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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:

Fifth Anti-Money Laundering Directive

- The EU has agreed on new anti-money laundering rules, which will require Member States to open up information on the beneficial ownership of trusts to the public. The implementation dates for the new Directive fall within the Government's proposed post-Brexit transition period, meaning that the UK is likely to be under a legal obligation to apply the new legislation.

European Defence Industrial Development Programme

- The Government has secured changes to a proposed EU funding programme (the EDIDP) for the development of prototypes for new military technology, meaning that UK firms after Brexit could have some—limited—participation in the programme. The proposal remains under scrutiny as the European Parliament is yet to set out its position, and may demand stricter requirements for "third countries".

EU-ACP economic partnership

- The UK's economic and political partnership with 78 developing countries in Africa, the Caribbean and the Pacific (ACP) is shaped, in large part, by the EU-ACP Treaty, also known as the Cotonou Agreement. The treaty expires in December 2020, and the European Commission is seeking a mandate from the Member States to negotiate a replacement. The Government's approach to these negotiations in the context of Brexit is unclear, as it will not automatically be a party to any new agreement, but it may not have the negotiating capacity to establish an alternative bilaterally.

Working Conditions Directive

- The European Commission has tabled a new legislative proposal to give new employment rights to workers with variable working hours, such as those on zero-hours contracts. The Government has expressed concerns about the potential unintended consequences of the proposal for UK employment law. The

final Directive is likely to be amended by the Member States and the European Parliament, but may have to be implemented in the UK if its date of effect falls within the post-Brexit transitional period.

Statutory Audit

- How would the UK audit sector be affected by a shift from the status quo to trade on the basis of European Commission equivalence and adequacy decisions, with reference to group audits, pan-European partnerships, and the ability of UK-qualified auditors to have their qualifications recognised and to practice in EU Member States?

Enhancing law enforcement cooperation and border control: strengthening the Schengen Information System

- The Committee asks when the Government expects the proposed SIS II police cooperation Regulation to be adopted, whether it is likely to take effect during any transitional/implementation period and how this would affect the Government's preparations for implementing the Regulation post-exit.

Waste policy

- Introduction of ambitious new recycling targets during post-Brexit transition period.

Common Agricultural Policy

- Links between future EU and UK agricultural policies.

North Sea demersal stocks

- Application of detailed new EU fisheries rules adopted during post-Brexit transition period.

Summary

Fifth Anti-Money Laundering Directive

The European Parliament and the EU Member States have agreed on amendments to the EU's Anti-Money Laundering Directive (AMLD). The legislation requires banks and other businesses handling financial transactions ("obliged entities") within the EU to apply due diligence to their customers, and report suspicious activity to the authorities. Since 2015 the legislation also obliges EU countries to maintain central registers of the beneficial ownership of both companies and express trusts.

Under the changes to the Directive now agreed, Member States will have to grant public access to information on beneficial ownership held on each EU country's Register of Trusts, subject to a "legitimate interest" test, the conditions for which must be defined in law by each individual Member State. Other changes relate to retrieval of bank account

information; the extension of money-laundering checks to auctioneers and estate agents; and the interconnection of national registers. Most of the provisions of the new legislation will take effect in 2019 and 2020, meaning the Directive will have to be applied in the UK under any post-Brexit transitional arrangement.

The Committee has cleared the legislation from scrutiny as the text has been finalised. However, we are awaiting further information from the Treasury about the resources the Government is mobilising to ensure that information on beneficial ownership of UK-registered companied and trusts is verified and accurate.

Cleared from scrutiny; drawn to the attention of the Home Affairs, Justice and Treasury Committees.

European Defence Industrial Development Programme

The EDIDP is a new EU funding instrument for the development of military prototypes, as part of the larger European Defence Fund. The Member States adopted their position on the EDIDP proposal in December 2017, with the Government overriding scrutiny. The UK supported the Council's position as it provides for some, albeit limited, participation of UK entities in the EDIDP after Brexit (and any transitional period).

There are a number of concepts contained in the Council's position which require further clarification, to establish how easy it would be for UK organisations to participate in the EDIDP-funded projects after Brexit. This is one of the Government's key objectives in the post-Brexit relationship with the EU on defence cooperation.

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

EU-ACP economic partnership

The Commission has requested formal permission from the Council to open negotiations with 79 countries in Africa, the Caribbean and the Pacific (ACP) on a successor to the current EU-ACP trade and partnership agreement (the Cotonou Agreement). The proposal is highly relevant in the context of Brexit, as the UK's economic and political relationship with numerous developing countries in the Commonwealth currently take place via the wider EU-ACP fora. The UK also provides one of the strongest voices for support to these countries, especially in the Caribbean and the Pacific.

The Cotonou Agreement expires in 2020, and the Government is currently seeking to secure a carry-over of its applicability after the UK ceases to be a Member State. The effects of failing to secure this would be disruptive since the agreement also provides the framework for the disbursement of the European Development Funds, to which the UK is contributing funding totalling another £4 billion during the post-Brexit transitional period.

With respect to the successor arrangement the EU wants to negotiate, the Government has not made clear whether the UK will seek to become a non-EU, non-ACP party to the new Agreement. If it is not, it presumably will have to negotiate a new UK-ACP agreement

(possibly using Cotonou as a template), or pursue new bilateral arrangements with individual ACP countries. Whether it has the negotiating resources to do so in parallel to negotiating a new UK-EU free trade agreement is questionable.

Not cleared from scrutiny; further information requested; drawn to the attention of the Foreign Affairs and International Development Committees.

Working Conditions Directive

The European Commission has proposed a new Working Conditions Directive, which would update the existing Written Statement Directive (which requires new employees to be informed in writing about their employment conditions), as well as seeking to introduce a statutory definition of 'worker' and new material employment rights relating to probationary periods and exclusivity clauses for zero-hours workers. The Directive also contains provisions allowing workers to challenge their dismissal if based on seeking to enforce these new rights.

The Committee has kept the proposal under scrutiny, in light of the Government's concerns that the Directive could have unintended consequences in the context of UK employment law. We have also used our powers under Standing Order 143 to request the opinion of the BEIS and Work & Pensions Committees on the proposal in light of their recent inquiry into working conditions.

Not cleared from scrutiny; opinion requested from the Business, Energy and Industrial Strategy and Work and Pensions Committees.

Proposed Insolvency Directive on restructuring and second chances for business and entrepreneurs

This proposed Insolvency Directive is a very significant proposal to harmonise aspects of Member States' insolvency law. Although it is unlikely that the UK would have to implement an adopted Directive before Brexit, in November the Committee asked the Government about the impact of a transition period on implementation.

We are also keeping under scrutiny an opinion of the ECB on the proposed Directive. It is relevant because it has called for wider harmonisation which would be problematic for the UK if it had to implement the proposed Directive.

The Government now responds to the Committee's questions. It considers it still unlikely that the UK would have to implement the Directive during a transition period. In terms of voluntary alignment post Brexit/transition, the Government has, in any event, been consulting on a similar preventive restructuring framework to that proposed in the Directive.

Not cleared from scrutiny; further information requested.

Waste policy

A provisional agreement has been reached on new recycling targets up to 2035, but the Minister reports that the Government has yet to decide whether or not to support the agreement. The Committee notes that, if adopted, the UK would be required to apply

this legislation under the terms of the proposed post-Brexit transition agreement. The Committee also queries the Government's indecision in the light of the professed commitment to ambitious recycling targets in the recent 25 year environment plan.

Cleared (by Resolution of the House on 08/03/2016); drawn to the attention of the Environment, Food and Rural Affairs Committee, the Environmental Audit Committee, the Communities and Local Government Committee, the Welsh Affairs Committee, the Scottish Affairs Committee and the Northern Ireland Affairs Committee.

Enhancing law enforcement cooperation and border control: strengthening the Schengen Information System

The Government has decided to opt into a proposed Regulation to improve the functioning of the Schengen Information System ("SIS II") and enhance cross-border police cooperation in tackling serious crime and terrorism. The Committee asks the Government when it expects the Regulation to be adopted, whether it is likely to take effect during any transitional/implementation period agreed with the EU and how this would affect the Government's preparations for implementing the legislation. The Committee notes that there is no precedent for a non-EU third country to participate in SIS II unless it also participates in the Schengen free movement area. It says that the Government will need to demonstrate why an exception should be made to allow the UK to continue to participate in SIS II post-exit once it is outside the EU and Schengen and no longer bound by EU rules on free movement. The Committee seeks further information on the implications of a "no deal" and the possibility of obtaining information contained in SIS II alerts on a bilateral basis from individual Member States.

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

Statutory Audit

A report on developments in the statutory audit markets in EU Member States provides an opportunity for the Committee to scrutinise the implications of Brexit for a sector in which the UK is very successful. A highly developed regulatory framework for statutory audit exists at EU level, which facilitates cross-border audit activity of various kinds, including recognition of auditors qualifications, pan-European partnerships, intra-group activity and sharing of documents. The Committee concludes that European Commission adequacy and equivalence decisions would be needed to retain the status quo, in the absence of which a range of negative consequences would arise: UK audits would cease to be valid in the EU and UK audit firms would have to register with each Member State and be subject to additional oversight from local regulators, and UK audit firms would have to be restructured out of pan-European partnerships. While some relocation of audit activity to the EU27 is possible, restrictive national rules and the dominance of UK capital markets mean that there is a limit on the proportion of UK audit activity which EU operators could take.

Not cleared from scrutiny; further information requested.

Common Agricultural Policy

The European Commission has set out ideas for the orientation of the EU's Common Agricultural Policy from 2021. Central to the Commission's vision is common objectives with more decentralised design and delivery of policy. The Committee notes that the direction of EU agricultural policy is relevant to the UK given the intention to continue a strong trading relationship between the UK and the EU post-Brexit. The Committee seeks confirmation that UK officials and Ministers will engage with the EU on the respective EU and UK approaches to future agricultural policy once the UK has published more details of its intentions. A commitment is also sought to provision by the Government of a detailed assessment of the areas of convergence and divergence between the UK and EU.

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

North Sea demersal stocks

Agreement has been reached on this proposal to agree a framework under which detailed management measures for North Sea demersal fisheries (such as cod, haddock, plaice, saithe, sole and whiting) should be managed. The Committee is satisfied with the agreement, but draws attention to the Minister's ambiguity on application of EU fisheries rules during the implementation period and to the Minister's reluctance to make any comment on the application of detailed implementing rules agreed and applicable during any implementation period. The Committee notes that we will monitor closely the negotiations on the future UK-EU fisheries relationship with a view to how it will affect co-operation under legislation such as this, as well as implications for the modification of EU fisheries legislation as retained EU law.

Cleared; drawn to the attention of the Environment, Food and Rural Affairs 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: European Accessibility Act [Proposed Directive (NC)]; Statutory audit [Report (NC)]; Parental and Carers' Leave Directive [Proposed Directive (NC)]; Working Conditions Directive [Proposed Directive (NC)]

Communities and Local Government Committee: EU Legislation on Waste [Proposed Directives (C)]

Defence Committee: European Defence Industrial Development Programme (EDIDP) [Proposed Regulation (NC)]

Digital, Culture, Media and Sport Committee: European Accessibility Act [Proposed Directive (NC)]

Environmental Audit Committee: EU Legislation on Waste [Proposed Directives (C)]

Environment, Food and Rural Affairs Committee: Common Agricultural Policy Reform [Communication (NC)]; EU Legislation on Waste [Proposed Directives (C)]; Multiannual Plan for Demersal Fishing Stocks in the North Sea [(a) Proposed Regulation, (b) Executive Summary, (c) Impact Assessment (C)]

Committee on Exiting the EU: Statutory audit [Report (NC)]; Enhancing law enforcement cooperation and border control: strengthening the Schengen Information System [Proposed Regulations (NC)]

Foreign Affairs Committee: New EU partnership with Africa, the Caribbean and the Pacific [Recommendation (NC)]

Health Committee: Carcinogens and Mutagens Directive (Phase I and Phase II) [(a) Proposed Directive (C), (b) Proposed Directive (NC)]

Home Affairs Select Committee: Fifth Anti-Money Laundering Directive [Proposed Directive (C)]; Enhancing law enforcement cooperation and border control: strengthening the Schengen Information System [Proposed Regulations (NC)]

International Development Committee: New EU partnership with Africa, the Caribbean and the Pacific [Recommendation (NC)]

Justice Committee: Fifth Anti-Money Laundering Directive [Proposed Directive (C)]; Enhancing law enforcement cooperation and border control: strengthening the Schengen Information System [Proposed Regulations (NC)]

Northern Ireland Affairs Committee: EU Legislation on Waste [Proposed Directives (C)]

Scottish Affairs Committee: EU Legislation on Waste [Proposed Directives (C)]

Transport Committee: European Accessibility Act [Proposed Directive (NC)]

Treasury Committee: European Accessibility Act [Proposed Directive (NC)]; Statutory audit [Report (NC)]; Fifth Anti-Money Laundering Directive [Proposed Directive (C)]

Welsh Affairs Committee: EU Legislation on Waste [Proposed Directives (C)]

Women and Equalities Committee: European Accessibility Act [Proposed Directive (NC)]; Parental and Carers' Leave Directive [Proposed Directive (NC)]

Work and Pensions Committee: Parental and Carers' Leave Directive [Proposed Directive (NC)]; Working Conditions Directive [Proposed Directive (NC)]; Carcinogens and Mutagens Directive (Phase I and Phase II) [(a) Proposed Directive (C), (b) Proposed Directive (NC)]

1 European Accessibility Act

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Transport, the Treasury, the Digital, Culture, Media and Sport, the Business, Energy and Industrial Strategy and the Women and Equalities Committees
Document details	Proposal for a Directive on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services
Legal base	Article 114, TFEU; Ordinary Legislative Procedure; QMV
Department	Business, Energy and Industrial Strategy
Document Number	(37371), 14799/15 + ADDs 1–8, COM(15) 615

Summary and Committee's conclusions

1.1 People with disabilities are often hindered in their access to products and services. The 'European Accessibility Act' is a proposed Directive which aims to improve disabled persons' access to products and services, minimising existing and potential differences between Member States—such as in the design of cash machines—as they implement the accessibility requirements of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).

1.2 While welcomed by the Government in principle, a number of concerns about the detail have been expressed by the UK and by other Member States. As the Parliamentary Under-Secretary of State (Lord Henley) explains in his letter, a compromise was agreed at Council on 7 December 2017. The UK abstained due to concerns that prescriptive requirements would hamper innovation, to the detriment of future accessibility provision. In addition, the lack of clarity in some parts of the text and the risk of overlap with sectoral legislation were cause for concern. A written statement was tabled to that effect (see Annex 1).

1.3 When we last considered this document, at our meeting of 22 November 2017, we waived the proposal from scrutiny in order that the Government could engage actively in negotiations in advance of the 7 December Council. We also requested greater clarity on the Government's concern about overlap between this Directive and the European Electronic Communications Code. That clarity has been provided by the Minister, as set out below.

1.4 **We welcome the information provided by the Government on the outcome of the Council and particularly commend the explanation of the UK position and the submission of a written statement to that effect. We note that prospects for imminent**

agreement with the European Parliament and Commission are low. With that in mind, we retain the document under scrutiny and look forward to an update on the progress of negotiations.

1.5 **Given the broad application of this proposed legislation and the interest shown by various Committees in the implications of the UK's withdrawal from the European Union, we draw this Chapter to the attention of the Transport Committee; the Treasury Committee; the Digital, Culture, Media and Sport Committee; the Business, Energy and Industrial Strategy Committee; and the Women and Equalities Committee.**

Full details of the documents

Proposal for a Directive on the approximation of the laws, regulations and administrative provisions of the Member States as regards the accessibility requirements for products and services: (37371), 14799/15 + ADDs 1–8, COM(15) 615.

Background

1.6 Details of the Commission's proposal, the Government's Explanatory Memorandum and our own views were set out in the Reports of 13 January and 25 May 2016 and of 1 February, 25 April and 22 November 2017.

1.7 In summary, the Commission's proposal sets common accessibility requirements (but not technical specifications) for certain key products and services, which were identified by the Commission in consultation with citizens, civil society organisations and businesses: computers and operating systems; ATMs; ticketing and check-in machines; smartphones; TV equipment related to digital television services; telephony services and related equipment; audio-visual media services (AVMS) and related equipment; air, bus, rail and waterborne passenger transport services; banking services; e-books; and e-commerce.

1.8 At our meeting of 22 November, we commended the amount of information provided by the Department. We noted the substantial changes negotiated to the text and the potential agreement at the 7 December Council. We supported the Government's approach and waived the scrutiny reserve in advance of Council to allow the Government to engage actively in negotiations.

1.9 We noted the Minister's concern that there was potential for overlap and inconsistencies between the text on electronic and emergency communications and the European Electronic Communications Code (EECC), which is being separately negotiated. We asked how the provisions on electronic and emergency communications are covered by the EECC, with respect to specific articles of that Directive.

Minister's letter of 19 December 2017

1.10 The Minister thanks the Committee for the scrutiny waiver provided in advance of the Employment, Social Policy, Health and Consumer Affairs Council (EPSCO) on 7 December. He goes on to provide an update on the negotiations.

1.11 The Minister notes that negotiations continued in working groups during November and the Estonian Presidency made a number of further amendments to the text of the Directive. These included some limited alterations intended to clarify the Annex I requirements and Article 12 on disproportionate burdens, the removal of the requirement for communication providers to provide relay services, and additional text in the recitals stating that, in case of conflict with the European Electronic Communications Code (EECC), the Code should take precedence.

1.12 At COREPER on 24 November, several Member States, including the UK, expressed support for removing sections of the text that referred to a specific requirement on services answering 112 emergency calls. The Presidency revised the text accordingly and presented it to EPSCO for agreement.

1.13 At Council, Ministers agreed a General Approach on the Presidency's compromise European Accessibility Act (EAA) text.[1] The UK, explains the Minister, stated its support for the aims of the proposal and set out its strong domestic record on realising the rights of people with disabilities but registered an abstention, reflecting concerns about the clarity of the text and the risk that it would impede, rather than promote, innovation which might help accessibility. The UK tabled a written statement to this effect (see Annex). All other Member States supported the General Approach. Finland tabled a statement outlining likely problems with implementation, whilst Italy and Spain tabled statements regretting the removal of the 112 emergency number from the scope.

1.14 The Minister explains the UK's position in the following terms:

> "As outlined in previous letters to the Committee, the UK raised a significant number of concerns with the approach taken in the original EAA proposal throughout the negotiations. Many of these were shared with other Member States. Some of these have been resolved during the course of the negotiations, including the concern relating to emergency communications described in my previous letter, which was resolved at COREPER with the removal of emergency call answering. However, substantial concerns remained about the compromise text presented at EPSCO.
>
> "From the outset, the UK registered concerns about the text's lack of clarity, particularly the disproportionate burden provisions (Article 12) and the accessibility requirements which are set out in Annex I. The Estonian Presidency introduced a new Annex IV to provide additional guidance on how to assess whether a requirement is a disproportionate burden; we welcome this. However, it remains unclear how the new benchmarks are to be used in practice, with the risk that different Member States' market surveillance authorities will assess them inconsistently, hindering an effective single market. Despite attempts by several Presidencies to reorder and clarify the language in Annex I, for example by adding examples (a UK suggestion), we remain concerned that the text here is also unclear and would be difficult to comply with.
>
> "Our fundamental concern with Annex I, however, remains the prescriptive nature of many of the requirements in stipulating particular accessibility

1 Council General Approach 15586/17.

solutions, in particular those relating to the user interface of products and provision of information in an accessible form. Specifying very detailed requirements limits the ability of businesses to innovate and find better accessibility solutions than those currently available, to the detriment of the intended beneficiaries of the Directive.

"Throughout the negotiations the UK has been concerned that the horizontal nature of the legislation risks creating overlaps with sectoral legislation that includes accessibility requirements. We have also expressed reservations over provisions which will significantly affect electronic communications networks, considering that these would be better dealt with in the European Electronic Communications Code (EECC). While the overlaps with transport and audio-visual media services legislation have been removed, there remains a real prospect of incompatibility with the EECC. This stems from a cross-reference in the EAA to the EECC which would result in the two Directives placing contradictory requirements on some electronic communications service-providers. The addition of a recital in the EAA which specifies that the EECC should prevail in case of conflict does not in our view fully resolve this issue: it would be preferable to amend the body of the text so that such inconsistencies did not arise, or simply place the requirements in the EECC and not the EAA.

"The UK believes in robust legislation on accessibility and has always supported the aims of this Directive in improving the accessibility of a range of products and services for persons with disabilities. However, given these outstanding, fundamental concerns with the text presented to EPSCO, we considered it had not yet reached a stage where the UK could support it. The UK therefore abstained. The Government's final position took account of a wide range of views, including those of industry, disability groups and accessibility experts."

1.15 On stakeholder consultation, the Minister adds:

"Disability groups have expressed support for the EAA and are concerned that the UK's legislative provision will not keep pace with EU standards when we leave the EU. The Government has clarified that, regardless of the outcome of EU exit negotiations, the UK's legislative framework will continue to promote and protect the rights of disabled people. Industry representatives have continued to express concerns about clarity and prescriptive requirements, similar to those outlined previously. My officials will continue to work with the Office for Disability issues to ensure views on the EAA are sought as part of their ongoing engagement with disability stakeholders on accessibility issues and UNCRPD implementation. My officials will also speak to industry stakeholders about the steps businesses would need to take in order to implement the proposal's requirements."

1.16 The Minister goes on to address the Committee's particular query about how electronic and emergency communications are separately covered by the European Electronic Communications Code (EECC). The Code is a recast of existing legislation and is under negotiation at the moment. The Minister explains that the relevant accessibility

provisions are included in Articles 23(a)(1) and 26(4) of the existing regulatory framework (Universal Service Directive,[2] as amended by the Citizens' Rights Directive).[3] Under Presidency proposals for the recast EECC, Article 103 maintains similar provisions to the existing Article 23a, while Article 102(4) maintains the provisions on access to emergency calls set out in the existing Article 26 (4).

1.17 Looking forward, the Government expects the Bulgarian Presidency to commence inter-institutional negotiations early in 2018. Given the length and complexity of the Directive and the divergence between the Parliament and Council texts on a number of substantive points, such as the inclusion of public procurement in the scope, the Minister does not expect the trilogue process to be completed quickly. The Government will continue to keep the Committee updated on the progress of negotiations.

Previous Committee Reports

Second Report HC 301–ii (2017–19), chapter 1 (22 November 2017); Fortieth Report HC 71–xxxviii (2016–17), chapter 2 (25 April 2017); Thirtieth Report HC 71–xxviii (2016–17), chapter 3 (1 February 2017); Third Report HC 71–ii (2016–17), chapter 2 (25 May 2016); Eighteenth Report HC 342–xvii (2015–16), chapter 1 (13 January 2016).

Annex: Statement by the UK to the Minutes of the Council

The UK was unable to support the General Approach on the European Accessibility Act at EPSCO on 7th December 2017, but neither does the UK oppose it. The UK has therefore abstained.

The UK believes in robust legislation on accessibility and has always supported the aims of the European Accessibility Act in improving the accessibility of a range of products and services for persons with disabilities. The UK ratified the United Nations Convention on the Rights of Persons with Disabilities in 2009 and is committed to the progressive realisation of the rights for disabled people that it sets out. The UK Equality Act 2010 already prohibit discrimination on grounds of disability and imposes a duty on providers of goods and services to make "reasonable adjustments" to prevent this.

Despite the improvements that had been made during Council negotiations, the UK considered that the text was not yet ready to be agreed. The UK was particularly concerned about the potential that prescriptive requirements would hamper innovation, to the detriment of future accessibility provision. In addition, the lack of clarity in some parts of the text and the risk of overlap with sectoral legislation were cause for concern.

The UK recognises the challenges of negotiating such an important and technically detailed file. We would like to thank the Presidency for continuing to work with Member States to address the long-standing issues with the text.

2 Directive 2002/22/EC.
3 Directive 2009/136/EC.

2 Insolvency, Restructuring and Second Chances for Business and Entrepreneurs

Committee's assessment	Legally important
Committee's decision	Not cleared from scrutiny; further information requested
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

2.1 Existing EU insolvency legislation—the 2002 EC Regulation on Insolvency Proceedings and the 2015 recast EU Regulation on Insolvency Proceedings (which came into effect on 26 June 2017)—provides a framework for mutual recognition and judicial co-operation of cross-border insolvency proceedings within the EU. The regulations do not harmonise national insolvency laws and there are wide-ranging differences between Member States' insolvency regimes.

2.2 In November 2016 the Commission published document (a), a proposal for a Directive to harmonise aspects of insolvency laws across the EU to support business rescue and a second chance for entrepreneurs. It has since been the subject of our predecessors' scrutiny. The aim of the proposed Directive is to ensure that Member States have effective restructuring procedures in place to help viable businesses in distress to survive, allow honest entrepreneurs to have a second chance after failure and reduce differences in restructuring and insolvency regimes across the EU. A summary of the proposal's main provisions is provided in our predecessor's previous Reports and outlined in paragraph 2.9 of our last Report of 13 November.[4]

2.3 Document (b) is an Opinion of the European Central Bank (ECB) on the proposal. A summary of the Opinion was provided in paragraphs 2.12–13 of that same Report.[5]

2.4 Last time we considered these documents, the Government told us that it seems very unlikely that the UK would have to implement the proposed Directive before Brexit given the anticipated Brexit timetable. However, turning to document (b), the Government considered that the push from the ECB for more harmonisation might cause difficulties

4 First Report HC 301–i (2017–19), chapter 2 (13 November 2017).
5 See footnote above.

for the UK if it were to "implement the Directive". It welcomed the suggestion that Member States follow the UNCITRAL Model Law on Cross-Border Insolvency because that would make recognition of cross-border insolvency proceedings easier after Brexit and/or a transition period.

2.5 In response, we asked the Government whether the UK might still have to implement the proposed Directive, once adopted, in the event of a two-year transition period. We also asked about the possibility of voluntary alignment with proposal (a) once adopted, after Brexit and/or a transition period. Finally, we drew the House's attention to another Report considered at the same time. This included general comment from the Government on the question of how cross-border insolvencies will be governed by UK law and the domestic law of each Member State after Brexit in terms of jurisdictional issues and enforcement of orders and judgments. The Report related to a document which has now been cleared from scrutiny[6] but we refer the House to the very helpful letter from Andrew Griffiths, Minister for Small Business, Consumers and Corporate Responsibility in response to our Report dated 12 January 2018.[7]

2.6 The Minister now writes in a separate letter with an update on the negotiations of proposal (a) and with response to our questions.

2.7 **We thank the Minister for his letter. We look forward to hearing more from him in due course on further progress in the negotiations of proposal (a) during the Bulgarian Presidency. From what the Minister says, the Member States are some way from being able to agree a General Approach. But we would ask that we are given plenty of advance information of any such development, including any draft texts where possible. Despite Brexit, this remains a significant proposal in terms of the overall insolvency law landscape across the EU which could affect UK businesses trading into the EU post Brexit/transition.**

2.8 **We retain draw these documents under scrutiny and draw them and this chapter to the attention of the Business, Energy and Industrial Strategy Committee.**

Full details of the documents

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, COM(17) 723.

The Minister's letter of 12 January 2018 on documents (a) and (b)

2.9 The Minister for Small Business, Consumers and Corporate Responsibility (Andrew Griffiths) first provides an update. He says that since the last Government update of 25 August the Estonian Presidency has made "considerable progress in taking work forward on the draft Directive".

6 Proposed Regulation replacing Annex A to Regulation (EU) 2015/848 on insolvency proceedings: (38963), 11667/17 + ADD 1, COM(17) 422. See our Seventh Report, HC 301–vii (2017–19), chapter 9 (19 December 2017).

7 Letter from the Minister for Small Business, Consumers and Corporate Responsibility (Andrew Griffiths MP) to Sir William Cash MP Chair of the European Scrutiny Committee dated 12 January 2018, Cabinet Office website

2.10 He describes progress as follows:

- The Council Working Group finished its first read-through of the proposal in November.
- In December JHA Council, Ministers held a policy debate on three important principles:
- the ability of Member States to introduce a viability test for access to a stay of enforcement action from creditors when a restructuring plan is being negotiated;
- cross-class cram down (the involuntary imposition of a restructuring plan on dissenting creditors who voted against it); and
- a maximum discharge period from insolvency for honest entrepreneurs of three years.
- While the UK generally supports these principles (subject to agreement of technical details), other Member States were divided on cross-class cram down and the maximum discharge period.
- Before the end of December and its Presidency, Estonia circulated a revised draft of the Directive incorporating drafting amendments emerging from Council working group meetings.
- Work will continue on the revised text under the new Bulgarian Presidency.

2.11 The Minister comments that:

> "The UK will continue to play a constructive and active part in these ongoing discussions to ensure that that the proposal delivers on its objectives, as improving the prospects for business rescue in the EU will benefit UK creditors, lenders and investors."

2.12 In response to the Committee's question about the impact of an implementation period or transitional arrangements, the Minister says that while it is unlikely the UK would be required to implement the draft Directive, "the terms of any implementation/ transitional EU withdrawal period are subject to further negotiation, and so at present it is not possible to say whether this will definitely be the case".

2.13 Addressing our other question about voluntary alignment "once the UK is free of any obligation to implement it", the Minister responds that:

> "The UK Government consulted in 2016 on reforms to the corporate insolvency regime, which are broadly similar to the draft Directive's provisions for a preventive restructuring framework."

Previous Committee Reports

(a) and (b): 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).

3 Parental and Carers' Leave Directive

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Business, Energy & Industrial Strategy Committee, the Women & Equalities Committee, and the Work & Pensions Committee
Document details	Proposal for a Directive on work-life balance for parents and carers, and repealing Council Directive 2010/18/EU.
Legal base	(a) Article 153(1)(i) and (2)(b) TFEU; ordinary legislative procedure; QMV
Department	Business, Energy and Industrial Strategy
Document Number	(38689), 8633/17 + ADDs 1–3, COM(17) 253

Summary and Committee's conclusions

3.1 In April 2017, as part of a new push to modernise the EU's social policy framework,[8] the European Commission published a proposed Directive on statutory entitlements to parental and carers' leave for workers.[9] The draft legislation would establish EU-wide statutory minimum requirements for paid paternity, parental and carers' leave for workers with an employment contract. The Commission has proposed that Member States should compensate workers who make use of any of the leave entitlements under the Directive by at least the same amount as national sick pay.

3.2 The Government has told us that the proposal would make substantial changes to existing UK law on statutory rights for workers, for example by creating an entirely new entitlement to paid carers' leave, and that the full cost of the new Directive to the Exchequer and to businesses could run into hundreds of millions of pounds annually.[10] The Minister has not shared the Government's position about the legal base for the proposal, Article 153 TFEU, which gives the EU a supporting competence to adopt minimum-harmonising Directives in the field of social policy.

3.3 The Committee first considered the proposal when it was reconstituted following the 2017 general election, in November 2017.[11] We took note of the changes the draft legislation would require within UK employment law, since it creates employees' entitlements that do not currently exist. We also considered that the potential impact of the proposal should not be understated despite the UK's scheduled exit from the EU, as it could have force of law under the terms of a post-Brexit transitional arrangement.[12] Accordingly, we retained the document under scrutiny as politically and legally important.

8 See for more information the Committee's Report of 29 November 2017 on the "European Pillar of Social Rights".

9 In July 2016, the Commission had asked the EU social partners (trade unions and employer's organisations) if they wanted to negotiate an agreement among themselves on parental and carers' leave entitlements, but no talks took place because the positions of the two sides were too far apart.

10 Explanatory Memorandum submitted by the Department for Business, Energy & Industrial Strategy (6 July 2017).

11 See Committee Report of 29 November 2017.

12 The position of the other EU Member States is that the transitional arrangement sought by the Government, to maintain current levels of market access to the EU after Brexit, would require the UK to continue applying all EU law—including new legislation which takes effect only during the transition.

3.4 By letter of 16 January 2018, the new Minister for Small Businesses (Andrew Griffiths) provided the Committee with more detail on the Government's position on the proposal.[13]

3.5 The Minister emphasised the UK's commitment to "facilitating the balance of work with family and other commitments". However, the Government is not yet convinced that legislation at EU-level is the best way of achieving this objective and will seek to "retain as much flexibility as possible for Member States to maintain or develop their own systems of leave and pay for workers with caring responsibilities". With respect to Brexit, he states the Government cannot yet "provide certainty at this stage on whether the UK will be obliged to continue implementing EU Social and Employment legislation". Given this remains a possibility, the Government will continue to "actively engage on current EU legislative proposals, assessing policies on their merits".

3.6 Based on a progress report prepared by the Estonian Presidency in December 2017,[14] we have summarised the broad direction of travel within the Council—especially on the controversial issue of setting the level of pay for carers' and paternal leave via EU legislation—in paragraph 3.18 below. This shows Member States are likely to press for caps on the level of pay below the limits foreseen by the Commission, or even removing the requirement to provide compensation for loss of salary altogether. The Council also looks set to recommend changes to the scope of the carer's leave entitlement by defining the conditions under which the Directive would apply more strictly.

3.7 The Minister confirmed that Bulgarian Presidency of the Council hopes to broker a general approach on the proposal at the meeting of the EPSCO Council on 15 March. As the Employment & Social Affairs Committee of the European Parliament has provisionally scheduled a vote on the proposal for July 2018, trilogue negotiations on the final text of the Directive could take place in the second half of 2018.

3.8 **We thank the Minister for his update on the Government's position on the proposed Directive, which now appears ready for endorsement at ministerial level during the EPSCO Council on 15 March.**

3.9 **The information at our disposal on the position taken by Member States in the Council indicates that the final Directive may require less drastic changes to existing statutory leave entitlements for workers in the UK compared to the original Commission proposal. This would of course also be subject to the views of the European Parliament as co-legislator on EU employment law. We ask the Minister to keep us informed of further developments in the negotiations on the Directive, and to provide us with the draft general approach in good time before the March EPSCO Council to allow us to consider its contents before deciding whether to grant a scrutiny waiver.**

3.10 **Continued scrutiny of this proposal remains important, because the post-Brexit transitional arrangement offered by the EU—during which the UK effectively retains its current position within the EU's internal market—would require the continued application of EU law in the UK. The other Member States have explicitly referred to the obligation to implement EU law which takes effect only during that post-Brexit period. That may include this new Directive on leave entitlements, if it takes effect before or during the transition.**

13 Letter from Andrew Griffiths to Sir William Cash (16 January 2018).

14 Progress report prepared by the Estonian Presidency (Council document 14280/17).

3.11 **We draw these latest developments to the attention of the Business, Energy and Industrial Strategy Committee, the Work and Pensions Committee and the Women and Equalities Committee. They may wish to consider how these proposed EU statutory requirements for paid and unpaid leave might affect workers and businesses in the UK.**

Full details of the documents

Proposal for a Directive on work-life balance for parents and carers, and repealing Council Directive 2010/18/EU: (38689), 8633/17 + ADDs 1–3, COM(17) 253.

Background

3.12 In April 2017, nearly ten years after a failed attempt to update the EU's Maternity Rights Directive, the European Commission proposed a new EU Directive on statutory entitlements to parental and carers' leave.[15] It is part of a wider effort by the European Commission to revise and update the EU's corpus of employment and social law, in line with the ambitions set out in the European Pillar of Social Rights as adopted in November 2017.[16]

3.13 The draft legislation aims to improve access to work-life balance arrangements such as leave and flexible working arrangements, in particular by men, by introducing new entitlements for paternity and carers' leave, but leaving the current EU minimum requirements for maternity leave unamended. The Directive as proposed by the Commission would establish the following minimum statutory requirements for paid paternity, parental and carers' leave for workers with an employment contract:

- a right to paid paternity leave for fathers for at least 10 days at the time of the birth of their child;
- a right to four months of paid parental leave for both mothers and fathers during the first twelve years of each of their children's lives. This leave entitlement cannot be transferred to the other parent, but can be taken flexibly (e.g. full-time, part-time or in separate blocks) to encourage take-up by men; and
- a carer's entitlement to five days' paid leave annually for the purposes of providing care.

3.14 The proposal would also require EU countries to ensure that workers who take leave under any of the above entitlements "receive a payment or an adequate allowance at least equivalent to what the worker concerned would receive in case of sick leave". This leaves individual Member States free to legislate for higher pay during periods of leave under the Directive, for example by linking it to a worker's normal salary.

3.15 The Minister for Small Business (Margot James) submitted an Explanatory Memorandum on the proposal in July 2017.[17] She noted that that the entitlement to paid carers' leave would be a "completely new entitlement" in the UK from which workers could benefit. In addition, the Minister explained that the provisions of the proposed Directive dealing with paid paternity and parental leave would cut across existing domestic

15 In July 2016, the Commission had asked the EU social partners (trade unions and employer's organisations) if they wanted to negotiate an agreement among themselves on parental and carers' leave entitlements, but no talks took place because the positions of the two sides were too far apart.

16 See the Committee's Report of 29 November 2017 for more information on the European Pillar of Social Rights.

17 Explanatory Memorandum submitted by the Department for Business, Energy & Industrial Strategy (6 July 2017).

legislation to a lesser or greater extent, in particular in respect of paid parental leave.[18] She added that the full cost of the new Directive to the Exchequer and to businesses were difficult to predict, but could run into hundreds of millions of pounds annually.

3.16 The Committee first considered the proposal when it was reconstituted following the 2017 general election, in November 2017.[19] While noting that the draft legislation would make "substantial changes to the current entitlements to leave for working parents and carers in the UK", we were disappointed that that the Minister did not provide an assessment of the merits of the Commission proposal, nor make explicit the Government's position on it. We asked the Minister to provide such an assessment.

3.17 In the context of the UK's withdrawal from the EU, the Committee also considered that the legal and political importance of the new Directive should not be understated. During the proposed post-Brexit transitional period, UK will most likely continue to be bound by EU employment law.[20] The Parental and Carers' Leave Directive may have to be transposed into UK law if it takes effect during the transition, the length of which is yet to be determined in negotiations between the Government and the EU.

Developments since November 2017

3.18 Within the Council, Member State representatives have discussed the draft Directive on a number of occasions since it was published in April 2017. EU Employment Ministers considered the proposal at the meeting of the EPSCO Council in Brussels on 7 December 2017.[21] At that point, all Member States retained a general scrutiny reservation on the Directive, showing the level of controversy around the draft legislation. In particular, discussions within the Council working party had shown:

- while most countries supported the proposal for an EU-wide minimum standard for **paternity leave**, they sought clarification that the 10-day leave entitlement would be calculated pro-rata for part-time employees. There was no consensus on using a more "gender-neutral term" for this entitlement. There was no agreement yet on an EU-level requirement for paternity leave to be compensated by at least the same amount as sick pay;

- with respect to **paid carers' leave**, many Member States were sceptical of the need for any EU legislation on this matter. They also questioned the scope of this provision (in relation to which family members, and the severity of their condition, which could trigger the entitlement), and whether an entitlement of five days could make any practical impact on the division of caring responsibilities between men and women. Most Member States did not want any minimum pay level for carers' leave defined in the Directive;

18 Domestic UK law provides for unpaid parental leave for a period of up to 18 weeks for all parents for each child, which can be taken up until the child's 18th birthday. The Commission went considerably further by proposing an entitlement to 4 months of non-transferable parental leave per parent, compensated at least at the level of sick pay, although the leave must be taken before the child turns 13 years old.

19 See Committee Report of 29 November 2017.

20 The other 27 EU Member States have offered a post-Brexit transitional period on the condition that the UK continue to accept the entire body of EU law, under the principles of supremacy and direct effect, for its duration.

21 See for more information the progress report prepared by the Estonian Presidency of the Council (Council document 14280/17).

- most national governments opposed the proposed changes to the length of, and compensation for, non-transferable **parental leave**. They expressed particular concern about the potential financial impact of having to compensate workers with the equivalent of sick pay during the proposed four-month period. As a result, the Estonian Presidency recommended reducing the non-transferable allowance of parental leave to three months, and allowing for the introduction of a cap on compensation during that period in line with the national ceiling for sick pay; and

- more generally, as can be seen, most EU Member States expressed concerns about requiring **compensation at least equivalent to national sick pay** during periods of leave under any of the entitlements proposed by the European Commission. The Presidency therefore suggested an amendment that would allow individual EU countries to cap entitlements equivalent to sick pay under the Directive (i.e. for paternity leave and non-transferable parental leave) to twice the "average national monthly gross wage".[22]

The Government's view

3.19 On 18 January 2018, the new Parliamentary Under Secretary of State for Small Business (Andrew Griffiths) wrote with further information on the Government's position on the proposal.[23]

3.20 He emphasised the Government's commitment to facilitating the balance of work with family and other commitments, but that the Directive should "not disrupt existing national systems unfavourably". In addition, the UK is not yet convinced that legislation at EU-level is the best way of achieving this objective. As such, it will seek to "retain as much flexibility as possible for Member States to maintain or develop their own systems of leave and pay for workers with caring responsibilities".

3.21 The Minister confirmed that Bulgarian Presidency of the Council hopes to broker a general approach on the proposal at the meeting of the EPSCO Council on 15 March. As the Employment & Social Affairs Committee of the European Parliament has provisionally scheduled a vote on the proposal for July 2018, trilogue negotiations on the final text of the Directive could take place in the second half of 2018.

3.22 With respect to Brexit, the Minister states he could not "provide certainty at this stage on whether the UK will be obliged to continue implementing EU Social and Employment legislation". Given it remains a possibility, the Government will continue to "actively engage on current EU legislative proposals, assessing policies on their merits". The Committee has kept the proposal under scrutiny and will report any further developments to the House.

Previous Committee Reports

See (38689), 8633/17: Third Report HC 301–iii (2017–19), chapter 1 (29 November 2017).

22 It was unclear from the text of the Presidency's report whether this overall ceiling would apply per month or for the duration of the entitlement cumulatively.

23 Letter from Andrew Griffiths to Sir William Cash (17 January 2018).

4 Statutory audit

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Committee for Exiting the European Union, the Business, Energy and Industrial Strategy and the Treasury Committees
Document details	Report from the Commission to the Council, the European Central Bank, the European Systemic Risk Board and the European Parliament on monitoring developments in the EU market for providing statutory audit services to public-interest entities pursuant to Article 27 of Regulation (EU) 537/2014
Legal base	Non-legislative; Article 27 of the EU Audit Regulation requires each National Competent Authority (NCA) to report on the statutory audit market in its jurisdiction.
Department	Business, Energy and Industrial Strategy
Document Number	(39066), 12536/17, COM (17) 464

Summary and Committee's conclusions

4.1 This chapter considers the implications of EU exit for UK statutory auditors and audit entities. The document that is under scrutiny is a European Commission report[24] which brings together information submitted by National Competent Authorities for statutory audit in each of the EU Member States, in order to assess the market for providing statutory audit services to "Public Interest Entities" ("PIEs").[25] The Commission's report is relatively insignificant: it identifies the most common recurring issues with the quality of audit work, and concludes that none represents a major risk to the provision of audits or to financial stability.

4.2 In an Explanatory Memorandum submitted on 16 October 2017,[26] the Parliamentary Under Secretary of State for Small Business (Margot James MP) stated that the European Commission's reports provided a useful indication of any developing risks to audit quality for Public Interest Entities in Europe but also noted that, as the first report of its kind, on its own, and without any indication of developing statistical trends, it provided limited insight. More generally, the Minister noted that the UK is a key location for the provision of statutory audit services in the European Union and worldwide, and that the Commission's report found that more than half of the revenues generated from the audits of Public Interest Entities in the EU are generated in the UK. However, the Government provided no analysis of the implications of EU exit for the sector.

24 European Commission, Report from the Commission to the Council, the European Central Bank, the European Systemic Risk Board and the European Parliament on monitoring developments in the EU market for providing statutory audit services to public-interest entities pursuant to Article 27 of Regulation (EU) 537/2014 12536/17.

25 Auditing banks and insurers, building societies and companies with securities admitted to trading on a regulated market.

26 Explanatory Memorandum from the Minister, BEIS, to the Chairman of the European Scrutiny Committee (16 October 2017).

4.3 We have therefore sought in this chapter to draw on other available sources of information to assess the implications of EU exit for statutory audit. In summary, an equivalence and an adequacy decision from the Commission would be needed for the activities of UK audit firms to avoid being disrupted, although further clarification is needed regarding the extent to which these decisions would effectively maintain the status quo in its entirety. In the absence of these approvals, a range of difficulties would arise which would cause problems in a number of specific market situations (group audits, pan-European partnerships, listing of securities for EU companies on UK regulated markets), which would increase costs for UK auditors as well as the companies paying for their services. However, while these developments would damage the sector, features of audit regulation and capital markets mean that the extent to which the EU could force large amounts of UK-based audit activity to relocate to the EU27 is limited.

4.4 **We thank the Government for its Explanatory Memorandum. The Committee notes the European Commission's finding that the UK has the largest audit sector in the EU, which accounts for approximately half (€15.3bn) of all turnover of audit firms auditing Public Interest Entities (PIEs) in 25 Member States, and generates around 29% of all fees from statutory audits within in the EU (€3.17bn).[27] It is regrettable therefore that the Government's Explanatory Memorandum provides no consideration of the implications of EU exit for UK auditors and audit firms.**

4.5 **The Committee considers that the Government's sectoral assessment[28] understates the amount of UK-EU cross-border economic activity[29] that takes place in statutory audit, as well as the negative implications for UK auditors of an exit which does not ensure that mutual recognition arrangements are in place at the moment of withdrawal. Consequences of this scenario would include:**

- **non-recognition of UK qualified auditors who did not exercise Treaty freedom of establishment rights prior to the UK's exit from the EU without undergoing full re-qualification procedures;**
- **UK audits not being recognised as legally valid in EU Member States, requiring an additional level of audit in some cases;**
- **UK audit firms having to register as third country operators with individual Member States and being subject to additional oversight by their regulators;**
- **barriers to transfer of documents across jurisdictions where quality assurance is concerned, and related issues (investigations and sanctions); and**

27 Report from the Commission to the Council, the European Central Bank, the European Systemic Risk Board and the European Parliament on monitoring developments in the EU market for providing statutory audit services to public-interest entities 12536/17.

28 Sectoral Report—Professional and Business Services (Published 21 December 2017).

29 The Government's assessment (see the final section of this report) states that "Cross-border supply of audit services is quite rare because of the significant economic regulatory concerns and the resulting controls in most countries, which restrict supply." While regulatory requirements undoubtedly mean that most statutory audits are conducted by local auditors and audit firms, group audits of consolidated accounts are cross-border in character, although not purely so, as local auditors are involved, and work under oversight of the group auditor. Informal industry estimates suggest that the auditor conducting the group-wide consolidation typically takes at least 15% of total revenues for a group audit.

- **in the absence of equivalence and adequacy decisions from the European Commission, UK audit firms would have to establish bilateral arrangements with individual Member States, which would require a major investment of administrative resource.**

4.6 **The sum effect of these impacts would be to increase the cost of providing statutory audits for UK audit firms as well as their customers (including EU businesses).**

4.7 **Market situations in which difficulties would arise in the absence of adequacy and equivalence decisions include: (i) group audits for consolidated accounts, the provision of which is substantially facilitated by the EU framework; (ii) EU registered companies being unable to list securities on UK financial markets, if EU27 audits were not accepted in the UK; and (iii) pan-European partnerships (such as those of EY and Deloitte) that include UK audit firms having to be restructured in line with EU ownership and control requirements. Ernst and Young (EY) has stated that "failure to secure a similar regime [to the status quo] could threaten the UK's pre-eminent role in accounting and audit in [the] EU."[30]**

4.8 **Despite the damage to the UK audit sector that an EU exit without adequacy and equivalence decisions would cause (both with regard to mutually recognised audit qualifications and, separately, audit regulators and underlying regulations), with consequences for the UK audit sector, we observe that the EU's ability to require UK audit activity to relocate to the EU27 is generally weaker than in some other PBS sectors (e.g. legal and financial services). This is because (i) national regulators require local audits to be signed off by local auditors, meaning that there is a de facto limit on the proportion of UK and EU audit that can be done overseas, and (ii) as long as UK capital markets remain the preferred destination for listings and EU firms continue to list securities on them, group consolidations for UK listed companies will continue to take place here.[31] We also note the strategic importance of effective audit for the integrity, stability and efficient functioning of capital markets. The UK and EU27 therefore have a mutual interest in negotiating an orderly transition and future relationship with respect to audit.**

4.9 **To enable the Committee to conclude its scrutiny of this issue, we ask the Government to clarify:**

- **how a shift from current UK audit activities on the basis of the status quo (EU membership) to the alternative legal basis that would be provided by Commission equivalence and adequacy decisions would affect UK audit activity, specifically in relation to (i) group audits; (ii) ownership and control rules and pan-European partnerships; and (iii) the ability of UK-qualified auditors to have their qualifications recognised and to practice in EU Member States. In each case, what differences from the status quo would arise and how feasible would it be for UK audit firms to work around these?**

30 Written evidence to the House of Lords European Union Committee, Ernst and Young (October 2016).

31 DTR 4.1, a Financial Conduct Authority rule that implements part of the EU Transparency Obligations Directive, and is made under the powers granted to the FCA under the Financial Services and Markets Act 2000, requires parent companies to prepare consolidated financial statements. This would continue to be the case under the Great Withdrawal Bill framework unless and until the FCA changed the law (or the government took the power back from the FCA). It is important to note that the EU27 Member State of incorporation will also require consolidated accounts as a matter of company (rather than securities) law, because it is a condition of the Accounting Directive.

- **which UK audit firms are currently part of pan-European partnerships; whether the Government has engaged with these firms about the possibility of their having to be restructured, so that the pan-European partnerships can conform with EU ownership and control rules; and whether, in the Government's assessment, this would substantially harm these UK audit firms, or whether they could undertake the necessary restructuring without excessive difficulty;**

- **whether, under the terms of the Joint Report on phase 1 of negotiations[32] and the Commission's recommendation on transitional arrangements,[33] the UK would continue to benefit from the intra-EU status quo for statutory audit in all respects, including recognition of UK audit qualifications and regulators/regulation, until the end of the transition period;**

- **whether, if mutual recognition on audit matters cannot be agreed as part of Article 50 negotiations, the Government would have to wait until any transition period ends before it could apply for equivalence and adequacy decisions from the Commission, or whether it would be able to do so before then (please provide the basis for this assessment);**

- **if mutual recognition arrangements are not concluded before the UK exits the Single Market, whether the Government would contemplate accepting EU27 audits on a unilateral basis in order to facilitate EU companies continuing to list on UK markets, or whether it would make their recognition strictly conditional on reciprocity (i.e. the EU recognising UK audits); and**

- **whether the Government is talking to the Financial Reporting Council and the UK profession about an outcome that is in the UK public interest, and what approach they advocate.**

4.10 **We ask the Government to respond to the Committee's questions by 7 March 2017. In the meantime, we retain the proposal under scrutiny. We draw this chapter to the attention of the Committee for Exiting the European Union, the Business, Energy and Industrial Strategy Committee, and the Treasury Committee.**

Full details of the documents

Report from the Commission to the Council, the European Central Bank, the European Systemic Risk Board and the European Parliament on monitoring developments in the EU market for providing statutory audit services to public-interest entities pursuant to Article 27 of Regulation (EU) 537/2014: (39066), 12536/17, COM (17) 464.

32 Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union TF50 (2017) 19—Commission to EU 27 (8 December 2017).

33 Annex to the Recommendation for a Council Decision supplementing the Council Decision of 22 May 2017 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union COM (17) 830 final (20 December 2017).

Background

4.11 A statutory audit is a legally required review of financial records. The role of a statutory audit is to certify the financial statements of companies or public entities. An audit provides stakeholders such as investors and shareholders with an opinion on the accuracy of companies' accounts. As a result, statutory audits contribute to the orderly functioning of markets by improving the confidence in the integrity of financial statements.

4.12 The current rules consist of:

- The EU Statutory Audit Directive, recently amended by Directive (EU) 2014/56,[34] which sets out the framework for all statutory audits, strengthens public oversight of the audit profession and improves cooperation between competent authorities in the EU. A consolidated version is available.
- The EU Statutory Audit Regulation[35] which specifies requirements for statutory audits of public interest entities (PIEs), such as listed companies, banks and insurance undertakings.

4.13 In the UK, the Financial Reporting Council (FRC) is responsible for the public oversight of statutory auditors, as required under EU law, and is recognised as an appropriate regulatory authority throughout the EU.

4.14 As the UK is currently an EU Member State, it automatically benefits from those aspects of the EU audit regulatory framework which reduce non-tariff barriers to trade and facilitate intra-EU market access. Under this regime:

- the UK FRC is recognised as an appropriate regulatory authority throughout the EU;
- audits performed by an FRC accredited auditor in the UK are accepted as legally valid within the EU and vice-versa, without the need for the additional oversight to which third country auditors (that lack recognition) are subject;
- UK auditors are enabled to have some involvement in audits for EU entities, most crucially when consolidating group-wide audits within the UK, during which 'local auditors' in other EU Member States are effectively under UK auditor control; and
- UK auditors are able to share documents with EU auditors, facilitating cross-border activity.

4.15 The Statutory Audit Directive means that, in principle, audit qualifications attained in one Member State are recognised across all EU Member States, however, Member States have their own requirements for statutory audits and typically require examination of those areas before auditors from other EU Member States can practice.[36]

34 The consolidated text of Directive 2006/43/EC as amended by subsequent legal acts including Directive 2014/56/EU is available here.

35 Regulation 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC.

36 Freshfields Bruckhaus Deringer, The legal impact of Brexit on the UK-based financial services sector (17 January 2017).

Third country provisions

4.16 The Statutory Audit Directive explains how the EU audit framework applies to auditors in third countries.

4.17 Article 27 addresses the statutory audit of consolidated accounts, including evaluation by the group auditor of work performed by third country auditors and the obligations with respect to quality assurance reviews carried out by the competent authorities.

4.18 Chapter XI of the EU Statutory Audit Directive covers the treatment of third country auditors, audit firms (the latter being the most relevant) and audit regimes as follows:

- *Oversight of registered third country audit firms*—Article 45 requires that Member States register every third country audit entity that provides an audit report concerning the annual or consolidated accounts of a company incorporated outside the EU which is listed on a Member State regulated market. Audit reports issued by third country auditors which are not registered have no legal effect in the Member State. Unlike EU auditors and audit firms, registered third country auditors and audit firms are automatically subject to the Member State's oversight, quality assurance and investigation and sanctions regime.

- *Equivalence decisions allowing derogation of third country requirements*—Article 46 establishes the procedure for derogation of third country requirements where there is an equivalence decision by the EC in cooperation with Member States. A Member State may assess a third country for equivalence as long as the EC has not taken any prior decision. The EU has adopted several equivalence decisions[37] recognising that the public supervision of auditors in certain non-EU countries meets the same requirements that are in force in the EU through the audit directive.

- *Adequacy decision on working arrangements*—Article 47 sets the criteria for an adequacy decision by the EC to enable cooperation with a third country competent authority through working arrangements to be agreed on a reciprocal basis. It sets out the basis for cooperation with competent authorities from third countries, notably in relation to the transfer of audit working papers. The EU has also adopted several decisions recognising that the audit supervision authority of certain non-EU countries is adequate to exchange audit working papers with relevant authorities in EU countries.

- *Requirements for third country audit firms to register*—Article 45 sets out the requirements which must be met for a third country audit entity to register. These encompass equivalent requirements to those set out in the EU legislation with regard to: ownership and control conditions for the audit entity; education, training and experience requirements for the individual auditors; and auditing standards and transparency reporting by the auditing entity.

- *Provisions on approval, ownership and control*—Article 3 addresses approval, ownership and management rules for statutory auditors and audit firms. Member

37 European Commission, Implementing and delegated acts on Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts—Equivalence Decisions (accessed 22 January 2018)

States have to designate competent authorities for the approval of statutory auditors and audit firms operating in their own and in other Member States. Audit firms can only be approved where they satisfy the following conditions:

- the individuals carrying out statutory audit on behalf of the audit firm are approved in the Member State concerned—i.e. are 'locally qualified' (either by having completed the education and training in that Member State or having gained recognition through an aptitude test after home country qualification);
- the majority of voting rights in the firm are owned by audit firms and auditors which are approved in any Member State or by individuals who satisfy the good repute and education and experience conditions in the Directive to become approved as a statutory auditor.

- A majority of members on the management board of the entity, up to a maximum of 75%, must be approved on the same basis.
- There is the potential for Member States to set down other provisions on voting rights for the statutory audit of cooperatives, savings banks or similar and to go beyond the maximum of 75% on the management board (but not materially relevant for the points under consideration).

Exit effects

4.19 Effects of EU exit, without adequacy and equivalence decisions in place, include:

- UK qualified auditors no longer automatically benefit from the possibility to practice in the EU after passing an aptitude test or completing an adaptation period;
- UK audits and audit firms having to operate in the absence of equivalence and adequacy decisions from the Commission; even when administrative procedures are underway, these decisions can take a significant period of time;
- UK audits no longer being legally valid within the EU (and vice-versa);
- UK audits being subject to oversight and quality assurance regimes of regulators in the relevant Member States, increasing costs;
- UK audit firms no longer being able to conduct group audits with a local EU auditor effectively operating under their control;
- barriers to the sharing of documentation with UK auditors, for the purposes of, for example, group audits;
- in order to allow business to continue, UK auditors and audit firms having to register in EU Member States and vice-versa, with all parties being subject to additional regulatory and bureaucratic burden;

- a shift of resource into navigating the sudden proliferation of new regulatory requirements, which might have an impact on the quality of audit work conducted;
- EU companies no longer being able to list on the UK capital markets (although this is something the UK could address unilaterally);
- pan-European partnerships which include UK audit firms would have to restructure to accommodate EU ownership and control requirements; and
- potential loss of some international audit activity to the EU27, if UK headquartered companies (particularly those not listed on UK capital markets) relocated headquarters to the EU, or audit companies (including pan-European partnerships) relocated headquarters / some group activity to the EU; however, UK regulatory requirements would limit the extent of any loss of activity in this area, particularly where firms continued to list on UK capital markets.

4.20 An adequacy decision from the Commission with respect to the UK's data protection regime[38] would also be necessary for the sharing of data with other European jurisdictions, however it is important to note that this is not in itself sufficient for UK auditors to process audit documentation: although an adequacy decision on data protection would allow UK auditors to continue to receive data from EU jurisdictions, a separate adequacy decision under the Statutory Audit Directive would be necessary in the specific context of audit for UK auditors to receive certain types of audit documentation and to use that documentation in their work.

Market situations affected by EU exit

4.21 Three specific situations are potentially affected in the context of EU exit:

- *Audits of EU registered companies with securities trading on UK regulated markets*—Over 70 EU registered companies, which have audits done within an EU27 Member State, currently have listings on UK regulated markets. Listings are not permitted without legally valid audits. For these companies to continue to list in the UK, their local EU audits will have to be recognised by the UK, but when the UK leaves the EU this will no longer automatically be the case. In principle, the UK could unilaterally resolve the issue by continuing to recognise EU27 audits. This would appear to be the most likely outcome, as the consequences of no longer allowing 70 EU companies to list on UK regulated securities markets would clearly be detrimental to UK capital markets. However, if the EU did not reciprocate by offering recognition, and the issue became politicised as part of wider trade negotiations, the UK could require that EU audits be subject to additional UK oversight and monitoring, before being recognised. This would increase costs for all parties, and make the UK in particular a less attractive location for certain types of audit activity.
- *Working arrangements for group and cross-border audits*—As shown by the European Commission's report, the UK currently leads the EU in carrying out the consolidation of EU-wide audits. If the UK ceased to be part of the

38 European Commission, Adequacy of the protection of personal data in non-EU countries (accessed 24 Jan 2018)

EU regime, without securing equivalence and adequacy decisions from the Commission, this would raise a wide range of difficulties with respect to the carrying out of this work. Difficulties would arise in relation to access to audit working papers and other documents. UK auditors seeking to conduct group audits would also no longer be able to do so on the current basis, whereby UK auditors can undertake audits and sign audit reports in EU Member States on the basis that the signing partner is locally qualified. UK auditors and audit firms would have to register in the EU and operate under oversight by regulators in the host country. UK audits of EU27 businesses would have to be examined and approved by EU authorities. All of these changes would increase the cost of providing the service in the UK (including for EU companies that want to list securities on UK markets).

- *Pan-European partnerships*—The UK currently leads the EU as the destination in which audit practices are registered as pan-European partnerships. If, outside the EU regime, the UK regime does not retain its current equivalence and adequacy, companies would have to restructure as UK audit authorities, entities and auditors would no longer be recognised, and UK auditors would cease to qualify as EU auditors for the purpose of the EU auditor ownership rules. UK authorities would no longer be able to register audit firms with pan-European ownership. Existing pan-EU partnerships would have to be restructured to enable them to operate in line with EU law.

Stakeholder views

4.22 The Government's analysis of the implications of EU exit for audit, provided in full at the end of this chapter, notes the EU audit framework "facilitates cross border supply of audit services by firms" and "provides for some free movement of EU auditors",[39] but states that, in practice, "cross-border supply of audit services is quite rare."[40]

4.23 UK-based audit organisations are significantly more concerned about the possible implications of EU exit than the Government's sectoral analysis would suggest is warranted, although there is some variation among organisations.

4.24 The European Contact Group (ECG) which is an informal regulatory and policy working group of six large audit networks in the EU (BDO, Deloitte, EY, Grant Thornton, KPMG and PwC), has published an FAQ document on EU Audit Legislation.[41] At the end of the briefing, it identifies the following key implications of the UK leaving the European Union for statutory auditors:

- When the UK has formally exited the European Union, the Audit Directive and Regulation will in principle no longer apply;

- UK qualified auditors would therefore in principle no longer automatically benefit from the possibility to practice in the EU after passing an aptitude test or completing an adaptation period;

39 In a letter to the Committee on 19 October 2013, the Minister involved in negotiating the proposal (Jo Swinson) wrote that the Regulation and Directive provided for "a pan-European 'passport' for statutory audit firms to allow them to provide statutory audits in Member States other than the Member State in which they have been approved".

40 Sectoral Report—Professional and Business Services (Published 21 December 2017).

41 European Contact Group, European Union Audit Legislation Frequently Asked Questions (12 April 2017).

- Similarly, EU qualified auditors would in principle no longer automatically benefit from the possibility to practice in the UK after passing an aptitude test or completing an adaptation period; and
- UK auditors of UK incorporated entities listed on a regulated market in the EU would have to register as third country auditors and be subject to the oversight, quality assurance and investigations and penalties regime of the EU Member State of the regulated market, except if the UK regime has been declared equivalent to the EU regime by a decision issued by the European Commission.

4.25 The ECG qualifies its concern about the possible loss of equivalence of the UK regime, noting that it would expect that the UK regime would be considered to be equivalent and that, subject to reciprocity, UK auditors of UK incorporated entities listed on regulated markets in the EU might therefore be exempted from the oversight, quality assurance and investigations and penalties regime of the EU Member State of the relevant regulated market.

4.26 Other sector stakeholders, including Ernst and Young,[42] the Professional and Business Services Council,[43] and the Institute of Chartered Accountants in England and Wales (ICAEW),[44] provided the House of Lords EU Committee with written evidence which relates to the implications of Brexit for audit, as part of a wider inquiry into the Brexit and future UK-EU trade in non-financial services.[45]

4.27 The Professional and Business Services Council states that "it is most important that leaving the single market does not result in currently recognised qualifications becoming unrecognised" and that the recognition of the FRC as an appropriate regulatory authority throughout the EU "allows auditors that it regulates some involvement in audits for overseas entities and reduces barriers to trade".[46] However, the PBSC also notes in its submission that each Member State has its own requirements for statutory audits, and that barriers to the provision of audit services across EU borders remain.

4.28 Ernst and Young (EY) stated that the equivalence of the regulatory framework overseen by the FRC and its equivalence with other EU Member States "reduces barriers and costs to trade."[47] EY states that, outside the EU, retaining the benefits of the current regime would be a matter for negotiation, and that "failure to secure a similar regime could threaten the UK's pre-eminent role in accounting and audit in [the] EU."[48]

42 Written evidence, Ernst and Young (October 2016).
43 Written evidence, the Professional and Business Services Council (October 2016).
44 Written evidence, The Institute of Chartered Accountants in England and Wales (ICAEW) (October 2016).
45 House of Lords, Brexit: trade in non-financial services (22 March 2017).
46 Written evidence, the Professional and Business Services Council (October 2016).
47 Written evidence, Ernst and Young (October 2016).
48 Written evidence, Ernst and Young (October 2016).

The UK-EU Joint report[49]

4.29 The UK-EU Joint report contains the following paragraph (32) on the recognition of professional qualifications, which effectively states that the rights of statutory auditors who exercise rights relating to the recognition of professional qualifications in the UK or any other EU Member State prior to exit day will have those rights protected:

> "Decisions on recognition of qualifications granted to persons covered by the scope of the Withdrawal Agreement before the specified date in the host State and, for frontier workers, the State of work (either the UK or an EU27 Member State) under Title III of Directive 2005/36/EC (recognition of professional qualifications where the person concerned was exercising the freedom of establishment), Article 10 of Directive 98/5/EC (lawyers who gained admission to the host State profession and are allowed to practise under the host State title alongside their home State title) and Article 14 of Directive 2006/43/EC (approved statutory auditors) will be grandfathered. Recognition procedures under these Directives that are ongoing on the specified date, in respect of the persons covered, will be completed under Union law and will be grandfathered."

The Commission's report[50]

4.30 Article 27 of the EU Audit Regulation requires that each National Competent Authority (NCA) should regularly monitor and report to the Commission on the statutory audit market in its jurisdiction on risks arising in its audit market, market concentration levels, the performance of audit committees of PIEs in that jurisdiction, and a wide range of other factors. Using the information provided the Commission must assemble an overall report in cooperation with the Committee of European Audit Oversight Bodies (CEAOB).

4.31 The Commission's report, which brings together information submitted by the National Competent Authorities for statutory audit in each of the EU Member States, concludes that:

- in 15 of 21 Member States that provided appropriate data the "Big 4" audit firms (Deloitte, EY, KPMG and PWC) hold more than an 80% share of the market by turnover for the supply of statutory audit services to Public Interest Entities;
- audit inspections in Member States identified the following most common recurring issues with the quality of audit work:
    - deficiencies in internal quality control by firms;
    - failure to document some aspects of the audit engagement; and,
    - lack of sufficient evidence of having carried out a full audit assessment.

49 Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union TF50 (2017) 19—Commission to EU 27 (8 December 2017).

50 European Commission, Report from the Commission to the Council, the European Central Bank, the European Systemic Risk Board and the European Parliament on monitoring developments in the EU market for providing statutory audit services to public-interest entities pursuant to Article 27 of Regulation (EU) 537/2014 12536/17.

4.32 The report does not conclude that any of these recurring issues represent a major risk to the provision of audits or to financial stability. It suggests that the next report should monitor whether any of these recurring issues risks becoming a structural feature of the market.

The Minister's Explanatory Memorandum of 16 October 2017[51]

4.33 In the policy implications of her Explanatory Memorandum, the Parliamentary Under Secretary of State for Small Business (Margot James MP) states that the European Commission's reports provide a useful indication of any developing risks to audit quality for Public Interest Entities in Europe and any threats to the supply in the market for audits of PIEs of appropriate quality; however, the Minister also notes that, as the first report of its kind, on its own, and without any indication of developing statistical trends, it provides only limited insight.

4.34 The Minister provides some information about the UK's implementation of the EU Audit Directive and Regulation, noting that the Competition and Markets Authority completed an investigation into the supply of statutory audit services to UK companies in the FTSE 100 and 250 indexes, which resulted in conclusions which are reflected in the UK's implementation of the EU audit regulatory framework. The Minister also observes that the Government and the Financial Reporting Council keep the UK's audit regulatory framework under review for any indication that it is failing to fulfil its intended objective of securing high quality audits, particularly for PIEs.

4.35 More generally, the Minister observes that that the UK is a key location for the provision of statutory audit services in the European Union and worldwide because it is a global hub for financial services, professional business services, the holding companies of multinational groups and for the financial markets on which they raise capital. The Commission's report finds that more than half of the revenues generated from the audits of Public Interest Entities in the EU are generated in the UK.

4.36 No consideration is provided of the implications of the UK's decision to leave the European Union, and the Government's intention to leave the Single Market, for UK-based providers of statutory audit services either domestically or elsewhere in the EU.

The Government's sectoral analysis[52]

4.37 By way of background, the Government's sectoral report on the Professional Business Services sector that describes the EU audit framework and its relevance to UK auditors is reproduced below in its entirety:

> *Audit Directive (2006/43/EC) (amended by Directive 2014/56/EU) and Regulation (537/2014)*
>
> "The UK's audit regulatory framework has developed out of a series of Directives to harmonise the regulation of professional auditors and audit firms and to impose a considerable body of EU regulation: on auditor appointment; on the maintenance of relations between the auditor and

51 Explanatory Memorandum from the Minister, BEIS, to the Chairman of the European Scrutiny Committee (16 October 2017).

52 Department for Exiting the European Union, Professional and Business Services Sector Report (published December 21).

the client's senior management; on the application of technical standards on audit work; on comparable codes to maintain auditor independence; and on the regulation of auditors through inspections, investigation and enforcement.

"The audit framework provides for some free movement of EU auditors with provision for aptitude tests or adaptation periods by Member State authorities to enable mutual recognition of qualifications. The Audit Directive also makes some provision for the audit of non-EU businesses that are listed on UK capital markets. This framework has developed over time with the objective of protecting investors. The EU framework now recognises that a different approach is needed in respect of UK and other EU firms auditing overseas.

"Cross-border supply of audit services is quite rare because of the significant economic regulatory concerns and the resulting controls in most countries, which restrict supply. In most large economies, auditors are established and regulated within their client's jurisdiction, though the Directive now facilitates cross border supply of audit services by firms, subject to certain regulatory preconditions. In addition to mutual recognition of qualifications for those permitted to sign audit reports, ownership and management of an audit firm are also subject to requirements that the majority of owners and managers must hold mutually recognised qualifications or, for firms, registrations. Within the confines of this framework, mutual recognition allows audit firms to develop ownership structures across borders.

"The framework also prescribes how national audit regulators (competent authorities) should cooperate internationally, both within and outside the EU, and sets out how auditors of businesses listed on the main capital markets should be regulated if the business is established overseas (this framework primarily affects UK auditors of non-EU businesses listed on UK markets).

"The structure of the UK accountancy sector means that many aspects of this framework indirectly affect almost all services offered by almost all accountancy firms. This is partly because of necessary regulation as to which other services a business may procure from its auditor, and how it can then ensure the auditor's continued independence. In addition in the UK, the regulatory oversight of audit firms is the starting point for the UK's non-statutory regulatory framework for wider accountancy services."[53]

Previous Committee Reports

None on this document, but see our earlier Reports on Regulation 2014/537 (EU) on specific requirements regarding statutory audit of public-interest entities and Directive 2014/56 (EU) on statutory audits of annual accounts and consolidated accounts: Nineteenth Report HC 83–xviii (2013–14), chapter 1 (23 October 2013); Eighth Report HC 83–xviii (2013–14), chapter 8 (3 July 2013); Fifty-fourth Report HC 428–xlix (2011–12), chapter 3 (1 February 2012).

53 Department for Exiting the European Union, Professional and Business Services Sector Report (published December 21).

5 Working Conditions Directive

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Business, Energy & Industrial Strategy Committee and the Work & Pensions Committee
Document details	Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions.
Legal base	Article 153(1)(b) and Article 153(2)(b) TFEU; ordinary legislative procedure; QMV
Department	Business, Energy and Industrial Strategy
Document Number	(39396), 16018/17, + ADDs 1–2, COM(2017) 797

Summary and Committee's conclusions

5.1 Following the adoption of the European Pillar of Social Rights in November 2017, the European Commission in December last year tabled its first concrete proposal for a new piece of EU employment legislation: a draft Directive[54] to "promote more secure and predictable employment while ensuring labour market adaptability and improving living and working conditions" throughout the European Union.

5.2 The Commission is seeking to achieve this by updating the types of information employers must provide to new starters on their employment conditions under the existing 1991 Written Statement Directive,[55] and expanding its scope by introducing an explicit definition of the type of "worker" covered.

5.3 In addition, the Commission wants to rebadge the legislation as a "Working Conditions Directive" (WCD) by adding EU-wide minimum statutory employment conditions for workers with precarious or variable hours, including:

- limits on probationary periods for new starters, based on the Commission's perception that lesser statutory employment rights apply during probation in the UK and Ireland;
- restricting the use of exclusivity clauses, which prevent workers—especially those on variable hours—from taking up parallel employment to supplement their earnings; and
- giving workers on variable hours more predictability on their working times, but requiring employers to give them "reasonable advance notice" of when they are expected to work.

54 Other initiatives the Commission is preparing as part of the Pillar of Social Rights are a legislative initiative on access to social security for atypical workers and the self-employed; an evaluation of existing EU Directives on fixed-term contracts and part-time work; and legislative proposals for a European Labour Authority and a European Social Security Number. See "Background" for more information.

55 Directive 91/533/EEC, transposed into UK law under the Employment Rights Act 1996.

5.4 Under the terms of the Commission proposal, workers would be able to challenge their dismissal from work if it was based on seeking to enforce any of these new rights.[56]

5.5 The Parliamentary Under Secretary of State at the Department for Business, Energy and Industrial Strategy (Andrew Griffiths) submitted an Explanatory Memorandum and regulatory checklist on the proposal in January 2018.[57] The Minister appears broadly supportive of the Commission's objectives in proposing this legislation, and notes the overlap between the drivers behind this new Directive and the findings of the Taylor Review of modern working practices.[58]

5.6 However, the Minister raises concerns of substance over the elements of the Directive on material employment rights; the apparent misunderstanding by the Commission of the link between probation and statutory employment rights in the UK; and the extent to which the proposal would allow for unfair dismissal claims from the very start of an employment relationship, given that under current UK law only employees who have been in service for two years or more can make such a claim.

5.7 We have set out the substance of the proposal, and the Government's position, in more detail in paragraphs 5.35 to 5.47 below.

5.8 **The proposal marks a significant expansion of EU employment law, and—as the Minister has noted—would require substantial changes to the UK's domestic legislation if adopted in its current form. We therefore consider it both legally and politically important.**

5.9 **Although the Committee sees the benefits of the proposed modernisation of the Written Statement Directive insofar as it relates to the types of information that must be provided to new employees, it is concerned about both the reasoning and substance of the Commission's proposals on new material employment rights.**

5.10 **In particular, the impact assessment prepared by the Commission contains a distinct lack of evidence to support its claim that "there is a risk of race to the bottom in standards applying to new forms of work where the regulatory framework is weaker and more patchy across Member States". As a result, the proposed changes—in particular in relation to probationary periods and the requirements as regards reference hours for variable workers—may be disproportional to the Commission's objectives.**

5.11 **In addition, the drafting of the proposal leaves many crucial concepts—including "reasonable advance notice" in relation to variable hours; the "interest of the worker" test for extending probation periods; and the "legitimate reasons" test for using exclusivity clauses to prevent parallel employment—undefined, meaning the legislation could increase rather than reduce divergences in national practices if these concepts are interpreted in different ways by different Member States.**

5.12 **With respect to the proposed restriction on probationary periods, we note from the Minister's explanation that the time limit on probation seems to serve no**

56 Article 17: "Member States shall take the necessary measures to prohibit the dismissal or its equivalent and all preparations for dismissal of workers, on the grounds that they exercised the rights provided for in this Directive".

57 Explanatory Memorandum submitted by the Department for Business, Energy & Industrial Strategy on 15 January 2018.

58 https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices.

meaningful purpose. It would require legislative change in the UK and Ireland only, even though there is no link in UK law between the length of the probationary period and the enjoyment of statutory employment rights. As such, the UK's current approach to probation cannot be construed as conferring an unfair competitive advantage to British employers compared to those based elsewhere in the EU.

5.13 **Given the legal and political importance of the proposal, we retain it under scrutiny and ask the Minister to keep the Committee informed of developments within the Council and the European Parliament. We are particularly interested in:**

- **the scope of the Directive, and in particular the definition of "workers" who will be able to avail themselves of the rights created by this new legislation;**
- **the Council's position on the proposed restrictions on probationary periods and their link to potential unfair dismissal claims, and how this affects the Government's assessment of the necessary legal base and legislative procedure for adoption of the Directive;**
- **the precise wording of the provisions on exclusivity contracts, and how the Government will seek to ensure these do not decrease existing protections in the UK under the Employment Rights Act 1996; and**
- **the Government's position on the proposed redress mechanisms for failure to provide a worker with a written statement of their employment rights, i.e. the "favourable presumption" or the independent complaints mechanism.**

Implications of Brexit

5.14 **Our conclusion that this new Directive is politically important is also based on the fact that this EU legislation might have to be implemented in the UK after it has ceased to be an EU Member State, under the proposed terms of the post-Brexit transitional period.**

5.15 **To prevent economic disruption resulting from a departure from the EU in March 2019 before the necessary domestic regulatory architecture is in place, the Government is seeking to effectively remain in the Single Market and Customs Union for "around two years" after the end of the Article 50 period. The EU has made clear that such an arrangement would only be acceptable to it if the UK continued to apply the entire body of EU law, including legislation which only takes effect during the transition.[59] Depending on the timetable for adoption of the WCD and the length of the transitional agreement, the Government might therefore be under an obligation to transpose this new Directive into UK law.**

5.16 **We are particularly concerned that, in this scenario, the UK may not have a formal say over the adoption of the Working Conditions Directive if the Member States and the European Parliament reach agreement on the legal text shortly before, or indeed after, the UK's expected date of withdrawal from the EU in March 2019. At that point,**

59 European Council guidelines on Article 50 (15 December 2017).

the UK will have lost its representation, both at official and ministerial level, when amendments to the legislation are discussed within the Council, and it would no longer have a vote over the final Directive.[60]

5.17 **The implications of the transitional period for the political legitimacy of adding new EU legislation to the UK statute book present a particularly acute problem in political terms if the Government was not supportive of the final legal text and had no meaningful influence over its contents, but had to implement it regardless.**

5.18 **Given the substance of the proposal, and the possibility that the Directive may apply in the UK irrespective of Brexit (and potentially against the better judgement of the Government), we are seeking the views of the Business, Energy & Industrial Strategy and Work & Pensions Committees on this proposal, as they have been undertaking an inquiry into employment conditions in the UK. We are particularly interested in their views on:**

- **the substance of the new material employment rights, and in particular the proposed restrictions on exclusivity clauses and the provisions on predictability of working hours for those with variable working hours;**
- **the potential implications of the new definition of "worker" contained in the Directive for the Committees' own draft Bill on "employment and worker status";**[61] **and**
- **the potential expansion of the ability of workers to lodge a claim for unfair dismissal for a breach of their rights under the new Directive, given that such claims in the UK are currently restricted to employees (rather than all workers) and only for those with continuous service of two years or more.**

5.19 **We will use their views to continue to scrutinise the Council's deliberation of the Directive, and the Government's efforts in Brussels to secure a good outcome, and report further developments in the legislative negotiations to the House.**

5.20 **The Committee also has wider concerns about the political, legal and financial implications of the proposed transitional arrangement. In particular, the UK would effectively retain most, if not all,**[62] **the obligations of a Member State without the attendant rights, in particular as regards representation and voting rights within the Council, COREPER and the technical Committees that assist the European Commission in the implementation of EU law. These implications should be carefully considered by Parliament.**

Full details of the documents

Proposal for a directive of the European Parliament and of the council on transparent and predictable working conditions: (39396), 16018/17, + ADDs 1–2, COM(2017) 797.

60 The Government has suggested some elements of the proposed Directive may require a different legal base, which would in turn impose a unanimity requirement. It is unclear if the contentious elements (which relate to claims for unfair dismissal) could dropped or split off into a separate Directive.

61 https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/352/35209.htm#_idTextAnchor048.

62 For example, it is still unclear where the UK will have the ability to negotiate new international agreements that fall within the remit of EU law during the transition (even if they would only enter into force afterwards).

Background

The Written Statement Directive

5.21 One of the earliest pieces of EU employment legislation was the 1991 Written Statement Directive (WSD),[63] which gives "paid employees" the right to be notified in writing of the essential aspects of their employment relationship within two months of starting a new job.[64] The Directive was transposed in the UK via the Employment Rights Act 1996.[65]

5.22 Application of the WSD varies by country, because it allows every Member State to define the concept of "employee" within its scope. It also contains derogations which individual Member States can use to restrict its ambit further: they are allowed not to apply the Directive to employees with a temporary contract of one month or less; to those with a working week of eight hours or less; or, most ambiguously, where the work is of a "casual or specific nature" and non-application is justified by "objective considerations".[66]

5.23 As part of its Regulatory Fitness and Performance (REFIT) programme, the European Commission carried out an evaluation exercise of the Written Statement Directive in 2016.[67] It concluded that the legislation remains "fundamentally relevant", but that changes in the labour market had also exposed "some gaps in its protection mechanisms". In particular, the evaluation found that:

- the scope of the Directive, and the permitted exemptions, have been interpreted differently by Member States, leading to the same types of workers having rights under the WSD in some EU countries but not in others;[68]
- more generally, the wording of the Directive has not kept pace with developments in the labour market and as a result offers little protection for entire categories of workers, especially in the "gig economy"[69] or those on zero-hours contracts. This means they do not receive a written statement of their working conditions at all;[70]
- the information included in the written statements may sometimes be insufficient as the statement of employment conditions does not have to include, for example, the determination of variable working hours for those on zero-hours contracts;[71] and

63 Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. It was adopted by unanimity under then-article 100 of the Treaty on the common market. The EU did not have a specific competence to legislate in respect of employment conditions until the entry into force of the Treaty of Amsterdam in 1999.

64 The Written Statement Directive was transposed in the UK in 1993 via the Employment Rights Act 1996.

65 Other EU employment legislation focuses on health and safety protection; limits on working time; anti-discrimination and equal treatment measures; employment conditions for posted workers; and information provision on transfers of undertakings (TUPE) and collective redundancies.

66 19 Member States, including the UK, use at least one of these derogations.

67 REFIT Evaluation SWD(2017) 205 (26 April 2017).

68 For example, the UK does not apply the Directive to agency workers whereas most Member States do. See for more information the overview on pages 11–12 of the Commission Impact Assessment (SWD(2017) 47).

69 Those employed in the gig economy are referred to as "platform workers" by the European Commission, to the extent that they are not self-employed (and therefore outside the scope of EU labour law).

70 European Commission Impact Assessment SWD(2017) 47, p. 9.

71 Idem, p. 15.

- member States' existing enforcement mechanisms do not guarantee effective implementation of the minimum standards required by the Directive. The Commission expressed concern that, although workers in every Member State could seek judicial redress against their employer for failure to comply with the Directive, they are in practice reluctant to do so.[72]

5.24 The evaluation also found that the total number of workers in categories exempted from the Directive had grown substantially in recent years, and that vulnerable workers—such as younger, less-educated employees—and women were overrepresented in this group.

The European Pillar of Social Rights

5.25 In addition to the specific evaluation of the Written Statement Directive, the European Commission has also been leading a broader initiative to push employment and social policy higher on the EU's political and legislative agenda. It therefore announced in spring 2016 the creation of a "European Pillar of Social Rights", a mixture of existing employment and social rights under EU law and ambitions for the future development of this policy area.

5.26 The Commission ran a public consultation on the strengths and weaknesses of the EU's social policy framework to help it prepare the Pillar of Social Rights.[73] The consultation paper recognised the "large difference in employment conditions (…) across different employment contracts", and proposed that the provisions of the Written Statement Directive should apply to "every worker". Following the consultation, the Commission concluded in April 2017 that the WSD—and the current EU social *acquis* more broadly—did not "sufficiently address some of the new phenomena in the labour market".[74]

5.27 While acknowledging that flexible and non-standard forms of work "contribute to job creation and widen professional opportunities", the Commission also concluded that workers in these types of employment often lacked the "fair and equal" access to a number of employment rights as required by the (then draft) Pillar of Social Rights. It considered that specific shortcomings such as a "lack of reasonable advance notice in case of on-demand workers, unjustified exclusivity or incompatibility clauses[75] and long probation periods are measures which may put [these workers] in overly precarious situations".[76]

5.28 The Commission also noted that some Member States had taken steps domestically to address these problems, but that was not sufficient and could even be harmful in the long run:

> "There is a risk of race to the bottom in standards applying to new forms of work where the regulatory framework is weaker and more patchy across Member States, and their efforts to ensure minimum protection of workers is likely to lead to increasingly divergent and even contradictory national solutions, creating regulatory loopholes when viewed from an EU

72 Idem, p. 16.
73 European Commission document COM(2016) 127. Cleared from scrutiny on 8 February 2017.
74 European Commission Impact Assessment SWD(2017) 47.
75 Under exclusivity or incompatibility clauses in employment contracts, a worker cannot take up parallel employment with another employer.
76 Impact Assessment SWD(2017) 47.

> perspective, and leading to inequality in the protection of workers and their living conditions. Eventually it could affect the quality of the workforce, the relative competitiveness of employers, companies and Member States, and the functioning of the EU internal market."

5.29 When the Commission published its final proposal for the European Pillar of Social Rights in April 2017,[77] it therefore sought to explicitly address the need to ensure adequate working conditions in all forms of employment, and inform workers of their rights, in two of its principles:

- Principle 5, on "Secure and flexible employment", states that workers have a right to "fair and equal treatment" in terms of working conditions, access to social protection and training, "regardless of the type and duration of the employment relationship"; and
- Principle 7 on "Information about employment conditions and protection in case of dismissals" states that workers should be informed of their employment conditions at the start of their employment (and not, as allowed by the Written Statement Directive, within two months of their starting date).

5.30 The Commission also decided that the subsidiarity threshold for further EU legislation was met to achieve these objectives. Subject to consultation of the European social partners,[78] it began preparing a revision of the Written Statement Directive to remedy the shortcomings identified by the REFIT evaluation, and to address the divergence in Member States' approach to securing basic employment rights for workers in the "flexible economy".

5.31 Other initiatives being prepared as part of the Pillar of Social Rights are a legislative initiative on access to social security for atypical workers and the self-employed;[79] an evaluation of existing EU Directives on fixed-term contracts and part-time work;[80] and legislative proposals for a European Labour Authority[81] and a European Social Security Number.[82] These will be subject to scrutiny in their own right in due course, if and when formal proposals are submitted to the Council. The remainder of this Report will be focused on the Commission's efforts to revise the Written Statement Directive.

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77 The Committee considered the Pillar of Social Rights in more detail in its Report of 29 November 2017. The Pillar was formally adopted by all Member States, the Commission and the European Parliament on 17 November 2017.

78 The Commission said in April 2016: "Together with the European Pillar of Social Rights, the Commission is launching a first-stage consultation of the social partners on the revision of Directive 91/533/EEC (the Written Statement Directive). As part of this consultation, the social partners will be consulted on whether to amend the Directive more substantially with a view to introducing minimum standards applicable to every employment relationship and prohibiting abuse".

79 The first phase consultation of the social partners on an EU initiative on "access to social protection", which is focused on the rights of those in non-standard employment and the self-employed (which are not covered by EU employment law) took place in May 2017. The second phase consultation opened in November 2017. The Commission is expected to announce in early March what, if any, next steps it intends to take with this initiative after hearing the views of trade unions and employers' organisations.

80 Council Directive 99/70/EC on fixed-term work and Council Directive 97/81/EC on part-time work. The REFIT evaluation of these Directives had been due for publication in 2017, but this appears to have been delayed.

81 The proposal for a European Labour Authority, currently scheduled for publication in early March 2018, is expected to focus on strengthening cooperation between labour market authorities, especially with respect to EU nationals who live and work in two different Member States.

82 The proposal for a European Social Security Number is expected to introduce a unified social security number (e.g. national insurance number) for EU nationals which can be used in all Member States.

Revising the Written Statement Directive

Consultation of the social partners

5.32 The EU Treaty[83] requires the European Commission to consult the European social partners[84] on possible new employment law initiatives before it can table a proposal of its own. The procedure consists of a first phase consultation—on the need for, and possible content of, a legislative proposal—and a second phase consultation—on the specific content of such a proposal, if the Commission still considers legislative action necessary after the initial discussions with the social partners.

5.33 For the revision of the Written Statement Directive, the first and second phases of consultation took place between April and June 2017[85] and between September and November 2017 respectively.[86] In the second phase consultation document, the Commission set out in some detail its proposed "avenues for EU action", including a clearer, more expansive definition of which workers fall within the scope of the WSD and requiring additional information on employment conditions to be provided to all workers, for example on paid overtime, guaranteed paid hours and training opportunities. The Commission also suggested introducing new EU-wide minimum employment rights, including for those in atypical or zero-hours employment, such as requirements regarding predictability of hours, and restrictions on exclusivity clauses and probationary periods.

5.34 The Treaty allows for the social partners to negotiate new EU social and employment law between themselves.[87] Trade unions were in favour of clarifying and broadening the personal scope of the Directive, as well as supporting the introduction of new EU-wide minimum rights aimed at improving transparency and predictability of working conditions.[88] Conversely, employers' organisations opposed practically all of the Commission's suggestions, including the extension of the scope of the Directive to more workers; adding more information to the statutory written statement; and the inclusion of new minimum rights.[89]

5.35 Because of these diametrically opposed views, the social partners decided not to negotiate bilaterally on a new Written Statement Directive. The Commission took the view that, the employers' organisations' views notwithstanding, it was "important to improve protection in this area by modernising and adapting the current legal framework". As a result, it decided to table a legislative proposal of its own for consideration by the Member States in the Council and the European Parliament.

83 Article 154 TFEU.

84 The European Trade Union Congress on behalf of national trade unions, and on the employers' side BUSINESSEUROPE (private firms), UEAPME (small businesses) and CEEP (public employers).

85 http://ec.europa.eu/social/BlobServlet?docId=17657&langId=en.

86 http://ec.europa.eu/social/BlobServlet?docId=18309&langId=en.

87 Article 155 TFEU

88 The trade unions requested more rights than those proposed by the Commission in its second phase consultation document, including "a complete ban on forms of contractual arrangements not guaranteeing workers a minimum of paid hours and a right to adequate remuneration". See Commission Impact Assessment SWD(2017) 478, p. 29.

89 The employers' organisations preferred not to express views on specific minimum rights set out in the consultation document, "arguing that such issues were a matter of national competence and that it was not necessary, or even contrary to the principle of subsidiarity, for the EU to act in these fields". See Commission Impact Assessment SWD(2017) 478, p. 29.

The Commission proposal

5.36 Following the consultation of the social partners, and based on the objectives set by the Pillar of Social Rights and the REFIT evaluation of the WSD, the Commission adopted a proposal for a new Directive on "transparent and predictable working conditions" in the EU just before Christmas 2017.[90] The objective of the draft legislation is to "promote more secure and predictable employment while ensuring labour market adaptability and improving living and working conditions" throughout the European Union and the EFTA-EEA countries.

5.37 In addition to broadening the overall scope of the Directive by introducing an explicit definition of which "workers" are covered by its provisions, the legislative purpose of the proposal is twofold. Firstly, it would modernise the 1991 Written Statements Directive by repealing it wholesale and replacing it with new requirements for information on employment conditions, which aim to address the shortcomings identified in the 2016 evaluation exercise. Secondly, the Directive introduces a number of new material rights for workers to reflect changes in the EU's labour market, especially the precarious working conditions of zero-hours and casual workers.

5.38 The Parliamentary Under Secretary of State at the Department for Business, Energy and Industrial Strategy (Andrew Griffiths) submitted an Explanatory Memorandum and regulatory checklist on the proposal in January 2018.[91] The Minister appears broadly supportive of the Commission's *objectives* in proposing this legislation, recognising that "new forms of work can bring certain challenges as well as opportunities".

5.39 The Minister also refers to the Government-commissioned Taylor Review of Modern Employment Practices, which recommended that "the same basic principles should apply to all forms of employment in the British economy".[92] He notes that certain elements within the draft Directive reflect the recommendations made by the Review, notably around extending certain employment rights to cover more employment categories including a "day one" right to an enhanced written statement and better reflection of actual hours worked in employment contracts. The Government says it will respond to the Taylor Review recommendations "shortly", but has not so far committed to any legislative change to address the issues identified. Whether it does so will need to be taken into account as negotiations on the Directive progress.

5.40 Irrespective of any domestic proposals being considered by the Government following the Taylor Review, the Minister's Memorandum raises concerns of substance over the elements of the Commission proposal. Explaining that the Directive would require substantial changes to UK employment law (including the Employment Rights Act 1996 and the Employment Tribunals Act 1996), the Minister argues that the elements of the Directive relating to the probationary period, the basis for unfair dismissal claims, and the restrictions on exclusivity clauses, could create unintended effects that could undermine existing employment rights.

5.41 We have considered the substance of the draft Directive in more detail below, drawing on the Commission's own impact assessment and the Minister's substantive comments on various elements of the proposal.

90 European Commission document COM(2017) 797.

91 Explanatory Memorandum submitted by the Department for Business, Energy & Industrial Strategy on 15 January 2018.

92 https://www.gov.uk/government/groups/employment-practices-in-the-modern-economy.

The scope of the Directive

5.42 As noted, the wording of the 1991 WSD has led to divergent application of the scope of the legislation across Member States, depending mostly on their concept of a "paid employee" and their use of the derogations permitted by the Directive. The Commission is particularly concerned that the existing legislation will not apply to an increasingly large segment of the working population in non-standard forms of employment. It therefore proposes to clarify the scope of the Directive, by:

- establishing an updated definition for determining who is a "worker" for the purposes of the Directive, based on case law of the European Court of Justice.[93] Under the proposal, any natural person who "for a certain period of time performs services for and under the direction of another person in return for remuneration" will be considered a worker;

- restricting the existing ability of individual Member States to exempt certain workers as defined above from the rights contained in the Directive.[94] Such a derogation would only be available where the employment relationship is less than 8 hours per month.[95] Where the working hours are not determined in advance, for instance in zero-hours employment, the derogation cannot apply because the duration of the work is not known;

- clarifying that, for agency workers, the user undertaking rather than the employment agency can also be under the obligation to inform such workers directly of the conditions of employment; and

- allowing collective agreements between trade unions and employers' organisations to set different standards for the material rights contained in chapter III of the Directive (see paragraph 5.48 to 5.59), as long as the overall degree of worker protection is not weakened as a result. However, collective agreements could not be used to modify the requirements relating to the written statement of employment rights in chapter II (see paragraphs 5.45 to 5.47).

5.43 In its Impact Assessment, the Commission argues that these changes would lead to "at least 2 to 3 million non-standard workers [entering] into the scope of the Directive". The Minister has raised some concerns about the new, prescriptive statutory definition of "worker" proposed by the Commission, calling it "broad".

5.44 In UK employment law, all employees are workers, but the converse is not true.[96] Employees have an employment contract which also grants them certain statutory entitlements, including the written statement required by the WSD, which non-employee

93 The European Commission explains that its proposed criteria are based on the case law of the Court as developed since case C-66/85 (*Lawrie-Blum*), most recently recalled in its judgement in case C-216/15 (*Ruhrlandklinik*).

94 Member States can currently exempt workers from the Written Statement Directive where the employment relationship is of less than one month; entails a working week of 8 hours or less; or where it is "of a casual and/or specific nature".

95 The Commission has also proposed that, to avoid placing disproportionate burdens on private households, Member States can disapply certain specific rights for domestic workers: the right to request a new form of work, to mandatory training without charge, and to application of favourable presumptions in case of missing information with respect to natural persons employing domestic workers.

96 See https://www.gov.uk/employment-status/employee.

workers—such as freelancers, agency workers or zero-hours workers—do not have. The Commission proposal would therefore substantially expand the scope of the Directive in the UK compared to the current situation.

Information on employment conditions

5.45 Chapter II of the proposed Directive sets out requirements for the provision of information on working conditions by employers to their employees, effectively replacing the 1991 Written Statement Directive. Primarily, the Commission has proposed to:

- expand the types of information that must be provided compared to the 1991 Directive by also including the duration and conditions of probation; training entitlements; overtime arrangements and pay;[97] and the determination of variable working schedules for those on casual, zero-hours or "gig economy" contracts; and
- remove the current provision allowing this information to be provided within two months of the start of employment. The Commission proposes that the written statement should be provided no later than the first day of the employment relationship. The two-month period is also removed for the notification to employees of changes to working conditions covered by the initial written statement.[98]

5.46 There are also consequential changes to the information employers must provide to employees who are to be posted abroad, for example on the currency of their salary and the duration of the posting.

5.47 The Minister does not raise any substantive concerns about this element of the proposal, which in essence simply updates the existing Written Statement Directive. He notes that elements of the Commission proposal mirror the recommendations made by the recent Taylor Review,[99]and that the Government will "assess the merits of this provision (…) in this context".

New material employment rights

5.48 To address the lack of stability and predictability for workers in flexible modes of employment, including in zero-hours contracts and in the "gig economy", the Commission has also proposed an expansion of rights compared to the 1991 Directive. These are contained in Chapter III of the proposed Directive. In particular, the Commission proposes to:

- restrict the **maximum duration of any probationary period** in a new employment relationship to six months, unless "a longer duration is justified by the nature of the employment, such as a managerial position, or where it is in the worker's interest, for instance an extension following long illness";[100]

97 The introduction of information on overtime into the written statement reflects the case law of the European Court of Justice, which ruled in Case C-350/99 (*Lange*) that "such information forms part of the 'essential aspects of the employment relationship' about which the worker should be informed".

98 In order to reduce burdens on employers, the proposal also requires Member States to produce templates and models for the written statement and to make information on national laws or provisions and relevant collective agreements available to employers in an accessible format.

99 The Taylor Review recommended that the right to a written statement should be extended to non-employee workers, and should be made a "day one" right.

100 This provision reflects Principle 5(d) of the European Pillar of Social Rights: "5(d): Any probation period should be of reasonable duration".

- prohibit the use of **exclusivity or incompatibility clauses** that prevent employees from taking up parallel employment with another employer, unless such a clause is used for legitimate reasons such as the protection of business secrets or for the avoidance of conflicts of interests;

- require employers of employees with variable work schedules to notify such workers of the periods of the **reference hours and days** during which they may be required to work.[101] The purpose is to enable the worker to use the time not covered by such reference times in other employment, in education or to fulfil care obligations. Workers may agree to work outside the reference hours and days, but cannot be obliged to do so, and must not be subject to detriment if they refuse;

- prevent employees from requiring workers with variable schedules to work if they receive less than a "**reasonable advance notice**", the definition of which must be set out in in the written statement at the start of the employment relationship. The concept of "reasonable" in this regard will be left to Member States to define, and can vary sector-by-sector;

- allowing workers who have been with a company for more than six months to **request more secure and predictable form of work**, such as a full-time working relationship, or a working relationship with a higher number of guaranteed paid hours.[102] Employers are required to respond in writing to such requests;[103] and

- requiring employers to provide their employees with **training free of charge**, where such training is required under EU law, national legislation or collective agreements.

5.49 The Minister has raised a number of concerns about the potential impact of Chapter III of the Directive on UK employment law, in particular as regards the link between probationary periods and statutory employment rights. We have set these out below.

Restrictions on probationary periods

5.50 The Commission has proposed that probation at the start of an employment relationship should, in principle, be limited to six months (except where Member States allow it to be extended where "justified by the nature of the employment or [where it] is in the interest of the worker"). In addition, workers would have the right to challenge dismissal if they are sacked for challenging their employer if this maximum period is exceeded.

101 The Commission explains that these restrictions on employers do not apply "in cases where the employer sets a task to be achieved, but the worker is free to determine the time schedule within which he or she performs the task".

102 The Commission argues this provision reflects Principle 5(a) of the European Pillar of Social Rights: "The transition towards open-ended forms of employment shall be fostered."

103 Employers will have to respond to a written request for a more stable employment relationship within one month for larger organisations, and but Member States can extend that period to three months for natural persons and small businesses.

5.51 According to the Commission, restricting the use of probation at the start of an employment relationship in this way would require legislative changes only in the UK and Ireland out of all 28 Member States.[104] It has proposed to introduce an EU-wide maximum on probationary periods because:

> "During probation periods, the conditions attaching to the termination of the employment contract are often light and some protective measures that normally apply in case of dismissal are absent (e.g. notice period and severance pay). Therefore, overly long probation periods, in which employment rights are inferior to standard employment, may limit worker protection."

5.52 However, the Minister's Memorandum calls into question this line of reasoning, because there is currently no legal definition of a "probationary period" in UK employment law. As a result, a contractual probation cannot deprive a worker of any of their statutory employment rights, which all apply from the first day of work. Employees cannot file a claim for unfair dismissal until after two years of service, but this is not linked to any probation period as such. The issues identified by the Commission appear to be more general concerns about statutory employment conditions, including notice periods and redundancy pay, which do indeed differ depending on the length of service but are not linked to any probationary period.

5.53 The Government's specific concerns about the proposal on probationary periods are therefore:

- it is unclear what problem the Commission is seeking to address by restricting the maximum duration of the probationary period, given that in the UK there is no link between probationary status and enjoyment of statutory employment rights (i.e. employees do not have fewer or restricted statutory rights during their probation, although contractual entitlements can be affected);
- the proposal could affect the general position under UK employment law that an employee[105] cannot claim unfair dismissal until they have completed two years of employment;
- depending on the proposal's impact on an employee's ability to claim unfair dismissal, the Government believes the Directive may require a separate legal base which in turn requires a different legislative procedure;[106] and
- it is unclear whether the Commission proposal to allow probationary periods to be extended beyond six months "in the interest of worker" would apply where an employer extends probation if a new employee's performance has initially been considered sub-standard.

104 Commission Impact Assessment SWD(2017) 47, p. 190.

105 Non-employee workers are not normally entitled to protection against unfair dismissal.

106 The proposed Directive is based on Article 153(1)(b) on working conditions and subject to the ordinary legislative procedure, i.e. the European Parliament is co-legislator and the Council decides by qualified majority. By contrast, EU legislation that affects "protection of workers where their employment contract is terminated" must be adopted under article 153(1)(d) TFEU, which requires the Council to act by unanimity and only requires the European Parliament to be consulted.

Exclusivity clauses prohibiting parallel employment

5.54 UK employment law already bans the use of exclusivity clauses in zero-hours contracts.[107] The Commission proposal would go significantly further, by restricting exclusivity clauses for all types of employment relationships, subject to a "legitimate reasons" test. If that test were met, for example to protect a company's trade secrets, an exclusivity clause would be lawful. However, the Directive itself does not specify conclusively how "legitimate" is to be interpreted.

5.55 The Minister notes that there is already a "significant amount of case law in the UK regarding restrictive covenants",[108] and the Government is still considering how the "legitimate reasons" test would interact with the common law. In addition, he expresses concerns that the qualified limits on parallel employment could reduce the scope of the current unqualified right for zero-hours workers not to be subject to an exclusivity clause.

5.56 Overall, the Minister says the Government is not convinced that exclusivity clauses put a disproportionate burden on the worker in all types of employment relationship, especially in circumstances in which workers have a full-time employment contract. He cites figures compiled by the Resolution Foundation, which found that 3.6 per cent of the UK's total workforce has more than one job. However, he concedes that it is "not known how many jobs have exclusivity clauses stopping a worker from getting an additional job against their wishes".

Minimum predictability of work

5.57 The Commission has proposed that employees with variable work schedules should be notified of their "reference hours and days", during which they could be required to work. This would allow such workers to use the time not covered by such reference times in other employment, in education or to fulfil care obligations. It would be unlawful for an employer to require a worker to work outside the reference times. In addition, the draft Directive would require employers to set out the "reasonable advance notice" they will give employees with variable schedules of the hours they are expected to work. The legislation does not define this concept any further.

5.58 The Minister has explained that these provisions do not have any domestic equivalent in UK law. He notes the Government wants to clarify with the Commission what it believes a "reasonable period" in advance would be, and whether the Directive as drafted gives employers and employees sufficient legal clarity.

5.59 He also notes that up to 5 million workers in the UK "*could* benefit from greater predictability in their working hours", including those on zero-hours contracts, agency workers and those who perform regular overtime work. However, he adds that "it is unclear how many currently receive reasonable notice of future working hours, the

107 See Section 27A of the Employment Rights Act 1996. The Minister says this "reflects the government's position that the use of exclusivity clauses in zero hours contracts undermines choice and flexibility for the individuals concerned, and that it is unjustifiable for an individual who is not guaranteed work to be prevented from seeking and carrying out work elsewhere in order to boost their income".

108 "Restrictive covenants" are usually agreements between employee and employer in order to restrict the employee's activities if the employment is terminated.

number of hours they generally receive or how many workers change the number of hours they decide to work themselves at short notice". As a result, the "actual benefit" of this element of the proposal is "difficult to quantify".

Application and enforcement of the Directive

5.60 The Commission proposal also contains a number of important horizontal provisions on the application and enforcement of the new Directive by the Member States. They include:

- establishing means of redress for workers who are not fully informed of their rights by means of the written statement, provided any omission is not rectified at the employee's request within fifteen days. This redress could take the form either of "favourable presumptions" (e.g. a presumption of an open-ended employment relationship if no information is provided about the duration) or through a complaints mechanism involving an independent public authority which could lead to a fine for the employer;[109]

- ensuring that all Member States' national legal systems provide access to "effective and impartial dispute resolution and a right to redress and, where appropriate, compensation", for infringements of the rights established under the proposed Directive;

- requiring Member States to provide workers who have complained of breaches of their rights under the Directive with "adequate judicial protection against any adverse treatment or consequences by the employer". Workers would also be able to challenge dismissal which they can justifiably assert was based on seeking to exercise their rights under the Directive; and

- as is standard practice in EU Directives relating to employment and social matters, the proposal allows individual Member States to legislate for a higher level of protection than that guaranteed by the proposed Directive. Similarly, eventual transposition of the Directive cannot be used as a justification for lowering existing standards in a Member State.[110]

5.61 The Minister notes that the Government "will be seeking further information about this element of the proposal as it extends the definition of who has a right not to be dismissed and will require legislative changes in the UK". As noted, the Government is also concerned about the provisions on the maximum probationary period on the two-year qualifying period that currently applies before an employee can claim unfair dismissal (see paragraph 5.51).

Implications of Brexit

5.62 The Minister also touches on the implications of the UK's withdrawal from the EU on the Government's approach to negotiations on the Directive. He says:

109 See article 14 of the proposed Directive. In the case of favourable presumptions, employers would have the possibility to "rebut the presumption", the effects of which are not made clear. The complaints mechanism was proposed after the REFIT evaluation of the Written Statement Directive found redress systems based on claims for damages are less effective than those based on other forms of penalty such as lump-sums.

110 Article 19 of the proposed Directive.

> "While we remain members of the EU, the government has made a commitment to continue to act 'in good faith' on ongoing EU business. This means the UK continues to actively engage on current EU legislative proposals, assessing policies on their merits. (…) Against the backdrop of EU exit, the Prime Minister has firmly committed not to roll back workers' rights, and to extend those rights when that is the right choice for the UK."

5.63 The Government has requested a post-Brexit transitional period, during which it would effectively stay within the EU's economic structures (i.e. the Single Market and the Customs Union). With respect to the implications of such an arrangement for the UK's adherence to EU law, the Minister states that "the precise nature of both the proposed time-limited implementation period and our economic relationship with the EU thereafter are both subject to negotiations, and as such we cannot provide certainty at this stage on whether the UK will be obliged to implement this piece of legislation".

Timetable for consideration of the proposal

5.64 The Bulgarian Presidency has noted it aims to reach a general approach within the Council at the June 2018 meeting of EU Employment Ministers. It is unclear at this stage whether the proposal as tabled by the Commission has sufficient support among the Member States to make that a feasible proposition. The European Parliament's Employment & Social Affairs Committee has not yet established a timetable for its consideration of the draft Directive.

5.65 The deadline for national Parliaments to submit a Reasoned Opinion on the proposal on the grounds of subsidiarity expires on 8 March 2018.

Our assessment

5.66 The Minister notes that, since employment law is an area of shared competence between the EU and the Member States, "the Government "is examining whether this proposal is sufficiently flexible to allow for national implementation that complements existing national arrangements".

5.67 Although the Committee supports the proposed modernisation of the Written Statement Directive insofar as it relates to the types of information that must be provided to new employees, we have reservations about the proposed definition of "workers" within the scope of the new Directive. It is very broad, and would make the Directive more prescriptive in its scope than previous pieces of EU employment law.

5.68 As regards chapter III of the draft Directive on new material employment rights, the Committee is concerned at the lack of substantive evidence adduced by the Commission to support its claim that "there is a risk of race to the bottom in standards applying to new forms of work where the regulatory framework is weaker and more patchy across Member States". As a result, the proposed changes—in particular in relation to probationary periods and the requirements as regards reference hours for variable workers—may be disproportional to the Commission's objectives.

5.69 In addition, the drafting of the proposal leaves many crucial concepts—including "reasonable advance notice" in relation to variable hours, the "interest of the worker" test

for extending probation periods; and the "legitimate reasons" test for using exclusivity clauses to prevent parallel employment—undefined, meaning the legislation could increase rather than reduce divergences in national practices if these concepts are interpreted in different ways by different Member States.

5.70 With respect to the proposed restriction on probationary periods, we note from the Minister's explanation that the time limit on probation seems to serve no meaningful purpose. It would require legislative change in the UK and Ireland only, even though there is no link in UK law between the length of the probationary period and the enjoyment of statutory employment rights. As such, the UK's current approach to probation cannot be construed as conferring an unfair competitive advantage to British employers compared to those based elsewhere in the EU.

5.71 Given the legal and political importance of the proposal, we have retained it under scrutiny and have asked the Minister to keep the Committee informed of developments within the Council and the European Parliament. We are particularly interested in:

- the scope of the Directive and the definition of "workers" which will be able to avail themselves of the rights created by this new legislation;
- the Council's position on the proposed restrictions probationary periods and their link to potential unfair dismissal claims, and how this affects the Government's assessment of the necessary legal base and legislative procedure for adoption of the Directive;
- the precise wording of the provisions on exclusivity contracts, and how the Government will seek to ensure these do not decrease existing protections in the UK under the Employment Rights Act 1996; and
- the Government's position on the proposed redress mechanisms for failure to provide a worker with a written statement of their employment rights, i.e. the "favourable presumption" or the independent complaints mechanism.

Implications of Brexit

5.72 Although the UK is scheduled to have left the EU by the time this new Working Conditions Directive would take effect at the start of the next decade, the Minister notes the Directive may have to be transposed into UK law under the terms of the post-Brexit transitional arrangement which the Government is seeking.

5.73 The Committee agrees that, if the Government wants a post-Brexit transitional period during which the UK effectively stays in the Single Market to avoid the abrupt imposition of trade barriers when it becomes a "third country" in March 2019, EU law would continue to apply. The other Member States have said explicitly that such an obligation would also include EU legislation that only takes effect during the transitional period. Whether this new Working Conditions Directive will apply in the UK therefore depends on whether the legislation is agreed, and takes effect during the transition.

5.74 The new Directive is not expected to take effect until late 2020 at the earliest. However, given the current uncertainty about the potential length of the transition, the UK could be under a legal obligation to transpose it into domestic law. The Committee therefore

considers full and continued scrutiny of the proposal will be necessary in view of its potential impact on UK employment law. The Committee has written to the Business, Energy and Industrial Strategy and Work and Pensions Committees to seek their views on the proposal before considering it further, in view of their inquiry into employment conditions in the UK.

5.75 The Committee has wider concerns about the political, legal and financial implications of the proposed transitional arrangement. In particular, the UK would effectively retain most, if not all,[111] of the obligations of a Member State without the attendant rights, in particular, as regards representation and voting rights within the Council, COREPER and the technical Committees that assist the European Commission in the implementation of EU law. These implications should be carefully considered by Parliament.

Previous Committee Reports

None.

111 For example, it is still unclear where the UK will have the ability to negotiate new international agreements that fall within the remit of EU law during the transition (even if they would only enter into force afterwards).

6 Common Agricultural Policy Reform

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Environment, Food and Rural Affairs Committee
Document details	Commission Communication—The Future of Food and Farming
Legal base	—
Department	Environment, Food and Rural Affairs
Document Number	(39294), 14977/17, COM(17) 713

Summary and Committee's conclusions

6.1 As part of its preparations for leaving the European Union, the United Kingdom is considering its future approach to agricultural policy. In parallel, reflections are underway on the EU's post-2020 Common Agricultural Policy (CAP). The European Commission's Communication, "The Future of Food and Farming" presents emerging thoughts on the new CAP.

6.2 At the heart of the Commission's vision is a new delivery model whereby basic policy parameters are set at the EU level, while Member States would set the specific requirements that claimants must meet and could develop their own compliance and control framework. To preserve a functioning agricultural internal market, Member States would each establish a "CAP Strategic Plan" covering both direct payments and rural development spending. If agreed, this delivery model would represent a significant devolution of responsibility.

6.3 Particular themes include:

- research and innovation;
- fair income support through retention of direct payments, although these should be better targeted;
- risk management; and
- replacement of the current "green architecture" of the CAP with a more targeted, more ambitious, flexible approach—income support will be conditional on the implementation of a streamlined set of environmental and climate conditions, providing environmental and climate public goods.

Others considerations included are simplification, rural economy, health and food waste.

6.4 The Commission's discussion on the future CAP will be driven at least in part by the budgetary gap left by the UK once the current financial framework has ended.[112] If

112 The UK has agreed to pay its full financial contributions until the end of the current financial framework (31 December 2020).

agricultural payments are to remain at similar levels, there will either need to be significant cuts elsewhere or increased overall budget payments by the remaining Member States. The next budgetary framework is already under active consideration in Brussels.

6.5 Separately, the UK is also discussing its future arrangements regarding agriculture, including future priorities and the implications of devolution. There is no detail as yet, but the Secretary of State for Environment and Rural Affairs, Michael Gove, made a speech to the Oxford Farming Conference on 4 January[113] setting out four areas for change:

- a coherent food policy, integrating the needs of agriculture businesses, other enterprises, consumers, public health and the environment;
- a five-year post-Brexit transition period before the introduction of a new system;
- direct payments to be replaced by a system of public money for public goods; and
- integration of the natural capital approach (recognition of the assets provided by the environment).

6.6 The Secretary of State specifically referenced food labelling, food waste, research and innovation as matters for attention within the context of the areas above. On the replacement of the direct payments system, he confirmed extension of the basic payment system until 2024.[114] During the interim period, the largest payments would be reduced and, at the end of any post-Brexit implementation period, payments could be made without the need for compliance with existing cross-compliance rules and procedures. A command paper is expected in the Spring setting out further details.

6.7 In his Explanatory Memorandum, which was submitted before the Secretary of State's speech, the Minister for Agriculture, Fisheries and Food (George Eustice) says that no direct implications arise from this Commission discussion document. He notes that much of the discussion about the future CAP will take place while the UK remains a member of the EU but, as the new CAP will not apply to the UK, the Government will not be active participants in the discussions.

6.8 The Minister also confirms the expected timetable for future CAP discussions. Legislative proposals are expected before the summer of this year, with a view to agreement between the Council and the European Parliament (EP) before the June 2019 EP elections and the appointment of a new Commission in November 2019. The Minister acknowledges that much of the discussion and negotiation will therefore take place while the UK continues to be an EU Member State.

6.9 **We note that the Government does not intend to be an active participant in the CAP negotiations. While we understand that the UK will not have a direct stake in the future CAP, we take the view that the direction of EU agricultural policy is relevant to the UK given the intention to continue a strong trading relationship between the UK and the EU. Similarly, the direction of UK agricultural policy will no doubt be of interest to the EU.**

113 Speech by The Rt Hon Michael Gove MP, Oxford Farming Conference, 4 January 2018.
114 The five-year transition was spelled out in detail in a Q&A session following the speech.

6.10 **We acknowledge that, until the UK has published its own detailed approach to future agricultural policy, it is difficult for Ministers and officials to engage in discussions allowing debate around the respective approaches and the implications of different approaches for the future relationship.**

6.11 **We would welcome the Minister's confirmation that, once the UK command paper on the future of agricultural policy has been published, the UK will engage with EU colleagues on the future of the CAP and on the UK proposals for future domestic agricultural policy. Furthermore, it would be helpful if the Minister could write to us at that stage with a detailed assessment of the areas of convergence and divergence between the emerging EU position and the Government's proposals.**

6.12 **On the basis solely of the EU paper and the Secretary of State's speech, a number of common themes are already evident, including the importance of agricultural innovation for example. On the point of greatest apparent divergence—the Secretary of State's proposal that direct payments should end—the policy objectives are nevertheless similar. It is proposed that continuing EU direct payments should be conditional on the provision of environmental and climate public goods. While there is an income objective too, the overall effect is similar to an approach of "public money for public goods" as advocated by the Secretary of State.**

6.13 **Another area of discussion between the UK and the EU might be risk management. That is the favoured US agricultural support approach and is included in the EU paper, but it was not mentioned by the Secretary of State in his Oxford speech. UK engagement in discussions at the EU level on risk management might be beneficial as a strong risk management policy may increase pressure for such measures in the UK.**

6.14 **We also note with interest that the EU's timetable for change is more radical than the UK's, with change envisaged from 2021 rather than 2024. Clearly, both approaches are to be negotiated and it may well be the case that the UK's eventual changes are more radical than those of the EU.**

6.15 **We look forward to the requested confirmation in relation to future engagement both at the EU-level and with us. The document remains under scrutiny and we draw it to the attention of the Environment, Food and Rural Affairs Committee.**

Full details of the documents

Commission Communication—The Future of Food and Farming: (39294), 14977/17, COM(17) 713.

Background

6.16 The Commission's Communication is the second stage towards the development of the new CAP. The first stage included a public consultation that was launched in February 2017. That consultation underlined the importance of three dimensions of sustainability (economic, environmental and social) and linked them to a broader need to modernise and simplify the policy. During the three-month consultation period the Commission received more than 320,000 replies, mostly from individuals.[115]

115 https://ec.europa.eu/agriculture/consultations/cap-modernising/2017_en.

6.17 According to the Commission, the consultation found that most respondents wanted to keep a strong CAP at EU level but that it needed to be simpler and more flexible, and more focused on meeting the key challenges of ensuring a fair standard of living for farmers, preserving the environment and tackling climate change.

6.18 The Commission's Reflection Paper on the Future of EU Finances (28 June 2017) called for a shift towards new, sustainable growth that combines economic, social and environmental considerations, along with a stronger focus on the provision of public goods.

6.19 Some of the main themes explored by the Commission were:

- a new delivery model and a simpler CAP—the EU should set basic policy parameters (such as CAP objectives, basic requirements, and broad types of intervention) and Member States should have individual responsibility for devising the specific requirements claimants must meet in relation to the CAP objectives, as well as proposing their own compliance and control frameworks;
- a smarter, modern and sustainable CAP—the contexts within which the future CAP should fit include food quality and affordability, impacts on health, the impacts of agriculture on the environment, the context of world population growth and net migration into the EU, the desire to better use research and innovation, the need to encourage new blood into the EU farming sector, and a desire to strengthen the socio-economic fabric of rural areas;
- income support—a central objective of the CAP will remain the provision of income support to the EU's farmers; within the basic system of direct payments, there is to be an initiative to better direct the payments to balance farm incomes across the EU;
- risk management—the Commission proposes an EU-wide platform for the exchange of good practice and policy development between administrations, farmers and other stakeholders; current tools such as the Income Stabilisation Tool will be re-examined with a view to improving performance;
- bolstering environmental care and climate action—the proposal is that the current Greening Requirements, Cross Compliance and Pillar II environment measures will be replaced and all operations integrated into a more targeted, ambitious yet flexible approach; the Commission envisages a mandatory baseline of environmental measures for all farms, to be built upon through voluntary schemes, along with substantial Member State flexibility to devise appropriate measures themselves; and
- attracting new farmers—more thought will be given to how to attract new entrants into the EU farming sector, allowing Member States the flexibility to develop appropriate local solutions as part of their CAP Strategic Plans.

The Minister's Explanatory Memorandum of 14 December 2017

6.20 The Minister says that no direct implications arise from this Communication, which is a discussion document and does not at this stage make any legislative proposals.

6.21 On the UK's withdrawal from the EU, he says:

> "Although much of the discussion and negotiation of the next CAP will take place whilst the UK continues to be a member of the EU, decisions are expected to come after UK exit and the new CAP will not be introduced until 2021 at the earliest. The Government will not therefore be active participants in the discussions relating to a future CAP which will not apply to the UK."

Previous Committee Reports

None.

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

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Foreign Affairs and the International Development Committees
Document details	Recommendation for a Council Decision authorising the opening of negotiations on a Partnership Agreement between the European Union and countries of the African, Caribbean and Pacific Group of States
Legal base	Articles 218(3) and (4) TFEU; QMV or unanimity depending on final content of the agreement
Department	International Development
Document Number	(39367), 15720/17 + ADD 1, COM(17) 763

Summary and Committee's conclusions

7.1 The EU maintains a special economic and political relationship with countries in Africa, the Caribbean and the Pacific which have historical colonial links to its Member States. Since 1975, these countries have represented themselves jointly vis-à-vis the EU as the "African, Caribbean and Pacific Group of States" or ACP. Forty-one ACP countries are also members of the Commonwealth.

7.2 Currently, the bilateral EU-ACP relationship is governed by the Cotonou Partnership Agreement (CPA), which was signed in 2000 and expires in 2020.[116] It creates the framework for political dialogue and cooperation on a range of issues, including trade and economic development, climate change, and food security. The EU is also in the process of negotiating more detailed bilateral trade agreements termed Economic Partnership Agreements (EPAs) with groupings of ACP states. Lastly, the Union provides funding for development assistance projects in ACP countries via the European Development Funds (EDF). The UK is a major contributor to the EDF, having agreed to provide nearly 15 per cent (£3.2 billion) of its budget over the 2014–2020 period.

7.3 As the Cotonou Agreement expires in 2020, the EU has been engaged in a process of reflection on the options for the future of the EU-ACP relationship since 2015.[117] In October 2016, the European Commission recommended the creation of three "Regional Compacts" with the African, Caribbean and Pacific groups respectively under a single framework agreement.[118] In January 2017 the previous Committee published its assessment of these initial recommendations,[119] concluding that securing agreement between the EU

116 The Agreement is available in full on EurLEX.

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

118 Communication JOIN(2016) 52 on "A renewed partnership with the countries of Africa, Caribbean and Pacific" (22 November 2016).

119 See the previous Committee's Report of 25 January 2017.

and the ACP countries on renewing and updating the legal framework for their bilateral relations would be a "major challenge", with the implications for the UK complicated by its withdrawal from the EU.

7.4 The Commission formally submitted a proposal for a Council Decision containing its draft negotiating objectives to the Member States in December 2017, with a view to opening discussions between the Commission and the ACP states in May 2018. The proposal establishes the suggested priorities for each Regional Compact, to reflect the socio-economic, environmental and political challenges in the different regions. Each Compact would also have its own institutional framework to facilitate cooperation between the relevant ACP countries and the EU, within which regional organisations—such as the African Union, the Association of Caribbean States and the Pacific Islands Forum[120] would have a prominent role. The Commission also emphasised the importance of involving non-ACP states in North Africa in the work of the new EU-ACP association. We have set out the substance of the Commission proposal in more detail in paragraphs 7.29 to 7.36 below.

7.5 In January 2018, the then Minister of State at the Department for International Development (Lord Bates) submitted an Explanatory Memorandum on the Commission proposal for the new EU-ACP Agreement.[121]

7.6 The Government is broadly supportive of the Commission's approach, in particular the decentralised regional approach and the envisaged involvement of the African Union and non-ACP African countries in the EU-Africa Compact. However, the Minister makes clear the Government will seek further clarification of a number of elements of the Commission's negotiating mandate as it is modified by the Member States in the coming months. These include in particular the details of the procedures for modification of the new Agreement; the criteria for involvement of additional countries or regional organisations; and the parameters for a dispute resolution procedure and the process by which one party can terminate their participation.

7.7 With respect to the implications of Brexit, the Minister—after reiterating that the EU will remain an important partner for UK development policy—states that the UK will "continue to actively contribute to [the] negotiations" on the successor to the CPA. He also reiterates that the EU "will remain an important development partner for the UK in the future and a key player globally", adding that "it is in our interest to secure a modernised and fit for purpose post-2020 development framework".

7.8 **We thank the Minister for his helpful overview of the substance of the Commission proposals for the new EU-ACP Agreement and the three Regional Compacts. We ask him to keep the Committee informed of any changes to the substance of the detailed negotiating mandate before it goes for approval to the Council in May, in particular as regards the regional priorities for each of the three Compacts, and the criteria for accession to the Agreement or for obtaining observer status.**

7.9 **However, the Minister was regrettably unable to articulate in any more detail the Government's approach as regards the level of the UK's proposed involvement in**

120 In Africa, the Commission also foresees the involvement of the continent's Regional Economic Communities, such as ECOWAS and SADC, in the preparation of meetings of the EU-Africa Council.

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

the EU-ACP relationship after Brexit. As such, he did not address major outstanding questions on Brexit and the UK-ACP relationship which we have raised with him before, namely:

- **the immediate implications of Brexit for the UK's status as a party to the Cotonou Agreement[122] and related Economic Partnership Agreements, including potential disruption to trade links with Commonwealth nations and a lack of UK influence over funding decisions from the European Development Fund during the post-Brexit transitional period; and**
- **the Government's position on the possibility of UK participation in the successor to the Cotonou Agreement as a non-EU, non-ACP country, including the matter of continued contributions to the next European Development Fund.**

7.10 **We have made a more detailed assessment of these effects of Brexit in the "Background" section below, in paragraphs 7.44 to 7.70.**

7.11 **In summary, as regards the immediate implications of Brexit, we are concerned about the potential for disruption of the UK's economic and political engagement with ACP countries when it drops out of the Cotonou Agreement and related EPAs, as the Minister is unable to provide any detail of the status of discussions with the ACP or the European Commission on maintaining the UK as a party during the post-Brexit transition. Similarly, the Government has not made any public proposals for its involvement in the governance of the European Development Fund during the transition to ensure it can continue to scrutinise the way in which taxpayer money is spent.[123]**

7.12 **With respect to the future of the UK's relationship with the ACP, there is even less certainty about the Government's approach. Given that negotiations with the ACP countries are set to begin no earlier than June 2018, the UK will no longer be a Member State by the time a final agreement is presented to the Council for signature and conclusion if its EU exit date remains 29 March 2019.[124]**

7.13 **As such, the UK would not be a party to the new EU-ACP Agreement unless the Government makes a request to this effect, and this is explicitly agreed by both the EU and the ACP countries. The Committee is extremely disappointed that the Minister is still unable to indicate whether the UK will seek to become a party to the new EU-ACP Agreement as a non-EU, non-ACP country. It has not even released into the public domain any assessment of whether the efforts that would be involved in negotiating the appropriate institutional framework to allow for continued UK involvement could, or would, outweigh the efforts needed to recreate the UK's partnership with the ACP bilaterally.**

122 The UK's EU exit date will take place two years after the triggering of Article 50 TEU, i.e. on 29 March 2019, unless a) the negotiations are extended by the unanimous agreement of the remaining Member States and the UK, or b) the Withdrawal Agreement under Article 50 provides for a different exit date.

123 In December 2017, the Government announced that it had agreed to honour its funding commitments to the European Development Funds for the remainder of the current budgetary cycle, for all EDF expenditure commitments made until December 2020.

124 The date of EU exit could be changed by an extension of the Article 50 negotiating period, or by fixing a different date in the Withdrawal Agreement.

7.14 **The Committee takes the view that it is in the Government's interest to make clear now whether it wants to be a party to the successor to the Cotonou Agreement. Clarifying this objective explicitly at this stage would give the UK a clear stake in the drafting of the Commission's negotiating mandate and the subsequent talks with the ACP countries. Conversely, if the Government has taken the view that continued participation in the EU-ACP framework beyond Cotonou is not feasible or not in the UK's interest, it can begin to have preliminary talks with the ACP countries directly about the future relationship**.

7.15 **The Government is also yet to clarify whether the desired level of alignment on development policy with the EU after Brexit might involve contributions to the next European Development Fund after 2020, in return for a degree of influence over how the Fund is applied. If the UK is seeking continued participation in the post-2020 EDF, it will have to engage in negotiations with the EU-27 on the new Internal Agreement and the institutional framework to allow for the UK to exercise oversight as a non-EU contributor.**

7.16 **In this regard, the Committee will closely follow the negotiations between the Government and the Commission on the UK's representation on the current European Development Fund during the post-Brexit transition. The nature of the next Fund, and in particular whether it will remain "off-budget" or become part of the EU's overall Multiannual Financial Framework, will also have a considerable impact on the level of participation the UK could achieve given the constraints imposed by the Treaties on the management of the EU budget.**

7.17 **In light of the uncertainty around the UK's approach to the outcome of the EU's negotiations with the ACP on a new partnership, we retain the proposed Council Decision under scrutiny. We ask that the Minister update us in good time on the outcome of the Council's reflections on the Commission mandate, so that the Committee can consider it before the meeting of EU Development Ministers in May. We would also like to be kept informed of any future negotiations between the Member States on a 12th European Development Fund, whether as part of the wider discussions on the post-2020 Multiannual Financial Framework or by means of another Internal Agreement.**

7.18 **Given the importance of direct UK engagement with partner countries around the world after Brexit, we draw these developments to the attention of the Foreign Affairs and the International Development Committees.**

Full details of the documents

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

Background

7.19 The EU Treaties have provided for special treatment for Member States' dependent overseas countries and territories (OCTs), including preferential market access for their exports, since the founding of the European Economic Community in 1957. The purpose of that special association was to promote the OCT's economic and social development. To

finance development assistance projects in these territories, the Member States established the first European Development Fund in 1958, based on a separate inter-governmental agreement and funded outside of the Community budget.

7.20 Many OCTs regained their independence in the late 1950s and early 1960s, leading the EEC to establish formal bilateral relations with—initially—18 African countries under the Yaoundé Convention of 1963. The Convention was renewed in 1969, as Yaoundé II. The entry of the UK into the Community in 1973 more than doubled the number of developing countries with former constitutional links to a Member State. As a result, the 1975 EEC-ACP Agreement (dubbed the Lomé Convention) was signed by 46 ACP countries, compared to only nineteen in 1969.[125] It was also the first occasion where the ACP States negotiated formally as a group of states, rather than individually.[126]

7.21 The Lomé Convention was renewed in 1980, 1985 and 1990, with more ACP States signing up each time. A cornerstone of each iteration was the granting of non-reciprocal trade preferences to exports into the EEC from the ACP. The fourth Lomé Convention was replaced by the Cotonou Partnership Agreement (CPA) in 2000, which remains in force until 2020. It covers the 28 EU Member States and 78 ACP countries[127] (including over forty Commonwealth nations). The CPA is a legally binding agreement. It covers development, political and trade relations between the countries, establishes joint institutions and a framework for dialogue with each of its members.

7.22 The CPA also included the phasing out of non-reciprocal trade preferences for ACP countries, which were declared incompatible with the General Agreement on Tariffs and Trade. From 2008, they were withdrawn and both sides started a process of negotiating reciprocal Economic Partnership Agreements (EPAs). For the purpose of negotiating the EPAs, the ACP has been divided into seven groupings (the Caribbean, the Pacific, and five regions of Africa). At present, EPAs have been signed with two such groupings (the Southern African Development Community and the Caribbean) while negotiations with the other five groups continue. The EU has also signed interim EPAs with individual countries where progress with the regional grouping as a whole has been slow.

7.23 Where no EPA is yet in place, most ACP countries also benefit from unilateral preferential access to the EU's market under its Generalised System of Preferences (GSP). This grants different levels of duty- and quota-free access for exports from developing countries according to a sliding scale, where the least developed countries (LDCs) face no tariffs or quotas except on exports of arms. Lower or middle-income countries can export to the EU market with additional tariff- or quota restrictions, but far fewer than apply to industrialised countries.

The European Development Funds

7.24 The EU's development assistance to ACP signatories to the Cotonou Agreement is financed by the European Development Funds (EDFs), which remain outside of the EU budget. Funds are established for periods of five to seven years, through separate international agreements outside of the framework of the EU Treaties.

125 The only member of the Commonwealth to sign an EEC-ACP Agreement before the UK's entry into the Community was Mauritius, in 1969. It had joined the Commonwealth the year prior.

126 In 1975, the ACP countries formally organised themselves as a bloc under the Georgetown Agreement.

127 There are 79 ACP countries, but Cuba has not signed the Cotonou Agreement. South Sudan has expressed an interest in joining the ACP.

7.25 The current, 11th, EDF amounts to €30.5 billion (£21.9 billion)[128] for the period 2014–2020, of which UK's contribution is 14.68 per cent, or €4.5 billion (£3.2 billion). The vast majority (95 per cent) of the available funding is earmarked for development assistance projects in ACP countries. The remaining five per cent is allocated to the Member States' dependent territories (OCTs), including six British Overseas Territories.[129]

Replacing the Cotonou Agreement

7.26 The Cotonou Agreement expires in 2020. The EU has been engaged in a process of reflection on the options for the future of the EU-ACP relationship since 2015, initiated by the publication of a consultation paper by the EU's High Representative for Foreign Affairs and the European Commission in 2015.[130] Its purpose was to take stock of the CPA's performance, explore the extent to which it remained valid for the future and ultimately be used to set out policy proposals for the future relationship.

7.27 The Commission's own evaluation of the Agreement, published as part of the consultation exercise, concluded that the main shortcoming of the CPA had been its failure to provide a framework for the coordination of a response to the migration crisis, and that progress on human rights, democracy, good governance and the rule of law had been inconsistent.[131] In June 2016, the ACP countries also called for a renewed, legally-binding partnership with the EU.[132]

7.28 In November 2016, the Commission published its recommendations for a successor arrangement to the Cotonou Agreement. In particular, it indicated it would prefer the conclusion of three "Regional Compacts" with the African, Caribbean and Pacific groups respectively under a single framework agreement. It says this would "preserve all of the valuable elements of the current CPA", including a legal commitment to political dialogue, while allowing for a more tailored partnership for the different regions. It should, it says, also put in place the "right conditions [… to meet new objectives, such as more effectively pursuing EU political and economic interests".[133]

The Commission proposals for a new EU-ACP Agreement

7.29 In December 2017 the Commission formally proposed to open negotiations and asked the Council to adopt a Decision with detailed negotiating directives under Article 218 TFEU.[134] As expected, the draft negotiating mandate[135] for the renewed EU-ACP

128 €1 = £0.88723

129 The six British Overseas Territories which qualify for EDF funding are Anguilla, the Falkland Islands, Montserrat, Pitcairn, St. Helena and the Turks & Caicos Islands. The other three (Bermuda, the British Virgin Islands and the Cayman Islands) do not qualify on account of their advanced economic status. See the previous Committee's Report of 15 March 2017 for more information on the OTCs and the EU, especially in the context of Brexit.

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

131 For more information on the Commission evaluation, see the previous Committee's Report of 25 January 2017.

132 Waigani Communiqué on the future perspectives of the ACP Group of States (1 June 2016).

133 The three regional Compacts would build on, and replace, the EU's existing strategies for relations between the EU and various ACP regions—most notably the 2007 Joint Africa-EU Strategy (JAES), the 2012 Joint Caribbean EU Partnership Strategy, and the 2006 Strategy for a Strengthened Partnership with the Pacific Islands.

134 See Commission document COM(2017) 763.

135 The details of the draft negotiating mandate are contained Commission document COM(2017) 763 Annex.

partnership splits the proposed legally binding agreement into four parts: a general framework, which applies to all ACP countries, and three separate regional compacts covering Africa, the Caribbean and the Pacific, with tailored regional objectives.

7.30 The key overall objectives are to accelerate the ACP's progress against the Sustainable Development Goals (SDGs) and to promote more effective EU-ACP cooperation in international organisations. The Commission has also identified six horizontal priority areas for all three regions, including human rights and democracy; sustainable economic development and trade cooperation; environment and climate change; peace, security and justice; mobility and migration; and human development.

7.31 The three regional compacts would exist as legally-binding protocols to the overall agreement. The Commission has proposed the following regional priorities:

- **Africa**: Cooperation to promote peace and strengthening resilience, in order to manage demographic and mobility challenges; increasing private sector investment and job creation; and promoting human rights and democratic governance. The Commission also proposes to expand the practical reach of the EU-Africa Compact by involving the African Union and North African countries (which are not in the ACP bloc for historical reasons) more closely in the post-Cotonou framework, while also maintaining the EU's existing Association Agreements with those countries;

- **Caribbean**: The Commission has identified four main priorities (climate change, inclusive growth, human rights and good governance, and human development), with significant attention given to environmental sustainability and disaster management, as well as the tackling of organised crime, tax evasion and money-laundering. Other areas of attention include key economic sectors for the Caribbean including maritime transport, energy, and tourism. Haiti is singled out as being in need of particular support as the only Least Developed Country in the region; and

- **Pacific**: The four main priority areas for the Pacific echo those proposed in the Caribbean compact. The Commission has emphasised the importance of regional cooperation on climate change and sustainable management of natural resources, disaster risk management, fisheries, sustainable energy, maritime sector growth economy and tourism, as well as the promotion of human rights and the need to tackle use of Pacific islands as tax havens.

7.32 Regarding the institutional framework, the Commission proposes that the EU's primary interlocutors would be the Governments of the ACP countries. The overall strategic direction of initiatives undertaken under the new Agreement would continue to be taken by ad hoc summits of the Heads of State and Government of both the EU and the ACP as supported by the EU-ACP Council at Ministerial level, which would agree for example on joint positions within international fora.

7.33 Given the focus on regional cooperation, each Regional Compact will also be managed by its own Ministerial Council, which will have the task of conducting political dialogue and taking the decisions necessary for the implementation of the provisions of each Compact. Each Council will have an Operational Committee, to which it could delegate certain powers for the day-to-day management of the new framework. The

Commission argues that the relevant regional organisations (the African Union, the Caribbean Forum and the Pacific Islands Forum)[136] should have a prominent role in the work of the Compacts, and could seek observer status in their own right or even request accession to the relevant Compact as an independent party.[137]

7.34 The new EU-ACP Agreement would not have a fixed expiry date, unlike Cotonou. Instead, the Commission proposes to allow termination of the treaty at the request of one of the parties through a specific exit procedure, the details of which are to be established as the negotiations progress.

7.35 The exact geographical scope of the new Agreement is yet to be decided. All 78 current parties are expected to engage in the negotiations, but formal decisions on ratification by each of them will be taken at a later stage. It remains to be seen whether Cuba will reconsider its position as the only member of the ACP grouping not to have signed the Cotonou Agreement when any future partnership agreement is presented for signature. The European Commission is also actively encouraging South Sudan to become a signatory to the Cotonou Agreement and any successor arrangement.

7.36 The proposal for the Commission's negotiating objectives will be debated by the Member States in the coming months, with a view to EU Development Ministers agreeing to the opening of formal talks with the ACP countries at their meeting in Brussels on 22 May 2018.

The Government's views

7.37 When the European Commission published its initial recommendations for the successor to the Cotonou Agreement in October 2016, the then Minister of State at the Department for International Development (Lord Bates) said that it presented a "key opportunity to influence the EU to significantly reform the ACP relationship in a way which aligns with UK priorities and interests".[138] He noted at the time that the proposed Regional Compacts were "well-aligned" with UK priorities, but that they should be "sufficiently light touch and efficient in practice" to ensure that flexibility remains to work with different country groupings as necessary.

7.38 In response to the negotiating mandate tabled by the Commission in December 2017, the Minister has set out in more detail the Government's objectives for the EU-ACP negotiations.[139] In his latest Explanatory Memorandum, he states the Government is supportive of the proposal as a first step in securing a modernised partnership between the EU and ACP countries, welcoming in particular:

- the explicit link between the objectives of the new agreement and the implementation of the Sustainable Development Goals (SDGs), an emphasis which the Minister says "reflects UK lobbying throughout preparatory discussions";

136 In Africa, the Commission also foresees the involvement of the continent's Regional Economic Communities, such as ECOWAS and SADC, in the preparation of meetings of the EU-Africa Council.

137 The Commission proposal refers to both "observer" and "enhanced observer" status, but does not clarify the practical difference between the two.

138 Explanatory Memorandum submitted by the Department for International Development (8 December 2016).

139 Explanatory Memorandum submitted by the Department for International Development (Jan 2017).

- the proposed Regional Compacts and decentralised structure of the new agreement, which represents a "welcome shift" to decision-making at regional level within the ACP "which the UK has long advocated";
- the priority areas selected for each geographical region, which the Minister says should not be expanded further as they are already "comprehensive"; and
- the focus on involving the countries of North Africa in the EU-Africa Compact despite the fact they are not members of the ACP bloc, as this will encourage a "more coherent 'Whole of Africa' strategy".

7.39 However, the Minister also cautions that a number of issues will need to be clarified during the fine-tuning of the Commission mandate before negotiations begin with the ACP. These include:

- ensuring that the proposed institutional architecture for each Regional Compact takes into account the "political realities", on the ground, in particular by putting in place "appropriate and responsive governance processes which assign clear roles to different actors, enabling issues to be swiftly addressed in the most appropriate forum, will be critical to ensuring coherence and efficiency";
- establishing the nature and scope of the "simplified procedure" for amending the Regional Compacts by decision of the relevant Ministerial Council, to ensure the Agreement can be adapted to respond to new circumstances despite the fact it will be concluded for an indefinite period;
- clarifying the proposed criteria for countries or international organisations to accede to the EU-ACP Agreement, or to gain "observer" or "enhanced observer" status. The difference between the latter two also remains unclear; and
- agreeing on the parameters of a dispute resolution procedure and the process by which one party can terminate the partnership.

7.40 With respect to the implications of Brexit, the Minister—after reiterating that the EU will remain an important partner for UK development policy—states that the UK will "continue to actively contribute to [the] negotiations" on the successor to the CPA. He also reiterates that the EU "will remain an important development partner for the UK in the future and a key player globally", adding that "it is in our interest to a secure a modernised and fit for purpose post-2020 development framework".

7.41 However, the Minister is regrettably unable to articulate in any more detail the Government's approach as regards UK involvement in the EU-ACP relationship after Brexit. He refers to the ambition to secure "a future partnership with the EU that goes beyond existing third country arrangements, and which builds on the breadth and depth of our shared interests and values", but failed to provide any indication as to the proposed shape such a partnership should take in the context of a possible tripartite relationship between the UK, the EU and the ACP.

7.42 As such, the Minister did not address major outstanding questions on Brexit and the UK-ACP relationship which we have raised with him before, namely:

- the implications of Brexit for the UK's status as a party to the Cotonou Agreement and related Economic Partnership Agreements with the ACP countries, including potential disruption to trade links with Commonwealth nations, and a lack of UK influence over the way in which the UK's contribution to the European Development Fund during the post-Brexit transition;
- the Government's position on the possibility of UK participation in the successor to the Cotonou Agreement as a non-EU, non-ACP country, including the matter of continued contributions to the next European Development Fund; and
- if the UK cannot be, or chooses not to be, a party to the new EU-ACP Agreement, how the Government will seek to structure the future of its relationship with the ACP bilaterally.

7.43 In light of this, we have revisited our predecessors' assessment of the implications of the new EU-ACP partnership for the UK below.

Our assessment

7.44 In January 2017 the previous Committee published its assessment of the European Commission's initial recommendations for the successor to the Cotonou Agreement.[140] It concluded that securing agreement between the EU and the ACP countries on renewing and updating the legal framework for their bilateral relations would be a "major challenge", with the implications for the UK complicated by its withdrawal from the EU.

7.45 However, the Committee remains concerned about the Government's lack of clarity about the impact of Brexit on the UK's trading relationship with ACP countries, and Commonwealth nations in particular, which are covered by the Cotonou Agreement.

7.46 In December 2016 the Department for International Development stated that the Government would use the "opportunity of leaving the EU to free up trade with the world's poorest".[141] In September 2017 the Government also published a "future partnership paper" on foreign policy, defence and international development. This offers a UK-EU partnership which would be "unprecedented in its breadth […] and in the degree of engagement":

> "Such close collaboration would be on a case-by-case basis and be subject to UK's standards on full transparency, accountability, risk and assurance, results and value for money. The UK envisages that these partnerships could facilitate collaboration and alignment on development policy and programming in support of the UN's Sustainable Development Goals and our common interests."[142]

7.47 The Minister referred to this in his latest Explanatory Memorandum. However, there has been no detailed information from the Government about the implications of "a

140 See the previous Committee's Report of 25 January 2017.
141 DfID, "Bilateral Aid Review" (December 2016), p. 6.
142 DExEU, "Foreign policy, defence and development: a future partnership paper" (12 September 2017).

future partnership with the EU that goes beyond existing third country arrangements", and whether it might entail seeking to negotiate partnership agreements trilaterally with the EU and developing countries. Similarly, we have not yet received a meaningful reply from either the Foreign & Commonwealth Office or the Department for International Development with respect to their proposals for the institutional and legal frameworks to facilitate this "unprecedented" cooperation in practice after the UK loses its representation within the EU's institutions.

7.48 There have been some developments which shed further light on the Government's approach to development policy post-Brexit. In June 2017, it announced that it will maintain the effects of duty- and quota-free exports to the UK under the EU's Generalised System of Preferences for developing countries—including, where relevant, for ACP countries—under an independent UK trade policy after Brexit.[143] However, we have not yet received further information on the practical consequences of the Government's pledge to "free up trade with the world's poorest", and in particular the non-tariff barriers derived from EU law that will be targeted to make it easier for developing countries to export to the UK.[144]

7.49 Separately, in December, the Government and the European Commission reached a provisional financial settlement on the UK's withdrawal from the EU. As part of this, the UK has promised to make its contributions into the European Development Funds—the financial instrument to support implementation of the Cotonou Agreement—in line with its agreed contribution schedule until the end of 2020, and to assume liability for a share of any EDF expenditure commitments outstanding at the end of the 2014–2020 budgetary cycle.[145]

7.50 However, important questions remain about implications of Brexit and the UK's relationship with the ACP. These are essentially twofold:

- the immediate consequences of the UK ceasing to be a party to the Cotonou Agreement, its associated Economic Partnership Agreements, and the governance structures of the European Development Fund when it exits the EU; and
- the long-term options for the UK's future relationship with the ACP, either via the next EU-ACP Agreement or via a separate bilateral or multilateral route.

The immediate consequences of Brexit for the UK-ACP partnership

7.51 For many ACP countries, the UK is a major export market. Dozens of them have historical ties to the UK and were included in the EU-ACP Agreement from the 1970s onwards primarily for that reason.[146]

7.52 The UK's withdrawal from the EU means they face considerable uncertainty, and potential economic disruption. Not all ACP countries are covered by the Generalised

143 DIT and DfID, "Government pledges to help improve access to UK markets for world's poorest countries post-Brexit" (24 June 2017).

144 See for example our predecessors' Report of 25 January 2017 on the Government's pledge on Brexit and trade with developing countries.

145 See the Committee's Report of [x] December 2017 on the Article 50 financial settlement for more detail on the UK's post-Brexit contributions to the EU budget and the European Development Funds.

146 The two regions which have finalised their Economic Partnership Agreements with the EU (the Caribbean and the Southern African Development Community) are composed almost exclusively of Commonwealth countries.

System of Preferences the UK intends to carry over, under which preferential market access can be granted unilaterally to developing countries. A number of them—including Ghana, South Africa and all Caribbean ACP states[147]—access the EU's internal market (and therefore the UK) via Economic Partnership Agreements negotiated under the Cotonou umbrella, to which the UK will cease to be a party on its date of EU exit, unless they can be *de facto* carried over with the consent of both the EU and the ACP countries involved. The UK's withdrawal from the EU-ACP Ministerial Council will also require the UK to enhance its existing bilateral avenues for political dialogue and cooperation with ACP countries.

7.53 The Government has committed to maintaining the effects of existing EU trade agreements, to which the UK is party as a Member State.[148] However, how that is to be achieved in practice for all such agreements, including Cotonou and the EPAs, remains unclear. We asked the Minister in November 2017 what progress had been made in securing the continued operation of the Cotonou Agreement between the UK and the ACP signatories after Brexit but before its expiry in December 2020, but we have not received any clarity from him.[149] In his latest letter to us on this subject, dated 7 December 2017, the Minister stated only that the Government is "open to discussing with our European partners how we can best work together on development after we leave the EU".[150]

7.54 There have been reports that the Government is preparing to, effectively, ask the EU if it the UK can stay a *de facto* party to all its international agreements to ensure a degree of continuity at the moment of EU exit (although to do so would also depend on the willingness of the other parties to the agreement). As the Centre for European Reform has suggested, this could require the EU and the UK to agree a form of words in the Withdrawal Agreement to the effect that the UK would be part of the EU for the purposes of its international agreements.[151] The legal and political repercussions of such a solution, both domestically and in the UK's relations with other countries, would need to be carefully considered by Parliament.

7.55 In addition, the EU has explicitly stated that the UK would, in any event, no longer be represented in bodies created by the EU's international agreements during the transition, including—for example—the EU-ACP Council of Ministers.[152]

7.56 We also note that Dr Patrick Gomes, the ACP's Secretary-General, is on record as saying that "in those trade talks [with the UK] we want to be able to make a case, to point out that EPA is already in place and we can have EPA plus" and that the two-year until the UK's withdrawal "should give us enough space to negotiate what we see as a carry-

147 European Commission, "Overview of Economic Partnership Agreements" (accessed 22 January 2018).

148 Department for International Trade, "Trade White Paper: Preparing for our future UK trade policy" (January 2018), p. 8.

149 For example, on 7 December 2017 the Minister wrote: "You asked for more information on the government's plans for our future partnership that goes beyond existing third country arrangements, and which builds on the breadth and depth of our shared interests and values. We are open to discussing with our European partners how we can best work together on development after we leave the EU."

150 Letter from Lord Bates to Sir William Cash (7 December 2017).

151 Centre for European Reform, "Of transition and trade deals" (16 January 2018).

152 European Commission draft negotiating directives on the transitional arrangement (20 December 2017), para. 14.

over."[153] This heavily implies the ACP is not looking for a simple "roll-over" of the existing agreements, but something that is substantively different and provides better market access.

UK participation in the European Development Funds

7.57 When the previous Committee considered the renewal of the EU-ACP Agreement in January 2017, it also expressed concerns about the uncertainty of the UK's status under the European Development Funds, especially in relation to expenditure commitments after March 2019 but within the EU's 2014–2020 budgetary cycle.[154] As noted above, the EDFs provide substantial amounts of funding to both ACP countries with links to the UK—such as South Africa, Nigeria and Ghana—and to the less economically-developed British Overseas Territories (BOTs): Anguilla, the Falkland Islands, Montserrat, Pitcairn, St. Helena and the Turks & Caicos Islands.

7.58 The provisional Brexit financial settlement, as part of which the UK will make its contributions to the EDFs as scheduled in 2019 and 2020 despite its exit from the EU, has removed the most immediate source of uncertainty.[155] In absence of this agreement, we considered it likely that EDF funding for the British Overseas Territories and ACP countries with historical ties to the UK would have been reduced in 2019 and 2020, in the expectation that the UK would compensate with bilateral assistance.

7.59 However, while the provisional financial settlement means that projects that are set to receive UK-funded expenditure commitments from the European Development Funds in 2019 and 2020 will not be disrupted, the governance arrangements to ensure UK oversight of the Fund's activities is not yet clear. Funding decisions are taken by the European Commission, but effectively require the approval of a qualified majority of Member States on the EDF Committee.[156] After the UK exits the EU, despite making continued contributions to the EDF, it will no longer be represented on that Committee unless specific arrangements to that effect are made.

7.60 We therefore welcome the fact that the provisional financial settlement commits the Government and the European Commission to exploring "governance arrangements […] that take into account the continued participation of the UK in the 11th EDF". The Committee asked the Minister for further information on the Government's proposals in this area in December 2017, but has not yet received a reply.[157] At this stage it is unclear whether the Government might retain its voting rights over EDF funding decisions between March 2019 and December 2020, or whether it will only acquire observer status on the EDF Committee.

7.61 In addition to the implications for Government oversight of how UK taxpayer's money is spent, the scope of the UK's representation within the Fund's governance arrangements could also affect the how effectively the interests of the ACP countries with links to the

153 International Press Syndicate, "EU and 79 ACP Countries Plan a 'Modernised Partnership'".

154 See the previous Committee's Report of 25 January 2017.

155 DExEU and European Commission Joint Report of 8 December 2017. See the Committee's Report of 6 December 2017 for more information on the provisional Brexit financial settlement.

156 See Article 8 of the 11th Internal Agreement and Article 14 of Council Regulation 2015/322. If the EDF Committee delivers a negative opinion on a Commission proposal, it has to escalate the matter to the Council (i.e. ministerial level).

157 Ministerial correspondence between the Chairman of the Committee and the Department is available here.

UK, including Commonwealth nations, are pursued within the EDF Committee. The same applies to EU assistance to the six British Overseas Territories which qualify for finance from the European Development Fund.

The future UK-ACP partnership

7.62 In addition to the implications of Brexit during the remaining lifetime of the Cotonou Agreement and the 11th European Development Fund, there is also considerably uncertainty about the future of UK-ACP relations after December 2020.

7.63 Given that negotiations with the ACP countries are set to begin no earlier than June 2018, the UK will no longer be a Member State by the time a final agreement is presented to the Council for signature and conclusion if its EU exit date remains 29 March 2019.[158] As such, it would be a party to the new EU-ACP Agreement unless the Government makes a request to this effect, and this is explicitly agreed by both the EU and the ACP countries.

7.64 In his Explanatory Memorandum, the Minister does not make clear whether it is the Government's intention to seek to become a signatory to the successor to Cotonou. This is extremely disappointing, given that the Committee has pushed for a substantive Government position on this point since January last year. Whether or not it will seek membership of this new agreement is a crucial decision for the UK's post-Brexit relationship with nearly 80 developing countries, including forty-one Commonwealth nations.

7.65 The Committee takes the view that it is in the Government's interest to make clear now whether it wants to be a party to the successor to the Cotonou Agreement. Clarifying this objective explicitly at this stage would give the UK a clear stake in the drafting of the Commission's negotiating mandate and the subsequent talks with the ACP countries. Conversely, if the Government has taken the view that continued participation in the EU-ACP framework beyond Cotonou is not feasible or not in the UK's interest, it can begin to have preliminary talks with the ACP countries directly about the future relationship.

7.66 The Government's current ambiguity risks undermining what leverage the UK does have in the talks as it will not be clear to the other Member States why it should have a meaningful say in an agreement that will not apply to it. If the UK did want to become a party to the new Agreement, it would have to ensure that the new institutional architecture reflected the tripartite nature of the agreement.[159] Similarly, ACP countries may not see the need to dedicate scarce negotiating resources to a parallel set of discussions with the UK, unless it is clear that a new bilateral arrangement with the UK is necessary because it has explicitly ruled out being a party to the new EU-ACP Agreement.

Continued UK involvement in the European Development Funds

7.67 The Government has already suggested there could be continued "collaboration and alignment on development policy and programming" with the EU after Brexit. It

158 The date of EU exit could be changed by an extension of the Article 50 negotiating period, or by fixing a different date in the Withdrawal Agreement.

159 For example, the Cotonou Agreement limits participation in its Council of Ministers to "the members of the Council of the European Union and members of the Commission of the European Communities and […] a member of the government of each ACP State". Similarly, access to the dispute settlement mechanism under the CPA is limited to "Member States or the Community" or "one or more ACP States".

could be that the Government envisages that such alignment could be achieved through contributions to the European Development Fund after 2020 in return for a degree of influence over how the Fund.

7.68 However, the problem of institutional representation arises here as well if the UK were to seek continued participation in the European Development Funds. The Government would have to engage in negotiations with the EU-27 on the new institutional framework for the next EDF to allow for the UK to exercise oversight as a non-EU contributor. If that is the Government's preferred objective, it should hopefully be able to build on the negotiations on UK representation within the current EDF as part of the transitional arrangement until the end of 2020 (see paragraphs 7.59 to 7.61 above).

7.69 The issue of institutional representation would become more complicated if the next EDF is "budgetised", as the Commission has previously proposed. This would end the system of separate contributions by Member States into the European Development Funds, and instead fund development assistance for ACP countries via the general EU budget (in the same way as assistance for non-ACP countries). If the EDF was folded into the EU's normal budgetary structures, there would be less scope for the remaining Member States to accommodate the UK as a non-EU country within the Fund. Rather than having the flexibility of a separate agreement, the provisions of the Treaties on representation and voting rights would apply.

7.70 The Committee will therefore pay close attention to the European Commission's upcoming proposals for the next Multiannual Financial Framework, and any push for changes to the way in which the European Development Funds are financed. If the Government were to state explicitly that it will not seek to become a contributor to the post-2020 EDF, we will be able to readjust our conclusions on this point. There would also be need a for continued scrutiny of some sort of the EU's development policy, given that the UK would effectively remain aligned with it. We will therefore follow the negotiations on the Government's representation in the EDF during the post-Brexit transitional period with great interest.

Previous Committee Reports

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

8 Enhancing law enforcement cooperation and border control: strengthening the Schengen Information System (38426) (38427) (38428)

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs, the Justice Committees and the Committee on Exiting the European Union
Document details	(a) Proposal for a Regulation on the use of the Schengen Information System for the return of illegally staying third country nationals (b) Proposal for a Regulation on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks (c) Proposal for a Regulation on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters
Legal base	(a) Article 79(2)(c) TFEU, ordinary legislative procedure, QMV; (b) Articles 77(2)(b) and (d) and 79(2)(c) TFEU, ordinary legislative procedure, QMV; (c) Articles 82(1)(d), 85(1), 87(2)(a) and 88(2)(a) TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Numbers	(a) (38426), 15812/16, COM(16) 881; (b) (38427), 15813/16, COM(16) 882; (c) (38428), 15814/16, COM(16) 883

Summary and Committee's conclusions

8.1 At the end of 2016, the Commission presented a package of three proposed Regulations to improve the functioning of the Schengen Information System—SIS II—and strengthen border control and counter-terrorism efforts across the EU. The proposals are intended to close information gaps and enhance the exchange of information on terrorism, cross-border crime and irregular migration so that "in the future, no critical information should ever be lost on potential terrorist suspects or irregular migrants crossing our

external borders."[160] Three Regulations are needed to reflect differing degrees of Member State participation in Schengen but the Commission says they have been drafted to "work seamlessly together" to ensure the "comprehensive operation and use" of SIS II.[161] For this reason, we are holding all three proposals under scrutiny.

8.2 Our main focus of scrutiny is the proposed police cooperation Regulation—document (c)—as this is the only measure in which the Government has decided to participate. Announcing the decision last July, the Minister for Policing and the Fire Service (Mr Nick Hurd) told the House:

> "The proposed Police Cooperation Regulation will replace the legislation that currently governs SIS II's use for that purpose. The UK has participated in this aspect of SIS II since April 2015. Our law enforcement agencies benefit from this, for example by being able to detain at the border people who are wanted under European Arrest Warrants and to obtain intelligence from police forces across the EU on suspected criminals and security risks. The draft Regulation contains a number of proposals that would update SIS II's capabilities, for example allowing it to store a wider range of biometric data and permitting alerts to be created to protect children who are at risk of going missing. There are some changes we will seek, in particular to maintain Member States' control over when alerts are created, but the Government believes we will be in a better position to do this by not opting out and remaining full participants in the negotiation."[162]

8.3 The Minister made clear that the decision to continue to participate in the proposed police cooperation Regulation would "have no implications for our general opt out from the internal border-free zone established by Schengen".[163]

8.4 The SIS II package is intended to:

- make SIS II more secure and more accessible to front-line officers;
- align data protection requirements with EU data protection laws and ensure full respect for fundamental rights, including the right to effective remedies;
- improve information sharing and cooperation amongst Member States and support counter-terrorism efforts; and
- support law enforcement authorities in obtaining evidence for criminal proceedings by extending the range of objects on which alerts can be created.

8.5 The proposed police cooperation Regulation would:

- require Member States to create alerts on individuals or objects connected with terrorist activity;
- introduce a new "inquiry check" to question terrorist and other criminal suspects;

160 See the European Commission's press release on the proposed Regulations, issued on 21 December 2016, as well as its Fact Sheet and its infographic.
161 See p.3 of document (c).
162 See the Minister's Written Ministerial Statement of 20 July 2017, Hansard, 64WS.
163 Ibid.

- increase the range of biometric information held in SIS II and the ways in which it can be used to verify or establish identity (SIS II currently contains fingerprints and photographs—the proposal would add palm prints, facial images and, for limited purposes, DNA profiles if necessary to identify a missing person);

- establish a new category of alert on "unknown suspects or wanted persons" based on palm or fingerprints recovered from a crime scene involving the commission of a serious criminal or terrorist offence; and

- enable Member States to issue pre-emptive alerts for children considered to be at high risk of parental abduction (so authorities can act before a child is reported missing).

8.6 The Commission does not expect the SIS II package to take effect until around 2021. Negotiations are proceeding at a steady pace. The Council and the European Parliament each agreed their negotiating positions on the SIS II package in November 2017 and intend to reach a First Reading agreement.

8.7 The Minister told us in December that the Council general approach on the proposed police cooperation Regulation was "broadly acceptable". He highlighted changes which would enable Member States to decide *not* to create an alert on individuals or objects connected with terrorist activity if to do so would be "likely to obstruct official or legal inquiries, investigations or procedures related to public or national security" as well as more flexible deadlines for providing follow-up information in response to a "hit" in SIS II ("*preferably* not later than 12 hours").

8.8 The Government nonetheless decided to vote against the Council general approach as it considered that:

- the conditions determining when an alert created for one purpose could be used for a different purpose were "overly restrictive"—a requirement for the prior authorisation of the Member State creating the alert in all circumstances (even in the event of an imminent threat) could put public security at risk; and

- clearer wording was needed to ensure that an alert entered in SIS II requesting "inquiry checks" (used to elicit information through questioning a suspect) and "specific checks" (involving searches) could only be carried out if permitted by national law.

8.9 As our earlier Reports have made clear, the Government's decision to participate in the proposed police cooperation Regulation, even though the envisaged technical and operational changes to SIS II are not expected to take effect until 2021, only makes sense if it intends to secure some form of continued participation in SIS II post-exit. We have repeatedly asked the Minister to confirm that this is the case, not least because under existing EU rules governing SIS II, only EU Member States are entitled to participate and data processed in SIS II cannot be transferred or made available to third countries (see Article 62 of the proposed police cooperation Regulation). Despite this, four non-EU countries—Iceland, Norway, Switzerland and Liechtenstein—do participate in SIS II by virtue of agreements concluded with the EU associating them with the implementation, application and development of the Schengen rule book.

8.10 In July 2017 the Minister told us:

> "You will be aware that our current participation in SIS II is based on our membership of the EU and that the only non-EU countries that also participate are members of the Schengen border-free zone. The UK will not join the Schengen border-free zone but we will be in a unique position as a former EU Member State and we will seek a relationship with the EU that reflects that unique position. We are exploring options for cooperation arrangements once the UK has left the EU but it would be wrong to set out unilateral positions on specific measures in advance of negotiations."[164]

8.11 In December the Minister again said that it was "too early to say what future cooperation we may have in relation to individual measures" but added that it was "in the clear interest of both the UK and European partners that we find a way to continue to cooperate and exchange this kind of information".[165]

8.12 Given the likelihood that the Government will wish to seek some form of participation in the police cooperation elements of SIS II post-exit, we asked the Minister:

- whether it would be necessary to amend the proposed police cooperation Regulation (which prohibits third country access to SIS II) to accommodate any agreement on UK access to SIS II data post-Brexit; or
- whether the overarching agreement the Government intends to seek on security, law enforcement and criminal justice cooperation would establish bespoke structures and procedures associating the UK with parts of the EU's justice and home affairs rule book without requiring changes to third country provisions in EU secondary legislation (see the 'Background' section for further details); and
- whether in the absence of such an agreement with the EU, it would be possible for the UK to obtain the same information contained in SIS II alerts from Member States on a bilateral basis.

8.13 Our earlier Report explored possible models for UK participation in SIS II post-Brexit, drawing on a range of different EU/third county agreements. We concluded that there was a wide spectrum of possible outcomes on the role and jurisdiction of the Court of Justice and invited the Minister to indicate which the Government would prefer (or rule out) in any future agreement between the EU and the UK on security, law enforcement and criminal justice cooperation.

8.14 We noted that the proposed police cooperation Regulation includes an introductory recital on the EU Charter of Fundamental Rights.[166] The Minister indicated that "matters such as complying with the EU Charter on Fundamental Rights" would need to be addressed during the UK's exit negotiations.[167] We asked him to explain how, since clause 5(4) of the EU (Withdrawal) Bill envisages that the Charter will not form part of domestic law "on or after exit day". We also asked whether he anticipated that it would be necessary to identify equivalent Charter-type protections in UK law to secure continued UK participation in SIS II and other similar EU justice and home affairs measures post-exit.

164 See the Minister's letter of 20 July 2017 to the Chair of the European Scrutiny Committee.
165 See the Minister's letter of 1 December 2017 to the Chair of the European Scrutiny Committee.
166 See recital (52) of the Commission's original proposal.
167 See the Minister's letter of 1 December 2017 to the Chair of the European Scrutiny Committee.

8.15 In his response, the Minister sets out the Government's view on the main elements of the negotiating mandate agreed by the European Parliament. He makes clear that the Government values the capability provided by SIS II but considers that there would be "no appetite" amongst Member States and the Commission to lift the ban on sharing SIS II alerts with third countries. Retaining this capability will form part of negotiations on a future security partnership with the EU. He reiterates the Government's intention to agree "a new strategic treaty" with the EU on security, law enforcement and criminal justice cooperation and to "bring an end to the direct jurisdiction of the Court of Justice". Whilst the Government is "not seeking to recreate any other cooperation model" and wants "a bespoke approach which works for the UK", it will "take into account how the range of existing models for cooperation between the EU and third countries operate".

8.16 The Minister says that the reference to the EU Charter in the recital to the proposed police cooperation Regulation is "declaratory in nature" and "does not in itself create any obligations towards the Charter for Member States or other participating countries". He explains that the Government does not intend the Charter itself to form part of the body of EU law retained under the EU (Withdrawal) Bill but adds that, "insofar as the rights and principles underpinning the Charter exist elsewhere in directly applicable EU law or EU law which has been implemented in domestic law, that law will be preserved and converted by the Bill". The Government "does not intend that the substantive rights recognized in the Charter of Fundamental Rights will be weakened".

8.17 **We thank the Minister for his latest update.**

The UK's future relationship with SIS II

8.18 **The Minister tells us that the Government wishes to retain the capability provided by SIS II but has not sought to challenge the "long-established principle" that third countries cannot access alerts entered in SIS II as there would be "no appetite" amongst Member States and the Commission to change it. We appreciate the difficulties, but are not clear why they will be any easier to resolve when the Government begins negotiations on a new strategic treaty on security, law enforcement and criminal justice to take effect after the UK has left the EU.**

8.19 **Based on the limited information available to us, it seems likely that this treaty will seek to establish bespoke structures and procedures associating the UK with parts of the EU's justice and home affairs rule book—including SIS II—without requiring changes to third country provisions in EU secondary legislation (see the 'Background' section for further details). Whilst we can see some merit in this approach, we note that there is no precedent for a non-EU third country to participate in SIS II unless it also participates in the Schengen free movement area and the Minister has already told us that "the UK will not join the Schengen border-free zone". SIS II was conceived as a tool to compensate for the removal of internal border checks within the Schengen area. The Government will need to demonstrate why an exception should be made to allow the UK to continue to participate in SIS II post-exit once it is outside the EU and Schengen and no longer bound by EU rules on free movement.**

The EU Charter of Fundamental Rights

8.20 **We welcome the Minister's assurance that the Government does not intend there to be any weakening of the substantive rights recognised in the EU Charter of Fundamental Rights following the UK's withdrawal from the EU. We note, however that Article 8 of the EU Charter on the protection of personal data "has no direct equivalent in the European Convention on Human Rights".[168] This may make it difficult to demonstrate that the UK will be able to ensure a standard of protection essentially equivalent to that guaranteed within the EU and may create scope for future divergence in data protection laws which could have implications for UK participation in EU information-sharing systems such as SIS II post-exit.**

The implications of no deal

8.21 **Given the possibility that the UK may not be able to secure an agreement with the EU encompassing SIS II, it is disappointing that the Minister has not told us whether the UK would be able to obtain the information contained in SIS II alerts on a bilateral basis from individual Member States. We ask him to do so and to explain what processes the UK would need to follow to obtain this information.**

The general approach on the proposed police cooperation Regulation

8.22 **The general approach agreed by the Council would extend the existing category of alerts on missing persons to include alerts on "vulnerable persons who need to be prevented from travelling for their own protection". We ask the Minister whether he supports this change and how he envisages it being applied.**

Implementation of the SIS II package

8.23 **The European Parliament has proposed that the SIS II package should take effect one year after the proposed Regulations have been adopted (the Commission proposals leave the date to be determined at a later stage). Now that trilogue negotiations are underway, we ask the Minister when he expects the proposals to be formally adopted, whether he judges that they are likely to take effect during any transitional/implementation period agreed with the EU and how this would affect the Government's preparations for implementing the legislation.**

Progress reports

8.24 **In addition to the information requested, we look forward to receiving updates on the progress being made in trilogue negotiations with the EP on the overall SIS II package and on the Government's outstanding concerns on the proposed police cooperation Regulation—in particular, the provisions on proportionality in Article 21 (which determine how much discretion a Member State has to create an alert on a terrorist suspect), on "specific checks" and "inquiry checks" in Article 37, and on purpose limitation in Article 53. Meanwhile, the proposed Regulations remain under scrutiny. We draw this chapter to the attention of the Home Affairs, the Justice Committees and the Committee on Exiting the European Union.**

168 See the Government's Right By Right Analysis of the EU Charter of Fundamental Rights.

Full details of the documents

(a) Proposal for a Regulation on the use of the Schengen Information System for the return of illegally staying third country nationals: (38426), 15812/16, COM(16) 881; (b) Proposal for a Regulation on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, amending Regulation (EU) No 515/2014 and repealing Regulation (EC) No 1987/2006: (38427), 15813/16, COM(16) 882; (c) Proposal for a Regulation on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending Regulation (EU) No 515/2014 and repealing Regulation (EC) No 1986/2006, Council Decision 2007/533/JHA and Commission Decision 2010/261/EU: (38428), 15814/16, COM(16) 883.

Background

Documents (a) and (b)

8.25 Document (a)—the proposed returns Regulation—would create a new alert category for third country (non-EEA) nationals who have been issued with a return decision under the procedures set out in the EU Return Directive. The new alert is intended to increase the detection of illegally staying third country nationals and support EU-wide enforcement of return decisions. The Government decided not to opt into the proposed Regulation since it would also have to opt into the EU Return Directive and considered that this would "pose a risk to national control over how we remove people with no right to be here, and would place our returns process under the jurisdiction of the Court of Justice of the European Union".[169]

8.26 Document (b)—the proposed border checks Regulation—would require Member States to enter an alert in SIS II whenever they issue a Schengen-wide entry ban under the EU Return Directive. The Commission believes that increasing the visibility of entry bans should make their enforcement more effective at the EU's external borders. The UK is not entitled to participate in this proposal as it builds wholly on parts of the Schengen rule book on border controls which do not apply to the UK.

Models for UK participation in SIS II post-exit

8.27 Iceland, Norway, Switzerland and Liechtenstein are the only third countries that participate in SIS II. Their agreements with the EU identify the Schengen rules that these non-EU Schengen countries are required to implement and apply and establish special structures and procedures to enable them to keep pace with changes to the Schengen rule book.[170] The agreements operate in a way that avoids the need to make extensive changes to provisions in EU secondary legislation limiting participation to EU Member States.

169 See the Minister's letter of 20 July 2017 to the Chair of the European Scrutiny Committee.

170 For Iceland and Norway, see the Agreement associating them with the implementation, application and development of the Schengen *acquis* and Council Decision 1999/437/EC. For Switzerland, see the Agreement associating Switzerland with the implementation, application and development of the Schengen *acquis* and Council Decision 2008/146/EC. For Liechtenstein, see the Protocol on Liechtenstein's accession to the EU-Switzerland Agreement.

8.28 The agreements do not give the Court of Justice direct jurisdiction to resolve any disputes concerning their interpretation or application. The Court nevertheless has an important indirect role. The agreements include provisions which seek to ensure "as uniform an application and interpretation as possible" of common Schengen rules (based on the regular mutual transmission of relevant case law) and to avert any "substantial difference" in the case law of the Court of Justice and the courts of the non-EU Schengen countries. A failure to do so can lead to the termination of the agreements.

8.29 There are other models in which the Court of Justice has a more direct role for matters involving a high degree of regulatory approximation. For example, dispute settlement procedures in EU agreements with Ukraine, Georgia and Moldova involve an arbitration panel which is required to seek a ruling from the Court of Justice on questions concerning the interpretation of relevant EU law provisions. In these cases, the Court's ruling is binding on the arbitration panel and the ruling of the arbitration panel must be unconditionally accepted by the Parties.[171] These examples illustrate the wide spectrum of possible outcomes on the role and jurisdiction of the Court of Justice.

The Minister's letter of 12 January 2018

8.30 In our earlier Report agreed on 13 December 2017, we noted that a Council press release issued on 8 November stated that "COREPER endorsed, on behalf of the Council, a mandate for negotiations" with the European Parliament on the SIS II package. We asked the Minister whether the Council itself had agreed a general approach on the proposals. He confirms that this was the case.

8.31 We suggested that the Minister's reluctance to confirm that the Government intended to seek some form of participation in the police cooperation elements of SIS II post-Brexit could no longer be justified, given the imminence of negotiations on the framework for future UK/EU relations. He responds:

> "The Government has set out its intended approach to post-Brexit cooperation on security, law enforcement and criminal justice in the *Security, Law Enforcement and Criminal Justice—A Future Partnership* paper you refer to in your report. We are proposing a new strategic treaty that provides a comprehensive framework for future security, law enforcement and criminal justice co-operation. This would complement the extensive and mature bi-lateral relationships that we already have and promote security across Europe.
>
> "As the paper also sets out, we value the capability we currently have to share law enforcement and security alerts with EU countries. That capability is currently provided by SIS II. How we retain the capability though will be a matter for negotiations on our future security partnership with the EU."

8.32 We expressed concern at the Government's apparent lack of engagement on the provision of the proposed police cooperation Regulation prohibiting third country access to SIS II data. We reiterated our request to the Minister to explain whether changes to this provision would be necessary to accommodate any agreement on UK access to SIS II data post-Brexit. The Minister tells us:

171 See Articles 402–3 of the Association Agreement with Ukraine, Articles 321–2 of the Association Agreement with Moldova and Articles 266–7 of the Association Agreement with Georgia.

> "In the negotiations on the current SIS II legislation we have not sought to challenge the ban on sharing alerts with third countries because that prohibition is a long-established principle of SIS II and there would have been no appetite from Member States and the Commission to change it. Negotiations on our future cooperation on security, law enforcement and criminal justice will of course need to take existing EU legislation into consideration."

8.33 The Minister confirms that "leaving the EU will mean bringing an end to the direct jurisdiction of the CJEU" and adds:

> "As I have said previously, there is significant precedent for the EU to cooperate with third countries, including in fields closely aligned to areas of EU law, but no precedent for a third country to submit to the jurisdiction of the CJEU. The UK and the EU therefore need to agree on how our new security partnership can be monitored and implemented to the satisfaction of both sides, and how any disputes which arise can be resolved. Many other countries have agreements with the EU on both economic and security matters without accepting the direct jurisdiction of the CJEU, for example the EU's agreement with Norway and Iceland on surrender that I referred to in my previous letter.
>
> "You cite the example of the Association Agreements with Georgia, Moldova and Ukraine and ask which approach to the role and jurisdiction of the CJEU the Government would prefer. The Government has already stated that we are not seeking to recreate any other cooperation model as we want a bespoke approach which works for the UK. Nevertheless, we will of course take into account how the range of existing models for cooperation between the EU and third countries operate."

8.34 We drew the Minister's attention to an introductory recital to the proposed police cooperation Regulation which states that it respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union"[172] and asked how the Government intended to address the Charter during the UK's exit negotiations, given that clause 5(4) of the EU (Withdrawal) Bill envisages that the Charter will not form part of domestic law "on or after exit day". The Minister responds:

> "This recital is declaratory in nature and is not linked to any obligation contained within the proposed legislation. Rather it reflects the Commission's fundamental rights analysis as set on page 11 of the explanatory memorandum accompanying the proposal. The Government agrees that this proposal is compatible with the fundamental rights recognised in the Charter. The recital does not in itself create any obligations towards the Charter for Member States or other participating countries.
>
> "The European Union (Withdrawal) Bill will preserve domestic laws which implement EU law and convert directly applicable EU law into UK law. As the Charter was not intended to create new rights, but rather to reaffirm rights which already existed in EU law, the Government does not intend

172 See recital (52) of the Commission's original proposal.

> the Charter itself to form part of the body of EU law retained under the Bill after we leave the EU. However, insofar as the rights and principles underpinning the Charter exist elsewhere in directly applicable EU law or EU law which has been implemented in domestic law, that law will be preserved and converted by the Bill. Any provisions in the withdrawal agreement, and the treaty on security, law enforcement and criminal justice cooperation that we aim to agree with the EU, will be designed to enable the agreed relationship to operate effectively.
>
> "The Government has been clear that it does not intend that the substantive rights recognized in the Charter of Fundamental Rights will be weakened. Those rights will continue to be protected in a number of ways as set out in the 'Charter of Fundamental Rights of the EU Right by Right Analysis', published by the Government on 5 December 2017.[173]
>
> "The UK has a long tradition of commitment to human rights which will not change after our withdrawal from the European Union."

8.35 Finally, the Minister tells us that the European Parliament (EP) has put forward a large number of changes to the proposed police cooperation Regulation. Whilst some are "simply drafting improvements that we could accept", the Minister identifies others that are of greater concern:

- EP support for the Commission's proposal to make it compulsory to create alerts in counter-terrorist cases—"this is something we oppose and which we successfully argued should be changed in the Council text. It should be for Member States to decide whether an alert would assist in a particular case";
- an EP amendment that would make it compulsory for Member States to inform Europol whenever they create an alert in a counter-terrorist case—"Europol is a very important law enforcement tool, but as with SIS II we think it should be for Member States to decide when they think its involvement in a case would be useful";
- an EP proposal that pre-emptive alerts for children in danger of going missing should always be created by a judicial authority—"We believe it will sometimes be necessary for the police to create these alerts directly, as the text agreed by the Council allows"; and
- an EP proposal to transfer certain functions around the implementation of the budget for SIS II's communications infrastructure from the Commission to the EU's JHA IT Agency, eu-LISA—"We do not think this would be appropriate without a proper assessment of the impact of this change on eu-LISA".

Previous Committee Reports

Sixth Report HC 301–vi (2017–19), chapter 1 (13 December 2017), First Report HC 301–i (2017–19), chapter 1 (13 November 2017) and Thirtieth Report HC 71–xxviii (2016–17), chapter 1 (1 February 2017).

173 See the Government's Right by Right Analysis of the EU Charter published on 5 December 2017.

9 Carcinogens and Mutagens Directive (Phase I and Phase II)

Committee's assessment	Politically important
Committee's decision	(a) Cleared from scrutiny (decision reported on 13 November 2017); (b) Not cleared from scrutiny; drawn to the attention of the Health and the Work & Pensions Committees
Document details	(a) Proposal for a Directive amending Directive 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens or mutagens at work (Phase I); (b) Proposal for Directive amending Directive 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens or mutagens at work (Phase II)
Legal base	(a) and (b) Article 153(2) TFEU; ordinary legislative procedure; QMV
Department	Health and Safety Executive
Document Numbers	(a) (37758), 8962/16 + ADDs 1–2, COM(16) 248; (b) (38447), 5251/17 + ADDs 1–3, COM(17) 11

Summary and Committee's conclusions

9.1 The EU has been considering two separate amendments to its Carcinogens and Mutagens Directive (CMD), which aims to prevent dangerous levels of exposure to carcinogenic substances in the workplace.[174] The proposals are referred to as "Phase I" and "Phase II" respectively.[175] The Committee set out the substance of both amendments in more detail in the Reports of April and November 2017.[176]

9.2 The Minister of State for Disabled People, Health and Work (Sarah Newton) wrote to the Committee on 18 January 2018 with information on the state of both proposals.[177] She explained that the "Phase I" amendment has now been adopted by the Parliament and the Council, and will require EU Member States to enforce lower exposure limits by workers to Chromium (IV) and hardwood dust. The Government abstained in the vote on the legislation, because of concerns that the lower limits were not "supported by evidence, including impact assessment data"[178] and that they were not "practically achievable using currently available control measures".[179]

9.3 With respect to the Phase II proposal, the Member States in June 2017 agreed their position (which the Government also did not support, due to the lack of an evaluation for the extension of the CMD to a new group of substances called Polycyclic Aromatic

174 Directive 2004/37/EC, as amended.
175 The European Commission is expected to table further proposals to amend the Carcinogens and Mutagens Directive later this year.
176 See the Committee's Reports of 25 April and 13 November 2017 respectively.
177 See letters from Sarah Newton to Sir William Cash on the Phase I and Phase II proposals (17 January 2018).
178 Idem.
179 Letter by Penny Mordaunt to the Chair of the European Scrutiny Committee (15 August 2017).

Hydrocarbons).[180] Trilogue negotiations on Phase II are expected to begin after the relevant committee of the European Parliament has established its position on the proposal at the end of February 2018.

9.4 In response to the Committee's questions[181] about the possibility that the amendments to the Carcinogens and Mutagens Directive might have to be transposed into UK law as part of the post-Brexit transitional period, the Minister confirms that the Government is "proceeding on the basis that amendments to the CMD could be implemented despite their likely dates of application falling after March 2019 but stand ready to react swiftly to developments as they occur".

9.5 **We thank the Minister for her latest update on the amendments to the CMD. The Committee retains the Phase II proposal under scrutiny in anticipation of further information from the Minister about the position taken by the responsible committee in the European Parliament. We also draw these developments to the attention of the Health Committee and the Work and Pensions Committee.**

9.6 **The Committee has serious concerns about the legal and political implications of an arrangement which sees the UK bound by new EU law adopted after the Government ceases to be represented in the Council and other EU bodies. We will be taking evidence from the Government on this in the near future.**

Full details of the documents

(a) Proposal for a Directive amending Directive 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens or mutagens at work (Phase I): (37758), 8962/16 + ADDs 1–2, COM(16) 248; (b) Proposal for Directive amending Directive 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens or mutagens at work (Phase II): (38447), 5251/17 + ADDs 1–3, COM(17) 11.

Background

9.7 Cancer is the leading cause of work-related deaths in the EU, accounting for 53% of the total. In the UK alone, around 3,500 people die each year from occupational cancer caused by exposure to carcinogenic substances, principally through inhalation. To reduce these numbers, the EU has legislation in place to prevent dangerous levels of exposure to such substances in the form of the Carcinogens and Mutagens Directive (CMD).[182]

9.8 The European Commission proposed two sets of amendments to the Directive in May 2016 (referred to as "Phase I") and January 2017 ("Phase II") respectively, to add more carcinogens to the list of controlled substances. The Committee set out the details of the proposals, including the substances it would restrict, in the Reports of 25 April and 13 November 2017.[183]

180 PAHs consists of a group of over a hundred substances released from burning coal, oil, wood, general waste and other organic materials.

181 First Report HC 301–i (2017–19), chapter 29 (13 November 2017).

182 Directive 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens or mutagens at work.

183 See the Committee's Reports of 25 April and 13 November 2017 respectively.

9.9 The Government was broadly supportive of both set of amendments as originally proposed by the European Commission, and the previous Committee granted scrutiny waivers for both proposals. These allowed the previous Minister to support General Approaches in the Council in October 2016 and June 2017 on the condition that they were substantially the same as the original proposals.

9.10 The final text of the Phase I proposal was agreed between the Member States and the European Parliament in summer last year, including a further lowering of the original proposed exposure limit values for Chromium (VI) compounds[184] and hardwood dust, and an extension of the existing requirement for employers to conduct health surveillance of their workers. These changes were not supported by the UK Government.[185] The Committee cleared the Phase I proposal from scrutiny in November, given that that informal agreement has already been reached between the Council and the Parliament. We asked the Minister to inform us when the Directive was formally adopted by the Council, and to confirm whether the UK abstained or voted against.

9.11 On the Phase II set of amendments, the Committee in November took note of the Council's decision of June 2017 to recommend extending the scope of the Directive to a new category of substances called Polycyclic Aromatic Hydrocarbons (PAHs),[186] in absence of an evaluation of the impact of such a change (on which grounds the UK abstained from supporting the Council's general approach). We asked the Minister to keep us informed of the European Parliament's eventual position on the proposal.

9.12 We also reiterated our view that it appeared likely any EU legislation, including the proposals to amend the CMD, would have to be applied in the UK if it took effect during the post-Brexit transitional period.[187]

Developments since November 2017

9.13 On 17 January 2018, the Minister of State for Disabled People, Health and Work (Sarah Newton) wrote with further information on the state of play on both proposals.[188]

The Phase I proposal

9.14 The Minister has confirmed that the Phase I Directive, including the new exposure limits requested by MEPs, was formally adopted by the European Parliament in October 2017 and the Council on 7 December 2017. The UK abstained from supporting the legislation, along with Croatia and Poland.[189]

184 See the Health & Safety Executive's leaflet on "Chromium and you" for more information on Chromium (IV). It is used in many industrial processes, including the production, welding and cutting of stainless steel.

185 The Minister writes that the UK voiced concerns during the negotiations about the introduction of lower limit values, in particular, for process generated Chromium (VI) during welding of stainless steel and for hardwood dust generated by the wood working and building industry. The Government obtained advice from industry that the new limits are not "practically achievable using currently available control measures".

186 The Council's general approach is contained in Council document 9926/17. PAHs consists of a group of over a hundred substances released from burning coal, oil, wood, general waste and other organic materials.

187 In absence of a detailed proposal for the transition period by the Government, the remaining Member States reiterated in December 2017 that a "standstill" transitional arrangement which kept the UK in the Single Market would require the continued application of EU law, including new legislation which takes effect only during the transition period.

188 See letters from Sarah Newton to Sir William Cash on the Phase I and Phase II proposals (17 January 2018).

189 See Council document 15529/17.

9.15 The Directive was published in the Official Journal on 27 December 2017.[190] Member States will have until January 2020 to transpose it into national legislation, except for the dates the new exposure limits take effect. These will be deferred during an implementation period, until January 2023 (for hardwood dust) and January 2025 (for Chromium (IV)).

The Phase II proposal

9.16 The EU Member States in the Council adopted their position on the Phase II proposal in June 2017. In her latest letter, the Minister confirmed that that there has been no request from the Council to the Commission for an impact assessment on its amendment to extend the CMD to Polycyclic Aromatic Hydrocarbons (PAHs). She added that the impact of this element of the Council's approach in the UK is nevertheless likely to be low "as exposure of a substance via the skin already needs to be considered as part of the risk assessment required by UK legislation".

9.17 We note that the European Parliament's Employment & Social Affairs Committee will consider its position on the Phase II proposal at the end of February 2018.

9.18 The Minister explained that most of the suggested amendments put forward by MEPs are not of concern to the UK, except for the proposal to establish an exposure limit for Diesel Exhaust Emissions (DEEs). The European Commission did not include this in its proposal due to "practical difficulties with measuring techniques and concerns about the legal clarity of a definition". She added that Government would not support inclusion of an exposure limit for DEEs, if pushed for by the Parliament, unless the Commission could provide assurance that these technical obstacles have been overcome.

Implications of Brexit

9.19 The Committee has consistently taken the position that, until the Government confirms otherwise, the post-Brexit transitional period it seeks was likely to require the UK to continue applying EU law as if it were a Member State. The other EU countries have recently confirmed that is the basis on which they are willing to negotiate a transition, and that it would include an obligation for the UK to apply EU law which takes effect only during the transition (i.e. after the UK ceases to be a Member State).

9.20 In November 2017, we raised this matter with the Health & Safety Executive in the context of the amendments to the CMD, given that such an arrangement would require these new Directives to be transposed into UK law if they take effect during the transition.[191]

9.21 In response, the Minister has confirmed the Government's intention to negotiate a post-Brexit transitional arrangement which ensures that "businesses and public services would only have to plan for one set of changes in the relationship between the UK and the EU". However, the Government appears unwilling to explicitly concede, at this stage, that the UK would have to observe the primacy of EU law in a transitional period. The Minister says:

> "Work is underway to agree the detail of how [the transition] will operate in practice, including the application of EU legislation during such a period.

190 Directive (EU) 2017/2398.
191 First Report HC 301–i (2017–19), chapter 29 (13 November 2017).

> We are, therefore, proceeding on the basis that amendments to the CMD could be implemented despite their likely dates of application falling after March 2019 but stand ready to react swiftly to developments as they occur."

Previous Committee Reports

For Phase I, see: (37758), 8962/16: HC 71–iv Sixth Report (2016–17), chapter 6 (15 June 2016); Thirteenth Report HC 71–xi (2016–17), chapter 6 (12 October 2016); and First Report HC 301–i (2017–19), chapter 29 (13 November 2017). For Phase II, see: (38447), 5251/17: Thirty-first Report HC 71–xxix (2016–17), chapter 9 (8 February 2017); Fortieth Report HC 71–xxxvii (2016–17), chapter 16 (25 April 2017); and First Report HC 301–i (2017–19), chapter 29 (13 November 2017).

10 European Defence Industrial Development Programme (EDIDP)

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Defence Committee
Document details	Proposal for a Regulation establishing the European Defence Industrial Development.
Legal base	Article 173 TFEU; ordinary legislative procedure; QMV
Department	Ministry of Defence
Document Number	(38831), 10589/17 + ADD1, COM(17) 294

Summary and Committee's conclusions

10.1 In June 2017, the European Commission has proposed the creation of a European Defence Industrial Development Programme (EDIDP), which would co-fund from the EU budget the development of military technology. It will have a budget of €500 million (£439 million)[192] in 2019–20, with the Programme's future after that to be decided as part of the negotiations on the EU's next long-term budget. The EDIDP, which is due to go live in January 2019, is part of the new European Defence Fund.[193]

10.2 The EU Member States in the Council reached agreement on the legal text establishing the EDIDP in December 2017. Crucially, from the UK's, perspective, the Council's position on "eligible entities" for funding from the Programme would enable the UK defence industry to participate in EDIDP projects after Brexit, although it would be precluded from receiving funding directly except through subsidiaries established within the EU itself (see paragraphs 10.24 to 10.27 for more information). The European Parliament is expected to adopt its position on the proposal in February or March 2018, after trilogues will begin to agree the final legal text.

10.3 The Government supported the Council's general approach on 12 December 2017, overriding the scrutiny reserve which the Minister for Defence Procurement (Guto Bebb) confirmed by letter of 23 January 2018.[194] He apologised for the override, arguing that it was "necessary due to the compressed timescales of the EDIDP negotiation", and promised to keep the Committee informed about future development in the negotiations between the Council and the European Parliament.

10.4 The Minister also replied to questions raised previously by the Committee about the UK's involvement in the European Defence Fund more broadly after Brexit, noting that:

- the other Member States had retained a possibility for non-EU countries' participation in the EDIDP;

192 €1 = £0.88723

193 See our Report of 13 November 2017 for more information on the European Defence Fund.

194 Letter from Guto Bebb to Sir William Cash (23 January 2018).

- the Government remains "open to different options and models for participating in the European Defence Fund" after Brexit; and
- in any event, if the UK leaves the EU on 29 March 2019, UK entities would remain eligible for participation in all EU funding programmes until the end of 2020 as if it were still a Member State, under the terms of the provisional Article 50 Agreement.[195]

10.5 **We thank the Minister for his comprehensive reply to our questions on the European Defence Fund and its EDIDP component.**

10.6 **The Government has repeatedly emphasised the importance of the Fund and the EDIDP for the UK defence industry. We are therefore not surprised that the Government supported the substance of the Council's general approach, which would provide opportunities for UK participation in the Programme once it becomes a "third country" vis-à-vis the EU. We note that the original Commission proposal would have precluded such participation.**

10.7 **However, we are not convinced that the Government's scrutiny override in December 2017 was unavoidable. While we accept that the negotiations on the Regulation took place over a relatively short period of time, we remain of the view that the Minister could, and should, have informed the Committee in November 2017 about the direction of travel within the Council working party. A Presidency compromise had been circulated as far back as October, and Members of the European Parliament appear to have been aware of the Council's position on the eligibility requirements for non-EU undertakings by late November.**[196]

10.8 **We note furthermore that the terms used by the Council to frame participation in the EDIDP by undertakings controlled from, or based in, a non-EU country lack clear definitions. We would therefore like the Minister to clarify:**

- **how, and by whom, assurances by a host Member State about the eligibility for EDID funding of an undertaking controlled from a third country would be assessed, and whether other Member States could challenge those assurances;**
- **how the existence of an EU-based "executive management structure" of such third country-controlled undertakings would be assessed in practice, and against which criteria, to ensure it was indeed effectively run from within the EU;**
- **who would judge whether "competitive substitutes" for the necessary assets or resources for an EDIDP project are available within the EU, before a beneficiary could source them from a non-EU undertaking;**
- **whether cooperation with entities located in a country subject to CFSP sanctions would be allowed in principle, if not in practice; and**

195 Under the provisional financial settlement as part of the UK's withdrawal from the EU, the UK will pay into the EU budget as if it were a Member State in 2019 and 2020 (i.e. until the end of the 2014–2020 Multiannual Financial Framework). It will also take on liability for a share of any EU legally-binding expenditure commitments outstanding on 31 December 2020. See the Committee's Report of 13 November 2017 on the financial settlement for more details.

196 See for more information the "Our assessment" section of this Report.

- **what level of political representation the Government will seek within the Foreign Affairs Council and the Commission's EDIDP Committee, where individual funding decisions will be made, during the post-Brexit transitional period (when the UK will still contribute to the EDIDP as if it were a Member State).**

Brexit implications

10.9 With respect to the implications for the Council's proposed eligibility requirements for UK industry after Brexit, the Committee notes that there are two developments which could delay the imposition of the full third country restrictions on British companies within the EDIDP after the UK ceases to be a Member State.

10.10 Firstly, under the terms of the financial settlement agreed between the Government and the EU on 8 December 2017, the UK will pay into the EU budget as if it were a Member State in 2019 and 2020. In return, UK participation in EU programmes—including the EDIDP—"will be unaffected by the UK's withdrawal from the Union for the entire lifetime of such projects".[197] This is likely to be reinforced under the terms of any comprehensive post-Brexit transitional arrangement, which the Government is seeking to negotiate in the first quarter of 2018. The European Commission has suggested the transition should last until December 2020, to coincide with the end of the EU's current budgetary cycle.

10.11 As such, the conditions for "third country" participation within the Programme will not apply to the UK in 2019–20, unless a formal Withdrawal Agreement is never ratified[198] (in which case the UK will become a "third country" on 29 March 2019). The eligibility requirements for the EDIDP after 2020 will need to be set down in a new Regulation. If we assume that they will be in substance the same as those agreed by the Council, they would apply to UK entities applying for EDIDP funding from 1 January 2021 onwards (unless the transition period is extended beyond December 2020).[199]

10.12 Secondly, the Government is still considering the details of its preferred relationship with the EU on defence matters after the end of the transitional period. It may seek "special access" to the European Defence Fund, which would, presumably, negate the restrictions on third country participation in the EDIDP to some extent. The Government has not provided any concrete proposals to that effect however, and it is therefore unclear whether such a special arrangement would be acceptable to the EU-27.

10.13 Given that the exact conditions for post-Brexit participation in the EDIDP by the UK defence industry remain uncertain, we retain the proposal under scrutiny. We also draw these developments to the attention of the Defence Committee.

197 Joint Report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, paragraph 71.

198 In other words, concluded by the Council after obtaining the consent of the EP. Ratification by each of the 27 Member States is not required. It will need to be ratified by the UK, however.

199 In December 2017, the Prime Minister indicated the UK might press for a longer transition period (Oral evidence to the Liaison Committee, 20 December 2017): "[The European Commission] have set that end December 2020 date because that covers their current budget plan period, so that has a neatness for them—if I can put it like that—but we will obviously have to discuss it, because this is a practical issue about how long certain changes would need to take to be put in place".

Full details of the documents

Proposal for a Regulation establishing the European Defence Industrial Development Programme aiming at supporting the competitiveness and innovative capacity of the EU defence industry: (38831), 10589/17 + ADD1. COM(17) 294.

Background

10.14 In June 2017, the Commission tabled a legislative proposal for a European Defence Industrial Development Programme or EDIDP, which will part-fund the "early stages of the development cycle" for new defence equipment, particularly early prototypes for military technology. The Programme is part of the new European Defence Fund.[200]

10.15 The EDIDP is scheduled to become operational in early 2019, and has been earmarked for a provisional budget of €500 million (£438 million) in 2019–20. Co-financing from the EU budget for prototypes—the costliest development phase—will normally be capped at 20 per cent of the project cost, except for initiatives as part of the Permanent Structured Cooperation (PESCO) on defence, which was launched by twenty-five EU countries in December 2017.[201]

10.16 The proposed Regulation to establish the Programme remains under consideration within the European Parliament and the Council, with the latter adopting its negotiating position in December 2017 (see paragraph 10.21 below). Under the terms of the proposal, the day-to-day management of the EDIDP and decisions to fund individual projects for the development of military technology will be in the hands of the European Commission. It will adopt a multi-annual work programme and make award decisions by means of implementing acts (which must be endorsed by a qualified majority of Member States to take effect).[202] The Committee discussed the detail of the EDIDP proposal in more depth in its Report of 13 November 2017.[203]

10.17 The Government has expressed its support for the establishment of the EDIDP on multiple occasions, with a key objective being to secure UK participation after Brexit (see below).[204] The future of the EDIDP after 2020 will be discussed as part of the broader negotiations on the EU's next Multiannual Financial Framework.

200 In addition to the EDIDP, the European Defence Fund will also consist of a European Research Development Fund (for which a formal proposal is expected in 2018) and a "financial toolbox" to assist EU countries in joint acquiring military equipment. The Committee set out the substance of all elements of this new Fund in more detail in its Report of 13 November 2017.

201 The UK, alongside Ireland and Malta, does not participate in PESCO (although the Government is seeking to secure access for UK industry to specific projects after Brexit). With respect to the EDIDP-PESCO link, the co-financing rate from the Programme for prototype development as part of a PESCO initiative would be 30 per cent (compared to 20 per cent for non-PESCO projects). For more information on PESCO, see our Report of 19 December 2017.

202 The Commission also foresees the creation of a Coordination Board for the European Defence Fund as a whole (i.e. the future European Research Development Fund, the EDIDP and the financial toolbox). This Board, which would coordinate initiatives undertaken as part of any of the three elements of the Fund, would consist of the Commission, the EU's High Representative for Foreign Affairs, the Member States and the European Defence Agency. However, it is unclear what exact powers the Board would have.

203 Report of 13 November 2017.

204 See for example the Explanatory Memorandum of 10 July 2017 on the EDIDP; the Explanatory Memorandum on the 2018 budget for the European Defence Agency; and the Minister's letter of 23 January 2018 informing the Committee of the Council's general approach on the EDIDP.

UK participation in the EDIDP after Brexit

10.18 Under the terms of the original Commission proposal, funding from the EDIDP would only be available to EU-based organisations, which must also be owned and controlled by either EU governments or EU nationals. Moreover, the Commission proposed that all "infrastructure, facilities, assets and resources" used by the beneficiaries, including subcontractors and other third parties, must be located within the EU. This would clearly render participation by the UK defence industry in EDIDP projects after Brexit next to impossible.

10.19 In her Explanatory Memorandum of 10 July 2017, the then-Minister for Defence Procurement (Harriett Baldwin) confirmed that the UK would in principle seek continued post-Brexit participation in the Programme, but that the specific conditions would be a "matter for our negotiations". She argued that the proposed restrictions on non-EU countries' participation in the EDIDP ran "counter to the need to attract new investment and ideas into defence", and warned that, once the UK is outside the EU, this restrictive approach to participation could be "used in a way that disadvantages the UK and [its] defence industry".

10.20 At its meeting in November 2017, the Committee retained the EDIDP proposal under scrutiny given the uncertainties surrounding the UK's post-Brexit access to the Programme.[205] We asked the Minister to provide further information on the Council's deliberations on the proposal, in particular with respect to third country participation; the ability of UK organisations to bid for EDIDP funding during any post-Brexit transitional period; and the Government's proposals for long-term UK participation in the EDIDP after the end of that period.

The Council's general approach

10.21 The then Minister informed the Committee in December 2017 that the negotiations within the Council had led to an agreement on a general approach on the EDIDP. Furthermore, she explained that this draft position was due to be adopted by the Member States the next day, to serve as the basis for future trilogue negotiations with the European Parliament. The general approach was duly adopted at the General Affairs Council on 12 December, with DExEU Minister Lord Callanan—representing the UK Government—overriding scrutiny to vote in favour.

10.22 The new Minister for Defence Procurement (Guto Bebb) confirmed the override by letter of 23 January 2018.[206] He apologised that the scrutiny reserve resolution had not been observed, arguing that it was "necessary due to the compressed timescales of the EDIDP negotiation", and promised to keep the Committee informed about future development in the negotiations between the Council and the European Parliament.

10.23 We have set out the substance of the Council's general approach below, with a particular focus on where it differs from the original European Commission proposal.

205 Report of 13 November 2017.

206 Letter from Guto Bebb to Sir William Cash (23 January 2018).

Third country participation in the EDIDP

10.24 In the Council's position, the Commission's initial prohibition on third country participation in the EDIDP has been watered down. Although the Member States have retained the requirement that beneficiaries must be based in the EU, businesses within the UK defence industry would be able to participate in the EDIDP-funded programmes after Brexit in two circumstances:[207]

- non-EU businesses in the defence industry with a subsidiary in an EU Member State would be eligible for EDIDP funding, provided the country where the subsidiary is based has provided "sufficient assurances in accordance with its national procedures" that such funding would not "contravene (…) the security and defence interests" of the EU or the other Member States. The subsidiary also needs to have an executive management structure within the EU; and
- EDIDP beneficiaries would be able to cooperate with non-EU businesses that do not have a presence in the EU, but the latter cannot receive any funding. Moreover, any use of assets, infrastructure, facilities and resources located outside the EU or controlled by non-EU entities could only be used if "there are no readily available competitive substitutes in the EU".

10.25 The concepts used to frame these restrictions, including "sufficient assurances", "national procedures", "executive management structure" and "competitive substitutes", are not precisely defined in the general approach, leaving them open to interpretation by each Member State. In particular, the Council has not specified who will judge whether assurances are sufficient, or whether competitive substitutes within the EU are indeed unavailable. It is also not clear whether these conditions would be sufficient to bar participation by undertakings controlled from or based in countries subject to EU foreign policy sanctions.

10.26 Moreover, the European Parliament (which is co-legislator on this proposal) may take a more restrictive view on the eligibility of non-EU entities to contribute to EDIDP projects. The Parliament's draft Report[208] contains stricter provisions on assessing the extent to which EU-based undertakings applying for EDIDP funding are controlled by non-EU entities, although it has removed the requirement for beneficiaries to be majority-owned within the EU. However, the draft left the prohibition on third country participation as proposed by the Commission in place.

10.27 The European Parliament's Industry Committee is expected to formally adopt its negotiating position in February 2018. Any disagreements between the two institutions on the legal text would have to be resolved as part of the trilogue process before the EDIDP could become operational.

Other changes to the Commission proposal

10.28 The Council has also included the European Defence Agency as a non-voting observer on the technical committee of Member States' representatives, which will vote on the Commission's EDIDP work programme and individual funding decisions.

207 These conditions will apply to third countries generally, not solely the UK.

208 European Parliament document PE608.022.

Moreover, at least 10 per cent of the Programme's budget must benefit small- and medium-sized enterprises (compared the Commission's more ambiguous target of "a credible proportion").

10.29 The Council has maintained the Commission's proposal to provide projects for development of military technology under the umbrella of Permanent Structured Cooperation (PESCO) with a higher co-financing rate from the EDIDP than other projects. This is to incentivise joint development and acquisition of defensive equipment under PESCO, a voluntary agreement among 25 EU countries to work more closely together on improving their military capabilities.[209]

The financial toolbox for joint military acquisitions

10.30 The Minister also informed us that there is still little detail on the Commission's separate initiative to establish a Financial Toolbox for joint acquisitions of military technology by multiple EU countries, with the specific of this initiative to be worked out over the course of 2018. The purpose of the toolbox will be to facilitate the acquisition of technology developed as part of the EDIDP.

Our assessment

10.31 As we noted in our Report of 13 November, the launch of the EDIDP marks a turning point for the use of the EU budget. For the first time, discussions are underway to allow for substantial amounts of EU funding for projects that are explicitly military, and not dual-use, in nature.

10.32 With respect to the scrutiny override, we have taken note of the Minister's apology for the scrutiny override to support the adoption of the Council's general approach. While we accept that the override was acceptable in these circumstances, especially in view of the expedited nature of the negotiations and the importance of the changes made to the Programme's eligibility requirements, it remains the Committee's view that additional information on the direction of travel could have been brought to its attention sooner. We note in this respect that the Council's EDIDP working party met at least eight times from July to November 2017 and that the Presidency circulated a first compromise text for the Regulation as far back as early October.

10.33 It also appears that the substance of the Council's position on eligibility requirements had already been established, in substance, in November. That month, four MEPs in the ECR group[210] tabled an amendment to the European Parliament's draft Report on the definition of "eligible entities" which is in substance mostly identical to the Council's position and mirrors its terminology. It includes the requirement for beneficiaries to have an "executive management structure" within the EU; the need for sufficient assurances that awarding funding to a beneficiary controlled from a third country would not "contravene

209 The Committee considered the launch of PESCO in more detail in its Report of 19 December 2017, and recommended the initiative should be debated on the Floor of the House.

210 The ECR grouping in the Parliament is where MEPs representing the UK Conservative Party sit. The sponsoring MEPs were Zdzisław Krasnodębski, Edward Czesak (both from Poland), Evžen Tošenovský (the Czech Republic) and Hans-Olaf Henkel (Germany).

the security and defence interests" of the EU;[211] and the pre-condition that use of assets or resources located outside of the EU for EDIDP projects could only take place "if there are no competitive substitutes readily available in the EU".

10.34 The timing of the amendment appears to indicate that some form of agreement on the wording of the Regulation was already sufficiently advanced by that point for it to be shared with Members of the European Parliament in a bid to align the text prior to formal trilogues. However, the proposed changes to the eligibility requirements as eventually endorsed by the Council were not brought to the Committee's attention until the day before the Council meeting.

10.35 We have written to the Ministry of Defence to underline the need to keep the Committee informed of progress in negotiations regularly, and not only when an agreement has already been reached for formal approval by the Council or COREPER. This amounts to presenting Parliament with a *fait accompli*, robbing the scrutiny process of its purpose.

10.36 The European Parliament's Industry Committee is expected to adopt its position on the EDIDP in February 2018, allowing for trilogues to begin in March. The aim is for the proposed Regulation to be approved by July 2018, in order that the EU funds are allocated in time for projects to commence on 1 January 2019.

10.37 The Committee expects the Minister to keep us sufficiently informed of progress in the negotiations to avoid any possibility of an override on the final text of the EDIDP Regulation later this year. We would also like him to provide us with an assessment of the European Parliament's mandate for negotiations as soon as is feasible after its adoption on 21 February.

Brexit implications

10.38 As outlined above and in our previous Report, the EDIDP proposal's primary significance for the UK lies in the conditions for post-Brexit participation in projects to be funded. As the Programme is not due to become operational until early 2019, there are no benefits to be reaped before the UK's projected withdrawal on 29 March 2019. The Government has consistently sought to modify the elements of the Commission proposal that would preclude participation by the British defence industry after Brexit.

10.39 The Council's general approach represents a positive step in this regard. Under the definition of "eligible entities" proposed by the Council, after Brexit UK-based entities could apply for EDIDP funding provided they do so through a subsidiary based within the EU. Alternatively, UK firms could cooperate with EU-based companies on EDIDP-funded projects, although only under certain conditions and provided the assets or resources provided from the UK are not "readily available" in the EU. This is a substantial change

211 The European Parliament amendment additionally contains a stipulation that undertakings engaged in cooperation with countries subject to EU sanctions are by definition ineligible. This does not appear in the Council text.

from the original Commission proposal; although it will severely restrict the UK's access to the Programme compared to Member States, it nonetheless leaves the door open for participation by this economically important sector.[212]

EDIDP during the transitional period

10.40 The restrictions on non-EU participation are not expected to apply to UK firms for the duration of the current Multiannual Financial Framework. Under the terms of the provisional Brexit financial settlement, UK entities would remain eligible on par with EU companies during the post-Brexit transitional period:[213]

> "Accordingly, the eligibility to apply to participate in Union programmes and Union funding for UK participants and projects will be unaffected by the UK's withdrawal from the Union for the entire lifetime of such projects."

10.41 In his letter of 23 January, the Minister confirmed that Government has taken the view that UK undertakings should remain eligible for participation in the European Defence Fund for as long as the UK continue to contribute to the existing Multiannual Financial Framework (i.e. until the end of 2020). The Minister has also written to the UK's Letter of Intent colleagues (France, Germany, Italy, Spain and Sweden) "encouraging them to consider UK and UK industry participation in cooperative programmes that might be submitted for EDIDP funding".

10.42 It is less clear how the UK Government would be able to influence the work programme of the EDIDP and individual funding decisions during the transitional period. While the UK may still be represented in the Committee of Member States when the draft work programme is put forward for adoption (if this occurs prior to March 2019), it will no longer have a vote on any implementing acts related to the EDIDP (such as individual funding decisions) after the end of the two-year Article 50 period on 29 March 2019.

10.43 Under the European Commission's negotiating directives[214] on a transitional arrangement, which are to be agreed formally by the 27 other Member States on 29 January 2018, the UK would be precluded from attending meetings of the EU's "institutions, (…) bodies, offices and agencies" during the transition. The Government could be "*invited* to attend, without voting rights" (our emphasis) meetings of committees such as the EDIDP Committee. However, the conditions for such "exceptional attendance" are to be specified in the Article 50 Withdrawal Agreement.[215]

10.44 We have therefore asked the Minister to clarify as soon as possible what level of representation the Government will seek during the transitional period; this is clearly important as a horizontal matter, given that the EU is seeking for its entire *acquis* to apply during that time.

212 According to the Government, the UK is the third largest defence exporter in the world with its market share estimated at £7.7 billion, representing 12.8% of the estimated market share of the top ten defence exporters). (House of Commons Library briefing paper CBP 7842, 21 December 2016).

213 https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf.

214 European Commission, Annex to the Recommendation for a Council Decision on negotiations with the United Kingdom for an agreement setting out the arrangements for its withdrawal from the European Union (20 December 2017).

215 The European Commission's draft negotiating directives mention only two instances where UK representation would be justified: where the Committee was considering individual decisions relating to the UK or UK natural or legal persons; or "where the presence of the UK is necessary from a Union perspective for the effective implementation of the *acquis* during the transition".

EDIDP after the transitional period

10.45 The proposed EDIDP Regulation currently under discussion will expire on 31 December 2020, as it is part of the wider 2014–2020 Multiannual Financial Framework. If the Programme is to be continued after that, a new EDIDP Regulation will need to be proposed, negotiated and adopted in the coming years. Although we expect that any EDIDP Regulation for 2021 onwards would mirror most of the current terms for non-EU participation, this will also depend on the position of the European Parliament (which will have a different composition when the next Regulation is adopted, given the European elections in May 2019).

10.46 The length of the UK's post-Brexit transitional period is currently uncertain. On 20 December 2017, the European Commission proposed that it should end on 31 December 2020, to avoid it overlapping with the start of the EU's new budgetary cycle. By contrast, the Prime Minister told the Liaison Committee on the same day that the transition may have to last longer in certain areas.[216] If it extends past December 2020, the UK could, conceivably, still be a participant in the EDIDP as if it were a Member State under the new Programme in 2021. However, in the absence of any information by the Government on the scope and length of the transition, we presume that the UK will be a full participant in the EDIDP in 2019–20. Subsequently, by default, UK-based undertakings will be eligible for participation under the same conditions as those of any other third country.

10.47 However, in his letter of 23 January, the Minister explains that the Government has not ruled out seeking a "special agreement which continues to provide the UK with special access to the European Defence Fund" (including the EDIDP) to come into effect at the end of the transitional period.[217] In particular:

- the Government notes there is "some appetite" among other Member States for participation of the UK after Brexit in both the Research and Capability Windows of the European Defence Fund, as shown for example in the Council's general approach on the EDIDP;
- the Government remains "open to different options and models for participating in the European Defence Fund" after Brexit, including the possibility of a "financial contribution in return for some kind of special status" within the Fund; and
- the Minister also hints at the likelihood that the Government will seek to conclude an Administrative Arrangement on cooperation with the European Defence Agency.[218]

10.48 As the Government has made no concrete proposals for the post-Brexit defence partnership with the EU, we cannot yet make an assessment of the likelihood that they would be acceptable to the EU-27. We will continue to follow the Article 50 negotiations

216 In December 2017, the Prime Minister indicated the UK might press for a longer transition period (Oral evidence to the Liaison Committee, 20 December 2017): "[The European Commission] have set that end December 2020 date because that covers their current budget plan period, so that has a neatness for them—if I can put it like that—but we will obviously have to discuss it, because this is a practical issue about how long certain changes would need to take to be put in place".

217 Letter from Guto Bebb to Sir William Cash (23 January 2018).

218 Administrative Agreement with the European Defence Agency are subject to the unanimous agreement of the remaining Member States. Such an arrangement with the EDA would enable the UK to participate in the Agency's work, but it would not automatically entail involvement in other EU defence measures such as the European Defence Fund, PESCO, or individual CSDP operations.

closely, as well as future discussions on third country eligibility in the upcoming draft Regulation to continue the EDIDP after 2020 and under Permanent Structured Cooperation (PESCO).

Fall-back on WTO rules

10.49 In its Report of 13 November, the Committee also asked if the Government had identified any benefits for the defence industry from the UK's exit from the EU's regulatory system; and what the implications would be for a "no deal" Brexit in which trade relations between the UK and the EU would be covered solely by WTO rules.

10.50 The Minister has replied that it is difficult to assess the benefits of being out of the EU's regulatory framework, as there is no clear picture of what possible reform would look like. He added that it would be "wrong to speculate about possible reforms at this stage", but noted that most stakeholders in Government and industry who commented on this issue in the Five Year Statutory Review of the Defence and Security Public Contracts Regulations 2011 believed that the "defence procurement rules could be simplified to reduce the regulatory burden".

10.51 With respect to any fall-back on WTO rules, the Minister noted that WTO Agreement on Government Procurement ("GPA") has a general exception for military equipment. As a result, EU Member States would retain the power to decide the level of market access they allow UK suppliers for goods and services covered by the EU Defence and Security Directive. However, government procurement of dual-use and civil goods and services for use by the defence sector under the EU Public Procurement Directive will be open to suppliers from GPA parties, including the UK post-Brexit.

Previous Committee Reports

First Report HC 301–i (2017–19), chapter 30 (13 November 2017).

11 EU Legislation on Waste

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny (by Resolution of the House on 08/03/2016); further information requested; drawn to the attention of the Environment, Food and Rural Affairs, the Environmental Audit, the Communities and Local Government, the Welsh Affairs, the Scottish Affairs and the Northern Irish Affairs Committees
Document details	(a) Proposal for a Directive amending Directive 2008/98/EC; (b) Proposal for a Directive amending Directive 94/62/EC on packaging and packaging waste; (c) Proposal for a Directive amending Directive 1999/31/EC on the landfill of waste; (d) Proposal for a Directive amending Directives 2000/53/EC on end-of-life vehicles, 2006/66/EC on batteries and accumulators, and 2012/19/EC on waste electrical and electronic equipment
Legal base	(a) (c) and (d) Article 192(1) TFEU; ordinary legislative procedure; QMV; (b) Article 114 TFEU, ordinary legislative procedure, QMV
Department	Environment, Food and Rural Affairs
Document Numbers	(a) (37377), 14975/15 + ADDs 1–3, COM(15) 595; (b) (37378), 14976/15 + ADDs 1–3, COM(15) 596; (c) (37376), 14974/15 + ADDs 1–2, COM(15) 594; (d) (37375), 14973/15 + ADDs 1–2, COM(15) 593

Summary and Committee's conclusions

11.1 The EU has a strategic objective to develop a "circular economy" whereby the maximum value and use is extracted from all raw materials, products and waste, fostering energy savings and reducing greenhouse gas emissions. As part of its strategy, the European Commission accordingly proposed in December 2015 a package of four proposals to amend six pieces of existing waste legislation.

11.2 A provisional agreement between the EU institutions was reached in December and is now being considered by Member States before anticipated final adoption in March. It features a range of recycling and landfill targets as set out below.

11.3 When the Committee considered these documents at our meeting of 13 November 2017, we raised a number of queries in relation both to the substance of the proposals and to Brexit. The Parliamentary Under Secretary of State (Dr Thérèse Coffey) has responded, addressing our queries and providing a further update. She reports that agreement was reached between the EU institutions on 17 December 2017. While the Government is still waiting to see the final text, it understands that mandatory targets for municipal waste recycling will be set at 55% by 2025, 60% by 2030 and 65% by 2035. Full details of the Government's understanding of the text are set out below.

11.4 On Brexit, the Minister observes that, in the future, there could be changes in the UK's approach to targets to reflect the value and environmental impact of materials collected rather than weight alone. In terms of the shorter term transposition of this legislation into UK law during any post-Brexit transition or implementation period, the Minister is non-committal, while noting that the transposition date would be mid-2020.

11.5 Since the Minister wrote on 24 January, the Secretary of State for Exiting the European Union has further clarified the UK's approach to the implementation period.[219] He was clear that, for such a period to work, both sides must continue to follow the same stable set of laws and rules.

11.6 Addressing the contrasting levels of ambition within the UK and between Member States, the Minister notes that the greatest challenges for England are the scale of population and levels of urbanisation, which have an impact on local authority costs, collection arrangements and participation.

11.7 While the Government has yet to take a public position on the provisional deal, it is alleged by Greenpeace that the Government has spoken out against the deal in discussions in Brussels.[220] The Secretary of State for Environment, Food and Rural Affairs responded in the following terms on 25 January 2018:

> "We are anxious to make sure that, across the EU, we have the right targets. One of the flaws with the EU system, as I acknowledged earlier, is that because of its reliance on measuring through weight, it sometimes incentivises the wrong approaches."[221]

11.8 The debate takes place against the backdrop of the recently published 25 Year Environment Plan[222] in which the Government made a commitment to meet all current waste and recycling targets and to develop ambitious new ones.

11.9 **We note that, since the Minister wrote, the Secretary of State for Exiting the European Union has said that, for a post-Brexit implementation period to work, both sides must continue to follow the same stable set of laws and rules. We interpret this as meaning that the UK will apply any regulatory requirements applicable to EU Member States, including the transposition of legislation. While the final agreement on that period remains subject to negotiation, we now work on the assumption that the UK will apply the waste package in full, once it has been agreed, and would welcome the Minister's confirmation that this is a fair assumption.**

11.10 **In terms of the longer-term approach, we note the Minister's view that Brexit "could" allow for changes in the UK's approach to targets. Whether Brexit does permit such changes will of course be determined by the outcome of the negotiations on transition, withdrawal and the future relationship.**

219 https://www.gov.uk/government/news/david-davis-teesport-speech-implementation-period-a-bridge-to-the-future-partnership-between-the-uk-eu.

220 https://unearthed.greenpeace.org/2018/01/24/uk-opposes-new-eu-recycling-targets-despite-mays-call-plastic-crackdown/.

221 HC Hansard 25 January https://hansard.parliament.uk/Commons/2018–01–25/debates/2DB359A5–2EDB-471C-81ED-49C41AEC50D2/PlasticWaste.

222 A Green Future: Our 25 Year Plan to Improve the Environment.

11.11 **Turning to the negotiated deal, we note that it represents a clear compromise between the Council position—which the Minister previously described as "ambitious but achievable"—and that of the European Parliament (EP). In relation to the proposal that 65% of municipal waste be recycled by 2035, for example, the Council had proposed 60% by 2030 and the EP had proposed 70% by 2030. The outcome is therefore much closer to the Council position than that of the EP. The 70% packaging waste recycling target is identical to that proposed by the Council, whereas the EP had proposed 80%.**

11.12 **The Government is yet to take a position on the negotiated deal. We ask that the Government write to us once it has done so, with an accompanying analysis of the impact and achievability. It would also be helpful if the Minister could set her response in the context of the recent 25 Year Environment Plan, which committed not only to meeting current targets but to setting ambitious new ones. Should the Government decide to abstain or to vote against the deal, we ask that the Government submit to the Council a formal explanation of its position when the text is finally submitted for adoption.**

11.13 **These documents were cleared from scrutiny by resolution of the House on 8 March 2016 following the debate in European Committee A on 7 March 2016. We draw this Chapter to the attention of the Environment, Food and Rural Affairs, the Environmental Audit, the Communities and Local Government, the Welsh Affairs, the Scottish Affairs and the Northern Irish Affairs Committees.**

Full details of the documents

(a) Proposal for a Directive amending Directive 2008/98/EC on waste: (37377), 14975/15 + ADDs 1–3, COM(15) 595; (b) Proposal for a Directive amending Directive 94/62/EC on packaging and packaging waste: (37378), 14976/15 + ADDs 1–3, COM(15) 596; (c) Proposal for a Directive amending Directive 1999/31/EC on the landfill of waste: (37376), 14974/15 + ADDs 1–2, COM(15) 594; (d) Proposal for a Directive amending Directives 2000/53/EC on end-of-life vehicles, 2006/66/EC on batteries and accumulators and waste batteries and accumulators, and 2012/19/EU on waste electrical and electronic equipment: (37375), 14973/15 + ADDs 1–2, COM(15) 593.

Background

11.14 The details of the Commission's proposals were set out in the Report of 20 January 2016. Key elements included: a common EU target for recycling 65% of municipal waste by 2030; a common EU target for recycling 75% of packaging waste by 2030 (with specific targets for distinct materials, such as 85% for aluminium, glass, iron and paper); and a binding landfill target to reduce landfill to maximum of 10% of municipal waste by 2030.

11.15 The Committee considered that the proposal raised a number of important issues and recommended it for debate. During the debate, there was general support for the concept of the circular economy and for an EU role in it. The then Minister (Rory Stewart) concluded by pointing to three areas on which to focus: food waste reduction; household recycling; and the development of voluntary approaches such as the North Sea Resources Roundabout.[223]

223 http://www.green-alliance.org.uk/NSRR.php.

11.16 In a letter of 5 July 2017 the Minister updated us on the progress of negotiations between the Council and the European Parliament. She described the Council's negotiating position—adopted by the Committee of Permanent Representatives on 19 May 2017—as advocating "ambitious but achievable" measures. These included: a 60% recycling target for municipal waste by 2030; a 10% target for the amount of municipal waste going to landfill, with a five-year derogation for 11 Member States who are performing poorly at present (not the UK); and a 70% target for reuse and recycling of packaging waste.

11.17 The measures proposed by the European Parliament were described by the Minister as "very ambitious". These included a 70% recycling target for municipal waste by 2030 (plus an additional 5% target for reuse of products); a 5% target for the amount of municipal waste going to landfill; and an 80% target for the reuse or recycling of packaging waste. The European Parliament also proposed separate targets on food waste and on marine litter.

11.18 The Minister expressed concern about the feasibility of the most stringent targets, citing specific concerns about cost, household behavioural change and the need for substantial operational change at local authority level. Among Member States, the UK position was supported by Romania, Bulgaria, Poland and Hungary. Other Member States were more supportive of stringent targets, including France, Sweden, Belgium, the Netherlands and Sweden. There was also a difference of view between the UK Administrations, with the UK Government approach being supported by Northern Ireland while Scotland and Wales favoured a more ambitious approach.

11.19 At our meeting of 13 November, we sought the Minister's response to the following questions:

- from where the expectation of adoption of this amending legislation, or broadly equivalent measures, was likely to come;
- what assessment the Government had undertaken of the implications of deciding not to adopt these new, or broadly equivalent, measures;
- whether this package of legislation would need to be applied in the UK during any post-Brexit implementation period;
- why ambitious targets may be achievable in certain parts of the EU and the UK but not in other parts of the EU and the UK, and to what extent the UK might seek to learn from best practice elsewhere;
- whether the Directive would set minimum targets, allowing Member States and sub-national levels of government to pursue more ambitious policies should they be so minded; and
- how supportive the Government remained of voluntary initiatives such as the North Sea Resource Roundabout.

The Minister's letter of 24 January 2018

Provisional agreement

11.20 The Minister notes that a provisional agreement was reached with the European Parliament on 17 December 2017. The Government has the following understanding of the provisional agreement:

> "Mandatory targets for municipal waste recycling will be set at 55% by 2025, 60% by 2030 and 65% by 2035, although the latter is subject to review in 2024. The UK has consistently pushed for these targets to be realistic and achievable.
>
> "There is also provision for a target to limit landfill to no more than 10% by 2030, and an overall packaging waste recycling target of 65% by 2025 and 70% by 2030, with the following sub-targets for packaging materials:

- Plastic: 50%/55%
- Wood: 25%/30%
- Ferrous materials: 70%/80%
- Aluminium: 50%/60%
- Glass: 70%/75%
- Paper and cardboard: 75%/85%

> "Each Member State is entitled to a 15% derogation on packaging materials, to be used for one or divided between two sub-targets. However, use of the derogation cannot cause the target to fall below 30% for any material; for glass and cardboard the target cannot fall below 60%."

11.21 The Minister goes on to say that the provisional agreement retains requirements for separate collection (either kerbside or at disposal sites) of at least paper, plastic, metal and glass, and extends these requirements to include textiles and hazardous household waste by 2025. In addition, separate collection of bio-waste will be mandatory from 31 December 2023. Member States may apply a derogation where separate collection is not technically, environmentally, and economically practicable.

11.22 Extended Producer Responsibility (EPR) schemes must cover at least half the necessary costs on existing schemes, rising to at least 80% of costs by 2025. Following the Directive's entry into force, all new EPR schemes must ensure that the producers cover at least 80% of costs. EPR will be mandatory for all packaging placed on the market from 2025.

11.23 There are also alterations to calculation methods and derogation mechanisms, as well as a new definition of municipal waste being:

- mixed waste and separately collected waste from households including paper and cardboard, glass, metals, plastics, bio-waste, wood, textiles, packaging, waste electrical and electronic equipment, waste batteries and accumulators, bulky waste including mattresses and furniture; and

- mixed waste and separately collected waste from other sources where such waste is similar in nature and composition to household waste.

Municipal waste does not include waste from production, agriculture, forestry, fishing, septic tanks and sewage network and treatment including sewage sludge, end-of-life vehicles and construction and demolition waste.

11.24 The Government is currently assessing the provisional agreement. Once the Government has received the final text, it will be considered in detail by Member States and discussed at COREPER (Member State Ambassadors). The Government currently anticipates a vote on the package is at the next Environment Council in March, although this is subject to confirmation by the Bulgarian Presidency

Implementation period

11.25 On the implementation period, the Minister says:

> "The Prime Minister said in her speech in September that during the implementation period the UK's and the EU's access to each other's markets should continue on current terms. This entails continuing to transpose EU legislation into domestic legislation until exit.
>
> "The Department for Exiting the EU has been very clear that the implementation period should be based on the existing structure of EU rules and regulations, so that people and businesses only need to make one set of changes as we move to our future partnership. Given the way the EU processes operate, and the time limited nature of the implementation period, it is unlikely that significant new legislation will be implemented in the UK that we will not have had a chance to influence. Until we leave the EU, we will continue to input to proposals in the usual way.
>
> "The UK's departure from the EU could however allow for changes in our approach to targets to reflect the value and environmental impact of materials collected rather than weight alone.
>
> "Once the amendments to the Waste Directives are adopted, there will be a two year transposition deadline, which will run to the period when the UK has left the EU (summer 2020), but within the anticipated two year implementation period. Therefore, it is too early to tell to what extent the UK will be required to implement the measures as the nature of our relationship, rights and obligations will be a matter for our negotiations on EU exit."

Targets

11.26 The Minister offers no comment on whether ambitious targets are achievable in other Member States, as the Government has not seen their analysis.

11.27 In terms of the achievability of ambitious targets within the UK, the most influential factors, says the Minister, are the scale of population in England compared to Wales and Scotland, and the levels of urbanisation in England which have an impact on local authority costs, collection arrangements and participation. She adds:

> "In particular, there is significantly more and greater variation in housing design in England for high density properties, with waste storage facilities varying for each in terms of proximity and access for the householder and collection crews. This presents further difficulties where containers cannot be presented in a standard location (such as in kerbside rounds): collection costs increase as operatives spend more time on accessing facilities, meaning fewer properties can be serviced in one day, and more crews and fleet are therefore required.
>
> "Other factors affecting recycling rates in urban areas regularly cited are limited space for collection infrastructure, lower levels of owner occupation and transient populations."

11.28 The Minister says that the Government will continue to learn from other Member States and the Devolved Administrations. She confirms that the targets set out in the Directive will be minimum targets. The Devolved Administrations and local authorities are therefore able to pursue more ambitious policies if they choose to do so.

North Sea Resources Roundabout

11.29 The Minister also confirms that the Government is still supportive of and wishes to participate in the North Sea Resources Roundabout (which includes France, Flanders, the UK and the Netherlands). She notes that it is not an EU initiative and could in principle be extended to include other EU and non-EU countries. The Government does not see its value diminishing as a result of the UK leaving the EU. Post-Brexit, the UK will still want to further trade in secondary materials with other countries and the Roundabout will, she says, remain a useful vehicle for continued collaboration regardless of EU membership.

Previous Committee Reports

First Report HC 301–i (2017–19), chapter 34 (13 November 2017); Twentieth Report HC 342–xix (2015–16), chapter 1 (20 January 2016); Sixteenth Report HC 342–xv (2015–16), chapter 2 (6 January 2016).

12 Multiannual Plan for Demersal Fishing Stocks in the North Sea

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Environment, Food and Rural Affairs Committee
Document details	(a) Proposal for a Regulation on establishing a multi-annual plan for demersal fishing stocks in the North Sea and the fisheries exploiting those stocks; (b) Executive Summary of the Impact Assessment; (c) Impact Assessment
Legal base	(a) Article 43(2) TFEU; ordinary legislative procedure; QMV, (b) and (c)—
Department	Environment, Food and Rural Affairs
Document Numbers	(a) (38011), 11636/16 + ADD 1, COM(16) 493; (b) (38012),—, SWD(16) 267; (c) (38013),—, SWD(16) 272

Summary and Committee's conclusions

12.1 Multi-annual plans (MAPs) set a management framework establishing rules and criteria under which Total Allowable Catches (TACs) and other management measures are adopted. Under the reformed Common Fisheries Policy (CFP), MAPs should cover multiple stocks where those stocks are jointly exploited (i.e. a mixed fishery). On that basis, the Commission proposed this new MAP incorporating all relevant North Sea stocks into a single management plan.

12.2 In an earlier letter, the Minister for Agriculture, Fisheries and Food (George Eustice) signalled the Government's anticipation that the North Sea MAP would form an important basis for cooperation between the UK and the EU in determining appropriate exploitation rates. We note that the Commission's recently published presentation on future fisheries relations suggested that an EU-UK Fisheries Partnership Agreement could include provision for joint MAPs.[224]

12.3 The Minister has since written two further letters, responding to the Committee's Report of 22 November and updating the Committee on the outcome of negotiations. Regarding the UK's withdrawal from the EU, he notes that the Government is actively considering how the North Sea MAP will be modified as "retained EU law". While observing that leaving the EU means leaving the CFP, he also notes that an implementation period will be a bridge to that new relationship, thus potentially implying continued adherence—at least in part—to the CFP. We assume that this ambiguous wording is deliberate. The Minister does not reply in any way to the Committee's query as to whether it is the Government's intention that delegated acts adopted under this Regulation post-Brexit would apply during any implementation period.

224 https://ec.europa.eu/commission/sites/beta-political/files/fisheries.pdf.

12.4 On the negotiation of the MAP, the Minister reports that discussions have concluded and that the UK's priorities have been secured. In particular:

- inclusion of a provision which will allow exploitation rates to be set within an upper FMSY (maximum rate of fishing mortality) range if supported by science;
- simplification of the scope of the MAP by reducing the stock categories so that it applies to targeted stocks and to by-catch stocks; and
- the removal of certain control provisions, as these are more appropriately covered in separate legislation on fisheries control.

12.5 A European Parliament amendment bringing recreational fisheries under the plan broadly aligns with UK policy since the inclusion of recreational fisheries will contribute to improving the sustainability of many stocks. In addition, FMSY ranges will not be included in an annex to the plan. Rather, the Commission will request that these ranges are included by the International Council for the Exploration of the Sea (ICES) in its periodic catch advice. This approach, says the Minister, will work better for the joint management of the North Sea mixed fishery once the UK has left the EU.

12.6 Given that agreement of the MAP is imminent—subject only to legal and linguistic checks—the Minister requests that the Committee releases the proposal from scrutiny.

12.7 **It is welcome that the Government has secured its priorities in the negotiations, particularly as the Minister has previously signalled the Government's anticipation that this Plan will form the basis for future cooperation between the EU and the UK.**

12.8 **On the adherence to the Common Fisheries Policy during an implementation period, we note the continued ambiguity of the Government's position and that these matters are the subject of negotiation. The Minister does not respond at all to the Committee's query as to the Government's intentions as regards applicability of delegated acts adopted under this Regulation during any post-Brexit implementation period. While these matters will be the subject of negotiation, the Minister's reluctance even to set out the Government's stall on the application of detailed rules over which the UK has had little influence is notable.**

12.9 **We have no further issues to raise and are content to clear these documents from scrutiny. We will monitor closely the negotiations on the future UK-EU fisheries relationship with a view to how it will affect co-operation under legislation such as this, as well as implications for the modification of EU fisheries legislation as retained EU law. We draw this chapter to the attention of the Environment, Food and Rural Affairs Committee.**

Full details of the documents

(a) Proposal for a Regulation on establishing a multi-annual plan for demersal fishing stocks in the North Sea and the fisheries exploiting those stocks: (38011), 11636/16 + ADD 1, COM(16) 493; (b) Executive Summary of the Impact Assessment: (38012),—, SWD(16) 267; (c) Impact Assessment: (38013),—, SWD(16) 272.

Background

12.10 The plan would require the TACs for the main demersal stocks (cod, haddock, plaice, saithe, sole and whiting) and nephrops (langoustines) to be at or below a specified range of fishing mortality rates for each species. There is provision both for TACs to be set at a higher mortality rate where the spawning biomass of a stock (i.e. the future potential of the stock) is above a specified conservation reference level and for remedial action to be taken where spawning biomass falls below specified levels. Further details on the background to, and content of, the proposal were set out in the Committee Report of 12 October 2016.

12.11 In our Report of 22 November 2017, we noted the Government's interest in the North Sea MAP as a helpful framework for future management post-Brexit. We welcomed this pragmatic approach and asked if Norway had been involved, informally, in the development of the North Sea MAP at all. We also noted the Minister's comment that no decision had been taken on whether or how certain aspects of the MAP would be carried into UK law as retained EU law under the EU Withdrawal Bill.

12.12 Concerning any post-Brexit implementation period, the Committee requested confirmation as to the Government's intentions as regards applicability of the current framework of EU fisheries rules and procedures, including delegated acts adopted under this Regulation, during any post-Brexit implementation period.

The Minister's letter of 18 December 2017

12.13 Regarding Norwegian involvement in the development of the North Sea MAP, the Minister says that Norway has not been directly involved, but that the EU and Norway work closely together on the management of shared stocks. Norway, he says, has its own management plans for Norwegian waters based largely on single species advice.

12.14 The Minister confirms that, where possible, EU Regulations such as the North Sea MAP will become retained EU law under the EU Withdrawal Bill. The Government is actively considering how this will apply to the North Sea MAP.

12.15 Regarding the implementation period, the Minister says:

> "On the question of whether an implementation period should extend to the Common Fisheries Policy (CFP), leaving the EU and building a new partnership with the EU means that we will be leaving the CFP. An implementation period is a bridge to that new relationship. What it will look like precisely will be for the negotiations and will need to be in both of our interests."

The Minister's letter of 17 January 2018

12.16 The Minister explains that an agreement has been reached in negotiations between the Council and European Parliament.

12.17 He says that the UK has secured its priorities, describing this success in the following terms:

> "These [priorities] include a provision which will allow exploitation rates to be set within an upper FMSY(a)[225] range if supported by science, and the simplification of the scope of the MAP by reducing the stock categories so that it applies to (i) targeted stocks and (ii) by-catch stocks, together with the removal of potentially burdensome control provisions. The Council also successfully argued against nephrop quotas being set at a functional unit level, which could have rendered the current management of nephrop fisheries in the UK inoperable, and which would not be possible to resolve without significant upheaval for industry and fisheries managers."

12.18 On other amendments agreed, the Minister highlights a provision bringing recreational fisheries under the plan so that the impact of these fisheries is taken into account when setting fishing opportunities. When necessary, recovery measures will therefore also regulate recreational fishing activities. This, says the Minister, broadly aligns with UK policy since the inclusion of recreational fisheries will contribute to improving the sustainability of many stocks. The UK has already advocated this approach in relation to bass.

12.19 In addition, says the Minister, a definition for 'best available scientific advice' has been agreed:

> "FMSY ranges will not be included in an annex to the plan, instead the Commission will request that these ranges are included by the International Council for the Exploration of the Sea (ICES) in its periodic catch advice. This approach will work better for the joint management of the North Sea mixed fishery once the UK has left the EU."

12.20 The Government anticipates that the final version of the MAP will be published in the next few weeks after the 'jurist linguist' process is complete. He asks that the Committee consider releasing this dossier from scrutiny given the proximity of final agreement.

Previous Committee Reports

Second Report HC 301–ii (2017–19), chapter 12 (22 November 2017); Thirty-sixth Report HC 71–xxxv (2016–17), chapter 2 (22 March 2017); Thirteenth Report HC 71–xi (2016–17), chapter 3 (12 October 2016).

225 Maximum rate of fishing mortality.

13 International Whaling Commission

Committee's assessment	Legally and politically important
Committee's decision	Cleared from scrutiny
Document details	Proposal for a Council Decision on the position to be adopted on behalf of the European Union, at the next three meetings of the International Whaling Commission including related inter-sessional meetings and actions.
Legal base	Articles 191(1), 218(9) TFEU;—; QMV
Department	Environment, Food and Rural Affairs
Document Number	(39005), 11894/17 + ADD 1, COM(17) 463

Summary and Committee's conclusions

13.1 The International Whaling Commission (IWC) is the decision-making body for the International Convention for the Regulation of Whaling (ICRW), which ensures both the conservation and the sustainable management of whales at a global level. There are 87 Contracting Parties including the UK and 25 EU Member States. The European Union has observer status.

13.2 The proposed Council Decision establishes the broad position to be adopted on behalf of the European Union at the next three biennial meetings of the IWC (2018, 2020 and 2022), including related inter-sessional meetings. As the EU is not a Party to the ICRW, the position would be expressed by the Member States acting jointly in the interest of the EU. The EU's position includes support for the general ban on commercial whaling and for the position that the "scientific" whaling exemption should not be used to justify what is primarily commercial whaling.

13.3 The Committee raised Brexit-related queries when it first considered the proposal at its meeting of 13 November 2017. In particular, the Committee asked:

- whether the principle of sincere cooperation reflected in Article 4(3) TEU would apply to the UK during any post-Brexit implementation period; and
- if so, how that would impact on the UK's ability to decide and vote independently on matters at the IWC's 2020 meeting and at related inter-sessional meetings.

13.4 The Minister for Agriculture, Fisheries and Food (George Eustice) has responded, noting simply that it is difficult to fully answer the Committee's query at this stage. He adds that the detail of any implementation period is yet to be negotiated.

13.5 On the outstanding legal issues, the Minister confirms that the legal base was successfully corrected and that text referring to "matters falling within EU competence" was included. This reflects shared understanding that the Council Decision covers matters to the extent the EU has exercised shared competence.

13.6 **We note that the Minister is unable to clarify whether the EU's principle of sincere cooperation will apply to the UK during the implementation period and so is unable to comment on how independent a hand the UK will have at the IWC's 2020 meeting and at related inter-sessional meetings. We also note that the Minister is nevertheless confident that, post-Brexit, the UK will be in a much stronger position to exert its influence in the IWC. While this may be true in the longer term, we are less assured that it is strictly accurate in the short term given the recognised uncertainty over the terms of any implementation period.**

13.7 **We draw this document to the attention of the House as an example of where the government has agreed to the EU exercising shared competence, contrary to its normal policy that only Member States do so.**

13.8 **We will monitor progress on these matters in our scrutiny of the UK approach to a range of international organisations and agreements. There are no outstanding questions on this document, which we now clear from scrutiny.**

Full details of the documents

Proposal for a Council Decision on the position to be adopted. on behalf of the European Union, at the next three meetings of the International Whaling Commission including related inter-sessional meetings and actions: (39005), 11894/17 + ADD 1, COM(17) 463.

Background

13.9 The background to, and content of, the proposal were set out in our Report of 13 November 2017.

13.10 At our meeting of 13 November, we noted the Minister's expectation that, on leaving the EU, the UK will "extend its influence to shaping global coalitions in favour of whale conservation". We sought confirmation that the UK is already using its IWC membership to work with non-EU countries to boost whale conservation, but that the extent of that work is constrained by the need to respect the overall EU position.

13.11 Turning to the impact of any post-Brexit implementation period, we asked:

- Does the Minister envisage that the principle of sincere cooperation reflected in Article 4(3) TEU—and thus forming part of the EU's rules and procedures—would apply to the UK during the implementation period?
- If so, how would that impact on the UK's ability to decide and vote independently on matters at the IWC's 2020 meeting and at related inter-sessional meetings?

13.12 In his original Explanatory Memorandum (EM), the Minister highlighted a need to amend the legal base. While the proposed Article 191(1) TFEU sets out broad environmental policy objectives, it is Article 192(1) TFEU, he said, which is more appropriate as it provides for the Council to decide on EU action to achieve Article 191 objectives. Furthermore, as the proposal relates to the environment and matters in which both the EU and Member States have competence, the Minister considered that the draft Decision should clarify that it relates to "matters falling within EU competence".

13.13 We agreed with the Government that the substantive legal base for the proposal should be Article 192(1), but we noted that this would not affect the procedure. We agreed too that greater clarity around the competence being exercised by the EU would be desirable, and that this should be set out in the Council Decision. The Government referred only to "matters falling within EU competence", without distinguishing between shared and exclusive competence. We emphasised that, in future, we expect the Government to be specific.

13.14 We cleared the document from scrutiny at our meeting of 13 November in advance of its imminent adoption.

The Minister's letter of 21 December 2017

13.15 Concerning the UK's current engagement with non-EU countries, the Minister reassures the Committee that the UK currently plays a prominent and active role in the IWC where the UK is well respected among EU and non-EU countries. The UK, reports the Minister, works closely and constructively with Parties to the IWC and has developed "excellent" relationships with a number of countries, including Australia, New Zealand, USA, Brazil, Argentina and Mexico. The Minister adds:

> "Whilst the UK continues to use its influence within the IWC to secure improvements in the conservation and welfare of cetaceans globally, we must currently do this within the boundaries of EU and Member States common positions. After we leave the EU the UK will be in a much stronger position to exert its influence on this global platform."

13.16 The Minister expresses the Government's approach to the post-Brexit implementation period in the following terms:

> "With respect to the impact of a post-exit implementation period on our ability to operate within the IWC, it is difficult to fully answer this at this stage. The UK will cease to be a member of the EU on 29 March 2019. At that point, neither the UK nor the EU and its Member States will be in a position to smoothly implement many of the detailed arrangements that will underpin our new partnership. We have therefore proposed a time limited period for implementation. The framework for this period, which can be agreed under Article 50, would be the existing structure of EU rules and regulations. We will have to negotiate the detail of how the implementation period will work."

13.17 Turning to the legal base, the Minister was pleased that the UK successfully corrected the legal base and that text referring to 'matters falling within EU competence' was included. This, he says, is standard agreed text used in Council Decisions covering international negotiations under environmental treaties. It is based on the shared understanding that the Council Decision covers matters to the extent the EU has exercised shared competence.

Previous Committee Reports

First Report HC 301-I (2017–19), chapter 36 (13 November 2017).

14 Fifth Anti-Money Laundering Directive

Committee's assessment	Legally and politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Home Affairs, the Treasury and the Justice Committees
Document details	Proposal for a Directive amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC
Legal base	Articles 50 and 114 TFEU; ordinary legislative procedure; QMV
Department	Treasury
Document Number	(37927), 10678/16 + ADDs 1–2, COM(16) 450

Summary and Committee's conclusions

14.1 In December 2017 the European Parliament and the EU Member States agreed on amendments to the EU's Anti-Money Laundering Directive (AMLD).[226] The legislation requires banks and other businesses handling financial transactions ("obliged entities") within the EU to apply due diligence to their customers, and report suspicious activity to the authorities. Since 2015 the legislation also obliges EU countries to maintain central registers of the beneficial ownership of both companies and express trusts.

14.2 Under the changes to the Directive now agreed, which we have summarised in more detail in paragraphs 14.22 to 14.24 below, businesses and public authorities in the EU[227] will face the following new requirements:

- the obligation to perform anti-money laundering checks will be extended to auditors, accountants, tax advisors, auction houses and estate agents (the latter only when renting out property where the monthly let is €10,000 (£8,824)[228] or more);
- each EU country will need to create a central register or retrieval mechanism for ownership of bank accounts, enabling Financial Intelligence Units like the UK's National Crime Agency to identify account holders;
- Member States will have to grant public access to information held on each EU country's Register of Trusts, subject to a "legitimate interest" test, the conditions for which must be defined in law by each individual Member State;[229]

226 Directive 2015/849/EU on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

227 The new Directive is marked as "EEA relevant". The EU and the EFTA-EEA countries will therefore discuss in the coming months how the Directive will apply to Norway, Iceland and Liechtenstein. The 4th Anti-Money Laundering Directive has not yet been incorporated into the EEA Agreement.

228 €1 = £0.88723

229 The Directive states that "the criteria and conditions granting access to requests for beneficial ownership information on trusts and similar legal arrangements should be sufficiently precise and in line with the aims of this Directive".

- in addition, access to the Register of Trusts must also be granted to any member of the public in relation to a trust which holds or owns a controlling interest in a company that is not incorporated in the EU (and is therefore not included in any Member State's register of beneficial ownership of companies);
- Member States must put in place mechanisms to ensure that information on beneficial ownership in their registers of both companies and trusts is "adequate, accurate and current"; and
- Member States will have to ensure the interconnection between each other's respective registers on companies and trusts via a Central Platform by early 2021.[230]

14.3 The Economic Secretary to the Treasury (John Glen) informed us of the agreement on the new Directive by letter of 17 January 2018.[231] He explained that the agreed legislation "meets many of the UK's negotiating priorities, including avoiding public access to our register of trust beneficial ownership; ensuring appropriate criteria against which high-risk third countries will be assessed; and requiring other EU Member States to follow our leadership in establishing public registers of company beneficial ownership".[232] He noted, however, that a possible exemption from enhanced due diligence for domestic politically-exposed persons—which has been subject to controversy in the UK[233]—was not included in the final legislation. Instead, the European Commission will have to publish a report on this issue in 2019.

14.4 The Directive is expected to be adopted by the European Parliament in mid-April 2018 and by the Council shortly after. Its transposition will be staggered, with changes to the Register of Companies likely to be due by November 2019; the enhanced access to the Register of Trusts taking effect in January 2020; and the live date for the register of bank accounts scheduled for June 2020. The European Commission is also tasked with ensuring that the national Registers of Trusts and Companies are interconnected by early 2021.

14.5 **We thank the Minister for this latest update on this important new Anti-Money Laundering Directive, which makes substantial changes to the scope and operation of anti-money laundering rules in the UK.**

14.6 **Although the date when most of the new Directive is to take effect falls well beyond the UK's scheduled date of exit from the EU in March 2019, it now appears likely the Government will agree to a post-Brexit transitional arrangement during which the UK would effectively stay in the Single Market to avoid an abrupt change in the trading**

230 This Platform is to be established under Article 22 of Directive 2017/1132/EU (the Company Law Directive).

231 Letter from John Glen to Sir William Cash (17 January 2018).

232 The UK legislated for making the beneficial ownership of companies public from April 2016 onwards, even though this is not required by the current AMLD. However, it is not clear how information on beneficial ownership submitted to Companies House is verified. The new AMLD will require all EU countries to make information on beneficial ownership of companies public.

233 The provisions on due diligence for politically exposed persons (PEPs) in the fourth AMLD (which are meant to apply stricter requirements to business relations with people in high public office considered more likely to be in receipt of laundered money) led to controversy in the UK, because they led to some Members of Parliament and their families being refused bank accounts. See HC Deb 20 January 2016, vol 604, col 1519. The amendment proposed by the Council (but not included in the final Directive) would have allowed Member States to waive the stricter requirements for "domestic" PEPs altogether.

relationship between the UK and the EU. In return, the other Member States have said[234] the UK would have to continue applying EU law for the duration of that arrangement as if it were still an EU country. On balance, given the Government itself is seeking a transitional period, we consider it likely that most, if not all, of the new AMLD will have to be transposed in the UK as a matter of law.

14.7 **The likelihood that the new Directive will be applied in the UK has several important legal implications:**

- **although the new legislation does not go so far as to provide a general right of public access to the Register of Trusts, it still creates, for the first time in UK law, a requirement on HM Revenue and Customs to release information on the beneficial ownership of trusts into the public domain. The legal framework for granting public access (and in particular the "legitimate interest" test) will need to be established in UK law, subject to consultation by the Government;**

- **we are also concerned that the Government will have to invest in a centralised retrieval system for information on bank accounts, which it flagged as an area of concern when the Directive was first proposed in 2016.[235] It noted that this will require a "significant change" to current practice, where the National Crime Agency accesses bank account information via credit reference agencies and individual banks; and**

- **the Directive will compel the Government to invest in the interconnection of its Companies and Trusts Registers with counterparts across the EU, when that interconnection may be severed as a matter of law at the end of the transitional period. This area is problematic as the interconnection is scheduled to go live in January 2021, which is just beyond the end of the transitional period as proposed by the European Commission. It will be important to ensure that technical changes and the allocation of resources to this element of the Directive are commensurate with the benefits to the UK once it ceases to be part of the EU's networks and structures.**

14.8 **The Committee is also disappointed that the exemption from enhanced due diligence for low-risk domestic politically exposed persons (PEPs), supported by the Member States, was not included in the final text of the Directive. This means that the problems Members of Parliament and their relatives face in accessing basic financial services as a result of the AMLD will persist at least until the Directive ceases to have force of law in the UK.**

14.9 **There also remain outstanding questions about the manner in which the information on beneficial ownership of both companies and trusts registered in the UK is verified by Companies House and HM Revenue and Customs, which manage these registers respectively on behalf of the Government. We wrote to the Minister on this matter following the publication of the European Commission's supra-national**

234 European Council guidelines for the Article 50 negotiations (15 December 2017).

235 Explanatory Memorandum submitted by HM Treasury (5 September 2016).

risk assessment report on money-laundering, which recommended that information held on these registers is "verified on a regular basis".[236] It remains unclear to us how such verification is being resourced and carried out in the UK.[237]

14.10 **With respect to the implications of Brexit for UK-EU financial flows *after* the transitional arrangement ends, the Minister has refused to outline in any detail its proposals for a UK-EU financial services deal although he expressed the Government's confidence that such a deal will be reached. In this respect, the Committee is disappointed that it is yet to receive a reply from the Minister to its letter to his predecessor on the "process for establishing regulatory requirements for cross-border business between the UK and EU" on financial services, proposed by the Chancellor in June 2017.[238]**

14.11 **As the Government is, broadly, content with the final text of the new Directive, and given its imminent adoption by the Parliament and the Council, we now clear it from scrutiny. However, we ask the Minister to write to us as soon as possible with the information we have previously requested in relation to:**

- **the verification of information held on the UK's central Registers of Companies and Trusts, especially in light of the new requirement in the 5th Anti-Money Laundering Directive that "mechanisms" are put in place to ensure that the information is "adequate, accurate and current"; and**
- **the Government's proposal for a joint regulatory approach with the EU to financial services under a future UK-EU trade agreement, in view of the fact that the Government wants to begin negotiating the future UK-EU economic partnership in the next two months.**

14.12 **We expect to receive replies from the Minister to our requests for information on both points by 16 February 2018. We also draw this new legislation to the attention of the Treasury Committee, the Home Affairs Committee and, in respect of the changes to public access to the Register of Trusts, the Justice Committee.**

Full details of the documents

Proposal for a Directive amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC: (37927), 10678/16 + ADDs 1–2, COM(16) 450.

Background

14.13 The EU's Anti-Money Laundering Directive requires banks and other businesses handling financial transactions ("obliged entities") to apply due diligence to their customers, and report suspicious activity to the authorities. It also obliges Member States to maintain central registers of the beneficial ownership of both companies and trusts, although there is—at present—no obligation to make the latter accessible to the public.

236 European Commission, "Supranational Risk Assessment Report" (26 June 2017).

237 See for more information the letter from Sir William Cash to the Economic Secretary to the Treasury of 22 November 2017.

238 Mansion House speech by the Chancellor, 20 June 2017.

14.14 In July 2016, following the revelations of tax evasion contained in the Panama Papers, the European Commission tabled a proposal for a fifth Anti-Money Laundering Directive. The proposal sought to:

- enhance the accessibility of beneficial ownership registers and include more people in them by broadening the definition of "beneficial ownership" of a corporate entity;
- clarify the requirements for the register of trusts, make it partially accessible to the public and provide that trusts need to be registered in the Member State where it is administered (i.e. each Member State where trustees are established) rather than where it is registered; and
- strengthen customer due diligence rules for banks and other obliged entities.

14.15 At the time the Government expressed concerns about some elements of the proposal, notably the envisaged expansion of the number of people on the register of beneficial ownership of companies; the requirement to make the central register of trusts at least partially accessible to the public for those with a "legitimate interest"; and the obligation for each Member State to establish a central banking registry or retrieval system to allow for quick identification of the owners of a bank or payment account.[239]

14.16 In December 2016, the Government nevertheless supported a Council general approach on the draft Directive which was in line with the UK's priorities for the file.[240] The European Scrutiny Committee considered the proposal legally and politically important at its meetings in September, October and November 2016, and February and November 2017, and consequently retained it under scrutiny.

14.17 The European Parliament and the Council engaged in trilogue negotiations to agree on the final text of the legislation between March and December 2017. The Parliament's position diverged significantly from the UK Government's objectives, as it has been arguing in favour of mandatory public access to the register of trusts, a lower registration threshold for beneficial ownership of companies and new standards on anti-money laundering that third countries would have to adhere to in return for a trade agreement with the EU on financial services.

14.18 The Committee last considered the proposal in November 2017, in light of the information provided by the Minister on the state of the trilogue negotiations.[241] We noted that the possibility of private information about the beneficial ownership of UK trusts entering the public domain as a consequence of the new legislation was the most significant element of the draft Directive.

14.19 In the context of the UK's withdrawal from the EU, the Committee also noted that it was likely the new AMLD would have to be transposed in the UK during any post-Brexit transitional period, when EU law would be expected to apply in much the same as

239 Explanatory Memorandum submitted by HM Treasury (5 September 2016).
240 The previous Committee had granted a scrutiny waiver allowing the Government to support this general approach in its Report of 18 November 2016.
241 See our Report of 22 November 2017.

it does while the UK is still a Member State.[242] In addition, it identified some potential consequences for British banks and businesses after the UK becomes a "third country" vis-à-vis the EU for anti-money laundering purposes, including the ability of the National Crime Agency to obtain information from EU counterparts and the inclusion of UK-registered trusts in the central registers of EU countries where the relevant trustees are established.

14.20 Given the clear legal and political importance of the draft Directive, the Committee retained it under scrutiny pending further information about the outcome of the trilogue process.

The trilogue agreement of 13 December 2017

14.21 On 13 December 2017 the Estonian Presidency of the Council and the European Parliament announced that they had reached agreement on the new Anti-Money Laundering Directive.[243] The agreed changes to the AMLD include:

The scope of the Directive

- Auditors, accountants, tax advisors, auction houses and estate agents will be brought within the scope of the Directive, requiring them to perform anti-money laundering checks (the latter only when renting out property where the monthly let is €10,000 (£8,824)[244] or more);

Beneficial ownership of companies and trusts

- The registration of beneficial ownership of trusts will have to take place in the Member State where the trustee is established or resides. If this is a country outside of the EU, the beneficial ownership of the trust must be registered in the Member State where a trustee enters into a business relationship or acquires real estate in name of the trust;[245]

- Member States will have to put in place "mechanisms" to ensure that information on beneficial ownership in their existing registers of both companies and trusts is "adequate, accurate and current";

- In particular, "obliged entities" as well as competent authorities within the EU will be under an obligation to "report any discrepancies they find between

242 The European Council's guidelines of April 2017 identified a "prolongation of the *acquis*" as an option for the transitional period. Following the Government's explicit request for a transitional arrangement which would keep UK-EU market access arrangements intact immediately following Brexit, the European Council stated again that such a transition would require the UK to continue applying EU law even as a non-Member.

243 Council of the EU, "Money laundering and terrorist financing: Presidency and Parliament reach agreement" (20 December 2017). See also Council document 15849/17.

244 €1 = £0.88723

245 Where the trustees of a trust are established or reside in different EU countries, or where a trustee based outside the EU enters into multiple business relationships in the name of the trust in different EU countries, the amendment to the AMLD provides that 2a certificate of proof of registration or an excerpt of the beneficial ownership information in a register held by one Member State."; may be considered as sufficient to consider the registration obligation fulfilled".

the beneficial ownership information available in the central registers and the beneficial ownership information available to them" in relation to both companies and trusts;

- With respect to each national Register of Trusts, members of the public will have a right to seek access information on beneficial ownership held therein, subject to a "legitimate interest" test (to the conditions for which must be defined in law by each individual Member State);[246]
- In addition, members of the public must also be granted access to the Register of Trusts in relation to a trust which holds or owns a controlling interest in a company that is not incorporated in the EU (and is therefore not included in any Member State's register of beneficial ownership of companies).

Centralised information on bank accounts

- The Directive requires the establishment, in each EU country, of a central register or retrieval mechanism for ownership of bank accounts, enabling Financial Intelligence Units (FIUs) like the National Crime Agency to identify account holders.

Interconnection of the EU's national registers

- By 2021, the Directive will require the interconnection between all EU Member States' respective registers on companies and trusts via a Central Platform to be managed by the European Commission.[247]

Information on ownership of property

- Member States will have to provide FIUs and competent authorities with access to information which allows the identification "in a timely manner" of any natural or legal persons owning real estate within their territory.

14.22 The exemption from enhanced due diligence for domestic PEPs such as Members of Parliament, as proposed by the Council, has been removed at the request of the European Parliament. However, the agreement does include a review clause requiring the European Commission to consider the proportionality of applying enhanced due diligence measures to Politically Exposed Persons, and to publish a report addressing this point in the course of 2019. The final Directive also does *not* maintain the Commission's proposed amendment to one of the criteria for identifying the beneficial owner of a corporate entity, which would reduce the registration threshold for beneficial ownership from 25% to 10% of shareholding for some companies.[248]

246 The Directive states that "the criteria and conditions granting access to requests for beneficial ownership information on trusts and similar legal arrangements should be sufficiently precise and in line with the aims of this Directive". The new legislation also requires full public access to each EU country's register on beneficial ownership of companies to all members of the public, but this has already been legislated for in the UK.

247 This Platform is to be established under Article 22 of Directive 2017/1132/EU (the Company Law Directive).

248 The Government was concerned that this would increase the number of persons on the register and the costs to businesses, and create difficulties for complex corporate structures where there could be some companies within a group that would meet the 10% threshold while others would not.

14.23 The Austrian Government has laid a statement critical of the trilogue agreement, expressing its concerns that the Member States' Registers of Trusts should be fully accessible to the public. It also noted that the amendments to the AMLD "enhances [the] lack of transparency of beneficial ownership of trusts even more as it provides for the anonymity of beneficial owners of certain types of trusts".[249]

The Government's view

14.24 The Economic Secretary to the Treasury (John Glen) informed of us of the Government's position on the agreement by letter of 17 January 2018. He explained that the new Directive "meets many of the UK's negotiating priorities, including avoiding public access to our register of trust beneficial ownership; ensuring appropriate criteria against which high-risk third countries will be assessed; and requiring other EU Member States to follow our leadership in establishing public registers of company beneficial ownership".

14.25 With respect to public access to the Register of Trusts, the Minister notes that Member States will have to define in domestic law who should be considered to have a "legitimate interest" in information held on that register. The Government "will consider how best to consult with interested stakeholders on how this definition should be applied in the UK, in view of the fact that many trusts are established for personal or family reasons". The Minister also welcomed the fact that the Directive will not require trustees to register in multiple EU countries, but only where the trust is administered.

14.26 With respect to Brexit, the Minister reiterated the Government's position that the objective of the transitional period is to ensure that "businesses should only have to plan for one set of changes in the relationship between the UK and the EU". In addition, he expressed his confidence that the EU and the UK will "secure a deal on financial services" after the transition, because "it is in the interests of all parties to [do so] and we are confident in our ability to do so, as we start from a unique position of regulatory alignment".

14.27 In response to the Committee's question about continued cooperation of the UK's Financial Intelligence Unit (the National Crime Agency) with its EU counterparts after Brexit, the Minister refused to be drawn on the substance of the Government's approach. He stated only that the ambition is to establish a "UK-EU relationship [that] can be kept versatile and dynamic enough to respond to the ever-changing threat environment; create an ongoing dialogue in which law enforcement and criminal justice challenges and priorities can be shared and, where appropriate, tackled jointly".

14.28 The Minister also explained that the Government will maintain the current AMLD-derived Anti-Money Laundering Regulations when the Directive ceases to apply to the UK, "subject to minor amendments necessary to rectify deficiencies within the legislation caused by the UK no longer being a member of the EU". As a result, he says, there will be a continued legal basis for a register of trusts with UK tax consequences as established in July 2017.

14.29 The new Anti-Money Laundering Directive is due to be adopted by the European Parliament on 18 April 2018 and by the Council shortly after. The Minister requested that the Committee clear the proposal from scrutiny in view of the finalisation of the legislative procedure, so that it can vote in favour of the Directive when it comes to Council for formal approval.

249 See Council document 15849/17 ADD1.

Transposition of the Directive

14.30 The transposition date for most of the Directive, including the changes to the Register of Companies, will be 18 months after its publication in the Official Journal. If the legislation is adopted in April 2018 and published in the Official Journal in May, that date will fall in November 2019. The modified Register of Trusts would then have to be up and running by January 2020, and the central register of bank accounts by June 2020. The interconnection of the registers between Member States via the Central Platform would be scheduled to go live in January 2021, depending on the speed with which the necessary technical systems can be put in place.

14.31 Although these dates all fall after the UK's projected exit from the EU in March 2019,[250] it now appears likely the Government will agree to a post-Brexit transitional period during which EU law would continue to apply in the UK as if it were still a Member State. In those circumstances, the new AMLD would have to be implemented if its transposition dates occur within that period (which, considering the Prime Minister has said the transition is likely to be "around two years", is likely to be the case for all three types of register).

Previous Committee Reports

Eleventh Report HC 71–ix (2016–17), chapter 6 (14 September 2016); Fifteenth Report HC 71–xiii (2016–17), chapter 4 (26 October 2016); Eighteenth Report HC 71–xvi (2016–17), chapter 8 (16 November 2016); and Thirty-Second Report HC 71–xxx (2016–17), chapter 4 (22 February 2017); and Second Report HC 301–ii (2017–19), chapter 18 (22 November 2017).

250 The two-year Article 50 period ends on 29 March 2019. However, the UK's exit from EU membership could take place on a different date if the Article 50 negotiating period is extended, or if the Withdrawal Agreement fixes a different date.

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

Department for Business, Energy and Industrial Strategy

(39285) 14992/17 COM(17) 687	Report from the Commission to the European Parliament and the Council 2017 assessment of the progress made by Member States towards the national energy efficiency targets for 2020 and towards the implementation of the Energy Efficiency Directive as required by Article 24(3) of the Energy Efficiency Directive 2012/27/EU.
(39287) 14935/17 + ADDs 1–4, + ADD 32 COM(17) 688	Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank Third Report on the State of the Energy Union.
(39293) 15202/17 COM(17) 693	Report from the Commission to the European Parliament and the Council Report on the Functioning of the European Carbon Market.
(39361) 15836/17 COM(17) 744	Report from the Commission to the European Parliament and the Council on the functioning of the European Online Dispute Resolution platform established under Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes.
(39363) 15788/17 + ADD 1 COM(17) 755	Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Strategic Report 2017 on the implementation of the European Structural and Investments Funds.
(39364) 15785/17 COM(17) 762	Report from the Commission to the European Parliament and the Council Annual Report on Research and Technological Development Activities of the European Union and Monitoring of Horizon 2020 in 2016.
(39428) 15804/17 SWD(17) 452	Commission Staff Working Document accompanying the Document Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Strategic Report 2017 on the Implementation of The European Structural and Investment Funds.

Department for Environment, Food and Rural Affairs

(39272)	Special report No 16/2017: Rural Development Programming: less complexity and more focus on results needed.
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(39358)	Special Report n°21/2017: Greening: a more complex income support scheme, not yet environmentally effective.
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(39362)	Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Ninth Report on the implementation status and the programmes for implementation (as required by Article 17) of Council Directive 91/271/EEC concerning urban waste water treatment.
15794/17	
+ ADDs 1–2	
COM(17) 749	
(39383)	Proposal for a Regulation of the European Parliament and of the Council repealing Regulation (EU) No 256/2014 of the European Parliament and of the Council concerning the notification to the Commission of investment projects in energy infrastructure within the European Union.
15962/17	
COM(17) 769	

Department for International Development

(39395)	Report from the Commission to the European Parliament and the Council on 2016 EIB external activity with EU budgetary guarantee.
10235/17	
COM(17) 767	

Department for Transport

(39233)	Report from the Commission to the European Parliament and the Council—Assessment of the need to review Regulation (EC) no 1222/2009 of the European Parliament and the Council on the labelling of tyres with respect to fuel efficiency and other essential parameters.
14597/17	
COM(17) 658	

Foreign and Commonwealth Office

(39450)	Implementing Decision (CFSP) 2016/849 concerning restrictive measures against the Democratic People's Republic of Korea.
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(39451)	Implementing Regulation (EU) 2017/1509 concerning restrictive measures against the Democratic People's Republic of Korea.
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(39452) — Council Decision to support the activities of the Preparatory Commission of the Comprehensive Nuclear-Test-Ban Treaty Organisation in the detection and analysis of nuclear explosions.

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(39453) — Council Decision (CFSP) 2017/… of [dd/01/2018] amending Decision 2011/72/CFSP concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia.

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(39454) — Council Implementing Regulation (EU) …/2017 of [dd/01/2018] implementing Regulation (EU) No.101/2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Tunisia.

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HM Treasury

(39346) — Germany Commission Opinion & Staff Working Document

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SWD(17) 513

39347 — Slovenia Commission Opinion & Staff Working Document

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SWD(17) 526

(39156) 13603/17 — 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 Finland—EGF/2017/005 FI/Retail.

COM(17) 618

(39157) 13601/17 — 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 Greece—EGF/2017/003 GR/Attica retail.

COM(17) 613

(39359) — Special report No 20/2017: EU-funded loan guarantee instruments: positive results but better targeting of beneficiaries and coordination with national schemes needed.

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(39399) 16012/17 — Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2016/97 as regards the date of application of Member States' transposition measures.

COM(17) 792

Home Office

(39328) 13721/17 —	Commission Recommendation of 18.10.2017 on Immediate Steps to Prevent Misuse of Explosives Precursors.
(39372) 15887/17 COM(17) 759	Proposal for a Council Implementing Decision on subjecting the new psychoactive substance N-phenyl-N-[1–(2-phenylethyl)piperidin-4– yl] oxolane-2-carboxamide (tetrahydrofuranylfentanyl; THF-F) to control measures.
(39373) 15878/17 COM(17) 766	Proposal for a Council Implementing Decision on subjecting the new psychoactive substance methyl 2–{[1–(5-fluoropentyl)-1H-indazole-3–carbonyl]amino}-3,3-dimethylbutanoate (5F-MDMB-PINACA) to control measures.
(39374) 15877/17 COM(17) 765	Proposal for a Council Implementing Decision on subjecting the new psychoactive substance methyl 1–(2-phenylethyl)-4– [phenyl(propanoyl) amino]piperidine-4-carboxylate (carfentanil) to control measures.
(39375) 15875/17 COM(17) 764	Proposal for a Council Implementing Decision on subjecting the new psychoactive substance 1–(4-cyanobutyl)-N-(2-phenylpropan-2-yl)-1Hindazole-3-carboxamide (CUMYL-4CN-BINACA) to control measures.
(39376) 15873/17 COM(17) 758	Proposal for a Council Implementing Decision on subjecting the new psychoactive substance N-(1-amino-3-methyl-1-oxobutan-2-yl)-1–(cyclohexylmethyl)-1H-indazole-3-carboxamide (AB-CHMINACA) to control measures.
(39377) 15872/17 COM(17) 757	Proposal for a Council Implementing Decision on subjecting the new psychoactive substance N-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1–(cyclohexylmethyl)-1H-indazole-3-carboxamide(ADB-CHMINACA) to control measures.
(39378) 15871/17 COM(17) 756	Proposal for a Council Implementing Decision on subjecting the new psychoactive substance N-(4-fluorophenyl)-2-methyl-N-[1–(2–phenylethyl)piperidin-4-yl)propanamide (4-fluoroisobutyrylfentanyl) to control measures.

Formal Minutes

Wednesday 31 January 2018

Members present:

Sir William Cash, in the Chair

Steve Double	David Jones
Marcus Fysh	Andrew Lewer
Kate Green	Michael Tomlinson
Kelvin Hopkins	Dr Philippa Whitford
Darren Jones	

5. 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 14.31 read and agreed to.

Summary agreed to.

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

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

[Adjourned till Tuesday 6 February at 1.00pm

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*)