House of Commons

European Scrutiny Committee

Thirty-fourth Report of Session 2016–17

Documents considered by the Committee on 8 March 2017 including the following recommendation for debate:

Proceeds of crime: mutual recognition of freezing and confiscation orders

Report, together with formal minutes

Ordered by the House of Commons
to be printed 8 March 2017

HC 71-xxxii
Published on 14 March 2017
by authority of the House of Commons

Notes

Numbering of documents

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

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

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

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

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

Abbreviations used in the headnotes and footnotes

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

Euros

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

Further information

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

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

Staff

The staff of the Committee are Eve Samson (Clerk), Kilian Bourke, Terry Byrne, Alistair Dillon, Leigh Gibson, Nishana Jayawickrama, Foeke Noppert (Clerk Advisers), Arnold Ridout (Legal Adviser) (Counsel for European Legislation), Joanne Dee (Assistant Legal Adviser) (Assistant Counsel for European Legislation), Mike Winter (Second Clerk), Sarah Crandall (Senior Committee Assistant), Sue Beeby, Rob Dinsdale and Beatrice Woods (Committee Assistants), Ravi Abhayaratne and Paula Saunderson (Office Support Assistants).

Contacts

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

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Meeting Summary

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

Brexit related issues

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

Aviation Emissions

Whether UK aviation will be exempt from any form of emissions reduction scheme between Brexit and the entry into force of international arrangements in 2021 and, if so, what the implications would be and how should the aviation industry plan for that period.

Data Protection and Data Exchange

How will transfer of data between the UK and the EU be assured post Brexit? What are the prospects for a decision that UK standards are equivalent to EU ones, or for a data sharing agreement?

Eurodac

Will the Government retain access to the Eurodac database post Brexit and is it negotiating to allow third countries such access?

'Great Repeal Bill'

How will legislation which refers to limits set at EU level (ambulatory references) be dealt with in the Great Repeal Bill (see chapter on Toy Safety)?

Summary

Data protection: Exchanging data with non-EU countries

Despite being non-legislative, this Communication is significant. It highlights the EU's future approach to the exchange of data with third countries in a way which adequately protects EU citizens. The Commission explains that a diverse range of third countries already benefit from EU data-sharing arrangements and it is willing to facilitate further data-sharing with non-EU partners. After Brexit, a Commission adequacy decision or an international data-sharing agreement appear to be the best options to secure seamless UK-EU trading or law enforcement cooperation. The UK would have to demonstrate equivalent legal protections for EU citizens to EU data protection and e-privacy rules, in the light of the EU Charter of Fundamental Rights and recent CJEU rulings in Digital Rights Ireland, Schrems and Watson v Home Secretary. As the UK will no longer be

within the jurisdiction of the CJEU nor subject to the Charter on exit, this may present some challenges. However, on Brexit day it is likely that the UK will already be aligned with EU data protection laws. Given the length of time it has taken to put the EU-US data-sharing arrangements in place (Privacy Shield and the Umbrella Agreement), we seek assurance from the Government that it will take timely steps to ensure an "uninterrupted" and "unhindered" flow of EU-UK data post-Brexit.

Not cleared; further information requested; drawn to the attention of the Committee on International Trade, Home Affairs Committee and Culture Media and Sport Committee.

Eurodac

Eurodac is a database used to establish the Member State responsible for examining an asylum application under the Dublin rules. The UK has opted in to the proposed Eurodac Regulation—the only one of the seven legislative proposals making up the Commission's asylum reform package in which the Government has chosen to participate. In his latest update, the Immigration Minister (Mr Robert Goodwill) tells us that the UK intervened when Justice and Home Affairs Council agreed a partial general approach in December to "support further amendments to the text to make it easier to check Eurodac for law enforcement purposes".

Eurodac was originally conceived as an asylum database to support the Dublin system. Law enforcement access (subject to strict conditions) was introduced in 2013. A further easing of the conditions for law enforcement access to the Eurodac database would mark a significant extension of Eurodac's original purposes. The Minister is asked what analysis and evidence there is to demonstrate that such an extension is justified. He is also asked to comment on the sensitive question of extending access to Eurodac data to intelligence services.

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

Aviation emissions

International agreement to reduce aviation emissions was reached for the first time last October and will come into effect in 2021. In recognition of the international agreement, the Commission has proposed that the EU's own scheme, in place since 2012, be permanently restricted to flights between European Economic Area airports. The Committee considered the document to be particularly relevant in the context of Brexit, and posed the following questions:

- Can the Minister confirm that any non-participation by the UK in the Aviation EU ETS would leave UK non-domestic flights out of any form of aviation market-based emissions reduction measures between EU withdrawal and entry into force of the International Civil Aviation Organization (ICAO) mechanism in 2021?

- If that is the case, what would be the implications for a) the UK airline and travel industries and b) UK climate change policy?

- On what basis should the aviation industry plan for the period mid-2019 until the end of 2020?
- As the UK will be a third country once it has withdrawn from the EU, the ICAO agreement is timely. What effort is the UK making to work out the details of the ICAO scheme in order to ensure that it enters into force in 2021 as scheduled?

Not cleared; further information requested; drawn to the attention of the Transport Committee and the Business, Energy and Industrial Strategy Committee.

Insolvency, Restructuring and Second Chances for Business and Entrepreneurs

This proposed Directive is in the sensitive policy field of substantive insolvency law. Although the proposal is in line with many aspects of UK insolvency law, the Government has told us that implementation of the preventive restructuring provisions could still have a substantial impact on the UK. On current Brexit timings, it seems unlikely that the UK will have to implement this proposed Directive. Nevertheless, as a matter of precaution the Committee has asked the Government to minimise the impact of the proposal on the UK in negotiations. The Government now tells us that, as this is the first time the EU has proposed measures to harmonise insolvency, it does not anticipate rapid progress in negotiating the proposal. Responding to previous questions about Brexit implications and the possibility of any UK alignment with EU insolvency laws after Brexit, it does not want to pre-empt the outcome of withdrawal negotiations. However, it commits to ensuring that the proposal supports the interests of UK businesses by playing a full and active role in the negotiations while the UK remains a Member State.

Not cleared; further information requested on the progress of negotiations; drawn to the attention of the Business, Energy and Industrial Strategy Committee.

Carbon Capture and Storage

The Commission's Report on implementation of the Carbon Capture and Storage Directive—designed to establish a framework for the safe geological storage of carbon dioxide—raises no issues. However the Committee decided to report the document to the House due to the continued uncertainty over the UK Government's approach to this critical technology, which has yet to reach commercial viability. The Committee asks that the Minister either sets out the Government's approach or indicates when the House can expect to receive such details.

Cleared; further information requested; drawn to the attention of the Business, Energy and Industrial Strategy Committee and the Environmental Audit Committee.

Toy safety: lead content

The European Commission has proposed amending the EU's Toy Safety Directive to reduce the permitted lead content of toys, to protect children's health. While the Government notes the likely health benefits of the change are smaller than anticipated, the Committee has cleared the proposal from scrutiny as the impact on UK manufacturers is expected to be minimal.

However, the contents of the Toy Safety Directive do raise a more fundamental legal issue within the context of the UK's exit from the EU. The UK regulations implementing the Directive do not contain the actual content limits for chemicals in toys, but instead refer back to the EU legislation by 'ambulatory reference'. This means that some substantial redrafting of the Toy Safety Regulations is likely to be necessary as part of the Great Repeal Bill to ensure that the UK's legal framework in this area remains effective when the UK ceases to be a Member State.

Cleared.

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: Aviation Emissions [Proposed Regulation (NC)]; Insolvency, Restructuring and Second Chances for Business and Entrepreneurs [(a) Proposed Directive (NC), (b) Proposed Regulation (C) and (c) Proposed Implementing Regulation(C)]; Carbon Capture and Storage [Commission Report (C)]; State of the Energy Union [(a) Commission Communication, (b) Commission Staff Working Document, (c) and (d) Commission Reports (C)]

Culture Media and Sport Committee: Exchanging data with non-EU countries [Commission Communication (NC)]; Digital Single Market: "Building a European Data Economy" [Commission Communication (NC)]

Environmental Audit Committee: Carbon Capture and Storage [Commission Report (C)]

Exiting the European Union Committee: Proceeds of crime: mutual recognition of freezing and confiscation orders [Proposed Regulation (NC)]; Digital Single Market: "Building a European Data Economy" [Commission Communication (NC)]

Home Affairs Committee: Criminal law measures to counter money laundering [Proposed Directive (NC)]; Proceeds of crime: mutual recognition of freezing and confiscation orders [Proposed Regulation (NC)]; Exchanging data with non-EU countries [Commission Communication (NC)]; Fingerprinting of asylum applications and irregular migrants: the Eurodac system [Proposed Regulation (NC)]

International Trade Committee: Exchanging data with non-EU countries [Commission Communication (NC)]

Transport Committee: Aviation Emissions [Proposed Regulation (NC)]

1 Proceeds of crime: mutual recognition of freezing and confiscation orders

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; opt-in decision recommended for debate in European Committee B (decision reported on 1 February 2017); drawn to the attention of the Home Affairs Committee and the Committee on Exiting the European Union
Document details	Proposal for a Regulation on the mutual recognition of freezing and confiscation orders
Legal base	Article 82(1) (a) TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Number	(38429), 15816/16 + ADD 1, COM(16) 819

Summary and Committee's conclusions

1.1 The proposed Regulation is intended to improve the cross-border enforcement of court orders authorising the freezing and confiscation of the proceeds of crime. It forms part of a wider package of measures to disrupt and cut off funding for organised crime and terrorism which often has a transnational dimension. The proposed Regulation would replace two EU Framework Decisions adopted in 2003 and 2006 which the Commission considers to be "out of date" and unworkable in practice. The UK participates in both Framework Decisions.[1] The proposed Regulation is subject to the UK's Title V (justice and home affairs) opt-in, meaning that it will only apply to the UK if the Government decides to opt in.

1.2 The Security Minister (Mr Ben Wallace) told us that the changes proposed by the Commission were "broadly in line with existing UK legislation and policy on asset recovery" but identified some areas of divergence with domestic law.[2] In deciding whether or not to opt in to the proposed Regulation, he explained that the Government would take into account the outcome of the referendum, the extent of any changes that would be needed to UK law and the previous Coalition Government's decision not to opt in to the EU Confiscation Directive (adopted in 2014) on the grounds that "the UK, not Europe, should decide on UK criminal law".[3] An important factor in deciding not to opt in to the Directive was the risk that UK participation in an EU criminal law measure might provide a basis for asserting that more stringent criminal law standards and safeguards should apply to non-conviction based confiscation orders which, in the UK, are governed by civil procedures under Part V of the Proceeds of Crime Act (POCA) 2002.

1 Council Framework Decision 2003/577/JHA and Council Framework Decision 2006/783/JHA. The 2003 Framework Decision has been partially superseded by Directive 2014/41/EU on the European Investigation Order which establishes procedures for the freezing and transfer of evidence. The UK opted in to the Directive and has to implement its provisions by 22 May 2017.

2 See para 58 of the Minister's Explanatory Memorandum.

3 See para 61 of the Minister's Explanatory Memorandum.

1.3 In his latest letter, the Minister responds to questions raised in our earlier Report (listed at the end of this chapter) on the proposed Regulation. We requested further information on the degree of connection between the proposed Regulation and the EU Confiscation Directive, as well as the implications of the UK's opt-in decision for domestic criminal (and civil) asset recovery laws and the anticipated timescale for negotiations, given that it seemed the new rules could take effect before the UK leaves the EU. We also asked whether the Government supported the use of a directly applicable Regulation and sought further information on the mechanism for enforcing terrorist property forfeiture orders made under the Terrorism Act 2000. We invited the Minister to clarify the Government's position on UK participation in this and other EU criminal law mutual recognition instruments (such as the European Arrest Warrant and the European Investigation Order) once the UK leaves the EU.

1.4 **We conclude from the information provided by the Minister that the UK's non-participation in the EU Confiscation Directive would not present any practical or legal impediment to opting into the proposed Regulation. Nor would a decision to opt in place at risk the UK's civil asset recovery regime under Part V of the Proceeds of Crime Act (POCA) 2002.**

1.5 **In a different context, the Government has expressed concern that the use of a directly applicable Regulation, rather than a standard-setting Directive which has to be implemented in national law, raises "profound implications for national sovereignty".[4] The Minister has not raised similar concerns in relation to this proposal, even though a Regulation has not previously been used to implement mutual recognition arrangements in the criminal law field. He indicates only that the Government intends to explore the issue further during negotiations. This suggests that it is the content, rather than the form, of the legislative proposal that will determine the extent of any implications for national sovereignty. Does the Minister agree, and does he consider that any of the provisions in the Commission proposal present a threat to national sovereignty?**

1.6 **The Minister confirms that terrorist property forfeiture orders made under the Terrorism Act 2000 ("TACT") would fall within the scope of the proposed Regulation if the UK were to opt in and says that the Government is considering "how this would impact the terrorist financing provisions under TACT". We ask the Minister to elaborate on his concerns.**

1.7 **The Minister anticipates that negotiations on the proposed Regulation "may take to the end of the year, or perhaps longer". This means that the proposal could take effect before the UK leaves the EU, albeit for a relatively short period. We can see no reason for the Government to opt in unless it envisages maintaining cooperation in this and other areas of mutual recognition beyond Brexit. Given the imminence of Article 50 exit negotiations, it is highly regrettable that the Minister is unwilling to offer any view on the relative importance of a range of EU mutual recognition instruments in tackling serious transnational crime. We expect him to do so during the opt-in debate we have recommended on the proposed Regulation.**

4 See, for example, the Government's position on the EU asylum reform package: Twelfth Report HC 71-x (2016–17), chapter 1 (14 September 2016).

1.8 **The proposed Regulation remains under scrutiny. We ask the Minister to inform us at the earliest opportunity of the three month deadline for opting in to the proposal and expect the opt-in debate we have recommended to be scheduled in good time. We also ask him to provide progress reports on negotiations. We draw this chapter to the attention of the Home Affairs Committee and the Committee on Exiting the European Union.**

Full details of the documents

Proposal for a Regulation on the mutual recognition of freezing and confiscation orders: (38429), 15816/16 + ADD 1, COM(16) 819.

The Minister's letter of 20 February 2017

1.9 The Minister is unable to confirm the three month deadline for opting in to the proposed Regulation at the negotiating stage as "the last language version of the proposed Regulation has yet to be published", but undertakes to inform us once the date is known.

1.10 We asked the Minister whether the UK's non-participation in the 2014 Confiscation Directive would in any way impede its participation in the proposed Regulation. He responds:

> "The 2014 Directive set minimum standards for freezing and confiscation, which applied to matters such as the freezing and confiscation of the instrumentalities of crime, and so called 'extended' and 'third party' confiscation. The proposed Regulation builds on the measures set out in the 2014 Directive, which most Member States will follow. However, its purpose is to set requirements in relation to the mutual recognition of confiscation and freezing orders, and it does not seek to harmonise the underlying rules applicable to when confiscation and freezing orders can be issued.
>
> "In order to comply with the Regulation, the UK must be capable of recognising freezing and confiscation orders which are made by other Member States. It is not stated explicitly at any part of the proposal that the Regulation has the effect of imposing a domestic confiscation regime upon Member States; instead, the 2014 Directive is recognised as having that effect."

1.11 We also asked whether the previous Coalition Government's concern that participation in the 2014 Confiscation Directive might place at risk the UK's civil asset recovery regime under Part V of the Proceeds of Crime Act 2002 was relevant to the proposed Regulation. The Minister believes not:

> "The preamble to the draft Regulation states explicitly at paragraph (13) that 'This Regulation should not apply to freezing and confiscation orders issued within the framework of civil or administrative proceedings'. For this reason, and taken in conjunction with the conclusions in the paragraph above, we consider that the Regulation does not purport to extend a requirement to mutually recognise civil recovery orders and nor does it

> raise the possibility that our domestic civil recovery provisions would need to be re-framed as criminal measures in order to comply—this is on the basis that the Regulation does not affect domestic confiscation rules."

1.12 We invited the Minister to comment on the use (for the first time) of a directly applicable Regulation to implement mutual recognition arrangements in the criminal law field. He observes:

> "The European Commission has made it clear that they consider a Regulation is the most appropriate instrument to use in this area, primarily because of the inconsistent application of the existing Framework Decisions. We will explore those issues further during negotiation, and will revert back to the Committee on those outcomes."

1.13 The Minister's Explanatory Memorandum stated that "UK legislation does not currently provide for the mutual recognition of terrorist property forfeiture orders" made under the Terrorism Act 2000.[5] We asked the Minister to explain why this was the case and whether and how terrorist property concealed in another Member State could be recovered under existing UK law. We also asked him to confirm that terrorist property forfeiture orders would fall within the scope of the proposed Regulation if the UK were to opt in and to indicate whether this would present any difficulties for the UK. The Minister responds:

> "There is provision in UK law for the recognition and enforcement of external orders which are the equivalent to terrorist property forfeiture orders made under the Terrorism Act 2000 (TACT forfeiture orders). TACT forfeiture orders come within the definition of 'confiscation order' in both the 2003 and 2006 Framework Decisions. S.I. 2014/3141 provides for the recognition and enforcement of 'overseas confiscation orders' which are defined in Regulation 13(2) as:
>
> *'an order made by an appropriate court or authority in a member State for the confiscation of property which is in England and Wales, or is the property of a resident of England and Wales, and which the appropriate court or authority considers—*
>
> *(a) was used or intended to be used for the purposes of criminal conduct, or*
>
> *(b) is the proceeds of criminal conduct.'*
>
> "This means that there is a mechanism for recognising and enforcing in the UK external orders which are the equivalent of TACT forfeiture orders. Our analysis of the proposed Regulation indicates that TACT forfeiture orders would fall within scope if the UK were to opt in. We are currently considering how this would impact the terrorist financing provisions under TACT."

5 See para 49 of the Minister's Explanatory Memorandum.

1.14 The Minister's Explanatory Memorandum raised the possibility that the UK could be ejected from the existing EU regime for mutual recognition of freezing and confiscation orders if the Government were to decide not to opt in to the proposed Regulation.[6] We asked him to elaborate on his concerns in light of:

- Article 39 of the proposed Regulation which provides that the Regulation will only replace the 2003 and 2006 Framework Decisions for those Member States participating in it; and
- the Commission's accompanying explanatory memorandum which states that the 2003 and 2006 Framework Decisions "will continue to apply in relation to those Member States that are not bound by this Regulation".[7]

1.15 The Minister responds:

> "The European Commission's explanatory memorandum makes clear that under Article 39 (replacement) of the proposed EU Regulation, should the UK decide not to opt in to the proposed EU Regulation, the 2003 and 2006 Framework Decisions will continue to apply instead. In view of that and following a careful consideration of the content of the measures, we do not consider that the UK's non-participation could lead to a finding of inoperability under Article 4a(2) of Protocol 21 to the Treaties.
>
> "This is because the draft proposal only sets requirements in relation to the mutual recognition of confiscation and freezing orders, and does not seek to harmonise the underlying rules applicable to when confiscation and freezing orders can be issued. There is no reason that the procedures under the Framework Decisions could not continue to operate as the explanatory memorandum makes clear."

1.16 We requested a clearer indication of the likely timescale for negotiating and adopting the proposed Regulation, given that it appeared to be supported by the Council and the European Parliament and asked how likely it was that the Regulation would take effect before the UK leaves the EU. The Minister responds:

> "We do not at this point have a firm view from the Commission as to the expected date when the proposed Regulation will apply. The draft Regulation sets an expectation that it could apply 6 months after adoption. We anticipate that negotiations may take to the end of the year, or perhaps longer. We will provide further updates to the Committee as negotiations progress."

1.17 Finally, we noted that the proposed Regulation would supplement a number of other EU criminal law mutual recognition instruments—notably the European Arrest Warrant, the European Investigation Order, the European Supervision Order and the European Protection Order—as well as others concerning financial penalties and the transfer of prisoners in which the UK currently participates. The Government has so far given very little indication of its approach to mutual recognition measures in negotiating the terms of

6 See para 62 of the Minister's Explanatory Memorandum.

7 See p.19 of the Commission's explanatory memorandum accompanying the proposed Regulation.

the UK's exit from the EU, but has made clear that it is "committed to strong cooperation on security, law enforcement and criminal justice now and when we leave" and is seeking to develop "a unique and bespoke position" for the UK.[8]

1.18 We asked the Minister whether the EU mutual recognition instruments in which the UK currently participates, or opts in to before it leaves the EU, were to be included in the bespoke solution the Government was seeking. We also asked him to identity the most important instruments for the UK from a law enforcement and criminal justice perspective and to indicate whether he considered that mutual recognition could operate without some degree of oversight by the European Court of Justice. The Minister responds:

> "This negotiation process is part of the 'business as usual' activities that are ongoing whilst the UK remains a Member State of the EU.
>
> "The UK's relationship with the EU will change as a result of leaving the EU but the Government is clear that cooperation on security and law enforcement will continue. The precise nature of our participation in the practical cooperation mechanisms in place to support cooperation will be subject to negotiation with our European partners. It would not be appropriate to set out our approach on individual measures at this stage."

Previous Committee Reports

Thirtieth Report HC 71-xxviii (2016–17), chapter 2 (1 February 2017). See also see our earlier Reports on Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the EU: Tenth Report HC 342-x (2015–16), chapter 21 (25 November 2015); Twenty-eighth Report HC 83-xxv (2013–14), chapter 13 (18 December 2013); Twenty-second Report HC 86-xxii (2012–13), chapter 9 (5 December 2012); Twelfth Report HC 86-xii (2012–13), chapter 5 (12 September 2012); Sixth Report HC 86-vi (2012–13), chapter 4 (27 June 2012); and Sixty-third Report HC 428-lvii (2010–12), chapter 1 (18 April 2012).

8 See Hansard, HC Deb, 18 January 2017, col 955 and Hansard, HC Deb, 18 January 2017, col 960.

2 Insolvency, Restructuring and Second Chances for Business and Entrepreneurs

Committee's assessment	Legally and politically important
Committee's decision	(a) Not cleared from scrutiny; drawn to the attention of the Business, Energy and Industrial Strategy Committee; further information requested; (b) and (c) cleared from scrutiny (decision reported on 7 September 2016)
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) Proposed Regulation replacing lists of insolvency proceedings and insolvency practitioners in Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings; (c) Proposed Council Implementing Regulation replacing the lists of insolvency proceedings, winding-up proceedings and liquidators in Annexes A, B, C to Regulation (EC) No. 1346/2000 on insolvency proceedings
Legal base	(a) Articles 53 and 114 TFEU; ordinary legislative procedure; QMV; (b) Article 81(2)(a), (c) and (f) TFEU; ordinary legislative procedure; QMV; (c) Article 45 of Regulation (EC) 2000/1346;—; QMV
Department	Business, Energy and Industrial Strategy
Document Numbers	(a) (38313), 14875/16 + ADDs 1–2, COM(16) 723; (b) (37822), 9710/16 + ADD 1, COM(16) 317; (c) (37860), 10142/16 + ADD 1, COM(16) 366

Summary and Committee's conclusions

2.1 Existing EU insolvency legislation, (the 2002 Insolvency Proceedings Regulation[3] and the 2015 recast),[4] provides a framework for mutual recognition and judicial cooperation in respect of cross-border insolvencies in the EU. The Regulations do not seek to harmonise domestic insolvency laws and so there remain wide-ranging differences between Member States' insolvency regimes and procedures.

2.2 The proposed Directive on preventative restructuring frameworks (document a) seeks to harmonise two areas of substantive national insolvency law to ensure that Member States have effective procedures to help businesses in financial difficulties to restructure early to avoid bankruptcy and to ensure honest entrepreneurs have a "second chance" to do business after bankruptcy.

2.3 The last time we reported on the proposal we said that:

- While the Government does not register strong opposition to the proposal, it highlights a potentially substantial impact on UK law;
- Although the UK would be broadly compliant in respect of provisions for discharge periods for honest entrepreneurs, the regulation of insolvency practitioners, judicial capability and director duties, substantive provisions in the Directive for preventive restructuring laws would require significant supplementation of primary and secondary insolvency legislation in the UK; and
- This is despite the fact that the UK already has rescue procedures, administration, Company Voluntary Arrangements and Schemes of Arrangement under the Companies Act 2006.

2.4 The prospect of having to change UK insolvency law raised the important question of how likely it is that the proposal would apply to the UK before Brexit day (sometime in March 2019, applying current expectations). Once adopted as a Directive, the proposal would need to be implemented within two years of entry into force. On this analysis, the UK would only have to implement the proposal if it was adopted before 31 March 2017. Nevertheless, given uncertainty about the timing of Brexit, we asked the Government to keep us updated on this issue, taking into account how it might affect the UK's approach to negotiations. We also asked whether it was possible that the UK might want to align with EU insolvency law post Brexit.

2.5 Overall, we considered that Government's focus should be on minimising any potentially disruptive changes to UK law, particularly in relation to restructuring inclosing matters devolved to Scotland and Northern Ireland. We were particularly concerned about measures to ensure that levels of creditor protection and restructuring and second chance procedures are not open to abuse, given the reduced levels of court involvement envisaged by the proposal. We were also mindful of the need to ensure that the UK's successful insolvency industry remains competitive and effective.

2.6 The Government response now deals with those questions, saying it does not expect rapid progress, it also provides an update on (b) and (c), which proposes to amend the annexes to the original Regulation on coordinating insolvency proceedings (EC) No. 1346/2000 and its recast Regulation 2015/488. These Regulations organise the administration of cross-border insolvencies where the debtor's centre of main interest (COMI) is in the EU. They provide a hierarchy of judicial competence, determining one "main" set of proceedings in a single Member State (where the debtor's COMI is situated), with the possibility of other "secondary" or "territorial" proceedings in any other Member States where the debtor has an establishment. The annexes of the Regulations set out different national insolvency procedures and the practitioners governed by it.

2.7 As the amendments were otherwise technical and the opt-in issues on (b) had been addressed, we cleared both documents from scrutiny last year. However, we had one outstanding question about the Commission's claim that it had implied exclusive competence in relation to document (b), which would mean that the subsidiarity protocol would not apply. Although we agreed with the Government that document (b) satisfied the subsidiarity test, we were concerned about any unhelpful precedent being set for future

legislative proposals. We wanted the Government to press the point with the Commission that this policy area is one of shared competence, not implied exclusive competence. The Government has told us it did raise this matter, although the Commission did not agree with its assessment.

2.8 **We are grateful to the Minister (Margot James) for her updates on all three documents and her response about the outstanding matter concerning implied exclusive competence of the Commission in respect of document (b). We are reassured that the Government will remain vigilant in ensuring that subsidiarity assessments continue to be provided by the Commission in relation to further amendments to the annexes to this Regulation.**

2.9 **We retain document (a) under scrutiny, having already cleared documents (b) and (c). We draw document (a) and this chapter to the attention of the Business, Energy and Industrial Strategy Committee.**

Full details of the documents

(a) Proposal for a Directive of the European Parliament and Council 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) Proposal for a Regulation replacing lists of insolvency proceedings and insolvency practitioners in Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings: (37822), 9710/16 + ADD 1, COM(16) 317; (c) Proposal for a Council Implementing Regulation replacing the lists of insolvency proceedings, winding-up proceedings and liquidators in Annexes A, B, C to Regulation (EC) No. 1346/2000 on insolvency proceedings: (37860), 10142/16+ ADD 1, COM (16) 366.

The Minister's letter of 24 February 2017

2.10 The Minister for Small Business, Consumers and Corporate Responsibility (Margot James) says:

> "The committee asked if it was likely that the proposal will be adopted in time to require implementation before the latest expected Brexit date of 31 March 2019. At present it is difficult to give an estimate of the likely timeframe. The Secretary of State for the Home Department laid a statement in Parliament on 02 February following the first (informal) meeting of EU Interior and Justice Ministers where this proposal was presented. At the meeting some Member States cautioned against over-harmonisation as this is an area where national laws and practices diverge. Given that this is the first time the EU has proposed measures to harmonise insolvency, I do not anticipate rapid progression on this proposal but I will keep the committee informed of progress.
>
> "Secondly, the committee asked if the government would align UK law with the measures in this proposal after Brexit. I hope the committee will understand that, as substantive negotiations are yet to begin, I am unable at this stage to pre-empt the outcome. However, we will seek to ensure that

the proposal supports the interests of UK businesses and while we remain a member of the EU we will play a full and active role in the negotiations in the usual way. I will keep the committee informed of developments.

"I would also like to take this opportunity to provide an update on a matter considered by the committee in September on proposals to amend the Annexes of the EC and EU Insolvency Regulations, which the committee cleared from scrutiny. In its 10th report, the committee welcomed the Government's position that the Commission did not have implied exclusive competence in respect of amendments to the Annexes in the recast EU and asked if this important message had been conveyed to the Commission to avoid any unhelpful precedent being set for future legislative proposals.

"We have raised this matter with the Commission but they do not agree with our assessment. We will nonetheless continue to seek to ensure that any future proposals to amend the Annexes of the Regulation provide a full and accurate explanation of the applicability of the subsidiarity principle."

Previous Committee Reports

(a) Twenty-sixth Report HC 71-xxiv (2016–17), chapter 2 (18 January 2017); (b) and (c): Tenth Report HC 71-viii (2016–17), chapter 9 (7 September 2016); Seventh Report HC 71-v (2016–17), chapter 6 (6 July 2016).

3 Aviation Emissions

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Business, Energy and Industrial Strategy and the Transport Committee
Document details	Proposal for a European Parliament and Council Regulation amending Directive 2003/87/EC to continue current limitations of scope for aviation activities and to prepare to implement a global market-based measure from 2021
Legal base	Article 192(1), TFEU; QMV; Ordinary Legislative Procedure
Department	Business, Energy and Industrial Strategy
Document Number	(38508), 5968/17 + ADDs 1–2, COM(17) 54

Summary and Committee's conclusions

3.1 Greenhouse gas emissions from aviation activities are increasing significantly. In the absence of further measures, carbon dioxide (CO_2) emissions from international aviation are estimated to almost quadruple by 2050 compared to 2010.[9]

3.2 In 2008 the EU decided to include flights between aerodromes within the European Economic Area ("intra-EEA flights") and flights between aerodromes in the EEA and aerodromes in third countries ("extra-EEA flights") in the EU's main measure to reduce emissions—the Emissions Trading System (EU ETS)—from 2012.

3.3 Introduction of the new system provoked international opposition, in response to which the EU reduced the scope to intra-EEA flights only. This was intended as a temporary measure in order to facilitate progress towards reaching an international consensus through the International Civil Aviation Organisation (ICAO).

3.4 On 6 October 2016 the ICAO Assembly agreed to implement a Global Market–Based Measure (GMBM) from 2021 to 2035. Details are set out below. Following this development, the Commission has proposed to make permanent the previously temporary reduction in scope of the Aviation EU ETS to intra-EEA flights.

3.5 The Minister of State (Mr Nick Hurd) views the ICAO agreement as notable and supports continuing action, in the interim, through the EU ETS to control aviation emissions. He observes that agreement by March 2018 is necessary in order to avoid reversion back to "full scope", and the potential for a repeat of the earlier international opposition.

9 The International Civil Aviation Organisation forecasts in its 2016 Environmental Report that, in comparison to 2010, when annual international aviation CO_2 emissions stood at 448 million tonnes (Mt), international aviation emissions will increase by between 52% and 68% (estimated annual emissions of 682Mt to 755Mt) by 2020, between 169% and 185% (estimated annual emissions of 1205Mt to 1278Mt) by 2040 and up to 284% to 300% (estimated annual emissions of 1721Mt to 1794Mt) by 2050.

3.6 The Minister notes that the UK's future relationship with the Aviation EU ETS will form part of the negotiations on the UK's withdrawal from the EU. While the UK remains in the EU, the Government will continue to engage constructively on new and existing climate legislation and regulation.

3.7 **The document is particularly relevant in the context of the UK's withdrawal from the European Union, particularly as the outcome of the withdrawal negotiations may not be clear for some time.**

- **Can the Minister confirm that any non-participation by the UK in the Aviation EU ETS would leave UK non-domestic flights out of any form of aviation market based emissions reduction measures between EU withdrawal and entry into force of the ICAO mechanism in 2021?**
- **If that is the case, what would be the implications for a) the UK airline and travel industries and b) UK climate change policy?**
- **On what basis should the aviation industry plan for the period mid-2019 until the end of 2020?**
- **As the UK will be a third country once it has withdrawn from the EU, the ICAO agreement is timely. What effort is the UK making to work out the details of the ICAO scheme in order to ensure that it enters into force in 2021 as scheduled?**

3.8 **We retain the proposal under scrutiny and draw it to the attention of the Business, Energy and Industrial Strategy Committee and the Transport Committee.**

Full details of the documents

Proposal for a European Parliament and Council Regulation amending Directive 2003/87/EC to continue current limitations of scope for aviation activities and to prepare to implement a global market-based measure from 2021: (38508), 5968/17 + ADDs 1–2, COM(17) 54.

Background

3.9 The EU Emissions Trading System (EU ETS) is currently in its third phase (2013–2020). Negotiations on the rules for the fourth phase (2021–2030) are on-going. Aviation was included from 2012. Aircraft operators were required to monitor and report emissions from all flights to, from and between airports in the European Economic Area (EEA), then subsequently surrender the corresponding number of EU ETS allowances before 30th April in the year after which the emissions occurred. The inclusion of all flights to and from EEA airports in the EU ETS is known as "full scope".

3.10 The introduction of the full scope Aviation EU ETS in 2012 provoked widespread international opposition, which resulted in a number of retaliatory actions against the EU and EU-based aviation and aerospace organisations. In response to this opposition, the EU legislated to temporarily reduce the scope of the Aviation EU ETS to intra-EEA flights only for the 2012 compliance year.

3.11 In October 2013, the ICAO Assembly agreed to develop a GMBM proposal and to take a decision at the 2016 ICAO Assembly on its implementation from 2021. This prompted the EU to legislate to maintain the reduced intra-EEA scope for the period 2013 to 2016, at which point progress in ICAO towards agreeing a GMBM could be assessed, and the Commission could then put forward a further legislative proposal. The temporary derogation to reduce the scope expired on 31 December 2016 and, without a further amendment, aircraft operators would be required to comply, for the first time, with a full scope Aviation EU ETS in March 2018.

3.12 Under the ICAO deal reached in October 2016, a GMBM would be implemented from 2021 to 2035. This would include:

- airlines to offset a proportion of their emissions (through the purchase of international carbon credits from other sectors), with the aim of delivering carbon neutral growth for the international aviation sector from 2020;
- voluntary participation between 2021 and 2026 before mandatory participation for non-exempt states begins in 2027; and
- regular reviews that can raise the ambition of the scheme and extend it beyond 2035.

Commission's Proposal

3.13 The European Commission has accordingly proposed to make permanent the previously temporary reduction in scope of the Aviation EU ETS to intra-EEA flights. It also proposes to undertake a review at a later date to determine the future of the Aviation EU ETS from 2021, taking account of:

- progress made on the implementation of the GMBM, including the nature and content of the legal instruments and the actions taken by third countries to implement the scheme;
- how to implement the GMBM through revising the EU ETS Directive; and
- the contribution of aviation to the Union's 2030 economy-wide greenhouse gas reduction commitment.

3.14 Other key features of the proposal are as follows:

- the Commission is to be empowered to adopt delegated legislation on monitoring, reporting and verification of emissions for the purpose of implementing the GMBM;
- if it is agreed to continue the Aviation EU ETS after 2020 there will be an annual reduction in the number of aviation allowances from 2021 consistent with the rest of the sectors in the EU ETS; and
- the exemption for non-commercial operators operating less than 1,000 tonnes of CO_2 per annum, introduced in 2014, will be extended until 2030.

Minister's Explanatory Memorandum of 20 February 2017

3.15 The Minister considers that reducing greenhouse gas emissions from international aviation is an important part of the action that needs to be taken in order to meet the global objectives set out in the UN climate change agreement reached in Paris in December 2015. UK policy, he says, has long been that action is best taken at the global level, with regional measures such as the EU ETS filling the gap until such a time that sufficient global measures could be agreed:

> "The Government views the agreement reached in ICAO last October to implement a GMBM as a notable achievement. It will be important for any decision on the future of aviation in the EU ETS to take into account the progress made in ICAO, and the need for a high level of political will among ICAO Member States in order for the GMBM agreement to be fully and robustly implemented.
>
> "In the interim, before the GMBM is implemented, the Government supports continuing to take action through the EU ETS to control aviation emissions. In considering the appropriate scope of coverage of aviation by the EU ETS, there is a balance to be reached between ensuring that action is taken now, whilst not jeopardising the implementation of the GMBM from 2021. The EU ETS is a cost-effective measure to tackle international and domestic aviation emissions, allowing the aviation industry to grow sustainably. The EU ETS also plays a part in meeting the UK's domestic carbon budgets by reducing emissions from UK domestic aviation and would continue to do so under the Commission's proposal, as domestic aviation emissions would remain in scope of the EU ETS."

3.16 The Minister underlines the necessity for swift adoption:

> "Agreement on the proposal needs to be reached by 31 March 2018 at the latest, in advance of the reporting and surrender compliance deadlines for the 2017 scheme year, and the European Commission has expressed a preference for agreement to be reached by the end of 2017. If no agreement is reached the scheme will revert back to full scope which would risk a repeat of the opposition from third countries and damaging the implementation of the GMBM."

3.17 He adds that the Government supports the proposal to extend the exemption for small aircraft operators who emit less than 1,000 tonnes of CO_2 per year until 2030. This, he says, is consistent with Government policy to minimise administrative burdens for small operators.

3.18 Regarding the UK's withdrawal from the EU, the Minister says:

> "The relationship between the UK and our EU partners after we exit the EU will be the subject of negotiations that will start after we trigger Article 50, which the Prime Minister has said will be no later than the end of March. This will include, amongst other things, our future relationship with the EU on Aviation EU ETS. While we remain in the EU we will continue to engage constructively on new and existing EU climate legislation and regulation."

Previous Committee Reports

None.

4 Digital Single Market: Building a European Data Economy

Committee's assessment	Politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Committee on Exiting the European Union Committee and the Culture, Media and Sport Committee
Document details	Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions
Legal base	N/A
Department	Culture, Media and Sport
Document Number	(38456), 5349/17 + ADD 1, COM(17) 9

Summary and Committee's conclusions

4.1 Data, often described as the "currency of the internet", is a valuable resource that is of growing economic importance in the digital economy. Although an EU-level regulatory framework exists for personal data, no such framework exists for non-personal data. This creates legal uncertainty which may cause a number of problems. If these concerns are addressed at Member State level, this may fragment the Single Market and inhibit the growth of the EU's data economy.

4.2 As part of its Digital Single Market Strategy, the European Commission adopted on 10 January 2017 a Communication called "Building a European Data Economy". The Communication concludes that a policy framework is needed that enables data to be used throughout the value chain for scientific, societal and industrial purposes, and outlines a number of distinct issues and possible solutions to them. Its adoption coincides with the launch of a wide-ranging stakeholder dialogue including a public consultation that will run until 26 April 2017.[10]

4.3 Four thematic areas of concern are identified. Some Member States have introduced 'data localisation' measures which require data to be stored on servers physically located in that Member State. The Communication explains that such measures are ineffective, clarifies that a "principle of free movement of data within the EU" (derived from the treaties and secondary law) applies to non-personal data in the Single Market, and urges Member States to take this into account when considering introducing restrictions. No regulatory action is proposed at this time, but the Commission states that it will launch infringement proceedings to address unjustified data location requirements and may bring forward further initiatives in this area in due course.

10 European Commission, Public consultation on Building the European data economy (10 January 2017) https://ec.europa.eu/digital-single-market/en/news/public-consultation-building-european-data-economy.

4.4 The Communication also elaborates various less precisely defined concerns that relate to the competitive dynamics of the data economy. There are concerns that, in the absence of legal frameworks that clarify non-personal data ownership rights and data sharing requirements, dominant manufacturers and service providers may become 'de facto' owners of machine-generated data within supply chains, which could inhibit growth and competition and create lock-in effects. The Commission proposes to consult on a wide range of possible solutions to these concerns.

4.5 Further competition-related concerns are raised in relation to the lack of data portability in the data economy. Data portability, underpinned by interoperability and common standards, can facilitate switching between online platforms, promote the concurrent use of multiple platforms ("multi-homing") and encourage data exchange across platforms, which has the potential to enhance innovation. A lack of data portability can lead to lock-in effects and inhibit competition. Feedback is sought in relation to a range of possible interventions.

4.6 The Commission also intends to consult on the adequacy of current rules on liability in the context of emerging digital technologies such as the internet of things (IoT) and autonomous connected systems (such as self-driving cars), which could lead to difficulty establishing liability when faults occur. It seeks views on possible solutions.

4.7 The Minister of State for Digital and Culture (Matt Hancock) states that the Government will support action to restrict data localisation measures because doing so will reduce barriers to trade and the growth of businesses—particularly SMEs—and also endorses the proposed exception for national security and law enforcement, which may require data localisation in some cases. In relation to the many other possible regulatory interventions that are discussed, the Minister suggests that the Commission should only intervene where there is clear evidence that data markets are not functioning, and outlines a list of principles that should guide any further action.

4.8 On Brexit, the Minister provides no specific analysis of the implications of leaving the EU for this area of rapidly developing policy, which, post-exit, has the potential to cause problems for sectors of the economy that rely on intra-EU transfers of non-personal data. techUK has publicly expressed concerns that the Free Flow of Data initiative could introduce data localisation requirements for service providers from third countries, effectively requiring digital businesses to relocate part of their operations to the EU.[11]

4.9 The Commission's Communication does not make for reassuring reading in this regard: the focus throughout is very clearly on the free flow of data "within the EU", not between the EU and third countries. These concerns may be amplified by the Commission's continued delays in bringing forward concrete regulatory proposals, as a result of which the Government's opportunity to shape any legislation in this area, pre-exit, is decreasing.

4.10 **We thank the Minister for his Explanatory Memorandum which provides an overview of the Commission's Communication, "Building a European data economy". Although the Communication is not a legislative proposal, we consider it politically important because it provides a strong indication of the Commission's wide-ranging thinking in relation to future regulation of the data economy.**

11 Antony Walker, deputy CEO, techUK, Oral evidence to the House of Lords EU Internal Market Sub-Committee (20 October 2016) http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/brexit-future-trade-between-the-uk-and-the-eu-in-services/oral/42066.pdf.

4.11 The Communication explains that the Commission:

- intends to expand the EU *acquis* in the emerging area of non-personal data, which is of growing importance to many sectors of the economy;
- intends to take enforcement action against intra-EU data localisation restrictions, and may introduce further rules on such measures as part of the 'Free Flow of Data' initiative;
- is consulting on regulatory interventions to improve access to large datasets which may currently be controlled by individual businesses;
- is also consulting on regulatory interventions through which it could promote the portability of non-personal data across platforms, potentially through increased interoperability and the development of common standards; and
- is exploring the adequacy of current rules on liability in the data economy and possible solutions.

4.12 Given the rapid digitisation of all sectors of the economy, the growing importance of data to many sectors, and the EU's stated intention to use trade agreements to promote EU standards of data protection and digital regulation, we consider that the development of the EU *acquis* in relation to the data economy is likely to have significant implications for UK businesses post-exit.

The data economy Communication

4.13 **We ask the Minister to inform the Committee:**

- **whether the Government intends to submit a response to the Commission's consultation, and (if so) to provide us with a copy of its response;**
- **whether the Government has sought input from the Digital Catapult Centre on how the UK can maximise the growth of its data economy post-exit, and, if so, how the Catapult's vision aligns with the content of the Commission's latest Communication;**
- **whether any elements of the Commission's Communication overlap with aspects of the Government's Digital Economy Bill, and if so which ones; and**
- **to what extent the Communication's clarification of the "principle of the free movement of data within the EU" will be sufficient to prevent Member States from continuing to introduce data localisation requirements, given that some secondary legislation (notably the Services Directive) permits Member States, subject to very limited conditions, to introduce regulations which constrain the freedom of establishment and the freedom to provide services.**

Brexit implications

4.14 **We also ask the Minister to respond to the following questions about the implications of the Communication in light of the UK's imminent exit from the EU:**

- **How reliant does the Government believe the UK economy is on cross-border flows of non-personal data between the UK and EU Member States? Which sectors are most reliant?**

- **techUK has raised concerns that EU action on data localisation could, while liberalising the flow of data within the EU, simultaneously introduce EU-level data localisation requirements for service providers from third countries, in order to require digital businesses to relocate part of their operations to the EU.[12] Given that the focus throughout the Communication is on ensuring the free flow of data "within the EU", what is the Minister's assessment of this risk? Does the Communication dispel these concerns, or not?**

- **Given the current timescales for the adoption of legislative measures for the data economy, does the Government believe it will have ample opportunity, pre-exit, to influence any proposals this Communication may lead to? Is the Government concerned that the Commission may have delayed bringing forward concrete measures in order to limit the UK's opportunity to influence them? and**

- **In relation to EU-third country data flows, the Communication states that "the Commission will seek to use EU trade agreements to set rules for e-commerce and cross-border data flows and tackle new forms of digital protectionism in full compliance with and without prejudice to the EU's data protection rules". This suggests that it will seek to ensure that the UK complies with EU rules with regard to the digital economy. Does the Minister have a preliminary view as to whether it will seek a close approximation of UK domestic law with the EU acquis in the longer term in order to maximise market scale and minimise barriers to trade, or whether it believes that a more laissez-faire regulatory approach would offer the UK a competitive advantage, nothwithstanding the increased barriers to trade that would arise through regulatory divergence?**

4.15 **The Committee retains the document under scrutiny. We request responses to the above questions by 6 April 2017.**

4.16 **We draw the Minister's Explanatory Memorandum and our conclusions to the attention of the Committee on Exiting the European Union and the Culture, Media and Sport Committee.**

12 Antony Walker, deputy CEO, techUK, Oral evidence to the House of Lords EU Internal Market Sub-Committee (20 October 2016) http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/brexit-future-trade-between-the-uk-and-the-eu-in-services/oral/42066.pdf

Full details of documents

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (38456), 5349/17 + ADD 1, COM(17) 9.

Background

4.17 The Commission's Communication describes a variety of challenges and possible solutions that relate to the data economy. These are:

- data localisation restrictions and the free flow of data;
- the right to access and transfer machine-generated data;
- liability and safety in the context of emerging technologies; and
- portability of non-personal data, interoperability and standards.

4.18 The Commission's concerns and possible solution to each of these issues is summarised below.

Free Flow of Data ("Data Localisation")

4.19 One of the main barriers to the movement of data is "data localisation". This is the practice whereby a public authority requires that data must be stored on servers physically located in that member state. These restrictions range from requirements by supervisory authorities that financial service providers store their data locally, the implementation of professional secrecy rules and sweeping regulations requiring the local storage of archived information generated by the public sector.

4.20 Data localisation measures can undermine obligations under the free movement of services and the free establishment provisions of the EU Treaties and secondary legislation. For example, businesses operating in more than one Member State may be required to store and process data in more than one location. Data localisation also hampers the adoption of cloud computing which is a more energy efficient use of IT resources. It is estimated that the removal of data localisation restrictions would result in combined annual GDP gains for Member States of up to €8 billion (£6.82 billion).[13]

4.21 The trend, both globally and in Europe, is towards more data localisation, and the Communication notes that these measures are typically justified on the grounds of security or privacy. Where personal data is concerned, such concerns are not justifiable, as the General Data Protection Regulation (GDPR) provides a fully harmonised EU level framework for personal data protection and prohibits restrictions on the free movement of personal data within the Union for reasons connected with the protection of personal data. However, the GDPR does not apply to non-personal data, meaning that Member States currently have more scope to introduce restrictions on the flow of non-personal data.

13 €1 = £0.85305 as at 3 March 2017

4.22 The Communication explains that data localisation measures are often introduced due to a misconception that localised services are automatically safer than cross-border services. In fact, geographic restrictions are ineffective in this regard as state-of-the-art security systems and effective ICT management are the means by which data is effectively protected. In fact, the Communication concludes that locating data storage facilities in multiple Member States is likely to improve security by permitting these facilities to act as back-ups for one another.

4.23 To address concerns about data localisation, the Communication states that any Member State action affecting data storage or processing should be guided by a "principle of free movement of data within the EU". This principle, it asserts, is effectively "a corollary of their obligations under the free movement of services and the free establishment provisions of the Treaty and relevant secondary legislation", and as a consequence "any current or new data location restrictions would need to be carefully justified under the Treaty and relevant secondary law to verify that they are necessary and proportionate to achieve an overriding objective of general interest, such as public security".

4.24 However, the Communication notes that data localisation requirements may be justified and proportionate in some contexts, especially before effective cross-border cooperation arrangements are put in place, such as ensuring the secure treatment of certain data pertaining to critical energy infrastructure, the availability of electronic evidence (e.g. as localised copies of datasets) for law enforcement authorities, or local storage of data held in certain public registers.

4.25 The Communication concludes that, following the results of its dialogue with stakeholders and its evidence gathering, it will, where needed, launch infringement proceedings to address unjustified data location requirements (under free movement of services and the free establishment principles in the Treaty and secondary legislation) and will if necessary take forward further initiatives in this area.

4.26 The issue of data localisation is of particular relevance to UK-EU trade post-exit, because non-personal data flows underpin service provision in a wide range of sectors, and many UK service sectors are deeply integrated with the Single Market. In this regard, it may be cause for concern that the Communication places the emphasis on facilitating the flow of data within the EU specifically, not globally (the principle is the "free movement of data within the EU"). The Communication also emphasises that the EU will seek to use future trade agreements to set rules for digital trade:

> "The EU data protection rules cannot be subject of negotiations in a free trade agreement. As explained in the Communication on exchanging and protecting personal data in a globalised world dialogues on data protection and trade negotiations with third countries have to follow separate tracks. Beyond this, as indicated in the Trade for All Communication, the Commission will seek to use EU trade agreements to set rules for e-commerce and cross-border data flows and tackle new forms of digital protectionism in full compliance with and without prejudice to the EU's data protection rules."

Right to access and transfer machine-generated data

4.27 Ever-increasing amounts of data, both personal and non-personal, are being generated by machines or processes based on emerging technologies, such as the internet of things (IoT).

4.28 The Communication argues that, in order for the data economy to flourish, market players must have ready access to large and diverse data sets. However, evidence suggests that data generators tend not to share their data with other players, including those in supply chains, thus keeping valuable data in organisational silos. The exchange of data remains limited.

4.29 The Communication also highlights that frameworks do not exist at the national or EU level for access to and use of non-personal, machine generated data. Some data may satisfy specific conditions within individual Member States to qualify as an intellectual property right, database right or a trade secret, but raw machine-generated data would not generally meet the conditions at EU level.

4.30 The Commission suggests that some manufacturers or service providers may become the de facto "owners" of the data that their machines or processes generate, even if those machines are owned by the user. This can lead to lock-in effects, because "the user is effectively prevented by the manufacturer from authorising usage of the data by another party". The Commission suggests that, where such lock-in effects arise, the de facto owner of the data may use its position to impose unfair standard contract terms on the users or through technical means, such as proprietary formats or encryption.

4.31 The Communication states that these situations are currently dealt with under contract law, and notes that this approach, in combination with targeted competition enforcement, might be a sufficient response. However, it also notes that "where the negotiation power of the different market participants is unequal, market-based solutions alone might not be sufficient to ensure fair and innovation-friendly results, facilitate easy access for new market entrants and avoid lock-in situations".

4.32 The Commission concludes that it wishes to explore ways in which the trading of machine generated data can be facilitated in a way that addresses the unequal bargaining power of companies, whilst simultaneously ensuring that participants' legitimate interests and investments are protected.

4.33 It believes that the dialogue should focus on how to achieve the following high-level objectives, a number of which are potentially in tension with one another:

- improving access to anonymous machine-generated data;
- facilitating and incentivising the sharing of such data;
- protecting investments and assets;
- avoiding disclosure of confidential data; and
- minimising lock-in effects.

4.34 Furthermore, the Commission intends to discuss the following possible solutions through stakeholder dialogues and public consultation:

- guidance on how non-personal data control rights should be addressed in contracts;
- fostering the development of standardised Application Programming Interfaces (APIs) which would facilitate the exchange of data;
- default contract rules which might seek to restrict unfair terms and conditions and reduce imbalances in bargaining positions;
- a right to access for public interest purposes (e.g., improvement of public services/ scientific purposes);
- a data producer's right (a right to use and authorise the use of non-personal data that would be granted to the "data producer", i.e. the owner or long-term user of the device); and
- a framework that would encouraging data holders to provide access in return for remuneration.

4.35 The Commission places a strong emphasis on the sectoral dimension of these issues. It states that it intends to gather more information "on the functioning of the data markets by sector" and states that "sector-specific discussions will be held with relevant stakeholders in the data value chain".

Liability

4.36 The Communication argues that current rules on liability do not take into account the complexity of emerging data-driven technologies such as the internet of things (IoT) or autonomous connected systems (such as self-driving cars). When an error in an automated system results in some form of damage, there could be difficulties in establishing fault. The Commission states that "the issue of how to provide certainty to both users and manufacturers of such devices in relation to their potential liability is therefore of central importance to the emergence of a data economy".

4.37 The Commission plans to consult on the adequacy of current rules on liability and evaluate the effectiveness of the EU Product Liability Directive. Potential solutions outlined in the Communication are either risk-based approaches to establishing liability, or voluntary or mandatory insurance schemes.

Portability, interoperability and standards

4.38 Data portability is the ability to transfer data between different systems. In principle, this increases choice and reduces costs for consumers who wish to switch service providers or use multiple providers. However, there are at present no obligations to guarantee even a minimum level of data portability in relation to non-personal data, even for widely used online services such as cloud hosting providers.

4.39 Questions of data portability are closely related to questions of data interoperability (i.e. the principle by which multiple digital services can seamlessly exchange data) which requires the establishment of technical standards for different platforms. The Commission concludes that in the case of online platforms, data interoperability can facilitate not only switching, but also the concurrent use of several platforms (known as "multi-homing") and widespread cross-platform data exchange, which has the potential to enhance innovation.

4.40 The Commission proposes to consult stakeholders on these issues and possible solutions including, but not limited to, developing recommended contract terms to facilitate switching of service providers developing further data portability rights and introducing sector-specific experiments in standards.

Experimenting and testing

4.41 Before deciding on possible solutions to data access and liability issues, the Commission proposes using EU research and innovation funding to test them in a real-life environment. The Communication points to projects already underway in several Member States to develop connected and automated vehicles and its intention to work with a group of Member States to create a legal testing framework to conduct experiments on the basis of harmonised rules on data access and liability.

The Government's view

4.42 The Minister of State for Digital and Culture (Matt Hancock) provides a short summary of the Government's view of the policy implications of the document. He states that the Government is supportive of the free flow of data initiative insofar as it is aimed at reducing barriers:

> "The Government supports the Commission's efforts to reduce barriers to the free flow of data. In particular, we endorse its efforts to limit the ability of Member States to use data localisation measures, which go against the principles of the Single Market; for example, businesses operating in more than one Member State may be required to store and process data in more than one location. This could be prohibitively expensive—especially for startups or small and medium sized enterprises wishing to enter new markets—and so reduce competition."

4.43 The Minister states that the Government supports the proposed exception to this rule, which would permit restrictions to the free flow of data on national security and law enforcement grounds:

> "The Government also endorses the exception that a Member State can still require data related to national security and law enforcement to be retained solely within its borders. Furthermore, the Government considers that EU legislation prohibiting data localisation should protect the ability of Member State law enforcement authorities to access data for legitimate needs, as permitted by their particular domestic legislation. It should ensure that when companies exercise that right of the free flow of data they do not hinder the important principle that law enforcement agencies may have the right and ability to access data lawfully, no matter where it is stored."

4.44 In relation to the range of other issues covered in the Communication, the Government expresses the view that "the Commission must have clear evidence that data markets are not functioning before acting", and provides a list of principles that the Commission should take into account when considering potential market failures and how to respond. These points are:

- data markets and associated technologies are still nascent, and the EU should not regulate too soon in their development;
- new rights, obligations or standards should not stifle innovation or add significant costs to businesses;
- how existing instruments can be refined for a data driven economy;
- to look at sector and technology specific solutions rather than one-size-fits-all approaches;
- work with business to explore the role for technology in solving some of the issues identified;
- any legislative proposals coming out of the Communication should not undermine the balance of competence and must be in line with better regulation principles; and
- any legislative proposals should ensure a coherent landscape for data, in particular by aligning with the GDPR.

4.45 The Minister states that "the Government will engage constructively with the Commission and other relevant stakeholders to push these points".

Previous Committee Reports

None.

5 Exchanging data with non-EU countries

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Culture, Media and Sport Committee, the Home Affairs Committee and the International Trade Committee
Document details	Commission Communication on Exchanging and Protecting Personal Data in a Globalised World
Legal base	—
Department	Culture, Media and Sport
Document Number	(38493), 5191/17, COM(17) 7

Summary and Committee's conclusions

5.1 As part of a future trading relationship with the EU after Brexit or cooperation on law enforcement, the UK may have to exchange data directly with the EU bodies, Member States or through EU databases. This Communication, published in January, is directly relevant to this aspect of Brexit because it sets out the Commission's future strategy for engaging with selected third countries to reach adequacy decisions (i.e. decisions on whether a country's data protection framework is equivalent to that in the EU) or international data-sharing agreements. It also covers how the EU should promote its own data protection standards through participation in international data protection instruments. The Commission hopes to strengthen and influence personal data standards globally.

5.2 The Government has already said that it seeks an "uninterrupted" and "unhindered" flow of data with the EU after Brexit.[14] As a third country the UK would have to offer safeguards equivalent to EU privacy and data protection rules in order to receive and handle EU data. It is likely that this will be easier to achieve if UK law continues to align with EU data protection law. The Government has committed to making sure that UK law complies with the new General Data Protection Regulation (GDPR)[15] and Law

14 Lords' Select Committee on the EU, EU Home Affairs Sub-Committee, 1 February 2017 [Minister for Digital and Culture]: Q2, Uncorrected evidence: "Not only do we seek unhindered data flows but we want that to happen in an uninterrupted way—that is to say, on the morning on which we have left the European Union, it is very important that our data rules work, so that there is an uninterrupted system in place".

15 Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

Enforcement Directive[16] which apply from May 2018 and will be in alignment with EU law on UK exit.[17] The possible application pre-Brexit to the UK of the recently proposed e-Privacy Regulation is not yet clear.[18]

5.3 Whilst there are various mechanisms available for third country transfers of data,[19] an "adequacy" decision or international agreement for data-sharing, once adopted, would be likely to provide the most seamless option for UK businesses and UK public authorities, including law enforcement agencies.

5.4 We have previously scrutinised high profile examples of each of these mechanisms: the EU-US Privacy Shield[20] (on data exchange for commercial purposes which replaced "Safe Harbour") or the EU-US Umbrella Agreement (on sharing law enforcement data).[21]

5.5 As part of that scrutiny, it has become clear that providing equivalent safeguards for EU citizens and their data could present some challenges. This is because of a series of Court of Justice judgments[22] which underlined the need to protect rights to privacy and protection of personal data to the standards of Articles 7 and 8 of the EU's Charter of Fundamental Rights.[23] Adequacy decisions and international agreements on EU-third country data-sharing, to a greater or lesser extent, also need the support of the European Parliament, the Article 29 Working Party of Member States' data protection authorities and the European Data Protection Supervisor.

5.6 The Government welcomes the Communication as indicating the Commission's future approach to exchange of data with third countries. It repeats the view that it wishes UK-EU data flows to continue uninterrupted after Brexit and that it is exploring all options on "the most beneficial way of ensuring that the UK's data protection regime continues to

16 Directive (EU) 2016/680 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

17 The Minister of State for Exiting the European Union (Mr David Jones) has said: "I would point out that on the day of departure, the UK's data protection arrangements will be in perfect alignment with those of the continuing EU." (Hansard, HC Deb. 18 January 2017, col. 1020).

18 We reported on 8 February on this proposed Regulation concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications): (38455), 5358/17 + ADDs 1–6 , COM(17) 10. See Thirty-first Report HC 71-xxix (2016–17), chapter 6 (8 February 2017).

19 The GDPR provides a suite of mechanisms to transfer personal data from the EU to third countries and third country companies, including Binding Corporate Rules (BCRs), Standard Contractual Clauses (SCC), approved codes of practice, certification mechanisms and adequacy decisions. The Law Enforcement Directive also provides for adequacy decisions and international agreements for data-sharing. There is also some limited scope for case-by-case transfers.

20 (37695),—: Commission Implementing Decision pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield.

21 (37724–37726), 8245/16 and 8491/16:Proposed Council Decisions on the signing and conclusion, on behalf of the European Union, of an Agreement between the USA and the EU on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offences.

22 In the Schrems case the CJEU invalidated the EU-US "Safe Harbor" decision, the predecessor to Privacy Shield. There are also two current legal challenges to Privacy Shield itself. In 2014, the CJEU invalidated the Data Retention Directive in the Digital Rights Ireland case, In December the CJEU expanded on its Digital Rights Ireland ruling holding that any national legislation providing for "general and indiscriminate" retention of data is incompatible with the EU law, including the Charter (Watson v Home Secretary). This ruling, when it is applied by the UK Court of Appeal, may mean that the UK's Investigatory Powers Act 2016 will have to be amended.

23 Also, Article 47 (right to an effective judicial remedy) to enable EU citizens to enforce their data protection rights.

build a culture of data confidence and trust that safeguards citizens and supports business in a global economy". In so doing, it is mindful of the need to also be able to exchange data with non-EU countries.

5.7 **Although this Communication is a non-legislative document, we report it to the House because of its obvious significance for future EU-UK data-sharing arrangements. If the UK is to continue to trade with the EU or to cooperate on law enforcement after it leaves, then it would seem preferable to have mechanisms in place beforehand for third country transfer. It also seems clear that either an adequacy decision or an international data-sharing agreement would best provide the "uninterrupted" and "unhindered" flow of data which the Government seeks.**

5.8 **We note that it took over two and five years respectively[24] for the EU-US Privacy Shield and EU-US Umbrella Agreement to be put in place. So we ask the Government to ensure that sufficient time is left before UK withdrawal to agree any EU-UK data-sharing instruments. In so doing, we recognise that:**

a) **Privacy Shield and Umbrella may not be direct comparators for the UK as the UK will be far better aligned with EU data protection law than the US, given the Government's commitment to comply with the new General Data Protection Regulation (GDPR) and Law Enforcement Directive;**

b) **As the Commission recognises, adequacy decisions have been adopted so far under the existing data protection framework for a diversity of privacy and legal systems (see paragraph 0.23 of this chapter); but also that**

c) **Court of Justice rulings in Schrems,[25] Digital Rights Ireland[26] and Watson v Home Secretary[27] have had a direct bearing on the question of the adequacy of protection for EU citizens' data by third countries, as has the Court's interpretation of Articles 7, 8 and 47[28] of the EU Charter of Fundamental Rights. As the UK will not be subject to either on leaving the EU, the process of putting in place equivalent data-sharing arrangements might present some challenges for the Government.**

5.9 **We note the importance of EU third country data-exchange mechanisms to support any post-Brexit trading relationship and/or law enforcement cooperation between the EU and the UK and we draw this chapter and this document to the attention of:**

- **the Culture, Media and Sport Committee in its role of scrutinising the responsible Department for this document;**

24 For Privacy Shield see Commission Communication of 27 November 2013 first setting out 13 recommendations for changing Safe Harbor. Privacy Shield was adopted by the Commission on 12 July 2016. For the Umbrella Agreement, the Commission proposed on 26 May 2010 a draft mandate for negotiating the agreement between the EU and the US. The Agreement was concluded (ratified) by the EU on 2 December 2016.

25 Case C-362/14, Maximillian Schrems v Data Protection Commissioner.

26 Joined Cases C293/12 and C594/12 Digital Rights ireland v Minister for Communications, Marine and Natural Resources and others.

27 Joined Cases C203/15 and C698/15 Tele2 Sverige AB and Home Secretary v Watson.

28 Respectively, the rights to private and family life, to protection for personal data and to an effective judicial remedy.

- **the Home Affairs Committee because of the potential importance of the exchange of data between the UK and the EU for law enforcement purposes post Brexit; and**
- **the International Trade Committee because data-exchange with non-EU countries, possibly based on international data protection instruments mentioned in the Communication, is relevant to the UK's future non-EU trade deals.**

5.10 **Pending the Minister's response, we retain this document under scrutiny.**

Full details of the documents

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

The Communication

5.11 The present Communication, anticipated in the Commission's Work Programme, sets out the Commission's strategic framework for "adequacy decisions" as well as other tools for data transfers and international data protection instruments.

5.12 The Commission:

- highlights the EU's ambition to promote its own data protection values in seeking the convergence and compatibility of international systems of data protection law;
- notes that the EU data protection framework has been used as a point of reference by third countries when developing their own legislation;
- hopes that by engaging in active dialogue with international partners it can foster high and interoperable personal data standards globally; and
- considers that this will facilitate increased international data flows for both commercial and law enforcement purposes whilst ensuring more effective protection of individual's rights.

EU mechanisms for international data transfers

5.13 The Commission explains that the 2016 reform of the EU data protection rules on international transfers not only clarifies and simplifies existing transfer tools but also introduces some new ones. It then describes the different transfer tools.

Adequacy decision

5.14 A Commission "adequacy decision" establishes that a non-EU country provides a level of data protection that is "essentially equivalent" to that in the EU. This enables the free flow of personal data to that third country without the need for the data exporter to provide further safeguards or obtain any authorisation.

5.15 In making an adequacy assessment of a third country, Article 45(2) GDPR requires the Commission to take into account:

- the rule of law, respect for human rights and fundamental freedoms and relevant legislation, including in the area of data protection, public security, defence, national security and criminal law and access by public authorities to personal data;
- the means to effectively enforce those rights, including administrative and judicial redress for individuals, and an effectively functioning independent supervisory authority to ensure and enforce compliance with data protection rules; and
- adherence to legally binding conventions, in particular Council of Europe Convention 108,[29] and participation in multilateral or regional systems dealing with data protection.

5.16 The Commission can now also adopt adequacy decisions for the law enforcement sector, for transfer of data to third countries or international organisations, according to (very similar) criteria for assessment set out in Article 36(2) of the Law Enforcement Directive.[30]

5.17 Both the GDPR and Law Enforcement Directive explicitly allow for an adequacy determination to be made with respect to a particular territory of a third country or to a specific sector or industry within a third country (so-called "partial" adequacy).

Extension of Standard Contractual Clauses and Binding Corporate Rules

5.18 In the absence of an adequacy decision, there are a number of alternative transfer tools providing adequate data protection safeguards. The 2016 data protection reform has built on existing tools such as Standard Contractual Clauses (SCCs)[31] and Binding Corporate Rules (BCRs).[32] So now, for example:

- SCCs can now be included in a contract between EU-based processors and processors in a non-EU country ("processor-to-processor" model clauses);

29 The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108). The Convention opened for signature on 28 January 1981 and was the first legally binding international instrument in the data protection field. Under this Convention, the parties are required to take the necessary steps in their domestic legislation to apply the principles it lays down in order to ensure respect in their territory for the fundamental human rights of all individuals with regard to processing of personal data.

30 The Commission has to take into account "the rule of law, respect for human rights and fundamental freedoms, relevant legislation, both general and sectoral, including concerning public security, defence, national security and criminal law and the access of public authorities to personal data, as well as the implementation of such legislation, data protection rules, professional rules and security measures, including rules for the onward transfer of personal data to another third country or international organisation, which are complied with in that country or international organisation, case-law, as well as effective and enforceable data subject rights and effective administrative and judicial redress for the data subjects whose personal data are transferred". It also has to take into account the existence and independence of any supervisory authorities and legally binding commitments on data protection.

31 SCCs lay down the respective data protection obligations between the EU exporter and the third country importer.

32 BCRs are internal rules adopted by a multinational group of companies to carry out data transfers within the same corporate group to entities located in countries which do not provide an adequate level of protection.

- BCRs, previously limited to arrangements among companies in the same group, can now be used by a group of enterprises engaged in a joint economic activity, but not necessarily in the same group; and
- prior notification to, and authorisation by, Data Protection Authorities of transfers to a third country based on SCCs or BCRs is no longer required.

New GDPR tools—approved codes of conduct, certification, clarification of derogations

5.19 The new GDPR permits controllers and processors to use, under certain conditions, approved codes of conduct or certification mechanisms (such as privacy seals or marks) to establish "appropriate safeguards". This will:

- allow for "tailor-made" solutions for particular sectors or industries, or of particular data flows; and
- enable appropriate safeguards to be established for data transfers between public authorities or bodies on the basis of international agreements or administrative arrangements.

5.20 The GDPR also:

- clarifies the use of so-called "derogations" (e.g. consent, performance of a contract or important reasons of public interest) on which entities in specific situations can base their data transfers in the absence of an adequacy decision and irrespective of the use of one of the other tools. There is a new, but limited derogation for transfers taking place for the legitimate interests of a company; and
- allows the Commission to develop international cooperation mechanisms, between national supervisory authorities, on the enforcement of data protection rules, including through mutual assistance arrangements.

Commission's approach to adequacy decisions so far

5.21 The Commission highlights adequacy decisions as being the best option for a third country in order to achieve a "free flow of personal data from the EU without the EU data exporter having to implement any additional safeguards or being subject to further conditions".

5.22 An adequacy decision means that:

- the Commission has found that a third country's legal order provides an adequate level of protection because the country's system approximates to that of the EU Member States;
- transfers to the country in question will be treated similarly to intra-EU transmissions of data, so providing privileged access to the EU Single Market, while opening up trade opportunities for EU businesses on a reciprocal basis;

- this privileged recognition is deserved because the third country provides a level of protection comparable or "essentially equivalent"[33] to that of the EU; and
- there does not necessarily exist a "point-to-point replication of EU rules"[34] but rather that through the substance of privacy rights and their effective implementation, enforceability and supervision, the foreign system concerned as a whole delivers the required high level of protection.

5.23 In an observation which has some significance for the UK's post-Brexit position, the Commission observes:

> "the adequacy decisions adopted so far show, it is possible for the Commission to recognise a diverse range of privacy systems, representing different legal traditions, as being adequate. These decisions concern countries that are closely integrated with the European Union and its Member States (Switzerland, Andorra, Faeroe Islands, Guernsey, Jersey, Isle of Man), important trading partners (Argentina, Canada, Israel, the United States), and countries that have a pioneering role in developing data protection laws in their region (New Zealand, Uruguay)."

5.24 The Commission then comments separately on the "partial" adequacy decisions on Canada and the US:

- Canada's only applies to private entities falling within the scope of the Canadian Personal Information Protection and Electronic Documents Act; and
- in the absence of US general data protection legislation, the EU-US Privacy Shield relies on commitments by participating companies to apply the high data protection standards set out by this arrangement that are in turn enforceable under US law. It also builds on the specific representations and assurances made by the U.S. Government as regards access for national security purposes that underpin the adequacy finding. Compliance with these commitments will be closely monitored by the Commission as part of the annual review on the functioning of the framework.

Future adequacy decisions

5.25 The Commission highlights the opportunities for more adequacy findings, as many more countries around the world have been developing data protection laws, involving a common approach: a core set of common principles, including the recognition of data protection as a fundamental right, the adoption of overarching legislation in this field, the existence of enforceable individual privacy rights, and the setting up of an independent supervisory authority.

5.26 Under its framework on adequacy findings, the Commission considers that the following criteria should be taken into account when assessing with which third countries a dialogue on adequacy should be pursued:

33 Case C-362/14, Maximillian Schrems v Data Protection Commissioner, points 73, 74 and 96. See also recital 104 of the GDPR and recital 67 of the Police Directive which refer to the standard of essential equivalence.

34 The Commission's wording which it derives from para 74 of Schrems.

- the extent of the EU's (actual or potential) commercial relations with a given third country, including the existence of a free trade agreement or ongoing negotiations;
- the extent of personal data flows from the EU, reflecting geographical and/or cultural ties;
- the pioneering role the third country plays in the field of privacy and data protection that could serve as a model for other countries in its region; and
- the overall political relationship with the third country in question, in particular with respect to the promotion of common values and shared objectives at international level.

5.27 On this basis, the Commission says that it will;

- actively engage with key trading partners in East and South-East Asia, starting from Japan and Korea in 2017;
- depending on progress towards the modernisation of its data protection laws, with India, but also with countries in Latin America, in particular Mercosur, and the European neighbourhood which have expressed an interest in obtaining an "adequacy finding";
- in certain situations, consider partial or sector-specific adequacy (e.g. for financial services or IT sectors) which may concern geographic areas or industries that form an important part of a particular third country's economy. This might depend on the structure of data protection rules (general or sectoral), the constitutional structure of the third country or whether certain sectors of the economy are particularly exposed to data flows from the EU; and
- closely monitor adequacy decisions, which are "living" documents, with periodic reviews being held, at least every four years, to address emerging issues and exchange best practices between close partners.

Adequacy decisions separate to a Free Trade Agreement (FTA)

5.28 The Commission explains that EU data protection rules cannot be the subject of negotiations in a free trade agreement. This is because an adequacy finding is a unilateral implementing decision by the Commission, in other words a form of EU secondary legislation. Nevertheless, the Commission will "use EU trade agreements to set rules for e-commerce and cross-border data flows…without prejudice to the EU's data protection rules". It also comments that although adequacy decisions have to be negotiated on a "separate track", they are complementary to FTAs and can:

- ease trade negotiations, by building mutual trust allowing them to amplify the benefits of a trade deal; and
- deter a country from using personal data protection grounds to impose unjustified data protectionism (e.g. data localisation or storage requirements).

Working with stakeholders to develop bespoke transfer mechanisms

5.29 The Commission pledges to work with stakeholders to develop alternative personal data transfer mechanisms adapted to the particular needs or conditions of specific industries, business models and/or operators. For example:

- SCCs targeted at the requirements of a particular sector, e.g. specific safeguards when processing sensitive data in the health sector;
- BCRs applying to groups of companies involved in a joint economic activity, for instance in the travel industry; and
- approved codes of conduct and accredited third-party certifications introduce tailor-made solutions while benefiting from the competitive advantages associated, for example, with a privacy seal or mark.

5.30 The Commission will also:

- draw on work already started, for example, by the Article 29 Working Party of Member States[35] data protection authorities; and
- promote convergence between BCRs under EU law and the Cross Border Privacy Rules developed by the Asia Pacific Economic Cooperation (APEC).

EU efforts on international cooperation and convergence

5.31 The Commission says about its contribution to international cooperation on data protection that:

- it already encourages accession by third countries to Council of Europe Convention 108 and its additional Protocol which:
  - is open to non-members of the Council of Europe;
  - has already been ratified by 50 countries, including African and South American States, is the only binding multilateral instrument in the area of data protection; and
  - is currently being revised and the Commission will actively promote the swift adoption of a modernised text with a view to the EU becoming a Party.
- the GDPR already enables the Commission to develop international cooperation mechanisms to facilitate the effective enforcement of data protection legislation, including through mutual assistance arrangements; and
- it will explore the development of an agreement for cooperation between EU data protection authorities and enforcement authorities in certain third countries drawing from prior experiences in other enforcement areas such as competition and consumer protection.

35 To be replaced in 2018 by the European Data Protection Supervisory Board.

Law enforcement

New adequacy decisions

5.32 The Commission explains that the Law Enforcement Directive introduced adequacy decisions for data exchanges for law enforcement purposes and says that:

- rules on international transfers in the Law Enforcement Directive govern data exchanges between EU and non-EU law enforcement agencies (LEAs) as well as, in specific situations, transfers from LEAs to other entities; and
- it will promote the possibility of law enforcement adequacy findings with qualifying third countries, in particular with those countries with which close and swift cooperation is required in the fight against crime and terrorism, and where there are already significant personal data exchanges.

International agreement for data sharing

5.33 The Commission then outlines the alternatives to an adequacy decision:

- the EU-US Data Protection Umbrella Agreement concluded in December 2016 is a successful example of how law enforcement cooperation with an important international partner can be enhanced by negotiating a strong set of data protection safeguards;
- by automatically supplementing existing legal instruments on which data exchanges are based (in particular bilateral agreements at both EU and Member State level), the Umbrella Agreement brings immediate and direct benefits to individuals and strengthens law enforcement cooperation by facilitating the exchange of information;
- by establishing a baseline for future data transfer arrangements with the US, the Umbrella Agreement does away with the need to repeatedly renegotiate those same safeguards;
- Umbrella constitutes the first bilateral international agreement with a comprehensive catalogue of data protection rights and obligations in line with the EU acquis (body of law);
- Umbrella could form the basis for negotiating similar agreements with third countries not only in the field of judicial and police cooperation, but also in other areas of public enforcement (e.g. competition policy, consumer protection);
- similar future agreements could cover both government-to-government exchanges and data transfers between private companies and LEAs;
- they could also facilitate the conclusion of specific agreements concerning the exchange of data between relevant EU agencies (notably Europol and Eurojust) and third countries; and
- the Commission will therefore explore the possibility to conclude similar framework agreements with its important law enforcement partners.

5.34 Moreover, the Law Enforcement Directive:

- envisages the possibility, under strict safeguards and in specific circumstances, for LEAs in the EU to request information directly from a private company in a third country and to pass on personal information (typically a name or an IP address) in that request; and
- contrasts with the GDPR which specifically only allows private entities to transfer data to LEAs outside the EU under certain conditions, e.g. based on an international agreement or where disclosure is necessary for an important ground of public interest recognised in EU or Member State law.

5.35 The Commission also says that it will follow up the Council Conclusions on improving criminal justice in cyberspace to facilitate the cross-border exchange of e-evidence in conformity with data protection rules.

Europol and Passenger Names Records (PNR)

5.36 Finally, in accordance with the new legal basis for Europol, the Commission will assess the provisions contained in those operational cooperation agreements between Europol and third parties, concluded under Council Decision 2009/371/JHA, including their data protection provisions.

5.37 Also, as set out in the 2015 European Agenda on Security, the EU's future approach to the exchange of PNR data with non-EU countries will take into account the need to apply consistent standards and specific fundamental rights protections. The Commission, taking into account the forthcoming Opinion from the CJEU on the proposed EU-Canada PNR Agreement,[36] will work on legal solutions to exchange PNR data with third countries, including by considering a model agreement on PNR.

Commission's overall conclusions

5.38 The Commission concludes that it will

> "…ensure coherence of the internal and external dimension of EU data protection policy and promote strong data protection at international level to improve law enforcement cooperation, contribute to free trade and develop high personal data protection standards globally."

The Government's view

5.39 In his Explanatory Memorandum of 7 February 2017, the Minister of State for Digital and Culture (Matt Hancock) first repeats the standard statement about the Government's position in the EU until it exits.[37] Given the relevance of this document to Brexit, we reproduce what the Minister says about policy implications in full:

36 The Advocate General has already given his opinion in "Opinion 1/15" on 8 September 2016.

37 On 23 June, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.

"The Government welcomes the Commission's Communication. It provides a broad outline of the reformed EU data protection regime in the context of cross-border data transfers. It outlines the mechanisms available for transfer, such as adequacy agreements, standard contractual clauses and binding corporate rules under the existing regime. It also discusses how these have been broadened under the new regime, and sets out a number of new transfer measures, such as certification mechanisms and approved codes of conduct; which are designed to provide tailor-made solutions for companies which could enable them to benefit from the competitive advantages associated, for example, with a privacy seal or mark.

"The Communication presents the Commission's approach to adequacy decisions, which allow for the free flow of personal data between the EU or EEA and third countries that are recognised as providing "adequate protection" for personal data comparable to that in the EU. It notes what the process of an adequacy finding involves and outlines the criteria to be taken into account when assessing with which third countries a dialogue on adequacy is to be pursued.

"As part of the discussion the Commission indicates its intention to engage with Latin American countries (in particular Mercosur) and non-EU European neighbours that have expressed an interest in receiving an adequacy decision from the EU. The promotion of data protection standards internationally and international law enforcement co-operation are also addressed. Furthermore, it discusses the Commission's plans to work with and support countries interested in adopting strong data protection laws to converge with EU data protection principles and interoperable global standards; and notes steps the Commission will take to enhance enforcement cooperation, including through mutual assistance arrangements.

"As part of plans for the UK's exit from the EU, the Government will consider carefully how best to maintain its continued ability to share, receive and protect EU data with other EU member states (and, indeed, with nations outside the EU). The Government is keen to ensure that data flows with the EU are not interrupted after the UK leaves the EU and therefore is considering all the options on the most beneficial way of ensuring that the UK's data protection regime continues to build a culture of data confidence and trust that safeguards citizens and supports business in a global economy. The Government views the Communication as important in highlighting the Commission's approach to these matters."

Previous Committee Reports

None.

6 Fingerprinting of asylum applicants and irregular migrants: the Eurodac system

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee
Document details	Proposal for a Regulation on the establishment of 'Eurodac' for the comparison of fingerprints (recast)
Legal base	Articles 78(2)(e), 79(2)(c), 87(2)(a) and 88(2)(a) TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Number	(37754), 8765/16, COM(16) 272

Summary and Committee's conclusions

6.1 The proposed Regulation on Eurodac is part of a wider package of measures to reform the EU's asylum system so that it is better equipped to manage sustained pressures at the EU's external borders and prevent secondary movements within the Schengen free movement area. Eurodac is an EU database containing the fingerprints of third country (non-EU) nationals who have applied for asylum within the EU or who have been apprehended in connection with an irregular border crossing.[38] Member States are able to search the database for evidence to help determine which one is responsible for examining an asylum application under the Dublin rules. Up until now, Eurodac has operated primarily as an asylum database. Member States are unable to store and compare fingerprint data on illegally-staying third country nationals, making it difficult to track any secondary movements within the EU or identify where they first entered the EU. As a consequence, the Commission estimates that "thousands of migrants remain invisible in Europe, including thousands of unaccompanied minors".[39]

6.2 The changes proposed by the Commission would develop Eurodac into a broader migration management tool. The expanded Eurodac database would store the facial images as well as fingerprints of third country nationals falling within any one of three categories: asylum, irregular entry to the EU, or illegal presence within a Member State. The ability to access this information would, the Commission suggests, help to establish when and where an irregular migrant entered the EU and facilitate the identification and re-documentation of individuals so that they can be returned to their countries of origin if they have no right to be in the EU. National law enforcement authorities and Europol would have access to the more extensive range of biometric data held in the expanded Eurodac database in order to prevent, detect or investigate terrorism and other serious crimes.

38 Throughout this chapter, the reference to third country nationals also includes stateless persons.

39 See p.2 of the Commission's explanatory memorandum accompanying the proposed Regulation.

6.3 The proposed Regulation would lower the age threshold for taking fingerprints and facial images from 14 years to six on the grounds that it will be easier to identify asylum-seeking and migrant children, especially those that are unaccompanied or have been separated from their families, and ensure that they are properly safeguarded. At the beginning of 2016, Europol estimated that more than 10,000 unaccompanied migrant children in Europe had gone missing within hours of being registered as new arrivals. The actual number is expected to be considerably higher.[40]

6.4 The UK participates fully in Eurodac and in the wider Dublin system of which it forms part. The proposed Regulation is subject to the UK's Title V (justice and home affairs) opt-in, meaning that the UK will only be bound by the changes proposed by the Commission if the Government decides to opt in, as it has now done. The Government's opt-in decision was debated in European Committee B on 15 November 2016. The Immigration Minister (Mr Robert Goodwill) formally notified us of the Government's decision to opt in to the proposal in his letter of 15 December 2016. By then, the Justice and Home Affairs Council had already agreed a "partial general approach" at its meeting on 8–9 December, paving the way for negotiations with the European Parliament.[41] Of the seven legislative proposals which make up the Commission's asylum reform package, the Government has only opted in to the Eurodac Regulation.

6.5 When we first considered the proposed Regulation last June, we asked the Minister to:

- provide an analysis of the feasibility of opting into the revised Eurodac Regulation but not the revised Dublin IV Regulation, given that the Eurodac proposal is inextricably linked to the Commission's wider reform of the Dublin system;
- comment on the consequences for UK participation in Eurodac if the Commission and Council were to determine that the current (Dublin III) and revised (Dublin IV) rules were not operable, leading to the UK's ejection from the Dublin system;
- explain the rationale for reducing the age threshold for taking the fingerprints and facial images of very young children and the Government's view on the adequacy of the safeguards contained in the proposed Regulation; and
- comment on the enforceability of the safeguards to prevent the misuse of Eurodac data transferred to third countries.

6.6 We also sought confirmation that the Government had consulted the UK's Information Commissioner on the proposed changes to Eurodac and requested a summary of his views. We made clear that we would welcome an early indication of the reactions of other Member States and progress reports on any negotiations that took place up until the scheduling of the opt-in debate.

40 The NGO, Missing Children Europe, reports that in 2015, almost 90,000 asylum seekers in the European Union were unaccompanied children under 18, about nine times more than the number arriving in the previous three years. This figure does not include unaccompanied children who did not apply for asylum.

41 See Council document 15119/16 of 7 December 2016 setting out the partial general approach agreed by the Council.

6.7 It took the Minister six months to respond. His letter, dated 15 December, provided no information on the content of the partial general approach agreed by the Council, or the position taken by the UK, but indicated that changes had been made to the Commission proposal to "make law enforcement access easier in order to support wider security and law enforcement objectives". Whilst welcoming these changes, he added that the UK would be "pressing for further amendments to improve the scope and efficiency of law enforcement access". The Minister also explained the rationale for opting in to the proposed Regulation:

> "If we do not opt in at this stage, the lack of access to Eurodac for asylum/migration and law enforcement purposes risks the UK becoming a 'blind spot' in terms of data-sharing capabilities, which would harm UK interests. The new Eurodac will strengthen the UK's ability to control immigration, by tackling illegal migration, promoting the first safe country principle and maximising returns."

6.8 We asked the Minister to:

- explain whether the Government had endorsed, opposed, or abstained on the partial general approach agreed at the December Justice and Home Affairs Council;
- set out the main changes which the partial general approach would make to the Commission proposal and explain the further changes the Government would like to see to "improve the scope and efficiency of law enforcement access"; and
- explain what steps the Government intends to take during exit negotiations to mitigate or eliminate the risk that UK law enforcement and immigration control authorities may lose access to important EU data-sharing instruments once the UK leaves the EU.

6.9 **The Minister tells us that the UK intervened at the December Justice and Home Affairs Council to "support further amendments to the text to make it easier to check Eurodac for law enforcement purposes, but to note that we could not support a partial general approach due to parliamentary reserves". The published text of the partial general approach refers only to a parliamentary scrutiny reservation entered by Slovenia. We ask the Minister to ensure that any UK parliamentary scrutiny reserve is made clear on the face of the text agreed to ensure accountability and transparency to Parliament.**

6.10 **Although the partial general approach agreed by the Council envisages "a broader and simpler access of law enforcement authorities" to Eurodac data to "help Member States dealing with the increasingly complicated operational situations and cases involving cross-border crimes and terrorism with direct impact on the security situation in the EU",[42] the Minister does not consider that it goes far enough. He would like to dispense with the requirement for a prior "Prüm check" against national fingerprint and DNA databases and permit law enforcement access to Eurodac data for a wider range of criminal offences.**

42 See recital 22a to the Council's partial general approach.

6.11 **As the recitals to the Commission proposal make clear, Eurodac was originally established to facilitate the application of the Dublin rules on the allocation of responsibility for asylum applications made within the EU. Law enforcement access, first introduced in 2013, "constitutes a change of the original purpose of Eurodac". Strict conditions on law enforcement access to Eurodac data are intended to reflect the fact that the data concern individuals "who are not presumed to have committed a terrorist offence or other serious criminal offence".[43] A further easing of law enforcement access to the Eurodac database, as advocated by the Minister, would mark a significant extension of Eurodac's original purposes, transforming it from an asylum database into a much broader law enforcement tool. We ask the Minister what analysis and evidence there is to demonstrate that such an extension is justified.**

6.12 **The partial general approach removes a provision in the original Commission proposal specifying that "agencies or units exclusively responsible for intelligence relating to national security" shall *not* be included in the list of designated national authorities permitted to access Eurodac data for law enforcement purposes. We ask the Minister to explain the reasons for the deletion of this provision and to clarify:**

- **whether it is consistent with Article 4(2) of the Treaty on European Union which stipulates that "national security remains the sole responsibility of each Member State"; and**
- **whether the Government would wish to designate UK intelligence agencies and whether doing so would bring them within the scope of EU law.**

6.13 **We note that the Government's decision to opt in to the proposed Eurodac Regulation was informed by a concern that losing access to Eurodac data would place the UK at risk of becoming "a blind spot in terms of data-sharing capabilities" and would "harm UK interests". The UK's exit from the EU will magnify that risk. We think it reasonable to infer that an opt-in decision taken so close to the beginning of exit negotiations signals a wider intention to maintain, as far as possible, the UK's ability to share immigration and law enforcement information with EU partners post-Brexit. The Minister concedes that this will be "a key consideration as part of the process of leaving the EU and establishing a new relationship".**

6.14 **In that light, we ask the Minister to explain the Government's position on Articles 37 and 38 of the proposed Regulation (and partial general approach) which prohibit third country access to the Eurodac Central System for the purposes of comparing or transmitting biometric or other personal data of third country nationals and which set out the conditions governing the sharing of such data with third countries or private entities. Has the Government sought (or does it intend to seek) changes to these Articles during negotiations? What assessment has the Minister made of their likely impact on the UK's ability to participate in EU information sharing mechanisms post-Brexit?**

43 See recitals 20 and 22 of the proposed Regulation (also reproduced in the Council's partial general approach).

6.15 **The proposed Regulation remains under scrutiny. As well as responding to our questions, we ask the Minister to provide a summary of the European Parliament's negotiating position once it has been agreed and the Government's position on the main changes proposed. We draw this chapter to the attention of the Home Affairs Committee.**

Full details of the documents

Proposal for a Regulation on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person], for identifying an illegally staying third country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast): (37754), 8765/16, COM(16) 272.

Background

6.16 Our earlier Reports listed at the end of this chapter provide a detailed overview of the proposed Regulation and the Government's position.

The Minister's letter of 22 February 2017

6.17 The Minister first addresses our question about the feasibility of opting into the proposed Eurodac Regulation but not opting into the proposed Dublin IV Regulation, given that the Eurodac proposal is inextricably linked to the Commission's wider reform of the Dublin system:

> "The Commission was very clear when it published the Dublin IV proposals that should we not opt into the revised Regulation, the existing Dublin III Regulation would continue to apply between the UK and other Member States. The Eurodac III proposal includes provisions on territorial scope linking it to the Dublin Regulation, but there is no reason why this cannot include more than one version of the Dublin regime."

6.18 We asked the Minister to comment on the consequences for UK participation in Eurodac if the Commission and Council were to determine that the current (Dublin III) and revised (Dublin IV) rules were not operable, leading to the UK's ejection from the Dublin system:

> "If the Commission and Council determine that the two sets of Dublin rules are not operable alongside each other, we agree with the Committee's interpretation that Article 4a of Protocol 21 (governing the UK's opt in) does not appear to provide a procedure for removing the UK from Eurodac if the Government has opted into the revised Eurodac Regulation. The inoperability provisions in the Protocol concern situations where not opting in to a revised measure raises issues, rather than a situation of opting in."

6.19 The Minister notes that there is precedent for the UK only participating in parts of the EU's asylum rule book—the common European asylum system (CEAS):

> "On the general issue of not opting into all of the proposals forming the third phase of the CEAS, such as the proposals on the asylum procedure, reception conditions and qualification for international protection, then our approach is not without precedent in that the UK did not opt in to the corresponding measures that form the current, second phase of the CEAS. We remain bound by the minimum standards Directives adopted in the first phase of the CEAS yet opted into some, but not all, measures of the second phase of the CEAS."

6.20 Turning to the proposed reduction in the age threshold for taking the fingerprints and facial images of very young children, the Minister says:

> "The Commission's reasoning is clear from its memorandum accompanying the proposal: the migration crisis has raised issues about how to safeguard and protect unaccompanied children, with child protection and missing children from a third country in particular a concern of the situation within the EU. We agree with the Commission that the apparent increase in the smuggling of children below the age of 14 years (the lower age limit that currently applies to Eurodac) means there is a stronger need to collect biometrics for the purposes of Eurodac from a lower age to help with the identification of children and to see whether that information can also assist to establish family or other links."

6.21 We requested the Minister's views on the enforceability of the safeguards to prevent the misuse of Eurodac data transferred to third countries and sought confirmation that the Government had consulted the UK's Information Commissioner on the proposed changes to Eurodac, as well as a summary of his views. The Minister responds:

> "On data protection issues, my officials are in contact with the Office of the Information Commissioner and have received from that Office a copy of the letter from the Eurodac Supervision Coordination Group of the European Data Protection Supervisor (EDPS). On the question of data safeguards, we note the EDPS's remarks that general rules on data transfers to third countries laid down in the Eurodac proposal (as published) will need to be adjusted in accordance with the rules on data transfers laid down in the General Data Protection Regulation (EU) 2016/679."

6.22 The Minister tells us that the partial general approach agreed by the Justice and Home Affairs (JHA) Council in December "excluded all elements of the proposal relating to the Dublin IV Regulation" (which remains under negotiation). It did, however, include changes to the provisions on law enforcement access. He continues:

> "The proposals relating to law enforcement were put forward by the Presidency shortly before the JHA Council in December. At the JHA Council, the UK intervened to support further amendments to the text to make it easier to check Eurodac for law enforcement purposes, but to note

> that we could not support a partial general approach due to parliamentary reserves. The partial general approach is of course subject to the general principle that 'nothing is agreed until everything is agreed'."

6.23 The Minister says that the partial general approach corrected a number of omissions or cross-references in the Commission's original proposal by, for example, including additional references to "facial image" where required and replacing separate references to fingerprint data and facial images with a single reference to "biometric data" where appropriate.

6.24 He describes the changes made to the provisions on law enforcement access to Eurodac:

> "Eurodac has the potential to be a powerful tool in the fight against serious crime and terrorism, but arguably it is not used often enough for this purpose because of the strict conditions that have to be met before a law enforcement check can be made. The proposed changes to provisions on law enforcement concern the conditions for access by removing or amending existing restrictions in order to facilitate access. For example, one proposal removes the restriction that designated authorities permitted access shall not include agencies or units exclusively responsible for intelligence relating to national security. Another proposal provides that data on beneficiaries of international protection, which is marked as such within the database, is available for search by law enforcement authorities on the same terms as other stored data. There are proposed changes that remove the requirement that a search can only be made if comparisons with other databases (listed in Article 19) did not lead to the establishment of the identity of the data subject, replacing this with the condition that a prior check has been conducted in those databases, but with the reference to the Visa Information System (VIS) deleted from the list. It is also proposed that a search can be made where it is necessary in a specific case or to specific persons."

6.25 Whilst welcoming these changes, the Minister considers that "further amendments to the text would make it easier to check Eurodac for law enforcement purposes". He continues:

> "We think we should look again at the requirement to do a Prüm check before Member States can consult Eurodac, as this could lead to significant delays, particularly if a Member State has reached its daily quota for Prüm fingerprint requests with some other Member States. This can mean a Member State has to wait until the next day, or even later, before it can make a Prüm check and thus consult Eurodac. We also believe that the list of offences for which a Eurodac check can be made should be revisited, as at present a search can only be carried out to support an investigation into a terrorist offence or into an offence that appears on a list that is linked to extradition under the European Arrest Warrant (provided the offence has a maximum penalty of three years or more). The list does not include theft or burglary or sexual assaults other than rape, meaning that law enforcement

> authorities cannot use Eurodac to try to identify the perpetrators of these offences. The limitations should be removed to facilitate the investigation of these offences."

6.26 Finally, the Minister does not explain what steps the Government intends to take during Article 50 exit negotiations to mitigate or eliminate the risk that UK law enforcement and immigration control authorities may lose access to important EU data-sharing instruments once the UK leaves the EU, observing only that:

> "[…] the question of how the UK shares information about asylum applicants and illegal migrants with the EU and international partners will of course be a key consideration as part of the process of leaving the EU and establishing a new relationship."

Previous Committee Reports

Sixth Report HC 71-iv (2016–17), chapter 2 (15 June 2016) and Twenty-fifth Report HC 71-xxiii (2016–17), chapter 8 (11 January 2017).

7 Criminal law measures to counter money laundering

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Home Affairs Committee
Document details	Proposal for a Directive on countering money laundering by criminal law
Legal base	Article 83(1) TFEU, ordinary legislative procedure, QMV
Department	Home Office
Document Number	(38422), 15782/16, COM(16) 826

Summary and Committee's conclusions

7.1 The Commission has proposed a Directive establishing minimum rules on the definition of money laundering offences and on criminal sanctions which would replace the money laundering provisions contained in a Framework Decision adopted in 2001.[44] The Framework Decision is one of a number of EU police and criminal justice measures adopted before the Lisbon Treaty took effect in December 2009 which were subject to the UK's 2014 block opt-out decision. The Framework Decision ceased to apply to the UK from December 2014 as the then Coalition Government took the view that it was "not for Europe to impose minimum standards on our police and criminal justice system".[45]

7.2 The proposed Directive is intended to bring EU law into line with international standards set out in a 2005 Council of Europe Convention and in the recently updated Recommendations of the Financial Action Task Force (see the Background section below) and to improve cross-border cooperation in the investigation and prosecution of money laundering offences by making it harder for criminals to exploit different national laws.

7.3 The proposed Directive is an EU criminal law measure and is subject to the UK's Title V (justice and home affairs) opt-in, meaning that it will only apply to the UK if the Government decides to opt in.

7.4 The Security Minister (Ben Wallace) told us that the Government "strongly supports international cooperation to tackle money laundering" and that the proposed Directive is "broadly in line with existing UK legislation and practice on money laundering". He identified two areas of concern—a requirement to take account of certain "aggravating circumstances" when determining the sentence to be given for money laundering offences (Article 6 of the proposed Directive) and the definition of corporate liability (Article 7)—and indicated that if the Government were to opt into the proposal, it would either have to negotiate these provisions out or amend domestic law.

44 See Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime.

45 See the comments made by the then Home Secretary (Mrs Theresa May) during a debate in the House on 15 July 2013, HC Deb, col. 777.

7.5 We noted that similar provisions on aggravating circumstances and on corporate liability had not prevented the UK from participating in two EU criminal law measures concerning trafficking in human beings and the sexual abuse and exploitation of children.[46] We asked the Minister to explain why these provisions were of particular concern in relation to money laundering.

7.6 We also noted that the Commission considered the provisions on corporate liability to be "in line with Article 10 of the Warsaw Convention". As the UK has ratified the Warsaw Convention, we asked the Minister to confirm that UK law complies with Article 10 and to explain whether (and if so, to what extent) Article 7 of the proposed Directive goes further than the Convention.

7.7 We decided not to recommend a debate on the Government's opt-in decision for two reasons. First, given that the previous Coalition Government decided not to rejoin around 20 EU criminal law measures establishing minimum standards in order to "bring powers in those areas back to the UK", we thought it unlikely that the Government would wish to opt in to this proposed Directive.[47] We nevertheless asked the Minister whether the Government remains of the view that it is "not for Europe to impose minimum standards on our police and criminal justice system" or whether different considerations might apply with regard to money laundering. Our second reason for not recommending an opt-in debate was that even if the Government were to decide to opt in to the proposal, the Minister considers that the UK "largely meets the requirements of the Directive" and that its impact on UK law would not be substantial.

7.8 In his latest update, the Security Minister (Ben Wallace) tells us that the three month deadline for opting in at the negotiating stage will expire on 3 May 2017. He reiterates the Government's support for the aims of the proposed Directive and for "a strong and collaborative international response" to money laundering and terrorism financing, but says that "the UK can play such an international role without needing to participate in minimum standards EU legislation of this kind". He notes that the UK does not have "fully equivalent provisions" on aggravating circumstances in relation to money laundering offences but says that, "after further consideration", the provisions in Article 7 of the proposed Directive on corporate liability are "in line" with similar provisions contained in the Warsaw Convention with which the UK complies.

7.9 **The Minister's response reinforces our view that the Government is unlikely to opt into the proposed Directive. We ask him to inform us promptly of the Government's opt-in decision and to set out the reasons informing its decision.**

7.10 **On the issue of corporate liability, we ask the Minister whether he is concerned that opting into an EU criminal law measure might put at risk the UK's continued reliance on civil liability and property recovery proceedings under Part V of the Proceeds of Crime Act 2002 to establish corporate liability based on a lack of proper supervision or control. We note that this was an important factor in the previous Coalition Government's decision not to opt into the 2014 EU Confiscation Directive as it feared that UK participation in an EU criminal law measure might provide a basis for asserting that more stringent criminal law standards and safeguards (under the**

46 See Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims and Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography.

47 See the contribution of the then Justice Secretary (Chris Grayling) in HC Deb, 15 July 2013, cols. 850–1 .

European Convention on Human Rights and the EU Charter of Fundamental Rights) should apply to Part V of the 2002 Act.[48] We also ask the Minister whether similar concerns arise in connection with the UK's implementation of equivalent corporate liability provisions in Article 10(2) of the Warsaw Convention.

7.11 **Given the importance of international cooperation in countering money laundering, we expect the Government will wish to remain closely involved with negotiations to ensure that any new EU criminal law money laundering regime is as closely aligned as possible with international standards. We ask the Minister to provide progress reports at key stages of the negotiation.**

7.12 **The proposed Directive remains under scrutiny. We draw this chapter to the attention of the Home Affairs Committee.**

Full details of the documents

Proposal for a Directive on countering money laundering by criminal law: (38422), 15782/16, COM(16) 826.

Background

7.13 The changes proposed in the Directive are intended to implement the money laundering provisions of the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism ("the Warsaw Convention") and Recommendation 3 of the Financial Action Task Force (FATF), an inter-governmental standard-setting body (on which the UK is represented) which has established a framework of measures to combat money laundering and terrorist financing.

7.14 FATF Recommendation 3 (updated in 2016) urges countries to criminalise money laundering in line with international standards established by the United Nations and to apply the crime of money laundering to "all serious offences, with a view to including the widest range of predicate offences". Money laundering assumes that a prior criminal offence has occurred in order to generate the criminal proceeds which are being laundered—the criminal conduct which has given rise to money laundering is referred to as the predicate offence. An interpretive note provides further guidance on how Recommendation 3 should be applied with a view to ensuring that national implementing laws are as comprehensive in scope as possible.[49]

7.15 The Warsaw Convention is the latest and most comprehensive international treaty on money laundering. It also requires participating countries to criminalise money laundering but goes further than FATF Recommendation 3, for example, by stipulating that a prosecution for money laundering does not have to be brought in the criminal court that has jurisdiction for the predicate offence and by requiring participating countries to ensure that an individual may be prosecuted for a money laundering offence without having been convicted of a predicate offence. The UK is one of 17 EU Member States that have ratified the Convention. The Commission considers that adoption of the proposed Directive would be "an important step towards EU ratification".

48 See our Tenth Report HC 342-x (2015–16), chapter 21 (25 November 2015).

49 See the Recommendations of the Financial Action Task Force and accompanying interpretative notes.

The Minister's letter of 27 February 2017

7.16 The Minister sets out the Government's position on EU criminal law measures establishing minimum standards on the substantive elements of criminal offences:

> "The UK supports the aims of the Directive, and is supportive of other Member States' efforts to strengthen their anti-money laundering legislation. As we made clear in the Action Plan for anti-money laundering and counter-terrorist finance, which we published in April 2016, we recognise the importance of a strong and collaborative international response to these crimes. However, our view is that the UK can play such an international role without needing to participate in minimum standards EU legislation of this kind."

7.17 Turning to "aggravating circumstances", he comments:

> "The provisions of the Directive in relation to aggravating circumstances have similarities with those in other Directives, but contain specific measures on money laundering. These do not have fully equivalent provisions in the UK, although the Sentencing Council Guidelines in this area cover them to some extent."

7.18 The Minister explains that the Government has re-examined Article 7 of the proposed Directive dealing with corporate liability and adds:

> "I can confirm that Article 7(1) is broadly in line with common law rules governing the attribution of corporate criminal liability, if each subparagraph is read disjunctively so that compliance with one is sufficient. Compliance with the supervision liability provision under Article 7(2) is achieved through reliance on corporate civil liability and property recovery proceedings under Part V of the Proceeds of Crime Act 2002. The UK therefore complies with Article 7 without the need for further negotiation or legislation. It is the case that the corporate liability requirements of article 7 are 'in line' with similar provision in the Warsaw Convention with which the UK complies."

Previous Committee Reports

Thirty-first Report HC 71-xxix (2016–17), chapter 14 (8 February 2017).

8 Toy safety: lead content

Committee's assessment	Legally and Politically important
Committee's decision	Cleared from scrutiny
Document details	Proposal for a Council Directive amending, for the purpose of adapting to technical progress, Annex II to Directive 2009/48/EC of the European Parliament and of the Council on the safety of toys, as regards lead.
Legal base	Article 46(1)(b) of Directive 2009/48/EC on the safety of toys; QMV
Department	Business, Energy and Industrial Strategy
Document Number	(38049), 12153/16, COM(16) 560

Summary and Committee's conclusions

8.1 The 2009 Toy Safety Directive sets limits on the content of nineteen heavy elements in toys, to protect the health of the children who play with them. These value limits are contained in an annex to the Directive, which can be amended by the European Commission in light of new scientific or technical developments. In early 2015, on the recommendation of the European Food Safety Authority, the European Commission used this power of amendment to propose a further reduction in the permitted lead content of toys.

8.2 In her assessment of the proposal, the Minister for Small Business and Consumers (Margot James) states that the Government considers the Commission's estimated health benefits of reducing toys' lead content further to be "very optimistic", because the proportion of children's exposure to lead from toys is very small. Overall, the Commission estimates that the Directive will lead to 662 job losses across the EU.[50] However, as 85 to 90 per cent of all toys sold in the EU are manufactured in China, the Minister notes that "it is primarily manufacturers located there that are affected".

8.3 The Minister also explains that adoption of the Directive would not require a change in UK legislation, as the Toy (Safety) Regulations 2011—which transpose the Toy Safety Directive into UK law—refer to the limit values laid down by the Directive by ambulatory reference.[51]

8.4 The proposal was originally put to the vote in a committee of technical experts representing the Member States in January 2015. However, it did not have the support of a qualified majority. The Commission subsequently re-submitted it to the Council as a formal proposal for a Directive in September 2016. The Environment Council endorsed the proposal at its meeting on 17 October, with the UK Government abstaining as the document was still under scrutiny. The Directive now awaits a final vote in the European Parliament before it can enter into force (see "Background" for more information on the procedural history of the proposal).

50 Commission Impact Assessment accompanying the proposal for a Council Directive.
51 The full text of the Toy (Safety) Regulations 2011 is available here.

8.5 **We take note of the Minister's (Margot James) assessment that the health benefits of reducing the lead content of toys further are likely to be smaller than estimated by the Commission. However, we also note that the vast majority of toys sold in the EU are manufactured in China. As such, the impact of the proposal on UK businesses is likely to be very small. In addition, as the Council has already voted on the Directive—with the UK Government abstaining—we are content to clear it from scrutiny.**

8.6 **However, we do wish to raise a final issue with respect to the UK's decision to leave the EU. In her Memorandum, the Minister notes that the Toy (Safety) Regulations 2011 refer to the value limits of individual chemicals by ambulatory reference to the Directive. In other words, the Regulations do not explicitly incorporate the specific limits for chemicals such as lead, cadmium and mercury into UK law. The transposition measure is therefore directly dependent on the Directive and cannot operate independently.**

8.7 **This raises an obvious problem in the context of Brexit. At the moment the UK ceases to be an EU Member State, it will no longer be bound by the provisions of the Directive. However, clearly the Toy Safety Regulations would be deprived of their effect unless either the ambulatory reference to the Directive was maintained or the limit values were explicitly incorporated into UK law. We therefore ask the Minister to clarify whether the Great Repeal Bill will aim to incorporate those elements of the Directive which are currently referred to by ambulatory reference directly into UK law.**

Full details of the documents

Proposal for a Council Directive amending, for the purpose of adapting to technical progress, Annex II to Directive 2009/48/EC of the European Parliament and of the Council on the safety of toys, as regards lead: (38049), 12153/16, COM(16) 560.

Background

8.8 In 2009, the EU adopted the Toy Safety Directive (TSD)[52] which sets strict safety standards for toys, in particular as regards use of their chemical composition and their flammability. Unless products meet the requirements of the Directive, they cannot be marketed in the EU. In addition to restricting the use of known or suspected carcinogens, the Directive expressly limits toys' content of nineteen heavy elements such as lead, mercury and cadmium.

8.9 The content limit for each of these elements is laid down in Annex II to the Directive, which can be amended by the Commission to update it in view of technical and scientific developments. Any such amendments must be approved via the so-called regulatory procedure with scrutiny, which is laid down in a 1999 piece of legislation on the implementing powers of the Commission.[53] Under this procedure, the Commission's proposed amendments must at first instance be put to a committee of technical experts representing the Member States—in this case the Toy Safety Committee.[54]

52 Directive 2009/48/EC on the safety of toys.

53 Decision 1999/468/EC on the exercise of implementing powers conferred on the Commission.

54 A proposal to align a number of existing EU Directives and Regulations to the new structure of Implementing and Delegated Acts introduced by the Lisbon Treaty is currently under consideration in the Council and the Parliament. This would replace the regulatory procedure with scrutiny in the Toy Safety Directive with the procedure for adopting Delegated Acts.

8.10 In January 2015, following a recommendation by the European Food Safety Authority, the Commission proposed to the Toy Safety Committee to reduce the maximum safe limits for lead in toys. However, in the absence of a qualified majority, the committee was unable to adopt a favourable opinion on the proposal.[55]

8.11 In such an eventuality, the regulatory procedure with scrutiny requires the Commission to formally submit a proposal to the Council in the form of a Council Directive, which it did on 13 September 2016.[56] The legislative procedure to be followed mirrors the consent procedure, where the Council votes on a proposal first (and only once) and then—if the Council supports the legal text—submits it to the European Parliament for final approval.

8.12 As the proposal[57] was submitted for formal consideration by the Council, the Minister for Small Business, Consumers and Corporate Responsibility (Margot James) submitted an Explanatory Memorandum to the Committee on 30 September 2016.[58] In the Memorandum, the Minister explained that the Government was still considering its position on the lower safety limit for lead in toys. The Directive was subsequently endorsed without discussion by the Environment Council at its meeting on 17 October 2016.[59]

8.13 The Committee wrote to the Minister on 19 October 2016 asking her to set out the Government's position on the proposal. The Minister responded on 14 February 2017, noting that the Government believed the Commission's assessment of the likely health benefits of the proposal were "very optimistic" given that children's exposure to lead from toys was small in comparison to exposure through the environment, food and water. She also confirmed that the Government had abstained from voting in the Council in October 2016 to reflect the fact that the Committee still had the document under scrutiny.

8.14 Before the Directive can be formally adopted, it must also be approved by the European Parliament. The Parliament is expected to vote on the proposal in the coming months, and the Minister has indicated she expects it to approve the Directive. It would then enter into force in the second half of 2018.

Our assessment

8.15 This proposal to lower the lead content of toys has an unusual procedural history, having originated as an implementing measure in a Comitology procedure. It was then submitted to the Council as a formal proposal for a Directive, after the Member States' technical experts failed to reach agreement on it. We note that it apparently took the Government over two years to form an opinion on the merits of the proposal, as the operative parts of the proposal originally put to the Toy Safety Committee in January 2015 and the subsequent proposal for a Directive submitted to the Council in September 2016 are identical.

55 The weighting of each Member State's vote to determine whether a Qualified Majority is reached was, in this case, the same as the one that applied to voting in the Council prior to November 2014.

56 The delay between the rejection of the proposal in committee and its eventual resubmission to the Council 18 months later was the result of scientific question on whether the proposed possible exposure to lead should be calculated on a weekly or daily basis.

57 The full text of the proposal for a Directive is available here.

58 Explanatory Memorandum submitted by the Department for Business, Energy and Industrial Strategy (30 September 2016).

59 Outcome of the Council meeting (17 October 2016).

8.16 With respect to the substance of the new Directive, we note that the Government believes the Commission may have overstated the health benefits of further reducing the lead content of toys. However, as over four-fifths of all toys marketed in the EU are produced in China, any impact on UK businesses appears to be negligible. Considering, moreover, that the Directive has already been approved by a qualified majority of Member States and will not be subject to further consideration in the Council, we are content to clear it from scrutiny.

8.17 We also thank the Minister for confirming that the Government abstained from voting at the Environment Council in October 2016 as we had the proposal under scrutiny at the time.

Implications of Brexit

8.18 We note that the Toy (Safety) Regulations 2011, which transpose the Toy Safety Directive in the UK, contain ambulatory references to the limits set out in the Annex to the Directive. In other words, the Regulations do not explicitly incorporate the specific limits for chemicals such as lead, cadmium and mercury into UK law. As a result, the transposition measure is directly dependent on the Directive and cannot operate independently. The Minister notes that this means that "no change will be made to the UK legislation" as a result of the updated restrictions on lead contents, because the Regulations will simply continue to refer to the updated Annex in the EU's Official Journal.

8.19 However, the use of ambulatory references to transpose EU law raises a more fundamental question in view of the UK's forthcoming exit from the EU. At the moment the UK ceases to be an EU Member State, it will no longer be bound by the provisions of the Toy Safety Directive. However, clearly the transposing Regulations would be deprived of their effect unless either the ambulatory references were maintained, or the limit values were explicitly incorporated into UK law.

8.20 If the ambulatory references in the Toy Safety Regulations were to be maintained, the day-to-day operation of the UK's legal framework in this area would be dependent on an external source of law. Given the nature of ambulatory references, UK businesses would also be bound by any future amendments to the Directive, over which the UK would have no say.

The Minister's letter of 14 February 2017

8.21 On 19 October 2016, the Committee asked the Minister for Small Business and Consumers (Margot James) to communicate the Government's position on the proposal as soon as it was established. The Minister responded with the requested information on 14 February 2017.

8.22 In her letter, the Minister explains that the Government had not been able to support the lower limit for lead in toys:

> "[There] is insufficient evidence that the [the lower limit] would be effective. (…) We regard the estimated health benefits set out in the Commission Impact Assessment, circulated alongside the explanatory memorandum, to be very optimistic, and this view is shared by Public Health England. The

> Commission acknowledges that the proportion of children's lead exposure from toys is small in comparison to environmental exposure and lead in food and water. This does not appear to be adequately reflected in the calculation of the potential health benefits."

8.23 In terms of the costs of the proposal, she adds:

> "The Commission proposals would, however, impose new costs on manufacturers through increased cost for testing to ensure compliance with the new limits, and could impact on consumer choice in the marketplace (…). The Impact Assessment also estimated that across Europe the costs would be up to 662 jobs lost (…). We have not undertaken a separate estimate for the UK. The toy manufacturing industry in the UK is relatively small (…). It is worth noting that 85–90% of toys are manufactured in China, and it is primarily manufacturers located there that are affected."

8.24 Finally, with respect to the Council vote in October 2016, the Minister confirms that the UK Government abstained and placed a scrutiny reserve resolution to reflect the fact the proposal was still under scrutiny. She adds the European Parliament is scheduled to vote on the Directive in the coming months, and is expected to approve it.

Previous Committee Reports

(29449), 5938/08: Fortieth Report HC 16-xxxvi (2008–09) chapter 1 (26 November 2008) and Seventeenth Report HC 16-xv (2007–08) chapter 2 (12 March 2008).

9 State of the Energy Union

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; drawn to the attention of the Business, Energy and Industrial Strategy Committee
Document details	(a) Commission Communication—Second report on the state of the energy union; (b) Commission Staff Working Document: Monitoring progress towards the Energy Union objectives—key indicators; (c) Commission Report—2016 assessment of the progress made by Member States in 2014 towards the national energy efficiency targets for 2020 and towards the implementation of the Energy Efficiency Directive; (d) Commission Report—Renewable Energy Progress Report
Legal base	—
Department	Business, Energy and Industrial Strategy
Document Numbers	(a) (38504), 5902/17 + ADDs 1–2, COM(17) 53; (b) (38512), 5901/17, SWD(17) 32; (c) (38502), 5868/17, COM(17) 56; (d) (38503), 5890/17, COM(17) 57

Summary and Committee's conclusions

9.1 The Energy Union is one of the ten political priorities identified by the Commission President, Jean-Claude Juncker. It has five dimensions: energy security; a fully integrated European energy market; energy efficiency; decarbonising the economy; and research, innovation and competitiveness.

9.2 The Commission concludes in its Report on the State of the Energy Union (document (a)) that progress has been made on all of these dimensions. It categorises 2016 as a "year of delivery" during which various legislative proposals were tabled, such as those revising the electricity market and amending the energy efficiency and renewable energy Directives. The focus now, it says, should be on implementation.

9.3 At the same time, the Commission published progress reports on energy efficiency and renewable energy. These demonstrate that the EU is on schedule to meets its 2020 targets in both areas. The UK is cited as one of the Member States, however, which might have to reinforce cooperation with others in order to reach its national binding renewable energy target.

9.4 The Parliamentary Under-Secretary of State, (Jesse Norman), is content with the various Reports. He identifies the recent improvements in interconnection within the EU as an important building block towards a fully functioning energy market and an important contribution to energy security.

9.5 **The documents are progress Reports and do not make new proposals. They relate, however, to the wide-ranging package of Clean Energy legislative proposals which we considered at our meeting of 25 January 2017. The Minister's specific reference to interconnection and to a fully functioning energy market point to the importance of resolving the UK's energy relationship with the EU following Brexit. This is a matter that we raised in our scrutiny of the Clean Energy package, and we look forward to the Government's response.**

9.6 **Given that background, we judge the documents to be of political importance and accordingly draw them to the attention of the House. We have no concerns additional to those already raised on earlier documents. We therefore clear them from scrutiny and draw them to the attention of the Business, Energy and Industrial Strategy Committee.**

Full details of the documents

(a) Commission Communication—Second Report on the state of the energy union: (38504), 5902/17 + ADDs 1–2, COM(17) 53; (b) Commission Staff Working Document: Monitoring progress towards the Energy Union objectives—key indicators: (38512), 5901/17, SWD(17) 32; (c) Commission Report—2016 assessment of the progress made by Member States in 2014 towards the national energy efficiency targets for 2020 and towards the implementation of the Energy Efficiency Directive 2012/27/EU as required by Article 24 (3) of the Energy Efficiency Directive 2012/27/EU: (38502), 5868/17, COM(17) 56; (d) Commission Report—Renewable Energy Progress Report: (38503), 5890/17, COM(17) 57.

Report on the State of the Energy Union (documents (a) and (b))

9.7 The Commission concludes that the EU as a whole has continued to make good progress on delivery of the Energy Union's objectives, in particular in meeting the EU's 2020 climate and energy targets. The EU is on track to meet its 2020 energy efficiency target. Greenhouse gas emissions were 22% below 1990 levels (against a 20% target for 2020) and although there was a temporary increase in emissions in 2015, emissions remain on a decreasing trend. Emissions in the EU Emissions Trading System (EU ETS) continued to fall. The EU is also on track to meet its 2020 renewable energy target with renewables reaching 16% of final energy consumption in 2014 though the Commission highlights the need for further efforts to 2020. The EU also continues to successfully decouple economic growth from greenhouse gas emissions with Gross Domestic Product growing by 50% from 1990–2015 whilst emissions have decreased by 22%.

9.8 The report highlights the entry into force of the Paris climate change agreement in 2016 and the legislative proposals on the EU ETS, effort share for sectors outside the ETS and integration of land use, land use change and forestry. The Commission also published a low emission mobility strategy in 2016 and the Clean Energy Package, including proposals on electricity market design, renewable energy, energy efficiency and a governance framework for the Energy Union.

9.9 The Commission highlights a number of important interconnection projects that began operation in 2016 with work beginning on a number of others. A new high-level group was also established for co-operation in the North Sea focussed on integration of offshore wind and interconnection.

9.10 On financing, the Commission highlights the important role of the European Fund for Strategic Investments in helping unlock private finance. European Structural and Investment Funds and Horizon 2020, the EU's research programme, are also identified as important sources of funding. In 2017 the Commission intends to launch a Smart Finance for Smart Buildings initiative in co-operation with the European Investment Bank to help accelerate building renovation.

9.11 Turning to the EU's neighbourhood, there was a particular focus in 2016 on market reform in Ukraine with progress made in the gas market and on energy efficiency. The Commission also conducted a series of meetings with Ukraine and Russia to ensure stable supplies to Ukraine and gas transit to the EU.

9.12 The Staff Working Document (document (b)) reports against a range of specific indicators intended to monitor and assess progress on meeting the Energy Union objectives.

Energy Efficiency Progress Report (document (c))

9.13 The Report assesses the progress made by the EU and individual Member States up to 2014 towards energy efficiency targets for 2020. It also reviews implementation of the Energy Efficiency Directive (2012/27/EU).

9.14 The Commission considers that considerable progress has been made to date and is optimistic that the 2020 target will be reached if Member States continue to implement existing legislation and programmes effectively. In 2014 the EU's primary energy consumption[60] was only 1.6% above the EU's 2020 target and final energy consumption[61] was 2.2% below the 2020 target though the Commission notes that 2014 was a very warm year and that both primary and final consumption increased in 2015.

9.15 The Commission notes that the annual reduction in primary energy consumption in the UK between 2013 and 2014 had been substantial (7%). The UK is judged by the Commission to be reducing consumption at a rate higher than that needed to meet the 2020 targets.

9.16 The Commission reports that the Energy Efficiency Directive has not been fully transposed in some Member States. The UK Government has formally notified the Commission that it has completed transposition of the Directive. The Commission considers that Member States have made good progress towards reaching their binding national energy-saving targets under Article 7 of the Energy Efficiency Directive. The UK is highlighted as one of eight Member States to have reached or exceeded expected savings in 2014.

Renewable Energy Progress Report (document (d))

9.17 The current Renewable Energy Directive, agreed in 2009, sets a target for 20% of energy to be renewable across the EU by 2020. EU Member States are also set individual binding targets for consumption of energy from renewable sources (UK 15%) as well as an additional target to achieve 10% renewable energy in transport.

60 Total energy demand of a country, including consumption by the energy sector itself.

61 Total energy consumed by end users, such as households, industry and agriculture.

9.18 The EU is on track to reach its 20% renewable energy target by 2020, having achieved a share of 16% renewables in its final energy consumption in 2014 and approximately 16.4% in 2015.

9.19 The EU is also performing strongly in terms of the deployment of renewables in electricity, with the highest share of Renewable Energy Sources (RES) in this sector. In 2011, renewables generated 21.7% of the EU's electricity; by 2015, this figure reached 27.5% and it is expected to climb to 50% by 2030. This continued growth has resulted in lower renewable costs. For example, the prices of photovoltaic modules fell by 80% between the end of 2009 and the end of 2015.

9.20 The transport sector had a 6% share of renewable energy in 2015, below the mandatory 10% target due to relatively high greenhouse gas (GHG) mitigation costs and regulatory uncertainty. Renewable energy in transport comes largely from biofuels (88%).

9.21 The report states that the EU Member States which are currently projected not to meet their national RES share binding targets by 2020 are the UK, Ireland, Luxembourg, and the Netherlands. The estimated RES share for the UK in 2020 is 14.8%, against a binding 15.0% target. To meet their target, EU Member States will be able to use cooperation mechanisms with other Member States and countries outside the EU such as statistical transfers of renewable energy or joint renewable energy projects.

Minister's Explanatory Memoranda of 21 February 2017

Report on the State of the Energy Union (documents (a) and (b))

9.22 The Minister welcomes the Report. Particularly encouraging is the Commission's assessment that the EU is on track to meet its 2020 targets for greenhouse gas emissions, energy efficiency and renewable energy. He sets out the Government's position in the following terms:

> "The Government shares the Commission's view that 2016 was an important year in delivering the objectives of the Energy Union. In particular, the publication of the Clean Energy package in November represents a significant milestone in implementing the EU's 2030 climate and energy framework with important legislation on electricity market design, renewable energy, energy efficiency and Energy Union governance to be negotiated over the coming year.
>
> "The Communication also rightly highlights the importance of ratification of the Paris Agreement and the action taken in 2016 to implement the EU's commitments by bringing forward proposals on the EU ETS and the Effort Share Decision in 2016. We also look forward to the translation of the Low Emissions Mobility Strategy into specific initiatives over the coming year.
>
> "The Commission's intention to continue to work to address barriers to investment and leverage private finance through EFSI is a positive step forward—a number of UK projects are already receiving support. We look forward to practical proposals under the Smart Finance for Smart Buildings initiative to help facilitate investment in building renovation.

> "The recent improvements in interconnection within the EU recorded in the report are also welcome as an important building block towards a fully functioning energy market and an important contribution to energy security. The UK is also a signatory to the political declaration on energy co-operation between the North Seas Countries adopted in 2016 and referred to in the report.
>
> "The Government supports the important work the Commission has done over the last year in brokering agreements between Russia and Ukraine to secure gas supplies for Ukraine and the important work on reforming Ukraine's energy market. The UK also supported adoption of the revised Decision on Inter-Governmental Agreements in order to ensure effective transparency, co-operation and compliance with EU law."

Energy Efficiency Progress Report (document (c))

9.23 The Minister expressed the Government's support for the Report, including its assessment that the EU as a whole and individual Member States, including the UK, have made considerable progress towards meeting EU and national energy efficiency targets for 2020. He comments:

> "The fact that the Commission considers that the EU is on track to meet the EU's 2020 target and that this is primarily due to improvements in energy efficiency driven by public policy is a reflection of the significant efforts made at the national level. The lessons derived from the progress made to date will also be an important contribution to the current negotiations on energy efficiency targets for 2030 in the updated Energy Efficiency Directive that formed part of the Commission's Clean Energy Package published in November 2016."

Renewable Energy Progress Report (document (d))

9.24 The Minister notes simply that the Government will play a full part in the forthcoming negotiations on the Commission's proposed recast of the Renewable Energy Directive, which would cover the period 2021 to 2030, as part of its wider legislative package "Clean energy for all Europeans".

Previous Committee Reports

None.

10 Carbon Capture and Storage

Committee's assessment	Politically important
Committee's decision	Cleared from scrutiny; further information requested; drawn to the attention of the Business, Energy and Industrial Strategy Committee and the Environmental Audit Committee
Document details	Report from the Commission on implementation of Directive 2009/31/EC on the geological storage of carbon dioxide
Legal base	—
Department	Business, Energy and Industrial Strategy
Document Number	(38505), 5908/17, COM(17) 37

Summary and Committee's conclusions

10.1 Carbon capture and storage (CCS) is a way of 'decarbonising' fossil fuel power generation, through capturing and storing the carbon dioxide (CO_2) produced. It is considered to be of critical importance to meet the UK's carbon targets at least cost and to fulfil the ambition of the UN Paris Agreement on climate change.[62]

10.2 The EU's CCS Directive was adopted on 23 April 2009. It established a legal framework for the safe geological storage of carbon dioxide (CO_2). The objective of the CCS Directive is to ensure that there is no significant risk of leakage of CO_2, no damage to health, no damage to the environment, and to prevent any adverse effects on the security of the transport network or storage sites. It sets out requirements covering the entire lifetime of a storage site.

10.3 The Commission reports that the provisions of the Directive have been consistently applied. Some Member States have advanced in their assessments of storage capacity but further and more detailed assessments will be needed if CCS projects begin. Despite the lack of positive assessment for technical and economic feasibility for CCS retrofitting, newly built power plants are generally going beyond the legal requirements .

10.4 When the CCS Directive was adopted, it was hoped that demonstration and commercialisation of CCS would have advanced further than has been the case. To date, there are no examples of commercial application of CCS in the EU. There are nevertheless several demonstration projects underway.

10.5 Despite support for the technology in the UK, progress towards commercial viability has been slow. The Coalition Government's £1 billion CCS competition was cancelled in 2015. This was the second CCS competition to be cancelled following the first cancelled competition running from 2007–2011. In a report published on 20 January 2017, the National Audit Office (NAO) calculated that £168 million (in 2015–16 prices) were

62 Letter from the Committee on Climate Change to the Secretary of State for Energy and Climate Change, 6 July 2016.

spent by the Government on these two CCS competitions. The NAO made a number of recommendations to be taken into account by the Government in the next phase of supporting CCS.[63]

10.6 The current Government has said that it is considering the findings and recommendations made in the report "Lowest Cost Decarbonisation for the UK: the critical role of carbon capture and storage", published in September 2016 by the Parliamentary Advisory Group on Carbon Capture and Storage,[64] and will set out its approach to carbon capture and storage in due course.[65]

10.7 In his Explanatory Memorandum on the Commission's Report, the Parliamentary Under–Secretary of State, (Jesse Norman), expresses contentment with the Commission's Report, noting that it has no new policy implications. He makes no reference to the prospects for commercialisation of CCS in the UK.

10.8 **The Commission's Report raises no issues and we are therefore content to clear it from scrutiny.**

10.9 **We report the document to the House because of the continued uncertainty over the Government's approach to Carbon Capture and Storage, a matter which we consider to be of political importance. We ask that the Minister either set out to us its approach to CCS or tell us when the House can expect to receive such details.**

10.10 **We note that the Minister of State for Climate Change and Industry, (Nick Hurd), was asked to comment on these matters by the Business, Energy and Industrial Strategy Committee in an evidence session on 10 January 2017.[66] We therefore draw this chapter to the attention of that Committee. We also draw it to the attention of the Environmental Audit Committee, which recommended in a Report of 8 November 2016 that the Government publish a CCS Strategy.[67]**

Full details of the documents:

Report from the Commission on implementation of Directive 2009/31/EC on the geological storage of carbon dioxide: (38505), 5908/17, COM(17) 37.

The Commission's Report

10.11 Whilst all Member States have notified the Commission of their implementation measures, the Commission considers that only sixteen Member States' legislation fully conforms to the CCS Directive requirements. Exchanges with the remaining Member States are ongoing regarding bringing their legislation fully in line with requirements.

63 National Audit Office, Carbon capture and storage: the second competition for government support, HC 950 Session 2016–17, 20 January 2017.

64 http://www.ccsassociation.org/news-and-events/reports-and-publications/parliamentary-advisory-group-on-ccs-report/ .

65 PQ 58702 [on carbon emissions], answered on 13 January 2017 and HC Deb, 24 January 2017, col 70WH [Westminster Hall].

66 Q28.

67 Environmental Audit Committee, Fifth Report of Session 2016–17, Sustainability and HM Treasury, HC 181.

10.12 There has been little recent activity within Member States to identify areas where storage may or may not occur. A storage site exploration permit was submitted in Spain. Five German federal states have passed laws banning underground storage of CO_2, or are preparing to do so.

10.13 The UK is identified as the only Member State where a CO_2 storage permit was applied for during the reporting period.[68] A storage permit application was reported as under evaluation in Italy, with a further application expected in the Netherlands.

10.14 Under Article 33 of the CCS Directive, operators must assess the technical and economic feasibility of carbon capture, transport and storage (referred to as 'capture readiness') when applying for a licence for large (300MW or more) thermal power generation stations. Where the assessment is positive, land must be set aside to accommodate future installation of CO_2 capture plant.

10.15 None of the 29 assessments carried out across seven Member States found CCS to be economically feasible. Technical difficulties were identified in some countries. Irrespective of this, applicants in four countries proposed to set aside land to allow future installation of CO_2 capture plant. During the reporting period, 14 applications were granted in the UK, where legislation on capture readiness goes beyond the CCS Directive requirements.

10.16 Whilst demonstration and commercialisation of CCS has not advanced during the reporting period, a number of Member States continue to support or plan to further support research activities to improve the technology and knowledge of underground storage of CO_2, with a number of countries exploring opportunities to utilise CO_2.

10.17 Two active CCS regional networks are working to develop common, cross-border CO_2 transport and storage infrastructure which could allow Member States, where underground storage is not available, to deploy CCS: the North Sea Basin Task Force (UK, Netherlands, Norway, Germany and Belgium) and the Baltic Sea Region CCS network (Estonia, Germany, Finland, Norway and Sweden).

10.18 The report concludes that:

- the provisions of the CCS Directive have been consistently applied across the reporting period in Member States;
- more evaluation of storage capacity will be needed as the industry becomes established; and
- newly built power plants are generally going beyond the legal requirements and are setting aside land to enable CCS to be retrofitted in future, should the economic conditions change.

Minister's Explanatory Memorandum of 21 February 2017

10.19 The Minister says that, as the document is a progress report and does not make any proposals, it does not have any policy implications. The Government, he concludes, is content with the Report as drafted.

Previous Committee Reports

None.

68 This was for the Peterhead CCS project in the context of its participation in the UK's CCS competition.

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

Cabinet Office

(38526)
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Court of Auditors Report 33/2016 Union Civil Protection Mechanism: the coordination of responses to disasters outside the EU has been broadly effective.

Department for Environment, Food and Rural Affairs

(38523)
6286/17
COM(17) 73

Proposal for a Council Decision establishing the position to be adopted on behalf of the European Union within the Conference of the Parties with regard to amendments of Annex III to the Rotterdam Convention.

Department for Exiting the European Union

(38490)
5743/17
+ ADD 1
—

Communication from the Commission EU Law: Better Results through Better Application.

Department for International Trade

(38517)
6078/17
COM(17) 67

Annual review by the Commission of Member States' Annual Activity Reports on Export Credits in the sense of Regulation (EU) No 1233/2011.

Foreign and Commonwealth Office

(38546)
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Council Implementing Decision concerning Council Decision (EU) No.2011/172/CFSP concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Egypt

(38547)
—
—

Council Implementing Regulation concerning Regulation (EU) No.270/2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Egypt

(38537)
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—

Council Decision (CFSP) 2017/298 of 17 February 2017 extending the mandate of the European Union Special Representative for Central Asia.

(38538)
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—

Council Decision (CFSP) 2017/300 of 17 February 2017 extending the mandate of the European Union Special Representative for the Horn of Africa.

Home Office

(38510)
5912/17
+ ADD 1
COM(17) 72

Proposal for a Council Decision on the position to be adopted, on behalf of the European Union, in the sixtieth session of the Commission on Narcotic Drugs on the scheduling of substances under the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol and the Convention on Psychotropic Substances of 1971.

(38514)
6053/17
COM(17) 55

Report from the Commission to the Council and the European Parliament Ex post evaluation report on the Daphne Programme (2007–2013).

Ministry of Justice

(38525)
6298/17
COM(17) 59

Report from the Commission to the Council and the European Parliament Ex post evaluation report on the Civil Justice Programme (2007–2013).

Office for National Statistics

(38530)
6429/17
COM(17) 71

Report from the Commission to the European Parliament and the Council on the implementation of Regulation (EC) No 450/2003 of the European Parliament and of the Council concerning the labour cost index (LCI).

Formal Minutes

Wednesday 8 March 2017

Members present:

Sir William Cash, in the Chair

Alan Brown	Kate Hoey
Richard Drax	Craig Mackinlay
Kate Green	Mr Andrew Turner

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 11 read and agreed to.

Resolved, That the Report be the Thirty-fourth Report of the Committee to the House.

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

[Adjourned till Wednesday 15 March at 1.45pm

Standing Order and membership

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

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

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

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

The expression "European Union document" covers—

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

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

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

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

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

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

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

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

Current membership

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

Alan Brown MP (*Scottish National Party, Kilmarnock and Loudoun*)

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

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

Richard Drax MP (*Conservative, South Dorset*)

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

Kate Hoey MP (*Labour, Vauxhall*)

Stephen Kinnock MP (*Labour, Aberavon*)

Craig Mackinlay MP (*Conservative, South Thanet)*

Mr Jacob Rees-Mogg MP (*Conservative, North East Somerset*)

Chris Stephens MP (*Scottish National Party, Glasgow South West*)

Graham Stringer MP (*Labour, Blackley and Broughton*)

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

Mr Andrew Turner MP (*Conservative, Isle of Wight*)

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

Mike Wood MP (*Conservative, Dudley South*)

The following members were also members of the Committee during the parliament:

Peter Grant MP (*Scottish National Party, Glenrothes*), Rt Hon Damian Green MP (*Conservative, Ashford*), Nia Griffith MP (*Labour, Llanelli*), Kelvin Hopkins MP (*Labour, Luton North*), Calum Kerr MP (*Scottish National Party, Berwickshire, Roxburgh and Selkirk*), Dr Paul Monaghan MP (*Scottish National Party, Caithness, Sutherland and Easter Ross*), Alec Shelbrooke MP (*Conservative, Elmet and Rothwell*), Kelly Tolhurst MP (*Conservative, Rochester and Strood*), Heather Wheeler MP (*Conservative, South Derbyshire*).