.**

Full details of the documents

(a) Communication on EU Enlargement Policy 2018: (39643), 8076/18 + ADD 1, COM(18) 450; (b) Commission Staff Working Document: Turkey 2018 Report: (39658), 8080/18, SWD(18) 153.

Previous Committee Reports

None.

93 Naturally the same applies to multilateral agreements to which both the UK (via the EU) and the candidate countries are parties, such as the European Common Aviation Area agreement.

94 Decision 3/80 of the EU-Turkey Association Council. The UK has previously (unsuccessfully) sought to annul a Council Decision with the aim of modernizing the EU's social security coordination rules with Turkey (arguing the measure constituted a Justice & Home Affairs measure). See Case C-81/13: *UK v Council*.

95 For example, the provisions on alignment with the EU acquis by the candidate country and other references to EU law would need to be removed and the free trade provisions adapted to reflect the new trading arrangements between the UK and the country concerned.

Annex: Candidates and potential candidates for EU accession

The table below shows the status of the EU accession process for the seven candidate and potential candidate countries.

Candidate country	Status	Status of accession negotiations	Last Accession Conference
Turkey	Candidate country since 1997	16 negotiation 'chapters' opened since 2006, one provisionally closed	June 2016
Macedonia	Candidate country since 2005	Not yet opened, to be considered by the Council in June 2018	-
Montenegro	Candidate country since 2010	30 negotiation 'chapters' opened since 2012, three provisionally closed	December 2017
Serbia	Candidate country since 2012	12 negotiation 'chapters' opened since 2014, two provisionally closed	December 2017
Albania	Candidate country since 2014	Not yet opened, to be considered by the Council in June 2018	-
Bosnia & Herzegovina	Potential candidate country since 2003	-	-
Kosovo	Potential candidate country since 2008	-	-

12 Strategic Partnership agreement with Japan

Committee's assessment	Legally and politically important
Committee's decision	Cleared from scrutiny; further information requested
Document details	(a) Joint Proposal for a Council Decision on the signing, on behalf of the European Union, and provisional application of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other part; (b) Joint proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Strategic Partnership Agreement, between the European Union and its Member States, of the one part, and Japan, of the other part
Legal base	(a) Article 37 TEU, Articles 212(1) in conjunction with Article 218(5) and the second paragraph of Article 218(8) TFEU; (b) Article 37 TEU, Articles 212(1) in conjunction with Article 218(6(a) and the second paragraph of Article 218(8) TFEU
Department	Foreign and Commonwealth Office
Document Numbers	(a) (39678),—; (b) (39679),—

Summary and Committee's conclusions

12.1 Since 2001 relations between the EU and Japan have been based on an EU-Japan Action Plan for Co-operation which is said to have established a Strategic Partnership. Since 2013 these parties have been negotiating a formal Strategic Partnership Agreement (SPA). These proposals would enable the EU to sign, provisionally apply and conclude (ratify) the SPA. The EU will not be able to conclude it until the European Parliament has given its consent.

12.2 The SPA sets out a platform for dialogue and cooperation across a wide range of topics including political, foreign, security and other sectors. It establishes a Joint Committee with the objective of coordinating the overall partnership built upon the SPA. It has been negotiated in parallel with an EU-Japan Economic Partnership Agreement (EPA). Both the SPA and the EPA are intended to be signed in July 2018.

12.3 Most of the SPA will be provisionally applied on signature.[96]

96 Because of Japan's internal law this is termed "application pending entry into force of the Agreement". The EU intend to lodge a declaration that this amounts to provisional application in terms of Article 25 of the Vienna convention on the Law of Treaties. Exceptions to provisional application are Article 5 (non-proliferation of nuclear weapons) Article 6 (conventional arms) Article 7 (serious crimes of international concern and the International criminal court), Article 8 (counter-terrorism, Article 9 (Chemical, biological, radiological and nuclear risk mitigation) Article 10 (international and regional cooperation and reform of the United nations); part of Article 15 concerning the maritime transport sector, Article 31 (health), Articles 33 to 36 on judicial and police cooperation, part of Article 38 (legal migration), part of Article 42 (additional areas of cooperation, and Article 48 (termination of the SPA).

12.4 **We clear these documents from scrutiny. In doing so we note that the SPA is a mixed agreement[97] but the published text of the proposal is not transparent as to the extent to which the EU is exercising competence. This is significant in areas of shared competence where such lack of transparency undermines the Government's stated policy that Member States should normally exercise competence to enter into international agreements which is shared[98] between the EU and its Member States, leaving the EU to act only where it has exclusive competence.**

12.5 **Furthermore, we note that the decision does not express any limitation on the extent to which the EU is authorising provisional application. As a consequence the proposal appears to be authorising provisional application even in areas where the Member States have competence.**

12.6 **We therefore ask the Minister (Sir Alan Duncan) whether he intends to take any steps (either by seeking amendment of the text of these proposals or by lodging a minute statement) to clarify the extent to which the EU is exercising competence in (a) signing, (b) concluding and (c) provisionally applying the SPA.**

12.7 **The Minister's explanation of the Brexit implications is limited to a single, uninformative and formulaic paragraph of his Explanatory Memorandum. Whilst it is anticipated that the SPA will be signed on 11 July it cannot be concluded then, and indeed will likely not be concluded by the EU and ratified by the Member States before the UK's formal departure from the EU, scheduled to be 29 March 2019. We ask him:**

- **to confirm that, in the event that the SPA is not concluded/ratified before the UK formally leaves the EU, Article 124 of the draft Withdrawal Agreement (if it is concluded/ratified) would apply;**
- **whether there has been any indication that Japan would be prepared to agree to apply the SPA to the UK during any transitional/implementing period;**
- **what practical effect there would be if the UK met all EU obligations under the SPA without being able to benefit from it; and**
- **whether the UK will be seeking to negotiate a similar agreement with Japan bilaterally after the UK's exit from the EU?**

Full details of the documents

(a) Joint Proposal for a Council Decision on the signing, on behalf of the European Union, and provisional application of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other part: (39678),—; (b) Joint proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Strategic Partnership Agreement, between the European Union and its Member States, of the one part, and Japan, of the other part: (39679),—.

97 Mixed agreements are entered into by the EU and the Member states in their own right. They need ratification by each Member State.

98 Shared competence may be exercised by either the EU or the Member states, it is a political choice.

The Explanatory Memorandum of 8 May 2018

12.8 The Government provided a revised Explanatory Memorandum on the basis that no official text had been received at a time when the proposals were available to the public. It also included an unclear citation of the legal basis of these proposals.

Previous Committee Reports

None.

13 VAT fraud: cooperation between tax administrations

Committee's assessment	Legally and politically important
Committee's decision	Cleared from scrutiny; further information requested
Document details	Amended proposal for a Council Regulation amending Regulation (EU) No 904/2010 as regards measures to strengthen administrative cooperation in the field of value added tax
Legal base	Article 113 TFEU; consultation procedure; unanimity
Department	Treasury
Document Number	(39299), 14893/17 + ADDs 1–2, COM(17) 706

Summary and Committee's conclusions

13.1 Countries across the European Union experience significant evasion of Value Added Tax (VAT), due to fraudsters exploiting a loophole in the EU's common system of VAT for cross-border sales of goods (so-called "missing trader" or MTIC fraud).[99] The European Commission has estimated that VAT lost to this type of fraudulent activity amounts to €45 to €53 billion (£39 to £46 billion)[100] annually.

13.2 Administrative cooperation between EU countries to tackle VAT fraud is currently governed by Regulation 904/2010.[101] It enables Member States to provide assistance to each other on individual taxpayers to correctly assess, control and collect VAT. It also provides for exchange of information, some of which is automatic—for example relating to the VAT Information Exchange System (VIES), which contains information on businesses involved in intra-EU sales of goods and services—and some of which is on request, or at the initiative of the sending tax authority.

13.3 As part of a package of measures of reform of Value Added Tax in the EU,[102] the European Commission in November 2017 tabled a proposal amending Regulation 904/2010, to reduce opportunities for VAT fraud. The main objective of the Commission proposal is to amend this legislation to establish a clear legal basis for the use of Member State-held data on businesses for use by a new analytical tool, the Transaction Network Analysis (TNA). This application, which is being set up on a voluntary basis between 25

99 See https://www.europol.europa.eu/crime-areas-and-trends/crime-areas/economic-crime/mtic-missing-trader-intra-community-fraud.

100 €1 = £0.87960 or £1 = €1.13688 as at 30 April 2018.

101 Council Regulation 904/2010.

102 The other proposals in the package concern the place of taxation for intra-EU supplies of goods and services; the restrictions on EU countries when setting VAT rates; and a special scheme that alleviates the administrative burden of VAT for small businesses. We have considered these in separate chapters in this Report.

Member States (but not the UK), aims to provide tax authorities with automated analysis of intra-EU supplies to detect VAT fraud, drawing on information submitted to the VIES by the Member States.[103]

13.4 The Government has expressed its support for the proposed changes,[104] provided they "do not encroach on the competence of Member States to run and administer their national VAT systems".[105] The Minister's original Memorandum did not, however, make clear why the Government has not so far participated in the TNA tool, and what its view is on that element of the proposed Regulation.

13.5 When it considered the proposal in March 2018, the Committee therefore asked the Minister to explain why the UK had not joined the voluntary data analysis project within Eurofisc.[106] It also requested more information on the Government's proposals to avoid VAT-related barriers to trade with the EU-27 that would result if the UK leave the EU's common VAT area (including, but not limited to, the fact that VAT would revert to becoming an import tax charged when goods from the EU enter the country, as is the case for imports from outside the EU). It retained the proposal under scrutiny pending further information from the Minister.

13.6 We received a reply from the Financial Secretary (Mel Stride) in May 2018, with further information on the Government's position on the new anti-fraud measures and on the status of negotiations within the Council on the final legal text.[107] The Minister explains that HM Revenue and Customs has reduced annual losses to the UK Exchequer from missing trader fraud from £3–4 billion in 2006 to £0.5–1 billion by 2018 by "improving the identification of the fraud and using a range of measures to tackle the businesses, and individuals behind them, that facilitate the fraud".[108] He adds that the Government introduced a new bespoke penalty in November 2017 to target those businesses and company officers that participate in VAT fraud, such as MTIC.[109] As such, the Minister says, "the UK is widely seen in Europe as leading the way in tackling MTIC fraud".

103 Each national tax authority in the EU, including HMRC, maintains an electronic database containing the VAT registration data of its traders (e.g. the VAT identification number, name and address, and supplies made to other EU countries). The EU's VAT Information Exchange System (VIES) was set up to allow for that data to be exchanged, in order to enable VAT administrations to monitor and control the flow of intra-EU trade in goods to detect irregularities.

104 In addition to providing a clear legal basis for the exchange of trader data for use by the TNA tool, the proposal would also make various other changes, including improved access for tax authorities to information on car sales and non-EU imports benefiting from a VAT suspension in other Member States (both areas affected by widespread VAT fraud, though with far lower revenue losses than "missing trader" fraud). We set out the substance of the proposals in more detail in our Report of 28 March 2018.

105 Explanatory Memorandum submitted by HM Treasury (17 February 2018).

106 See our Report of 28 March 2018.

107 Letter from Mel Stride to Sir William Cash (15 May 2018).

108 However, a recent EU inquiry found "substantial VAT evasion in connection with imports through the UK by abusing the suspension of the payment of VAT" (the so-called customs procedure 42 for transit of imported goods between EU countries). This allegedly led to losses of VAT revenue for *other* Member States amounting to €3.2 billion (£2.8 billion) between 2013–2016, but none for the UK Exchequer because the goods were destined for other EU countries. See for more information our Report of 24 January 2018.

109 See section 68 of the Finance (No. 2) Act 2017.

13.7 In response to the specific questions raised by our previous Report, namely why the UK, uniquely[110] among the 28 Member States does not participate in the TNA data analysis tool, the Minister added:

> "Prior to setting up the new Working Field, HMRC officials were involved in drafting a feasibility study which considered how the tool would operate and its benefits. (…) However, following this exercise the Government continues to have some concerns about the likely efficacy of TNA. There is a lack of evidence to determine whether or not the new tool will be more effective than existing methods in identifying businesses facilitating VAT fraud.
>
> "TNA also raises some potential sovereignty concerns—for example, there is a risk that the new tool will evolve into a wider and more prescriptive joint risk analysis. This could require even more trader data and undermine UK tax sovereignty. It might also lead to HMRC investigators being directed by other Member States as to which businesses they should visit. This is something the UK would not agree to.
>
> "The Commission and the Benelux countries[111] have previously stated that the use of Member State's trader data within TNA would be on a voluntary basis i.e. non-participating Member States would not have to provide this data. It appears that they have now moved away from this position. The proposed changes would allow the TNA tool to access information on cross border transactions held by HMRC that is already accessible to Eurofisc officers in other EU Member States via the VAT Information Exchange System, even if the UK does not join.
>
> "[As] it is unclear that automated access for TNA to this transaction data is provided for under the existing legislation (Regulation 904/2010), the proposed amendments will provide legal clarity on this point."

13.8 The Government's concerns about the TNA data analysis tool notwithstanding, the Minister adds that the Government "welcomes the legal clarity provided by the proposed amendment to Regulation 904/2010". He also explains that the new tool is still in the early stages and "will not begin to exchange any trader information before the end of [2018], at the very earliest". He adds—intriguingly, given the UK's exit from the EU—that "the UK would be able to join TNA at a later date, should we wish to do so".

13.9 The Minister's letter also explains that the timetable for adoption of the proposal had been expedited unexpectedly by the Bulgarian Presidency, meaning it was likely to be the subject of a general approach setting out the finalised legal text of the new Regulation at

110 Eurofisc comprises 6 different working fields, each of it dedicated to a specific VAT fraud area. HMRC participates in Working Field 1, where Member States exchange targeted information relating to businesses that facilitate MTIC, and Working Field 4, where the UK is a "leading contributor" at sharing best practice in how to tackle fraud and evasion. Twenty-five Member States are full participants in the working field 6 (the TNA tool). The Commission's Impact Assessment for its proposal clarified that Germany and Slovenia are currently observers only.

111 The Minister notes in his letter that Belgium, the Netherlands and Luxembourg are the lead Member States for the TNA project.

the ECOFIN Council on 25 May 2018.[112] In light of this, and the Government's support for the outcome of the Council's deliberations, the Minister requested the Committee clear the proposal from scrutiny to allow the Government to vote in favour of the Regulation at that meeting.

13.10 **We thank the Minister for his update on the proposal to amend Regulation 940/2009. It offers a more detailed insight into the Government's reasons for not participating in the project to establish the TNA data analysis tool to identify cross-border VAT fraud within the common VAT area.**

13.11 **The Minister's letter notes that the TNA tool could lead to "sovereignty concerns", where a more collective approach to risk analysis of trade flows could oblige the tax authorities of one participating country to investigate companies within its jurisdiction on the instruction of another EU country. We note, however, that the Government does not rule out the possibility of joining the TNA project at a later stage (presumably on the condition that it has shown to be more effective at addressing fraud than existing measures, and raises no "sovereignty concerns").**

13.12 **Given the new tool is open only to EU countries as members of the common VAT area, and will not become operational until the end of 2018 at the earliest, the option for the UK to join would depend firstly on the ratification of the Withdrawal Agreement and its transitional arrangement (during which EU VAT legislation, both existing and new, will continue to apply to the UK). To date, the Government has refused to rule out the possibility of an extension to the post-Brexit transitional period beyond the current end date of 31 December 2020 (which is itself dependent on ratification of the Withdrawal Agreement). While the changes related to the legal basis for the TNA tool may not be problematic, given the UK's ability to opt out of the project, there is a set of much wider reforms of the Single EU VAT area under consideration.[113] Any prolongation of the transition increases the risk that the UK may have to apply changes to its VAT system based on new EU legislation the Government would have blocked had it retained its veto over EU tax proposals.[114]**

13.13 **Moreover, as we have concluded repeatedly, the UK's exit from the common VAT area—whether in March 2019 or at the end of any subsequent transitional period—raises its own thorny set of issues for the Government. As is the case elsewhere in the world, HMRC collects VAT on imports on entry of the goods into the country using its system of customs controls. Even where deferral systems exist to allow imports to be released before VAT is paid, this is costly for importers as it requires a bond to be placed with the tax authorities. For intra-EU trade however, an exception applies:**

112 Although the proposal is subject to the consultation procedure, meaning the European Parliament is not co-legislator, the Council cannot adopt the Regulation until the Parliament has formally delivered its opinion thereon. As such, the ECOFIN Council will adopt a general approach, followed by formal adoption of the Regulation later this year after the Parliament establishes its non-binding opinion (which it is due to do on 2 July 2018).

113 See for more information our Report: "Value Added Tax: EU proposals for reform and the implications of Brexit" (28 March 2018).

114 In practice it would be all but impossible for the UK to 'opt out' of applying changes to the EU's VAT rules in tandem with other Member States without requiring the re-imposition of customs controls to collect VAT on goods traded between the UK and the EU-27. As we set out in more detail in our Report on EU VAT reform and Brexit of 28 March 2018, any unilateral rejection by the UK of changes to the VAT Directive or its supplementary legislation affecting cross-border trade could be severely disruptive to trade, given the reciprocal and symmetrical nature of the system, including the mechanisms for administrative cooperation under Regulation 904/2010.

the need for VAT border controls has been removed by a common legal framework, institutional architecture and agreements on sharing of trader data on cross-border supplies. In particular, it relies on the VAT Information Exchange System to match records of cross-border supplies between sending and receiving Member States, as shown below.

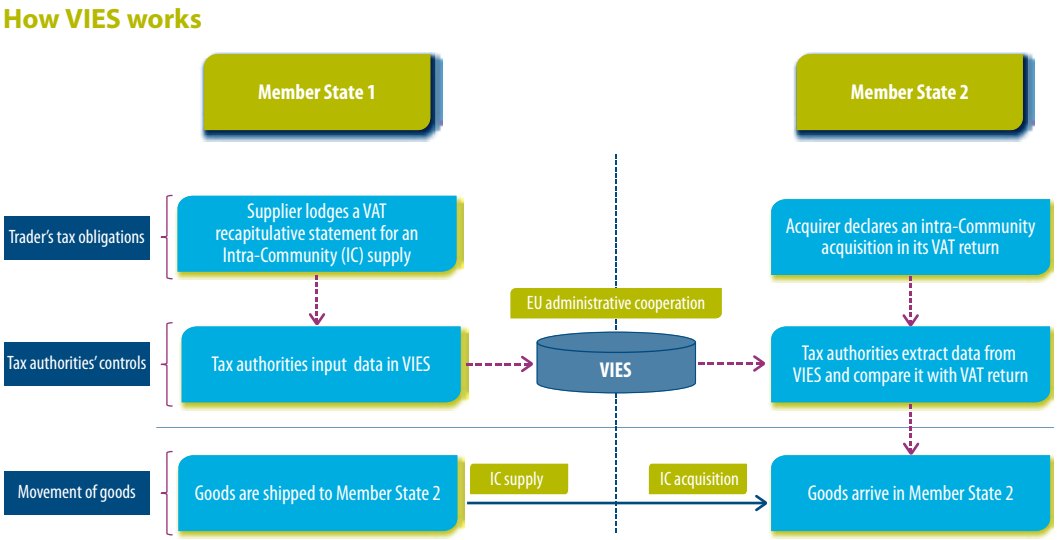

Figure 1: Operation of the VAT Information Exchange System (Source: European Court of Auditors)

13.14 **The Minister notes that the UK has been successful at significantly reducing losses due to missing trader fraud (which occurs when criminals exploit a loophole under EU VAT law that allows cross-border sales of goods to be sold into the UK at a zero-rate and without customs controls). HMRC's work in this area would nevertheless be at risk if negotiations on the Withdrawal Agreement were to collapse: the UK would need to establish, at speed, a new way of monitoring compliance with UK VAT law for imports and exports crossing the land border with Ireland (because HMRC would no longer send or receive information on cross-border sales involving a buyer or supplier based in another EU country via VIES, and there are no physical customs controls on the border).**

13.15 **If the transitional arrangement takes effect in March 2019 as intended, this 'crunch point' would be delayed by at least a further 21 months. The Government would still need to decide how to handle the exit from the common VAT system afterwards. While previous correspondence with the Financial Secretary has indicated the Government may be considering seeking an agreement to stay in the common VAT area in the longer term to mitigate these barriers (should the EU agree to this), confirmation of UK policy either way remains absent.**

13.16 **We will continue to press the Government for clarity on these matters, given the possibility of continued alignment with EU law in this area. The UK's initial discussions on the 'future framework' for relations with the EU, including a new economic partnership, are now underway. In this respect, we note that the Government will publish a second White Paper on Brexit in June 2018. We hope that, in the absence of correspondence from the Minister before its publication, this document will at**

least set out how the Government intends to address the VAT-related implications for trade resulting from the UK's exit from the EU under the new overarching economic partnership.

13.17 **With respect to our scrutiny of the TNA proposal specifically, we note that the new data analysis tool will only allow other Member States to use UK-held trader data to which they already have access. As such, we are content to now clear the proposal from scrutiny. However, we ask the Minister to write to us again to inform us when the proposal will be formally adopted by the Council and to include in this update:**

- **further information on the Government's tax sovereignty concerns about the TNA tool (and by extension what safeguards the UK would expect before it would consider joining the project); and**
- **confirmation of whether the potential for more "prescriptive joint risk analysis" (including the possibility of one Member State's tax officials being directed by those of another Member State) would require a further amendment to Regulation 904/2010 in the future.**

13.18 **Separately, on a broader point, the Government has repeatedly stated that preparations for a 'no deal' exit on 29 March 2019 are underway in case the post-Brexit transitional arrangement does not materialise. Given the implications of such a development for cross-border trade with the EU-27 from 30 March 2019 onwards have not been addressed by the Government to date, we ask the Minister to write to us by 8 June 2018 to explain how VAT compliance for both imports and exports wold be monitored for goods moving across the Northern Ireland-Ireland border if the UK exits the EU (and therefore the common VAT area and the VAT Information Exchange System) in March next year without an alternative arrangement with the EU in place.**

Full details of the documents

Amended proposal for a Council Regulation amending Regulation (EU) No 904/2010 as regards measures to strengthen administrative cooperation in the field of value added tax: (39299), 14893/17 + ADDs 1–2, COM(17) 706.

Previous Committee Reports

Twenty-third Report HC 301–xxii (2017–19), chapter 4 (28 March 2018) and Fourth Report HC 301–iv (2017–19), chapter 15 (6 December 2017).

14 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

(39655) 8251/18 + ADDs 1–3 COM(18) 229	Proposal for a Regulation of the European Parliament and of the Council on a multiannual recovery plan for mediterranean swordfish and amending Regulations (EC) No 1967/2006 and (EU) 2017/2107.
(39662) 8366/18 + ADDs 1–3 COM(18) 240	Recommendation for a COUNCIL DECISION authorising the opening of negotiations on behalf of the European Union for the conclusion of a Sustainable Fisheries Partnership Agreement and a protocol with the Republic of Madagascar.
(39668) — —	Court of Auditors special report 11/2018: New options for financing rural development projects: Simpler but not focused on results.

Foreign and Commonwealth Office

(39702) — —	Council Decision (CFSP) 2018/611 of 20 April 2018 amending Decision (CFSP) 2016/849 concerning restrictive measures against the Democratic People's Republic of Korea
(39703) — —	Council Regulation (EU) 2018/602 of 20 April 2018 amending Regulation (EU) 2017/1509 concerning restrictive measures against the Democratic People's Republic of Korea.

HM Treasury

(39295) 15171/17 COM(17) 699	Report from the Commission to the European Parliament and the Council on data pertaining to the budgetary impact of the 2017 annual update of remuneration and pensions of the officials and other servants of the European Union and the correction coefficients applied thereto.

(39649) 8269/18 COM(18) 230	Proposal for a Decision of the European Parliament and of the Council on the mobilisation of the European Globalisation Adjustment Fund following an application from France—EGF/2017/009 FR/Air France

Home Office

(39564) 7199/18 + ADDs 1–6 COM(18) 250	Communication from the Commission to the European Parliament, the European Council and the Council Progress report on the Implementation of the European Agenda on Migration.
(39621) 7926/18 + ADD 1 COM(18) 177	Annex to the Proposal for a Council Decision on the conclusion of the Agreement between the European Union and Federative Republic of Brazil amending the Agreement between the European Union and the Federative Republic of Brazil on short-stay visa waiver for holders of diplomatic, service or official passports.
(39622) 7924/18 + ADD 1 COM(18) 176	Proposal for a Council Decision on the signing, on behalf of the European Union, of the Agreement between the European Union and the Federative Republic of Brazil amending the Agreement between the European Union and the Federative Republic of Brazil on short-stay visa waiver for holders of diplomatic, service or official passports.
(39623) 7923/18 + ADD 1 COM(18) 175	Proposal for a Council Decision on the conclusion of the Agreement between the European Union and the Federative Republic of Brazil amending the Agreement between the European Union and the Federative Republic of Brazil on short-stay visa waiver for holders of ordinary passports.
(39624) 7922/18 + ADD 1 COM(18) 174	Proposal for a Council Decision on the signing, on behalf of the European Union, of the Agreement between the European Union and the Federative Republic of Brazil amending the Agreement between the European Union and the Federative Republic of Brazil on short-stay visa waiver for holders of ordinary passports.

Formal Minutes

Wednesday 23 May 2018

Members present:

Sir William Cash, in the Chair

Richrad Drax	Mr David Jones
Mr Marcus Fysh	Stephen Kinnick
Kate Green	Michael Tomlinson
Kelvin Hopkins	David Warburton
Darren Jones	

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 14 read and agreed to.

Summary agreed to.

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

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

[Adjourned till Wednesday 6 June 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*)