



House of Commons
Committee of Public Accounts

Eurotunnel and the UK border: out-of- court settlement with Eurotunnel

**One Hundred and Sixth Report of
Session 2017–19**

*Report, together with formal minutes relating
to the report*

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The Committee of Public Accounts

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Publication

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Summary

Departments have faced an unprecedented challenge in preparing for the UK's exit from the EU. Since we last reported on the Brexit preparations the date for the UK leaving has moved to 31 October 2019. Prior to the previous planned departure date of 29 March 2019 we had raised concerns with a number of departments about the rate of progress with the preparations. With little lead time left the Department for Transport undertook a rushed and risky procurement of additional ferry capacity which opened it to a court challenge from Eurotunnel, which had been excluded from the procurement, and which culminated in an out-of-court settlement costing £33 million. Coupled with the £51.4 million cost of cancelling the contracts with the ferry operators, the total cost of this procurement to the taxpayer stands at around £85 million. The Department must learn from this episode and use its time well should it be required to re-procure ferry capacity ahead of the new October deadline. We are however concerned that Departments appear to be waiting for clear instructions on what they should now plan for on Brexit. We acknowledge that without political certainty it is challenging but the government needs to inject direction into departments' preparations for leaving the EU with a deal, without a deal or any delay as a matter of urgency.

Introduction

We have been examining the government's preparedness for Brexit since 2017. Our reports have expressed concern about the pace of progress. This remained a key concern when we took evidence from the Department for Transport (the Department) on their out-of-court settlement with Eurotunnel and their preparations for October.

During autumn 2018, the government updated its planning assumptions relating to goods crossing the border should no deal be agreed with the EU. The worst-case assumption, agreed across government, was that the normal flow of goods across the short channel crossings could be reduced by up to 87% for as long as six months. In December 2018 the Department procured additional ferry capacity to assist with the movement of essential goods if the UK left the EU in March 2019 with no deal. To ensure that services would be in place in time, the Department took an unusual and risky approach to procurement. This procurement was subject to legal challenge by Eurotunnel, which had not been invited to bid. Rather than risk losing a legal case, which may have resulted in the court cancelling the ferry contracts ahead of 29 March 2019, the Department reached a £33 million out-of-court settlement with Eurotunnel. As part of the settlement Eurotunnel agreed to spend £33 million on certain types of project relating to the Channel Tunnel site's infrastructure, including security and border preparedness measures. On 24 April 2019 P&O Ferries began a legal challenge against this settlement on the grounds of, amongst other things, breach of procurement law.

The date for the UK to leave the EU has been extended from 29 March 2019 to 31 October 2019. On 1 May 2019, the Department announced that it had cancelled its ferry contracts with DFDS and Brittany Ferries. Departments now need to prepare for the new EU Exit date.

Conclusions and recommendations

1. **Momentum appears to have slowed in Whitehall, with preparations for the UK leaving the EU on 31 October not happening quickly enough.** The Department for Transport says that its immediate arrangements for leaving the EU were stood down after April and that it was reviewing the “sensible course to take to step those up again”. The task of planning for October will differ from the plans that were made for March. The Department says that work is being done across government to determine what the risk is to the flow of goods across the short channel crossings if the UK leaves the EU with no deal in place on 31 October 2019 and what action is required by departments. This work needs to be completed quickly, as it will shape what freight capacity the Department for Transport may need to procure and for what length of time, and the Cabinet Office tells us that a decision on ferry procurement needs to be made imminently. The Cabinet Office accepts that preparations for leaving the EU have been scaled back in Whitehall since March, and says that Departments stand ready to ramp up their work again. It is confident that the civil service will be ready by 31 October. But we remain concerned that departments’ preparations are being left too late. The window for decision-making for any departure on 31 October is short and key deadlines for decisions are passing every day.

Recommendation: *The Government must ensure that departments urgently step up their preparations on the assumption that the UK could be leaving the EU on 31 October and be ready to implement them.*

2. **The Department for Transport’s rushed procurement of ferry freight capacity resulted in it taking excessive risks and has cost the taxpayer an extra £33 million on top of the £51.4 million it paid to cancel the contracts.** The compressed procurement timetable for getting ferry capacity in place for 29 March resulted in a flawed process and exposed the Department to a risk of being challenged. As a result, when Eurotunnel, which had not been invited to bid, challenged the procurement the Department was forced to pay £33 million as part of an out-of-court settlement. Following the extension of the date for EU Exit to 31 October the Department has now cancelled its contracts with the ferry operators, at a cost of £51.4 million, bringing the total cost of this procurement to the taxpayer, including the settlement with Eurotunnel, to around £85 million. The Department recognises that it needs to learn from this flawed procurement. However, there is a real risk that the short time left before 31 October will force the Department into further high-risk procurements, which it wants to avoid. Given the lead time needed to put ferry capacity in place, which the Department says can take a minimum of three months, any new procurement process would need to begin very soon. Our evidence sessions were held in early and mid-June, since when the Minister for the Cabinet Office has made a written statement stressing the importance of preparations to minimise any disruption in the event of a No Deal scenario and updating the House accordingly. He states that the Department of Health and Social Care is starting the process of setting up an express freight contingency arrangement to support continuity of supply of medicines and medical products, that this will be for products requiring urgent delivery if the UK leaves the EU without a deal, and that Government will only pay for capacity as and when it is needed and used. He also states that the

Department for Transport is putting in place a freight capacity framework agreement that will provide government departments with the ability to secure freight capacity for our critical supply chains as and when required, that this framework does not commit the Government to purchasing or reserving any freight capacity, but that it does provide options that can be drawn upon if needed.

Recommendation: *The Department for Transport should set out within weeks what it has learnt from this procurement to ensure it does not expose the taxpayer to unnecessary risk and excessive cost in the future and particularly in its preparations for 31 October.*

- 3. We are not convinced that the Department has secured any additional benefit from its £33 million settlement with Eurotunnel.** The Department's settlement with Eurotunnel includes an obligation for Eurotunnel to commit at least £33 million on projects relating to infrastructure at the Channel Tunnel site, including security and border preparedness measures. The Department told us that it wanted to ensure that in return for the £33 million settlement Eurotunnel made investments that had a public value. This appears little more than window dressing, as Eurotunnel has said that it would have committed at least £33 million on these types of projects irrespective of the settlement. The Department will monitor how Eurotunnel commits the £33 million and told us that it expects to claw back expenditure that does meet the terms of the settlement.

Recommendation: *The Department should report back on how Eurotunnel commits the £33 million and what these projects will deliver.*

Out-of-court settlement and preparations for 31 October 2019

1. On the basis of a memorandum by the Comptroller and Auditor General, we took evidence from the Department for Transport (the Department) about the out-of-court settlement with Eurotunnel and the Department's preparations for 31 October 2019.¹
2. We have been examining the government's preparedness for Brexit since 2017. In our reports we have expressed concern about the pace of progress and concluded that departments have been moving too slowly. Our progress review on Brexit and the UK Border in March 2019 highlighted that, despite raising our concerns throughout 2018, planning and action happened too late in the day.²
3. We have also examined previously the Department's procurement of additional freight capacity, which was intended to provide a means to transport essential goods by ferry in the event of the UK leaving the EU without a deal. We concluded that the Department had taken a rushed and risky approach to procurement. Eurotunnel, which had been excluded from the procurement, subsequently took legal action against the Department, seeking damages amongst other legal remedies. We were also not convinced that the plans the Department had in place to address the challenges of a no-deal Brexit would have been sufficient.³

Preparations for leaving the EU on 31 October 2019

4. The date for the UK to leave the EU is 31 October 2019. Departments now have only a short time to prepare. They will be preparing to respond to different scenarios, including any potential disruption to the movement of goods at the border and, in particular, the short channel crossings. The Department told us that immediate arrangements across government were stood down after April 2019. When we took evidence from it in mid-June the Department told us that the government was reviewing the "sensible course to take to step those up again".⁴
5. The task of planning for October 2019 will be different from the plans that were made for the UK leaving the EU in March 2019. The Department told us that work was now being done to revisit the planning assumptions that formed the basis of the analysis that informed planning for March. This includes the potential impact of disruption on the flow of medicines and other critical goods.⁵ This work is being undertaken across government to determine what the risk is to the flow of goods across the short channel crossings if the UK leaves the EU, without agreeing a deal, on 31 October 2019.⁶ The Department said that they believe that preparations that have been made by the French on their side

1 C&AG's memorandum, [Out-of-court settlement with Eurotunnel](#), May 2019

2 Committee of Public Accounts, [Brexit and the UK border: further progress review](#), Session 2017–19, HC 1942, 11 March 2019; Committee of Public Accounts, [Exiting the European Union](#), Session 2017–19, HC 467, 29 January 2018; Committee of Public Accounts, [Department for Transport's implementation of Brexit](#), Session 2017–19, HC 1657, 28 November 2018

3 Committee of Public Accounts, [Brexit and the UK border: further progress review](#), Session 2017–19, HC 1942, 11 March 2019

4 Q 7

5 Q 5

6 Q 41

of the border may mean that “the level of disruption may not be as great as we thought it might be last autumn”.⁷ The Department told us that the Border Delivery Group has been meeting and is considering the “sensible steps” for Government to take on a “host of issues” relating to the UK’s exit from the EU.⁸

6. This work needs to be completed quickly as this new analysis will determine what action is required across government.⁹ For example, the analysis is necessary so that the Department knows what freight capacity it may need to procure, and for what length of time. The Department told us that it has been acting as an agent for other departments to provide capacity for goods that they consider critical. As such, the Department is highly dependent on the cross-government view of what the right level of action to take is when making its preparations.¹⁰

7. The Department told us that the Government will “need to make a decision about what they think are prudent and necessary arrangements. Those decisions have not been taken yet”.¹¹ We heard that this is a “political decision—the Cabinet will need to decide what it thinks the right approach is”.¹² We asked what the point of no return is for a decision to be made so the Department can plan for a no-deal exit on 31 October. We were told that there is not a single date but that the window for decision making is “soon” and needs to be done in “a matter of weeks not months”.¹³

8. The Department has identified that ferry operators require at least three months’ lead-in time to introduce new services.¹⁴ Given that the UK is scheduled to leave the EU on 31 October 2019, any procurement activity for ferry capacity may need to be completed by the end of July.¹⁵

9. The Department told us that the key lesson it had learned from its procurement of ferry freight capacity in late 2018 was that it was left with too short a window to carry out the actual procurement.¹⁶ The Department wants to avoid taking a “higher legal risk procurement route because of the pressure of time”.¹⁷ The Department told us that its “message to the Government, to the new Prime Minister and to any minister involved in this is, if this is something the Government wishes to do, we need to do it in a way that does not require us to rely on procurement processes that may leave us open to a higher than normal degree of legal risk”.¹⁸

10. Further to evidence from the Department for Transport on 5 June, we also put questions to the Cabinet Office and the Ministry of Housing Communities and Local Government on 12 June about Whitehall’s preparations for 31 October.¹⁹ When asked about key deadlines by when Departments will have to make decisions, the Cabinet Office referred, in the context of decisions about ferries, to the need to create a procurement

7 Q 39

8 Q 42

9 Q 41

10 Q 41

11 Q 8

12 Q 7

13 Qq 9–11

14 C&AG’s memorandum, para 1.10 and Figure 1

15 Q 8

16 Q 27

17 Q 40

18 Q 28

19 Oral evidence: [Sale of Public Land](#), HC 2040, Wednesday 12 June 2019

framework that is not subject to legal challenge. It referred to this being an imminent decision—“days and weeks”.²⁰ The Cabinet Office said it would be done in a way that is less legally exposed, and took no financial commitment at this point, with more time to set things up in a more ordered way.²¹ The Cabinet Office said that the effect of current political uncertainties on planning was under current discussion. It said that while there is no commitment to setting up a framework for getting additional transport capacity across the short straits, there were some things to be done that would make sense, albeit that a decision on ferry capacity was “a bit of a political decision”.²²

11. The Cabinet Office said there is a lot that departments could get on with while waiting for the appointment of a new Prime Minister, and that the Department for Exiting the European Union was compiling a list of what could be done so that there could be clarity on when the key dates were.²³ The Cabinet Office commented that the period earlier in the year had been enormously intense, with a focus on EU exit work streams almost every day, but all the machinery and mechanisms for delivering the work streams were exactly the same. The Cabinet Office said that the civil service had not been told to stand down on its EU exit preparations, but to “maintain all sensible provision”.²⁴

12. The Ministry of Housing Communities and Local Government confirmed that activity had been intense, and it would need to be again. It had scaled back activity on preparations for EU exit, but maintained, for example, a degree of staffing and engagement with local authorities. The Ministry commented that “We have put all those plans very carefully to one side, ready to inflate the balloon again, if you like, when we need to. We don’t think that moment is right now, but we are obviously very aware of the 31 October deadline. What we do not want to do is to keep a lot of staff basically doing nothing for the time being, but we absolutely have not let our plans lapse.” The Ministry said it thought the time it would have to scale activity back up would be early September, stressing that this did not mean it was doing nothing between now and then, just balancing the need to deliver its ongoing agenda with the need for no-deal preparations.²⁵ The Permanent Secretary of the Cabinet Office said that “The civil service will be ready by 31 October, of that I am quite sure, but what we have not done is to maintain everybody at the level of running hot that they were on 12 April.”²⁶

The Department’s settlement with Eurotunnel and the cancellation of Ferry contracts

13. On 25 January 2019, Eurotunnel began legal proceedings against the Department. An initial court hearing took place on 11 February 2019, at which an expedited trial date was set for 1 March 2019. On 28 February 2019 the Department reached a £33 million out-of-court settlement with Eurotunnel. The settlement includes an obligation for Eurotunnel to commit at least £33 million on projects relating to infrastructure at the Channel Tunnel site, including security and border preparedness measures.²⁷

20 12 June, Q 33

21 12 June, Q 48

22 12 June Q 34

23 12 June Qq 35, 36

24 12 June, Qq 42, 43

25 12 June, Qq 44–46

26 12 June, Q 42

27 C&AG’s memorandum, paras 2.1, 3.2

14. The Department understood the level of risk attached to its procurement process when contracts were signed in December 2018. It had identified Eurotunnel as a body that might challenge the procurement and that if a procurement challenge was raised it was likely to be successful.²⁸ The Department told us that its expectation in December 2018 was that any legal action would be pursued in a normal timeframe and any successful challenge would be focused on damages for the loss of profit. The Department had estimated £20 million as the potential consequence of a successful legal challenge.²⁹ However contrary to the Department's initial expectations an expedited trial date was set for 1 March 2019. In the Department's view the expedited trial date created a risk of the contracts being cancelled ahead of 29 March 2019. This was a risk that "the Government concluded it did not want to take".³⁰

15. The expedited trial date gave Eurotunnel the upper hand in its discussion with the Department.³¹ Eurotunnel were able to name their damages figure and initially sought £80 million in damages. When we put it to the Department that this would have been a tactic by Eurotunnel the Department acknowledged that "these things are a negotiation." The Department said it had "negotiated hard to get the lowest figure it could in the interests of the taxpayer. That ended up being £33 million".³² The Department recognised that there are lessons to be learned from this procurement exercise.³³

16. The Department's settlement with Eurotunnel includes an obligation for Eurotunnel to commit at least £33 million on projects relating to infrastructure at the Channel Tunnel site, including security and border preparedness measures. We asked if this was merely window dressing for the payment that the Department had to make to settle the case. The Department told us that it wanted to ensure that in return for the £33 million settlement "Eurotunnel were making investments that had a public value ... in terms of the resilience of our ports. That is why it is an important part of the settlement".³⁴ Eurotunnel has said that irrespective of its legal action, it would have committed in excess of £33 million on works that fall within the definition of permitted projects in the settlement agreement.³⁵

17. The Department told us that it will be monitoring how Eurotunnel commits the £33 million. Under the terms of the settlement agreement, the Department will pay Eurotunnel in three £11 million instalments over three financial years. The first payment was made on 5 April 2019.³⁶ Eurotunnel will provide the Department with at least four reports setting out what projects Eurotunnel has committed money to. The agreement includes a dispute mechanism if the Department does not believe that Eurotunnel has committed money to permitted projects.³⁷ The Department will receive evidence from Eurotunnel on the projects it has committed to. The Department told us that it expects to claw back money that is not meeting the purposes of the settlement.³⁸

28 C&AG's memorandum, paras 1.12–1.13

29 Q 13; C&AG's memorandum, paras 1.12, 2.18, Figure 3

30 Q 13

31 Q 13

32 Q 15

33 Q 40

34 Q 23

35 C&AG's memorandum, para 3.4

36 C&AG's memorandum, para 2.29

37 C&AG's memorandum, para 3.6–3.7

38 Qq 24–26

18. On 24 April 2019, the Department received a formal claim from P&O Ferries challenging the Department's settlement with Eurotunnel. This is on the grounds of, amongst other things, state aid and breach of procurement law. The Department told us that this legal action is at an early stage and that it is some way off coming to court. We were told by the Department that it had "no plans to settle" this legal action out-of-court.³⁹

19. On 1 May 2019 the Department announced that it had cancelled its ferry contracts with Brittany Ferries and DFDS. The cancellation of the contracts with these two ferry operators has cost the Department a total of £51.4 million. The Department told us that this includes around £43 million in termination fees and around £6.6 million in operating costs paid to DFDS.⁴⁰

39 Qq 20–21, 35

40 Qq 1–3

Formal Minutes

Monday 1 July 2019

Members present:

Meg Hillier, in the Chair

Sir Geoffrey Clifton-Brown Bridget Phillipson

Shabana Mahmood Gareth Snell

Anne Marie Morris

Draft Report (*Brexit and the UK border: out-of-court settlement with Eurotunnel*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 19 read and agreed to.

Introduction agreed to.

Conclusions and recommendations agreed to.

Summary agreed to.

Resolved, That the Report be the one hundred and sixth of the Committee to the House.

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

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Monday 8 July at 3:30pm]

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

Wednesday 5 June 2019

Bernadette Kelly, Permanent Secretary, Department for Transport, **Jim O'Sullivan**, Chief Executive, Highways England, and **Patricia Hayes**, Director General for Roads, Places and Environment, Department for Transport

[Q1-146](#)

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the [publications page](#) of the Committee's website. The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2017–19

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Second Report	Brexit and the future of Customs	HC 401 (Cm 9565)
Third Report	Hinkley Point C	HC 393 (Cm 9565)
Fourth Report	Clinical correspondence handling at NHS Shared Business Services	HC 396 (Cm 9575)
Fifth Report	Managing the costs of clinical negligence in hospital trusts	HC 397 (Cm 9575)
Sixth Report	The growing threat of online fraud	HC 399 (Cm 9575)
Seventh Report	Brexit and the UK border	HC 558 (Cm 9575)
Eighth Report	Mental health in prisons	HC 400 (Cm 9575) (Cm 9596)
Ninth Report	Sheffield to Rotherham tram-trains	HC 453 (Cm 9575)
Tenth Report	High Speed 2 Annual Report and Accounts	HC 454 (Cm 9575)
Eleventh Report	Homeless households	HC 462 (Cm 9575) (Cm 9618)
Twelfth Report	HMRC's Performance in 2016–17	HC 456 (Cm 9596)
Thirteenth Report	NHS continuing healthcare funding	HC 455 (Cm 9596)
Fourteenth Report	Delivering Carrier Strike	HC 394 (Cm 9596)
Fifteenth Report	Offender-monitoring tags	HC 458 (Cm 9596)
Sixteenth Report	Government borrowing and the Whole of Government Accounts	HC 463 (Cm 9596)
Seventeenth Report	Retaining and developing the teaching workforce	HC 460 (Cm 9596)
Eighteenth Report	Exiting the European Union	HC 467 (Cm 9596)

Nineteenth Report	Excess Votes 2016–17	HC 806 (Cm 9596)
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Twenty-First Report	The Nuclear Decommissioning Authority’s Magnox	HC 461 (Cm 9618)
Twenty-Second Report	The monitoring, inspection and funding of Learndirect Ltd.	HC 875 (Cm 9618)
Twenty-Third Report	Alternative Higher Education Providers	HC 736 (Cm 9618)
Twenty-Fourth Report	Care Quality Commission: regulating health and social care	HC 468 (Cm 9618)
Twenty-Fifth Report	The sale of the Green Investment Bank	HC 468 (Cm 9618)
Twenty-Sixth Report	Governance and departmental oversight of the Greater Cambridge Greater Peterborough Local Enterprise Partnership	HC 896 (Cm 9618)
Twenty-Seventh Report	Government contracts for Community Rehabilitation Companies	HC 897 (Cm 9618)
Twenty-Eighth Report	Ministry of Defence: Acquisition and support of defence equipment	HC 724 (Cm 9618)
Twenty-Ninth Report	Sustainability and transformation in the NHS	HC 793 (Cm 9618)
Thirtieth Report	Academy schools’ finances	HC 760 (Cm 9618)
Thirty-First Report	The future of the National Lottery	HC 898 (Cm 9643)
Thirty-Second Report	Cyber-attack on the NHS	HC 787 (Cm 9643)
Thirty-Third Report	Research and Development funding across government	HC 668 (Cm 9643)
Thirty-Fourth Report	Exiting the European Union: The Department for Business, Energy and Industrial Strategy	HC 687 (Cm 9643)
Thirty-Fifth Report	Rail franchising in the UK	HC 689 (Cm 9643)
Thirty-Sixth Report	Reducing modern slavery	HC 886 (Cm 9643)
Thirty-Seventh Report	Exiting the European Union: The Department for Environment, Food & Rural Affairs and the Department for International Trade	HC 699 (Cm 9643)
Thirty-Eighth Report	The adult social care workforce in England	HC 690 (Cm 9667)
Thirty-Ninth Report	The Defence Equipment Plan 2017–2027	HC 880 (Cm 9667)
Fortieth Report	Renewable Heat Incentive in Great Britain	HC 696 (Cm 9667)

Forty-First Report	Government risk assessments relating to Carillion	HC 1045 (Cm 9667)
Forty-Second Report	Modernising the Disclosure and Barring Service	HC 695 (Cm 9667)
Forty-Third Report	Clinical correspondence handling in the NHS	HC 929 (Cm 9702)
Forty-Fourth Report	Reducing emergency admissions	HC 795 (Cm 9702)
Forty-Fifth Report	The higher education market	HC 693 (Cm 9702)
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Forty-Ninth Report	Progress in tackling online VAT fraud	HC 1304 (Cm 9702)
Fiftieth Report	Financial sustainability of local authorities	HC 970 (Cm 9702)
Fifty-First Report	BBC commercial activities	HC 670 (Cm 9702)
Fifty-Second Report	Converting schools to academies	HC 697 (Cm 9702)
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Fifty-Sixth Report	Transforming courts and tribunals	HC 976 (Cm 9702)
Fifty-Seventh Report	Supporting Primary Care Services: NHS England's contract with Capita	HC 698 (Cm 9702)
Fifty-Eighth Report	Strategic Suppliers	HC 1031 (Cm 9702)
Fifty-Ninth Report	Skill shortages in the Armed Forces	HC 1027 (9740)
Sixtieth Report	Ofsted's inspection of schools	HC1029 (Cm 9740)
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Sixty-Second Report	Price increases for generic medications	HC 1184 (Cm 9740)

Sixty-Third Report	Interface between health and social care	HC 1376 (Cm 9740)
Sixty-Fourth Report	Universal Credit	HC 1375 (Cp 18)
Sixty-Fifth Report	Nuclear Decommissioning Authority	HC 1375 (Cp 18)
Sixty-Sixth Report	HMRC's performance in 2017–18	HC 1526 (Cp 18)
Sixty-Seventh Report	Financial Sustainability of police forces in England and Wales	HC 1513 (Cp 18)
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Eightieth Report	Capita's contracts with the Ministry of Defence	HC 1736 (Cp 97)
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