



House of Commons

European Scrutiny Committee

Nineteenth Report of Session 2019–21

Documents considered by the Committee on 3 September 2020,
including the following COVID-19 related documents:

Flight vouchers

Travel and tourism guidance

Report, together with formal minutes

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Notes

Numbering of documents

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

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

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

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

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

Abbreviations used in the headnotes and footnotes

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

Euros

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

Further information

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

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

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1 COVID-19: Travel and tourism guidance¹

These EU documents are politically important because:

- they concern the EU’s response to the COVID-19 pandemic; and
- they raise questions regarding the Government’s support to the UK travel industry during—and after exit from—current lockdown restrictions.

Action

- Draw to the attention of the Digital, Culture, Media and Sport Committee, and the Health and Social Care Committee.

Overview

1.1 The files under scrutiny—[document \(a\) \(41252\)](#) and [\(b\) \(41253\)](#)—were first considered by the Committee in its Fifteenth Report of Session 2019–21.² They were published by the Commission as non-binding guidance for Member States in their efforts to restart domestic and international tourism as the COVID-19 pandemic eases.

1.2 The Commission’s guidance covers free movement and internal borders, transport and connectivity, tourism and hospitality, consumer confidence, and the development of health protocols for hospitality establishments.³

1.3 The Committee wrote to the Minister responsible for the documents, Nigel Huddleston MP, requesting further information on the Government’s plans in the key areas outlined by the Commission for specific intervention. The Minister has since responded to the Committee, dated 20 July 2020, and his reply is considered below.⁴

Letter from Nigel Huddleston MP (Parliamentary Under Secretary of State for Sport, Tourism and Heritage)

1.4 In light of the Commission’s guidance on the development of health protocols for hospitality establishments and its wider work on containing the spread of COVID-19, the Committee was interested in the Government’s ongoing engagement with the European Centre for Disease Prevention and Control (ECDC). As suggested in the

1 Document (a) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Tourism and transport in 2020 and beyond; Council and COM number: COM(20) 550; Legal base: N/A; Department: Digital, Culture, Media and Sport; Devolved Administrations: Consulted; ESC number: 41252. Document (b) Communication from the Commission: COVID-19: EU Guidance for the progressive resumption of tourism services and for health protocols in hospitality establishments; Council and COM number: COM(20) 3251; Legal base: N/A; Department: Digital, Culture, Media and Sport; Devolved Administrations: Consulted; ESC number: 41253.

2 Fifteenth Report HC 229–xi (2019–21), [Chapter 1](#) (8 July 2020).

3 For a detailed overview of all aspects of the Commission’s guidance see the Committee’s Fifteenth Report of Session 2019–21.

4 [Letter from Nigel Huddleston MP to Sir William Cash MP](#), 20 July 2020.

Commission’s health protocols guidance (document (b)), we were also interested in whether the Government has, or plans to, provide data to the EU and Member States for the development of a European COVID-19 transmissions map.

1.5 In response, the Minister states that the Government is “working closely with the European Union, European countries and global partners to tackle this global pandemic”. In terms of the Government’s involvement in the ECDC’s mooted COVID-19 transmissions map, the Minister does not directly answer the Committee’s question on involvement, however, he does confirm that:

[The] United Kingdom continues to access and contribute to EU health security alerting systems, databases and networks during the transition period, including the EU’s Early Warning and Response System (EWRS) hosted by the ECDC, which we continue to use as part of our response to the pandemic.

1.6 The Committee also asked the Minister to outline the steps that his Department is taking to ease liquidity problems in the tourism sector and any activities it has initiated to promote tourism. Since the date of the Committee’s first Report chapter on the Commission’s guidance, there has been considerable Government activity in the area. The Minister helpfully summarises some of the Government’s most notable initiatives. These include: the ‘Enjoy Summer Safely’ campaign; the ‘Eat Out to Help Out’ scheme; and the reduction of VAT applied on most tourism and hospitality-related activities from 20 per cent to 5 per cent for the next six months.

1.7 Finally, the Committee was keen to hear more on the steps that the Government is taking to ensure the safety of tourists and workers as the pandemic eases and related establishments are permitted to reopen. The Minister outlines relevant guidance in this regard—such as for establishing ‘COVID secure’ premises—and provides links to these documents on the GOV.UK website.

Action

1.8 Drawn to the attention of the Digital, Culture, Media and Sport Committee, and the Health and Social Care Committee.

2 Review of the EU General Data Protection Regulation⁵

This EU document is legally and politically important because:

- it reviews the EU's [General Data Protection Regulation](#) (GDPR) which will continue to apply in certain respects to the processing of EU citizens' data after the transition period by UK businesses and other UK data controllers or processors; and
- the Commission's final review of the operation of international transfers of EU citizens' personal data in the document is subject to the recent CJEU ruling in [Schrems II](#) in relation to international transfers of EU citizens' personal data to third countries, such as the UK after transition. The Court's ruling heightens standards to be met for future data adequacy assessments and is sobering for UK aspirations for data adequacy decisions for both commercial and law enforcement purposes. It has also tightened requirements for the use of alternative data transfer mechanisms in default of data adequacy decisions, notably standard contractual clauses.

Action

- To clear the document from scrutiny as it is non-legislative and does not in itself have direct policy and legal implications for the UK.
- To write to the Minister asking for the Government's view of the *Schrems II* ruling and implications for the UK, focusing on questions concerning the data adequacy decisions the UK is currently seeking for 1 January 2021, any guidance on the ruling from the Commission and other EU and UK data authorities and any prospects for new or amended legal instruments for international data transfers (a new US data adequacy decision or standard contractual clauses) to be adopted by the Commission.
- To draw it and this chapter to the attention of the Digital, Culture, Media and Sport Committee, the Business, Energy and Industrial Strategy Committee, the Science and Technology Committee, the Joint Committee on Human Rights and the Committee on the Future Relationship with the EU.

Overview

2.1 The cross-cutting [General Data Protection Regulation](#) (GDPR) has applied throughout the EU since May 2018 to the processing of personal data for commercial purposes. The GDPR has an extraterritorial reach and applies to third country businesses when they process the data of EU citizens within the EU. It also governs international transfers of personal data of EU data subjects to third countries. As such, it will remain of significant relevance to the UK even after the end of the transition period.

5 Commission Communication "Data protection as a pillar of citizens' empowerment and the EU's approach to the digital transition — two years of application of the General Data Protection Regulation"; [COM\(20\) 264](#); —; DCMS; Devolved Administrations: informed; 41363.

2.2 This [document](#) consists of the Commission's first review of the application and operation of the GDPR as required by Article 97 GDPR. A separate review has also been carried out in relation to the Law Enforcement Directive and is the subject of separate Committee scrutiny. The particular focus of this review is international transfers of personal data and the cooperation and consistency mechanisms (see Article 97(2)). In carrying out the review, the Commission consulted the Council, the European Parliament, the European Data Protection Board (EDPB), national data protection authorities and other stakeholders.

2.3 The Commission's general conclusion is that two years after it started to apply, the GDPR has successfully met its objectives of strengthening personal data protection and guaranteeing the free flow of data within the EU.

2.4 However, the following areas of improvement and action were identified, though no immediate amendment of the GDPR has been suggested yet:

- **Divergence in application:** There is still some divergence in the way the GDPR is being applied by Member States,⁶ with the approach to the age of consent for children and derogation and reconciling freedom of expression with the right to data protection being some key examples. The Commission will address through bilateral dialogues with those Member States concerned and consider areas where further harmonisation is desirable, including the age of consent for children and some SME obligations.
- **Supervision and cooperation/consistency mechanisms:** National data protection authorities need to work more effectively, particularly in terms of their independence and openness to joint action. The Commission will monitor this, and Member States are asked to give national supervisory authorities adequate resources.
- **Innovation:** The Commission will monitor the application of the GDPR to new technologies, taking account of emerging and future technologies. It will also encourage the production of Codes of Conduct in the fields of health and research.
- **International Data Transfers:** In the light of the GDPR, the Commission is currently evaluating previous data adequacy decisions, allowing personal data transfer between the EU and third countries on the grounds that they provide equivalent data protection. As anticipated by the Commission, those reviews might have to be finalised in the light of the [Schrems II](#)⁷ ruling. In this ruling of 16 July 2020, the EU Court of Justice (CJEU) struck down the US data adequacy decision (Privacy Shield) for failing to protect EU citizens fundamental rights to privacy and judicial protection. It also interpreted the GDPR as imposing onerous obligations on business and other data controllers and processors in terms of an alternative international data transfer mechanism, standard contractual clauses, requiring them to carry out a mini “adequacy” assessment of their own to ensure transfers are safe from disproportionate access by intelligence agencies.

6 All but Slovenia had made the necessary changes in domestic law to be in compliance with the Regulation.

7 Case C-311/18, 16 July 2020.

- **International data cooperation:** The Commission will continue its efforts to influence global data standards in line with EU standards. To this end, the Commission intends to set up a ‘Data Protection Academy’, which will allow EU and foreign data protection authorities (presumably the UK from 1 January 2021) to share knowledge and best practices in these circumstances.

2.5 The Government in its [Explanatory Memorandum](#) (EM) of 21 July focuses on the issue of international transfer mechanisms and the EU’s ongoing adequacy assessments of the UK. It simply points that from the UK side, it has:

- legislated to make sure that, from the end of the transition period, the EU Member States and third countries the Commission has already found adequate, will also be deemed adequate for the purposes of transfers of personal data from the UK on a transitional basis; and
- from 1 January 2021, the UK will have its own independent international transfers capability, including the ability to conduct its own adequacy decisions of new countries.

2.6 However, despite the Government’s EM being published several days after the [Schrems II](#) ruling in July, the Government makes no mention of it in the EM. Despite this ruling being widely recognised as having significant implications for the UK during transition in terms of international transfers of EU citizens’ personal data to the US and after transition for the transfer of such data to the UK itself. We note both the [statements](#)⁸ of the Information Commissioner’s office of 16 and 27 July, together with the [FAQs](#) which were issued by the European Data Protection Board on 24 July.

Our Assessment

2.7 As there are no immediate legal or political implications for the UK from this non-legislative document, it can be cleared from scrutiny but draw to the attention of the Committees listed in the “Action” headnote to this chapter.

2.8 However, we have written to the Minister of State for Media and Data at the Department for Digital, Culture, Media and Sport (Rt Hon. John Whittingdale MP) asking how the Government proposes to navigate the *Schrems II* ruling. Both in terms of obtaining and maintaining durable GDPR and Law Enforcement data adequacy decisions⁹ and facilitating the use by business of alternative mechanisms for EU to UK data transfers. We have also asked for information on forthcoming guidance from the Commission and Information Commissioner on data transfers in the wake of that ruling. We also continue to expect an update on the progress of the data adequacy assessment process for the UK and on any other related developments, for example in respect of the negotiations of the proposed E-Privacy Regulation.¹⁰

⁸ This link is to the statement of 27 July, which includes a link to the earlier statement.

⁹ We also note that obtaining and maintaining both commercial and law enforcement data adequacy decisions under the GDPR and Law Enforcement Data Directive respectively is currently a condition of data-sharing for various security cooperation purposes in the draft EU legal text on the EU-UK future partnership in this field.

¹⁰ We last reported on this proposal on 26 March 2020: Third Report, HC 229–i (2019–21), [chapter 2](#), (26 March 2020).

Letter from the Chairman to the Minister of State for Media and Data (Rt Hon. John Whittingdale MP), Department of Culture, Media and Sport

Thank for your [Explanatory Memorandum](#) on the Commission's first [review](#) of the application and operation of the [General Data Protection Regulation](#) (GDPR).

As no imminent legislative changes with potential implications for the UK even after transition were proposed by the Commission, the Committee is content to clear this non-legislative document from scrutiny.

However, the Commission's final review of international transfers of EU personal data to third countries is stated to be subject to July's [Schrems II](#) ruling. This ruling is of the greatest significance for the UK both now and after transition. We were therefore astonished to find no mention of the ruling in your Explanatory Memorandum, despite being published several days after the ruling.

We would be grateful for a response within 10 days setting out the Government's view of the ruling, focussing on both how international transfers of EU personal data during transition may be affected, as well as UK's aspirations for durable data adequacy decisions for both commercial and law enforcement purposes from 1 January 2021. The response should also cover the following:

- What the Government will do to facilitate and support the use by business of alternative mechanisms for international data transfers (particularly from the UK to the US during transition) such as standard contractual clauses in the wake of that ruling.
- What are the implications for the way UK intelligence services currently access EU personal data for national security purposes and for corresponding UK legislation regulating those activities? We are mindful of the uncertainty of the outcome CJEU's future ruling in [Privacy International](#) particularly if it follows the Advocate General's view that national security activities are caught by the current E Privacy [Directive](#). Has the date been fixed yet for the delivery of the CJEU's ruling in that case?
- When is any further relevant guidance from the Commission and Information Commissioner's Office (ICO) expected to be published to assist UK businesses and other data controllers/processors when processing EU personal data in future? If published before your response to this letter falls due, a summary of the key points of the guidance and implications for UK public bodies and businesses would be helpful, together with any significant aspects of the [statements](#) and [FAQs](#) already published by the ICO and European Data Protection Board respectively.
- Is there any information yet on how quickly the Commission can replace the US Privacy Shield data adequacy decision or whether it is planning on revising standard contractual clauses in the light of the *Schrems II* ruling?

- How is the adequacy assessment process progressing in relation to the UK for data adequacy decisions for both commercial and law enforcement purposes?¹¹ Is adoption of these decisions by the end of the transition period realistic, given EU case law developments?
- Have there been any other EU personal data developments of relevance to the EU's assessment of UK data adequacy and/or international transfers of EU personal data, in particular in the negotiations on the proposed E Privacy Regulation?¹²

11 We also note that obtaining and maintaining both commercial and law enforcement data adequacy decisions under the GDPR and Law Enforcement Data Directive respectively is currently a condition of data-sharing for various security cooperation purposes in the draft EU legal text on the EU-UK future partnership in this field.

12 We last reported on this proposal on 26 March 2020: Third Report, HC 229–i (2019–21), [chapter 2](#), (26 March 2020).

3 EU Farm to Fork Strategy¹³

This EU document is politically important because:

- it suggests future changes to several pieces of legislation to which Northern Ireland must remain aligned; and
- it suggests changes which may affect the terms of trade between the UK and the EU, such as changes relating to pesticides and to nutrition labelling.

Action

- Write to the Minister.
- Draw to the attention of: the Environment, Food and Rural Affairs Committee; the Future Relationship with the EU Committee; the Health and Social Care Committee; and the Northern Ireland Affairs Committee.

Overview

3.1 The EU’s ‘Farm to Fork’ Strategy is part of its Green Deal policy and seeks to address the challenges of sustainable food systems, recognising “the inextricable links between healthy people, healthy societies and a healthy planet.” The Strategy is of direct interest to the UK as the Commission suggests amendments to legislation with which Northern Ireland (NI) must maintain alignment under the terms of the Ireland/Northern Ireland Protocol annexed to the Withdrawal Agreement. The affected legislation includes initiatives covering: pesticides; agricultural product marketing standards; animal welfare; and food labelling. Furthermore, some of the proposed changes — such as on the nutrition labelling of food — may create Technical Barriers to Trade between Great Britain and the EU/NI and be subject to conditions agreed as part of any agreement on the future EU-UK relationship. Finally, there are likely to be implications for the UK from the wider trade-related elements of the Strategy.

3.2 The Commission set out its intended actions — 27 legislative and non-legislative measures over a timespan running from 2020 to 2024 — in an [Annex](#) to the Strategy.

3.3 At the heart of the Strategy is an intended legislative proposal for a framework for a sustainable food system. This will: “promote policy coherence at EU and national level; mainstream sustainability in all food-related policies; and strengthen the resilience of food systems”, but there is little detail about the initiative.

3.4 Several initiatives are intended to “ensure sustainable food production”. These include:

- a revision of pesticides legislation to significantly reduce the overall use and risk of chemical pesticides and more hazardous pesticides by 50% by 2030, to enhance Integrated Pest Management and to facilitate the placing on the market of pesticides containing biological active substances;

13 Commission Communication: A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system; [8280/20](#), COM(20) 381; Legal base: —; Department: Environment, Food and Rural Affairs; Devolved Administrations: Consulted; ESC number: 41271.

- reduce fertiliser use by at least 20% by 2030;
- take action to reduce overall EU sales of antimicrobials for farmed animals and in aquaculture by 50% by 2030;
- evaluation and revision of existing animal welfare legislation, including on animal transport and slaughter of animals; and
- a proposal for a revision of the feed additives Regulation to reduce the environmental impact of livestock farming.

3.5 A second package of initiatives aims to stimulate sustainable food processing, wholesale, retail, hospitality and food services' practices, including:

- a revision of EU legislation on Food Contact Materials to improve food safety, ensure citizens' health and reduce the environmental footprint of the sector; and
- a revision of EU marketing standards for agricultural, fishery and aquaculture products to ensure the uptake and supply of sustainable products.

3.6 Initiatives designed to promote sustainable food consumption include a:

- proposal for harmonised front-of-pack (FOP) nutrition labelling to enable consumers to make health-conscious food choices;
- proposal to require origin indication for certain products; and
- proposal for a sustainable food labelling framework to empower consumers to make sustainable food choices.

3.7 The Strategy seeks to reduce food loss and waste through a proposal for EU-level targets for food waste reduction and a proposal for a revision of EU rules on date marking ("use by" and "best before" dates).

3.8 Finally, the Strategy goes on to outline links to research policy — including research for sustainable food under the future research framework programme ('Horizon Europe'), to which the UK wishes to associate — and to wider trade policy. The Commission contends that a more sustainable EU food system also requires increasingly sustainable practices by the EU's trading partners. In order to promote a gradual move towards the use of safer pesticides, the EU will consider, in compliance with WTO rules and following a risk assessment, a review of import tolerances for substances presenting a high level of risk for human health.

3.9 In her [Explanatory Memorandum](#), the Parliamentary Under-Secretary of State (Victoria Prentis MP) acknowledges that there may be legislative requirements that may need to be considered and implemented by the Northern Ireland Executive as a consequence of the Northern Ireland Protocol that may have an impact on farmers and farming businesses wishing to operate in — or trade with — Northern Ireland. As such, the UK Government will have an interest in the developing strategy and associated legislation and its impact on the UK's trading position and the Northern Ireland Protocol.

She adds that implications may also arise for the UK as a whole from any arrangements put in place to secure a commitment to a level playing field on environmental standards under the future relationship.

3.10 In a [Supplementary Explanatory Memorandum](#), the Minister recalls that Article 15(3)(b) of the Northern Ireland Protocol requires the EU to inform the UK about any planned Union acts within the scope of the Protocol, including Union acts that amend or replace the Union acts listed in the Annexes to the Protocol. As such, the Commission would be bound to tell the UK about any plans for legislation that might affect Northern Ireland in the future under the terms of the Protocol. The Minister goes on to indicate that, once the EU has published draft legislation, an analysis of how the proposed changes will impact Northern Ireland business can be made.

Our assessment

3.11 The Minister’s analysis is limited, noting only the possibility that legislative changes following from this Strategy will need to be implemented in Northern Ireland. She does not recognise the strong likelihood of such changes nor does she give any examples of the areas in which legislative change is envisaged. Her tone suggests that the Government will not engage in this EU policy until any legislative proposals emerge, but she does not explain why the Government would not wish to deploy a more strategic approach having identified potential impacts on the UK. For these reasons, the EM and SEM provide little assistance to Parliament in considering the document and they are consequently below the standard that we require in order to undertake effective scrutiny of the Government.

3.12 Our assessment is that the Strategy either explicitly or implicitly suggests amendments to the following pieces of legislation either falling within Annex 2 of the Protocol or referred to in legislation included in Annex 2:

- Sustainable Use of Pesticides Directive¹⁴ (while the Directive is not listed in Annex 2 of the Protocol, it supplements the Plant Protection Products Regulation, which makes reference to it regarding the concepts of “safe use” and “integrated pest management”);
- Plant Protection Products Regulation;¹⁵
- Live animal transport Regulation;¹⁶
- Animal slaughter Regulation;¹⁷
- Feed additives Regulation;¹⁸
- Food contact materials Regulation;¹⁹
- Agricultural markets Regulation;²⁰

14 [Directive 2009/128/EC](#) establishing a framework for Community action to achieve the sustainable use of pesticides.

15 [Regulation \(EC\) No 1107/2009](#) concerning the placing of plant protection products on the market.

16 [Regulation \(EC\) No 1/2005](#) on the protection of animals during transport and related operations.

17 [Regulation \(EC\) No 1099/2009](#) on the protection of animals at the time of killing.

18 [Regulation \(EC\) No 1831/2003](#) on additives for use in animal nutrition.

19 [Regulation \(EC\) No 1935/2004](#) on materials and articles intended to come into contact with food.

20 [Regulation \(EU\) No 1308/2013](#) establishing a common organisation of the markets in agricultural products.

- Fisheries and aquaculture markets Regulation; and²¹
- Food Information for Consumers Regulation²²

3.13 Other legislation included in Annex 2 of the Protocol may be affected, and it is also possible that the Commission may suggest that one or more new pieces of legislation be added to Annex 2 of the Protocol. In that event, both the EU and UK would need to agree in the Joint Committee.

3.14 We seek the Minister's view on whether she agrees with our assessment as to the list of legislation which will likely be amended as a consequence of the policies set out in the Strategy and which also falls within Annex 2 of the Protocol. If she does not agree, we ask her to explain with details and, if she does, we want to know why that information was not set out in her original communication with Parliament.

3.15 We acknowledge that there is insufficient detail to determine what the precise impact in Northern Ireland and GB of any changes to the rules might be. The direction of travel, though, is unambiguous in several instances. It is evident that the Commission seeks, for example, to make substantial changes to the regulatory framework on pesticides and that would inevitably affect, as a minimum, the Northern Irish market in such products themselves and in products treated by them. Furthermore, the Commission is clear that it wishes to encourage a wider move towards safer pesticides among its trading partners. On that matter, the Minister herself said in a recent [EM](#)²³ on a Commission Report assessing the implementation of pesticide legislation:

Whilst we support the idea that countries should adopt lower-risk approaches where possible, these are matters for national governments to determine. Failing to recognise the influence of national conditions on the authorisation of PPPs may introduce unnecessary barriers to trade in produce which has been treated with them, including between the UK and EU.

3.16 Another area where the Government has already signalled concern is that of 'Front of Pack' (FOP) nutrition labelling, such as the UK's traffic light system. The Department of Health and Social Care (DHSC) told us in a separate [EM](#)²⁴ that the suggestion to harmonise FOP labelling of food is of "great interest" to the UK, noting:

The outcome of the Future Relationship negotiations with the EU, will have some bearing on the UK's ability to improve FOP in the UK. FOP will be captured by the labelling provisions of the technical barrier to trade (TBT) chapter, where the UK is seeking to cooperate and share information when setting marking or labelling requirements in order to minimise barriers to trade. Any future UK regime will need to be compatible with any agreed future relationship with the EU.

21 [Regulation \(EU\) No 1379/2013](#) on the common organisation of the markets in fishery and aquaculture products.

22 [Regulation \(EU\) No 1169/2011](#) on the provision of food information to consumers.

23 Explanatory Memorandum dated 4 June 2020 concerning [COM\(2020\) 208](#), Commission Report: Evaluation of Regulation (EC) No 1107/2009 on the placing of plant protection products on the market and of Regulation (EC) No 396/2005 on maximum residue levels of pesticides.

24 Explanatory Memorandum dated 10 June 2020 concerning [COM\(2020\) 207](#), Commission Report regarding the use of additional forms of expression and presentation of the nutrition declaration.

3.17 Furthermore, noted the DHSC, any divergence on FOP labelling between the GB and NI would have implications for the UK's internal market. As a means of mitigation, a common nutrition labelling composition and standards (NLCS) framework has been developed to facilitate UK-wide cooperation on nutrition policy after the end of the Transition Period.

3.18 Noting that the Government has already expressed a view on two of the policy suggestions in the Strategy document, we do not accept the Minister's contention in her SEM that any analysis of potential impact on the UK, including Northern Ireland, must await the publication of "specific revisions to this legislation".

3.19 In her SEM, the Minister references the EU's obligation under the Protocol to inform the UK of any planned Union acts within the scope of the Protocol, an obligation which is to be exercised through the Joint Consultative Working Group (JCWG). As far as we are aware, the JCWG has not yet met. We also note that the term "planned" in this obligation is ambiguous and could apply to any point in the EU's legislative process, from suggestion in a non-legislative document such as this Strategy through to the point immediately prior to final adoption of a legislative act but after all decisions have been taken.

3.20 In the light of that ambiguity, we are uneasy with the implication that the UK will rely on the EU to highlight any legislative initiative of relevance to Northern Ireland. We seek confirmation of whether the Government will be relying on the Commission to provide information — potentially at a late stage in the planning process — or whether the Government will be pro-actively monitoring draft and potential EU law to assess implications for Northern Ireland, and then engaging with the EU institutions where desirable.

Action

3.21 Write to the Minister, as set out below, raising our outstanding concerns. We draw this document to the attention of: the Environment, Food and Rural Affairs Committee; the Future Relationship with the EU Committee; the Health and Social Care Committee; and the Northern Ireland Affairs Committee.

Letter from the Chair to Parliamentary Under-Secretary of State (Victoria Prentis MP), Department of Environment, Food and Rural Affairs.

We have considered your Explanatory Memorandum and Supplementary Explanatory Memorandum on the above document.

Regrettably, we are disappointed in the quality of your EM and SEM, which fall below the level that we require. Our concerns and outstanding queries are outlined below.

The reality is that the Strategy sets out a clear policy direction including a strong likelihood of legislative changes which will need to be implemented in Northern Ireland. You note only the possibility that changes might be required and do not give us any examples of the areas in which legislative change is envisaged. Furthermore, your tone suggests that the Government will not engage in this EU policy until any legislative proposals emerge even if UK interests are at stake.

Our assessment is that the Strategy either explicitly or implicitly suggests amendments to the following pieces of legislation either falling within Annex 2 of the Protocol or referred to in legislation included in Annex 2:

- Sustainable Use of Pesticides Directive²⁵ (while the Directive is not listed in Annex 2 of the Protocol, it supplements²⁶ the Plant Protection Products Regulation, which makes reference to it regarding the concepts of “safe use” and “integrated pest management”);
- Plant Protection Products Regulation;²⁷
- Live animal transport Regulation;²⁸
- Animal slaughter Regulation;²⁹
- Feed additives Regulation;³⁰
- Food contact materials Regulation;³¹
- Agricultural markets Regulation;³²
- Fisheries and aquaculture markets Regulation; and³³
- Food Information for Consumers Regulation³⁴

Clearly, other legislation included in Annex 2 of the Protocol may be affected, and it is also possible for both the UK and EU to agree to add new legislation to the Protocol.

We would welcome your view on our assessment as to the list of legislation which will likely be amended as a consequence of the policies set out in the Strategy and which also fall within the scope of Annex 2 of the Protocol. If you do not agree, please explain with details and, if you do agree, we ask you to explain why this important information was excluded from your EM and SEM.

You indicated in your SEM that an analysis of how the proposed changes will impact Northern Ireland business can only be made once the EU has published draft legislation. We acknowledge that there is insufficient detail to determine what the precise impact in Northern Ireland and GB of any changes to the rules might be. We consider that the direction of travel, though, is unambiguous in several instances and is sufficient to identify potential policy implications. It is evident that the Commission seeks, for example, to make substantial changes to the regulatory framework on pesticides and that would

25 [Directive 2009/128/EC](#) establishing a framework for Community action to achieve the sustainable use of pesticides.

26 Article 6(3) of the Withdrawal Agreement provides that references to provisions of Union law made applicable by the Agreement shall be understood to include references to the relevant Union acts supplementing or implementing those provisions.

27 [Regulation \(EC\) No 1107/2009](#) concerning the placing of plant protection products on the market.

28 [Regulation \(EC\) No 1/2005](#) on the protection of animals during transport and related operations.

29 [Regulation \(EC\) No 1099/2009](#) on the protection of animals at the time of killing.

30 [Regulation \(EC\) No 1831/2003](#) on additives for use in animal nutrition.

31 [Regulation \(EC\) No 1935/2004](#) on materials and articles intended to come into contact with food.

32 [Regulation \(EU\) No 1308/2013](#) establishing a common organisation of the markets in agricultural products.

33 [Regulation \(EU\) No 1379/2013](#) on the common organisation of the markets in fishery and aquaculture products.

34 [Regulation \(EU\) No 1169/2011](#) on the provision of food information to consumers.

inevitably affect, as a minimum, the Northern Irish market in such products themselves and in products treated by them. Furthermore, the Commission is clear that it wishes to encourage a wider move towards safer pesticides among its trading partners.

Through a separate EM,³⁵ you have already provided some analysis on potential changes to pesticides requirements. Similarly, the Department of Health has also identified³⁶ Government concerns with the Commission's suggestions on Front Of Pack nutrition labelling. These examples demonstrate that the Government is capable of setting out a position on suggested initiatives in this Strategy, identifying potential policy implications for the UK before draft legal texts are proposed by the Commission.

We therefore ask that — having identified all of the initiatives within the Strategy with likely, and potential, policy implications for all, or part, of the United Kingdom — you provide us with sufficient analysis to enable us to fulfil our scrutiny responsibility. It would be helpful if you could identify any initiatives on which you intend to engage with the EU institutions at an early stage while policy is being developed, rather than simply waiting for the respective legislative proposals.

Finally, you make reference in your SEM to the EU's obligation under Article 15(3)(b) of the Ireland/Northern Ireland Protocol to inform the UK of any “planned” EU acts within the scope of the Protocol, an obligation which is to be operated through the Joint Consultative Working Group. To the best of our knowledge, that Group is yet to meet, but we would welcome information from you on that point.

We also note that an EU act could be “planned” from its inception as a policy idea — such as in a Strategy such as this — or it could be “planned” in the form of a Commission proposal, or it could even still be “planned” immediately prior to formal adoption.

- Do you accept that the term “planned EU act” is ambiguous and that it would be desirable for the Government to maintain its own system of oversight of such acts and, if so, what is that system?
- What joint mechanisms have been put in place to support the EU's obligation?
- Has the EU yet informed the UK of any such planned EU acts?
 - If so, of what nature have those planned acts been and have you or the EU published that list or do you intend to do so?
 - If not, is the UK confident that, since the UK's withdrawal from the EU, the EU has not developed any plans for EU acts falling within the scope of the Protocol?

We would normally expect a response within ten working days. In the expectation of a comprehensive response requiring substantial analysis and engagement with other Departments, we ask for a response within four weeks.

³⁵ Explanatory Memorandum dated 4 June 2020 concerning COM(2020) 208, Commission Report: Evaluation of Regulation (EC) No 1107/2009 on the placing of plant protection products on the market and of Regulation (EC) No 396/2005 on maximum residue levels of pesticides.

³⁶ Explanatory Memorandum dated 10 June 2020 concerning COM(2020) 207 final, Commission Report regarding the use of additional forms of expression and presentation of the nutrition declaration.

4 COVID-19: Flight vouchers³⁷

This EU document is politically important because:

- it concerns the EU's response to the COVID-19 pandemic; and
- raises questions regarding the Government's approach to insuring vouchers offered by airlines for flights cancelled due to the pandemic.

Action

- Write to the responsible Minister, Rachel Maclean MP, requesting clarification of whether the Government's 18 July 2020 announcement—that vouchers for package holidays with a flight element will be insured—covers flights booked directly with operators and, if not, why.
- Draw to the attention of the Transport Committee.

Overview

4.1 The Committee last considered the [document under scrutiny](#) in its Thirteenth Report of Session 2019–21.³⁸ The document, a Commission Recommendation, is directed at Member States and makes a number of suggestions for how travel vouchers—offered by operators in light of COVID-19 service cancellations—can be made more attractive and useful for passengers and travellers.

4.2 The Recommendation was published without prejudice to the rights of consumers under EU law and was intended to mitigate the impacts of the COVID-19 crisis for operators by limiting the demand for refunds and therefore aiding short-term liquidity.³⁹

4.3 The Recommendation recognised that if, due to current difficulties, operators became insolvent, passengers and travellers may not receive refunds due to some vouchers not being protected. As such, it suggested Member States consider indemnifying vouchers through their own domestic protection schemes.

4.4 In the Government's [Explanatory Memorandum](#) (EM) on the Recommendation, the responsible Minister, Rachel Maclean MP, was clear that her Department did not have any plans for introducing insolvency protection for vouchers offered for cancelled flights. The Committee did not request further information on the Government's plans for other modes of transport (most notably rail, bus and sea).⁴⁰

37 Commission Recommendation (EU) 2020/648 of 13 May 2020 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic; Council and COM number: COM(20) 3125; Legal base: 292 TFEU; Department: Transport; Devolved Administrations: Consulted; ESC number: 41255.

38 Thirteenth Report HC-299–ix (2019–21), [Chapter 5](#) (24 June 2020).

39 As an example, for air travel in the EU, the right to choose between a full cash refund or re-routing as per the Air Passenger Rights Regulation. See [Regulation \(EC\) No 261/2004](#) of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (Text with EEA relevance).

40 The Committee chose to focus on the issue of flight vouchers in light of the considerable public disquiet resulting from the speed with which refund requests are being processed by some operators.

4.5 As the Committee was unclear whether the Government intended to take action across the areas outlined in the Commission's Recommendation, we wrote to the Minister requesting further information on its plans for making travel vouchers a more attractive alternative to cash refunds and on measures intended to improve consumer confidence that rights will be protected throughout the crisis.

Letter from the Minister (Rachel Maclean MP)

4.6 The Minister wrote in response on 15 July 2020.⁴¹ In her letter, the Minister informs the Committee that the Government is looking at insuring vouchers offered for cancelled package holidays that 'have a flight element'

4.7 Later, on 18 July, the Government announced that it would protect refund credit notes offered if travel packages are cancelled as a consequence of COVID-19.⁴² The announcement did not, however, specify whether flights booked directly by travellers—and not as part of a package—will be covered by the new scheme.

4.8 For this specific type of voucher, for directly booked flights, the Minister does not provide any information on the steps that the Government is taking, as per the Commission's Recommendation, to make vouchers a more attractive alternative to cash. In similarity with the original EM on the Recommendation, attention is directed towards industry with the Minister stating that:

You [the Committee] asked for information on consumer-focussed measures to make vouchers a more attractive option to cash refunds. We remain open to transport operators offering incentives to passengers to travel at a later date — for example, through the use of vouchers.

Action

4.9 We have written to the Minister, Rachel Maclean MP, requesting clarification of whether the Government's 18 July announcement covers flights booked directly with operators and not just those booked as part of a package holiday.

4.10 This Report chapter has been drawn to the attention of the Transport Committee.

Letter from the Chair to Parliamentary Under-Secretary of State (Racheal Maclean MP), Department for Transport

The Committee have asked me to thank you for your letter of 15 July 2020 on the above listed document. We note the Government's announcement of 18 July that the ATOL scheme will be extended to cover cancelled package holidays with a flight element. The Committee views this as an important step towards addressing the concerns of consumers. This having been said, our understanding of the Government's announcement is that flights booked directly with operators—and not as part of a package holiday—will not be covered. We request urgent clarification on this point and, if the Government has decided not to cover vouchers for directly booked flights, an explanation as to why.

We request a response to this letter within 10 days.

41 Letter from Rachel Maclean MP to Sir William Cash, 15 July 2020.

42 HM Government, ['Boost to passengers as government bolsters ATOL scheme'](#) (18 July 2020).

5 Short-term EU health preparedness for COVID-19 outbreaks⁴³

This EU document is politically important because:

- it covers an issue of current political and public interest; and
- the Government signals interest in participating in relevant joint procurement exercises with the EU.

Action

- Report to the House.
- Draw to the attention of the Health and Social Care Committee.

Overview

5.1 The COVID-19 pandemic, says the Commission, requires continuous vigilance and coordinated action. The Commission's policy document aims at ensuring the EU's short-term health preparedness in case of further COVID-19 outbreaks in Europe. It draws particular attention to the need to reduce the burden of the 2020/2021 seasonal flu, so to mitigate the additional strain on health systems should this coincide with a further outbreak of COVID-19.

5.2 The wide range of suggested actions cover: testing, contact-tracing and surveillance; the supply of personal protective equipment (PPE), medicines and medical devices; healthcare and surgical activity; healthcare surge capacity; large-scale lockdowns and border controls; support to vulnerable groups; and mitigation of seasonal influenza.

5.3 In his [Explanatory Memorandum](#) (EM), the Secretary of State for Health and Social Care (Rt Hon. Matt Hancock MP) expresses broad support for the suggestions, but makes a number of specific points as summarised below.

5.4 On contact-tracing mobile apps, he says that the UK has been working in collaboration with other app development teams across the world, including Ireland, Germany, Italy, Denmark and India. It may be necessary, he suggests, to make these apps interoperable in the future and so the Government is investigating how an open standard can be created to facilitate this.

5.5 Turning to public health surveillance, the Minister says that the Department is not persuaded that testing for exposure through the environment (such as toilet seats) is a priority. The value of this needs to be determined before it is recommended widely as most cases, he says, are clearly acquired from other infected individuals in the household or at work. Sampling of waste waters to track the presence of the virus in urban wastewaters, though, is considered to be useful. Public Health England (PHE) has collected sewage

43 Commission Communication — Short-term EU health-preparedness for COVID-19 outbreaks; [COM\(20\) 318](#); Legal base: —; Department: Health and Social Care; Devolved Administrations: Consulted; ESC number: 41416.

samples and the National Institute for Biological Standards and Control did do some very limited testing initially. A pilot is taking place in Wales to develop a programme for sampling in water treatment plants.

5.6 Concerning the supply of PPE, medicines and medical devices, the Minister explains that the UK is working with partners to assess the requirements of medical supplies, including PPE. The UK is assessing a mixture of UK, European and overseas provision to ensure supply, factoring sufficient stockpiles to ensure that any peaks in requirement will be met in full. During the post-Brexit Transition Period, the UK continues to engage with the EU to support efforts to combat the pandemic.

5.7 Under the EU [Joint Procurement Agreement](#)⁴⁴ (JPA) the UK has expressed interest in participating in an exercise to procure investigational therapeutics for patients diagnosed with COVID-19. These therapeutics are currently being tested in clinical trials, including in the UK, and if successful would represent an additional route for obtaining supplies of medicines as potential treatments for COVID-19 patients. The UK is also seeking to source medicines outside this joint procurement. The Minister adds that the UK has indicated interest in a similar exercise to secure intensive care medicines and has been clear that it will consider participating in other future EU JPA exercises on a case by case basis, taking into account UK health requirements at the time.

5.8 The UK also continues to access support via the Emergency Support Instrument (ESI). Most recently the UK bid into the EU Mobility fund,⁴⁵ under the ESI. This is emergency funding to support the transport of essential goods, medical teams and patients affected by COVID-19. As with other cooperation efforts with the European Commission, decisions to cooperate with the ESI will be made on the basis of public health requirements at the time and this will continue up until the end of the Transition Period.

5.9 As part of the UK's efforts to ensure that UK health and social care staff have the equipment they need to tackle this virus, the UK is also participating in the EU's [Clearing House](#) to better understand the supply and demand of PPE in the EU, UK and other associated countries. The Clearing House is a strategic exercise by the EU designed to collect information on the supply and demand of medicines and medical equipment in Member States and associated countries. The aim is to build up a European picture and to support longer-term planning for procurement exercises.

5.10 Concerning the mitigation of seasonal influenza, the Minister says that public health agencies across the UK are refreshing and expanding their programmes and public awareness campaigns for flu in light of the COVID-19 pandemic. This will be firmly based on research and insight on effective messaging. Manufacturers of flu vaccine are also planning awareness campaigns for the UK. Uptake of flu vaccines in over-65s and healthcare workers is very high in the UK but the Government has procured an additional 6.65 million doses to increase uptake in at-risk cohorts, and expand coverage to those who live in the same household as people who are shielding for COVID-19 and 50–64s for the first time.

44 Joint Procurement Agreement on Medical Counter-Measures.

45 To transport essential goods, medical teams and patients affected by the coronavirus.

Action

5.11 We take note of the Government's response to this Communication, including its case-by-case approach to cooperation with the EU during the remainder of the Transition Period. We have no outstanding queries, but report the document to the House given that the topic is of public and political interest. We draw the document to the particular attention of the Health and Social Care Committee.

6 UK participation in EU programmes post-Brexit: financial contribution and role of the EU Court of Justice⁴⁶

This EU document is politically important because:

- It will frame the EU's conditions for any continued UK participation post-Brexit in certain European funding programmes in areas such as scientific research and nuclear energy, which the Government is currently negotiating.
- The Government has now clarified that the EU's insistence on the ultimate jurisdiction of the EU Court of Justice (CJEU) over funding agreements between the European Commission and British organisations as part of any EU programmes in which the UK continues to participate would not breach its insistence that the Court should have no jurisdiction in the UK under the future relationship with the EU.
- However, important questions remain about the calculation of the UK's financial contribution, the investigatory powers of the EU's anti-fraud body as regards management of EU funds in the UK, and the basis for the Government's decision to select some EU programmes for UK participation but not others.

Action

- Draw the latest information received from the Government on UK participation in EU programmes to the attention of the Business, Energy and Industrial Strategy Committee, the Science and Technology Committee and the Committee on the Future Relationship with the EU.

Overview

6.1 At the end of 2020, the UK will by default stop being a participant in all programmes, schemes and funds financed from the European Union budget, including the Common Agricultural Policy, the Framework Programme for Research ("Horizon 2020") and the Structural and Cohesion Funds.⁴⁷

46 (a) Proposal for a Council Regulation laying down the multiannual financial framework for the years 2021 to 2027; (b) Amended proposal for a COUNCIL REGULATION laying down the multiannual financial framework for the years 2021 to 2027; (a) 8354/18 + ADD 1, COM(2018) 322; (b) COM(2020)443; Legal base: Article 312 TFEU; special legislative procedure; unanimity; Department: HM Treasury; Devolved Administrations: consulted; ESC number: (a) 39683; (b) 41313.

47 Although the UK left the European Union on 31 January 2020, it remains a participant in EU funding schemes until the end of 2020 because it has agreed to honour, in full, its share of the EU's 2014–2020 Multiannual Financial Framework and a share of other EU liabilities accrued during the period of the UK's EU membership. On 11 March 2020, the Office for Budget Responsibility estimated that the total net cost of that settlement will amount to approximately £32.9 billion from 1 February 2020 until its resolution.

6.2 However, as part of its [negotiating objectives](#) for a new relationship with the EU, the Government is seeking continued UK participation, formally known as “association”,⁴⁸ in four new EU programmes which are due to become operational in early 2021 under the EU’s next long-term budget for the 2021–2027 period: the “Horizon Europe” research programme; the Euratom nuclear research programme; the Copernicus earth observation project; and the “PEACE PLUS” cross-border cooperation scheme on the island of Ireland.⁴⁹ The option of seeking involvement in other EU programmes, such as the Erasmus+⁵⁰ student mobility scheme, was couched in conditional terms or dropped altogether.⁵¹ The Government also repeatedly said it would “not agree [...] for the EU’s institutions, including the Court of Justice, to have any jurisdiction in the UK”.⁵²

6.3 As we noted in our Reports of [26 March](#) and [27 May 2020](#), the UK’s continued involvement in those programmes selected by the Government is, however, not automatic, and needs to be negotiated with the EU. Based on the [draft text for a UK-EU agreement](#) published by the European Commission on 18 March 2020, and the precedent of its existing cooperative arrangements with “third countries”,⁵³ the EU appears to be setting the following conditions for continued British participation in the programmes selected by the Government:

- a yearly financial contribution to the EU, above and beyond the controversial Brexit financial settlement as set out in the UK’s Withdrawal Agreement.⁵⁴ This would be calculated by taking the EU’s own annual budget for each of the programmes in which the UK is participating⁵⁵ and multiplying it by Britain’s GDP as a proportion of that of the EU (which is approximately 15.6 per cent). Based on the four EU programmes in which the Government is seeking UK

48 “Association” is the EU’s term for formal participation by “third countries” in many of its funding programmes. This would give British organisations and individuals the same eligibility to receive EU funding from a particular programme as counterparts based in the European Union itself, in return for a British financial contribution.

49 The Government had long indicated the UK might seek continued involvement in specific EU schemes post-exit. However, the final list of programmes selected is very different from the indications given in the October 2019 [Political Declaration](#) on the new UK-EU relationship, which specifically referenced possible British participation in “Union programmes” in areas as varied as “science and innovation, youth, culture and education, overseas development and external action, defence capabilities, civil protection and space”.

50 The Government’s negotiating objectives of 27 February 2020 noted that continued involvement in the Erasmus+ student mobility programme could be an option “on a time-limited basis, provided the terms are in the UK’s interests” (which it did not define further).

51 This means that the Government is not currently seeking UK participation in other programmes including the [European Defence Fund](#) for defence industrial development, the [Creative Europe](#) programme for the cultural industries, the [Neighbourhood, Development & International Cooperation Instrument](#) for development assistance, the [Union Civil Protection Mechanism](#), and of course the [Galileo satellite navigation programme](#). The European Commission [published an overview](#) of which EU programmes are open to non-EU countries in January 2020.

52 See for example [“Our approach to the Future Relationship with the EU”](#), (27 February 2020). On 3 February 2020, the Prime Minister had already laid a [Written Statement](#) in Parliament which said: “Any [UK-EU] agreement must respect the sovereignty of both parties and the autonomy of our legal orders. It cannot therefore include any regulatory alignment, any jurisdiction for the CJEU over the UK’s laws, or any supranational control in any area”.

53 See for example the [EU-Switzerland agreement](#) on participation in the ‘Horizon 2020’ research programme, or the dispute resolution clauses of the European Commission’s [model grant agreement](#) for funding awarded from that programme.

54 The Committee will consider the Treasury’s latest estimate of the total cost of the Brexit financial settlement separately in the near future.

55 The budget for individual EU funding programmes would be set under the Union’s normal annual budgetary procedure, in which the UK no longer participates given that it is no longer a Member State.

involvement, this could lead to an estimated gross cost to the UK taxpayer of £2 billion annually, before funding received back from the EU budget by British beneficiaries is taken into account;⁵⁶

- a new ‘correction’ mechanism that would automatically require the UK to pay more into EU-funded schemes in which it participates if the money it receives outstrips its contribution by a — yet to be specified — proportion, preventing it from becoming a significant net recipient of EU funds.⁵⁷ The EU’s draft legal text does *not* provide for a correction in the other direction, namely refund to the UK if contributions outstrip its receipts;⁵⁸ and
- some limited powers for the EU institutions within the UK for the “protection of the Union’s financial interests”, including jurisdiction for the Court of Justice (CJEU) in relation to dispute settlement between the European Commission and British funding recipients, and on investigatory powers for the Commission’s anti-fraud unit (OLAF) to examine potential misuse of EU money.

6.4 The issue of continued British participation in “Union programmes” has been discussed during each of the UK-EU negotiations rounds on a new economic relationship since March 2020.⁵⁹ It also continues to preoccupy stakeholders in the scientific community, which [issued a statement](#) in July 2020 calling for an “agreement on UK participation in Horizon Europe” (the EU’s flagship research fund). Although EU Chief Negotiator Michel Barnier has reported “convergence” on this matter within the negotiations,⁶⁰ it is not known to what extent the two sides are close to an agreement on the UK’s rights and obligations as part of continued involvement in EU programmes. In any event, EU

56 See for more information the Committee’s [Report of 26 March 2020](#). The Commission has proposed an “operational contribution”, consisting of the UK’s proportion of the EU’s own budget for a specific programme, plus a “participation fee” for each EU programme in which it is involved, calculated as a fixed percentage of the operational contribution referred to above. See: European Commission, “Draft text of the Agreement on the New Partnership between the European Union and the United Kingdom” (12 March 2020), Part Four.

57 The UK as a Member State was a significant net contributor to the EU budget. From European Commission figures, it appears its share of receipts from specific EU programmes in a given year during the 2014–2020 budgetary cycle only outstripped its proportional contribution to the EU budget that year (which averages approximately 12.5 per cent of all Member States’ contributions, due to the rebate) in a limited number of cases, primarily for the Euratom research programme for nuclear power because of the presence of the EU-funded Joint European Torus fusion energy project in Culham, Oxfordshire.

58 Although this correction mechanism would be entirely new (since it is not included in the EU’s current agreements with other countries on participation in its programmes), the European Commission has made clear to the Government since at least May 2018 that it would be part of the EU’s demands. In May 2018, the European Commission published its [proposals](#) for the next generation of specific EU funding programmes for the 2021–2027 budgetary cycle, which explicitly included a reference to “ensur[ing] a fair balance as regards the contributions and benefits of the third country participating in the Union programmes” by means of an “automatic correction of any significant imbalance compared to the amount that entities established in the associated country receive through participation in the Programme, taking into account the costs in the management, execution and operation of the Programme”.

59 See the UK-EU negotiating agendas for [3–4 March](#), [20–24 April](#) and [11–15 May](#).

60 On 5 March 2020, EU Chief Negotiator Michel Barnier [said](#): “We note convergence on some of our objectives and on some specific points, such as cooperation in civil nuclear matters and the UK’s participation in some EU programmes”. The Government’s Written Statements on the negotiations to date, published on [9 March](#) and [28 April 2020](#), respectively, have only referred to the fact that the negotiations “covered all work streams, including [...] general terms for UK participation in programmes, including provisions for financial contribution”.

consent for UK participation in its programmes is likely also dependent on the wider outcome of the UK-EU trade negotiations, where no breakthrough has been achieved as of early September 2020.⁶¹

6.5 In addition, continued UK participation is dependent on the EU itself agreeing its next long-term budget, the Multiannual Financial Framework (MFF) for 2021–2027, because such a budget is a necessary precondition for the EU establishing the programmes in which the UK wants to participate from the start of next year.⁶² Discussions between the 27 Member States and the European Parliament have been on-going since spring 2018. The coronavirus crisis led the European Commission to table a new proposal the EU’s future spending plans in May 2020, but negotiations are likely to drag on into the autumn due to disagreements between the European Parliament and Member States over the division of EU funding between different priorities over that period.⁶³

6.6 As a consequence of the above, there is no clarity yet — especially for potential beneficiaries of participation in EU programmes — on whether the UK will remain part of the EU funding schemes prioritised by the Government from early 2021, or on which terms.

The Government’s position

6.7 While the outcome of the EU’s internal negotiations on its next long-term budget is outside of the UK’s control, the Government is in direct talks with the European Commission about our participation in various EU programmes to be funded from that budget from the start of 2021. On 26 March 2020, the European Scrutiny Committee therefore [wrote to the Chief Secretary to the Treasury](#) (Rt Hon. Steve Barclay MP), as the Minister responsible for any questions relating to UK contributions to the EU budget, asking for:

- the Government’s reasons for selecting some EU programmes for continued UK participation but not others;⁶⁴
- the UK’s position on the Commission’s proposed methodology for the UK’s budgetary contribution in return for “association”, including the new financial correction mechanism; and

61 We noted in our Report of 26 March 2020: “The process of seeking “association” could also easily become politicised by developments in the wider negotiations between the UK and the EU on a new economic and security relationship. The example of Switzerland, which was suspended from significant parts of the EU’s research funding programme over its refusal to extend free movement to Croatian nationals after the country joined the EU in 2013, is instructive in this regard. UK and EU scientific cooperation could easily become a casualty of the wider negotiations even if participation in the relevant EU programmes is in both sides’ interest”.

62 The Multiannual Financial Framework is also directly relevant to the UK because it will establish spending limits for the EU’s annual budgets during the 2021–2027 period, including for those programmes in which continued British participation is sought. Under the methodology proposed by the European Commission, the UK’s financial contribution to the specific programmes in which it wants to be involved would be calculated on the basis of those annual budgets.

63 The coronavirus crisis has added a new layer of complexity to these talks: in addition to the Commission’s new proposal for ‘routine’ EU spending under its next Multiannual Financial Framework, it also tabled draft legislation for a €750bn “Coronavirus Recovery Instrument”. We discussed these broader EU budget negotiations, and their potential implications for the UK, in more detail in our Report of 22 July 2020.

64 In particular, we asked the Government if the UK is still seeking participation in Erasmus+, the student mobility programme; in the EU’s ‘Fusion for Energy’ agency, its contribution to the international [nuclear fusion research programme](#) ITER; and in the EU’s [“Connecting Europe Facility”](#), which funds cross-border infrastructure projects, especially with respect to energy infrastructure.

- a clarification of whether the EU’s likely insistence that participation in its programmes requires acceptance of some limited jurisdiction of the Court and European Commission would breach the Government’s refusal to accept — as set out in its [negotiating objectives of February 2020](#) — “any jurisdiction by the CJEU over the UK’s laws, or any supranational control in any area”.

6.8 The Minister initially failed to reply to that letter. After we wrote to him again on 27 May, repeating our earlier questions, the Minister finally sent a response on 14 July 2020, which reiterates the Government’s position that its policy in this area is driven by balancing “the potential benefits of UK participation in certain EU programmes” against a “fair and appropriate financial contribution” and the “overriding priority [...] to regain our full political and economic freedom by the end of the [2020]”.

6.9 With respect to the selection of the EU programmes in which the Government is pursuing continued British participation, the Minister provides some clarification of the UK’s position on involvement in the EU’s nuclear research programme.⁶⁵ He also reiterated its ambiguity on the need for UK participation in the [Erasmus+ student exchange programme](#), noting in particular that the Government is “developing domestic alternatives” to the scheme. With respect to the EU programmes in which the Government is not seeking continued involvement, like the “[Creative Europe](#)” support scheme for the cultural sector or the “[Connecting Europe Facility](#)” for infrastructure investment, the Minister does not provide a justification but instead again refers to its commitment to a domestic approach to these matters. He also specifically rules out the need for the UK to contribute to the [European Defence Fund](#), a new EU programme that will investment in the development of military technology (although it remains unclear if the Government may seek involvement in individual projects to be financed by the EDF, even if wholesale “association” with the scheme is not being sought).

6.10 The Chief Secretary’s reply also touches on the question of the financial contribution in return for British participation in those EU programmes that the Government *has* determined could offer added value for the UK. However, the Minister refused to be drawn on the detail of the “correction mechanism” proposed by the European Commission to ensure the UK would not be a substantive net beneficiary of any EU funding programmes (but, apparently, without a reciprocal arrangement to ensure the UK would not be a substantive net *contributor* either).⁶⁶ Instead, he seeks to offer reassurance that any UK contribution would be for specific EU programmes in which it participates; in other words, the money could not be used for other areas of EU expenditure, like the Common Agricultural Policy.

6.11 Finally, as regards governance and oversight, the Minister acknowledges that the Government “would also expect the EU authorities to scrutinise” of EU funding in the UK would be managed and spent. More specifically, he says:

“EU bodies such as the European Court of Justice, the European Court of Auditors and the European Anti-Fraud Office will have a role in ensuring

65 The Minister’s letter also confirmed that the negotiations for the UK to join the Euratom research programme also includes talks on a “a relationship with the programme that includes formal participation in the “Fusion for Energy” Joint Undertaking”.

66 The Minister’s letter states: “The regulations for individual programmes are, of course, subject to ongoing negotiations as part of the Multiannual Financial Framework, with the full terms of participation only finalised with the conclusion of these negotiations”.

the rules of participation are followed across programme activity as a whole. UK recipients of funds would need to comply with those rules, which are based on EU law. Should difficulties arise in implementation, the EU and UK would need to cooperate under the terms of the agreement [on UK participation in EU programmes], and there would be a role for the UK in ensuring participants met their obligations. The details of these arrangements are subject to negotiations.”

6.12 The Minister’s reply therefore does not provide any information on the *specifics* of the “role” of the European Anti-Fraud Office, and what powers it would have to conduct investigate and on-site inspections in the UK as a precondition for British participation in EU funding schemes. However, he does offer further information as regards the role of the Court of Justice specifically. In February 2020, the Government of course [said](#) in its formal negotiating objectives for a new relationship with the EU that the Court would not “have any jurisdiction in the UK”. Earlier that month, the Prime Minister had also [ruled out](#) “any supranational control in any area”. However, in his letter of 14 July the Minister now says:

“Under the EU’s proposals, UK courts would not be bound by any decision of the CJEU, and no decisions of the CJEU would require the UK to amend or update its laws. Therefore, there is no jurisdiction for the CJEU over the UK’s laws. The CJEU would retain its role overseeing the actions of EU bodies where the UK agrees to participate in an EU programme”.⁶⁷

6.13 This, in essence, appears to mean that the Government does not believe the Court of Justice’s rule in overseeing application of EU programmes in which the UK seeks to participate would cross its ‘red line’, because the Court’s direct jurisdiction would extend only to the interaction between the EU institutions and UK recipients of EU funding and not to “the UK’s laws”.⁶⁸ It is less clear how even this limited role for the CJEU (and the EU’s Anti-Fraud Office) described in the Minister’s letter would not, technically, breach the Government’s even broader insistence that there should not be “any supranational control in any area” of the new UK-EU relationship.

Action

6.14 The Committee remains disappointed that the Government was unable to provide the requested clarifications about UK policy towards participation in EU programmes, as set out in the Committee’s letter of 26 March 2020, for nearly four months. This appears to have resulted from the centralisation of all aspects of the negotiations with the EU within the Cabinet Office, with even other Government Departments with a direct interest in

67 The Minister notes, for example, that CJEU would be able to review the legality of a Commission action affecting a UK participant in an EU programme: “If the Commission decided to impose a financial penalty on a UK participant for incorrect use of EU funds, that participant could challenge the legality of the Commission’s decision in the CJEU”.

68 British participation could, of course, also be affected by any CJEU rulings on the interpretation of the legal framework establishing programmes in which the UK wants to participate, for example if this impacts on eligibility and selection criteria for funding.

particular elements of the talks — such as, in the case of participation in EU programmes, the Treasury — having limited flexibility to ensure the timely provision of information to Parliament.⁶⁹

6.15 Nevertheless, stakeholders will welcome the Minister’s clarification that the UK’s ‘red line’ on avoiding the oversight of the EU Court of Justice does not preclude continued UK participation in specific EU programmes, even where this means continued CJEU jurisdiction with respect to individual funding decisions involving British beneficiaries. It would have been helpful if this had been made clear in the Government’s original negotiating objectives published in February this year, given a literal interpretation of the Government’s position would have effectively precluded UK participation in EU programmes. The Committee will remain vigilant about the governance-related provisions of any agreements with the EU on participation in its programmes, in particular — given the Government’s own position on supranational oversight — as regards the role of the CJEU, and any powers for the European Commission’s anti-fraud unit to carry out investigations in the UK relating to the management of EU funds. It will return to this matter in due course if necessary.

6.16 As regards the financial contribution the UK may end up making to participate in specific EU programmes from 2021 onwards, given the totemic role played by the question of our contribution to the EU budget in the 2016 referendum, the technical detail of any methodology the Government may agree with the European Commission to calculate the UK’s contribution to participate in specific EU programmes will merit close scrutiny. The Committee is of the view that Parliament should pay particular attention with respect to the “correction mechanism” if there is a significant gap between contributions and receipts, and that it should provide for a refund mechanism if UK contributions substantially outstrip receipts by British participants.

6.17 Similarly, where necessary the Committee will continue to pursue the basis for the Government’s decision *not* to seek participation in other EU programmes with the individual Government Departments within whose remit they fall. We did so, for example, in July 2020 relation to the [EU Health Programme](#) and the “[InvestEU](#)” scheme. We may do so for others if we consider this appropriate in the context of the outcome of the EU’s internal negotiations on the conditions for participation in those individual programmes by non-EU countries in due course.

6.18 Lastly, we note the EU’s decision to include the arrangements for UK participation in its programmes in its draft legal text for the overall UK-EU economic and security agreement. This means that, if the overall negotiations do not lead to a ratified agreement by 1 January 2021, the arrangements for UK participation in EU schemes like Horizon Europe could also be a casualty, even though it is a relatively uncontroversial element of the negotiations. In due course we may therefore press the Minister to clarify, if necessary in light of progress in the overall talks, what — if any — arrangements are being considered to secure British participation in EU programmes deemed to be of benefit to the UK under a standalone agreement from 1 January 2021 even in the absence of an agreement on trade and security.

⁶⁹ In addition, it appears the Cabinet Office is not fully open with other Government Departments about the state of play in the negotiations even in policy areas which are directly relevant for other Ministers. For example, this was clear from the letter dated 6 July 2020 that we received from the Financial Secretary to the Treasury, the Minister responsible for VAT policy, on progress in the negotiations with the EU on the implementation of the VAT-related provisions of the Protocol on Ireland/Northern Ireland.

6.19 In anticipation of further information from the Government in due course about the conditions for UK participation in EU programmes, we also draw the Chief Secretary's letter of 14 July 2020 to attention of the Business, Energy and Industrial Strategy Committee, the Science and Technology Committee and the Committee on the Future Relationship with the EU.

7 Standardising data protection rules in EU law enforcement instruments⁷⁰

This EU document is politically important because:

- it sets out a timetable for amending a number of EU law enforcement measures so that they are full aligned with the EU Law Enforcement Data Protection Directive, reinforcing the importance of the Directive in establishing a baseline for future data sharing arrangements between the EU and the UK in the law enforcement field after the end of the post-exit transition period.

Action

- Write to the Minister at the Home Office (Baroness Williams) requesting further information on progress in securing an “adequacy decision” by the end of 2020 to allow the reciprocal free flow of personal data, and on other developments in the law enforcement field which may affect future EU/UK cooperation.
- Draw to the attention of the Committee on the Future Relationship with the European Union, the Home Affairs Committee and the Justice Committee.

Overview

7.1 The [Data Protection Law Enforcement Directive](#) (“the Law Enforcement Directive”) establishes a set of common rules applicable to law enforcement authorities when they are processing personal data in connection with the investigation and prosecution of criminal offences or threats to public security.⁷¹ These rules apply to all EU Member States (including the UK until the end of the transition period on 31 December 2020) and to the four non-EU countries participating in the Schengen free movement area (Iceland, Norway, Switzerland and Liechtenstein). They are given effect in UK law by the [Data Protection Act 2018 \(Part Three\)](#).

7.2 The Law Enforcement Directive does not affect the data protection provisions contained in a number of EU police and criminal justice measures which were in force before 6 May 2016 (the date on which the Directive entered into force). Under Article 60 of the Directive, these “grandfathered” provisions continue to apply, pending a Commission review to determine whether they should be aligned with the data protection rules set out in the Directive. This [Commission Communication](#), published in June 2020, sets out the results of the Commission review. Of the [26 legal acts](#) covered by the review, the Commission identifies 10 which it says should be amended so they are aligned with

70 Commission Communication: Way forward on aligning the former third pillar acquis with data protection rules; Council number —; COM(20) 262; Legal base —; Dept — Home Office; Devolved Administrations — consulted; ESC number 41364.

71 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.

the Directive.⁷² The Commission expects to bring forward proposals to amend two of these legal acts—on Joint Investigation Teams and on the European Investigation Order—before the end of 2020, with further proposals to amend the remaining 8 legal acts in 2021.

Legal act	Applicable to the UK until the end of transition (31 December 2020)	Timetable for amendments
Joint Investigation Teams Council Framework Decision 2002/465/JHA	√	Proposal for targeted amendment in last quarter of 2020
Exchange of information and cooperation on terrorist offences Council Decision 2005/671/JHA	X	Proposal for targeted amendment in first semester of 2021
Exchange of information between law enforcement authorities Council Framework Decision 2006/960/JHA	√	Last quarter of 2021, following a feasibility study in 2020 on the possible future codification of EU laws in the field of law enforcement cooperation
Cooperation between Asset Recovery Offices Council Decision 2007/845/JHA	√	End of 2021, following the outcome of a study on the role and functions of Asset Recovery Offices
Cross-border cooperation in combating terrorism and cross-border crime (Prüm) Council Decisions 2008/615/JHA and 2008/616/JHA	√	Ongoing feasibility study on possible changes to Prüm and on linking it to other EU central databases. Proposal to align with Law Enforcement Directive likely in 2021
Use of information technology for customs purposes Council Decision 2009/917/JHA	√	Targeted amendments in first quarter of 2021
Mutual Legal Assistance Agreement with Japan	√	Council Recommendation to open negotiations to amend the Agreement expected in first quarter of 2021
European Investigation Order Directive 2014/41/EU	√	Proposal for targeted amendments in last quarter of 2020
Exchange of information on road safety-related traffic offences Directive (EU) 2015/413	√	End of 2021

72 The 26 legal acts are listed in the [Annexes](#) to the Communication.

Legal act	Applicable to the UK until the end of transition (31 December 2020)	Timetable for amendments
Use of Passenger Name Record data Directive (EU) 2016/681	√	Court of Justice ruling on the Directive pending. Review also underway, with possible changes to follow

7.3 In her [Explanatory Memorandum of 18 August 2020](#), Baroness Williams (Lords Minister at the Home Office) notes that the Directive is “the first instrument that takes a comprehensive approach in the field of law enforcement, as opposed to the previous ad hoc approaches whereby each law enforcement instrument was governed by its own data protection rules”. She says that the amendments to EU law which the Commission Communication envisages will not be adopted before the end of the UK’s post-exit transition period, adding:

The UK will not be cooperating on the basis of existing EU legislation after the end of the transition period, therefore the changes that are being made are not of direct relevance to the UK.

7.4 While the UK will no longer be bound by the Law Enforcement Directive or the [EU General Data Protection Regulation](#)⁷³ (“the GDPR” which applies to the processing of personal data for commercial purposes) after transition, the Minister confirms that the Government is seeking “positive adequacy decisions from the EU” under both instruments before the end of 2020. The purpose of these adequacy decisions is to allow the continued free flow of personal data between the EU and the UK based on standards of protection and oversight which are robust and “essentially equivalent” to those applicable in the EU. The Government has submitted extensive [explanatory material](#) on the UK’s domestic data protection framework to inform the adequacy assessment being carried out by the Commission.⁷⁴

Our analysis

7.5 The [Political Declaration](#) agreed by the EU and the UK in October 2019 setting out the framework for their future relationship envisages that the EU and UK will each complete the processes needed to allow for the reciprocal free flow of personal data by the end of 2020. The Government has said that transfers of personal data from the UK to countries within the European Economic Area after transition will not be restricted, provided they comply with the UK’s domestic legislation, the Data Protection Act 2018 and the “UK General Data Protection Regulation”.⁷⁵

7.6 By contrast, two separate adequacy decisions will be necessary for the UK to maintain the free flow of personal data from the EU after 2020, one under the EU GDPR covering commercial transfers and one under the EU Law Enforcement Directive covering the

73 Regulation (EU) 2016/679 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 (General Data Protection Regulation).

74 See <https://www.gov.uk/government/publications/explanatory-framework-for-adequacy-discussions>.

75 The Data Protection Act (DPA) 2018 was enacted in May 2018; the “UK GDPR” is retained EU law which has been incorporated into UK domestic law by the European Union (Withdrawal) Act 2018. The DPA 2018 and UK GDPR have both been amended by the [Data Protection, Privacy and Electronic Communications \(Amendments etc\) \(EU Exit\) Regulations 2019](#) (“the DPPEC Regulations”) to ensure that the UK’s data protection framework continues to be operable in a domestic context.

processing of personal data for law enforcement purposes. The [draft text published by the EU in March 2020 for an Agreement on the New Partnership with the United Kingdom](#) makes future (post-transition) cooperation with the UK on law enforcement and criminal law matters conditional on the UK being awarded an adequacy decision under the Law Enforcement Directive and continuing to ensure standards of data protection essentially equivalent to those required by EU law.⁷⁶

7.7 The Minister gives no indication of how discussions with the EU to secure a law enforcement adequacy decision are progressing. Nor does she acknowledge the possibility that the Government may have to consider two opt-in decisions if the Commission sticks to the timetable set out in the Communication and brings forward proposals to amend the Framework Decision on Joint Investigation Teams and the Framework Decision on the European Investigation Order before the end of the year. Under Article 127(5) of the [EU/UK Withdrawal Agreement](#), the UK’s Title V opt-in Protocol continues to apply to proposals amending EU justice and home affairs laws which remain binding on the UK during the transition period.

7.8 As well as reviewing the need to align existing EU justice and home affairs laws with the Law Enforcement Directive, feasibility studies are underway to inform “the possible future codification of EU law enforcement cooperation” and to examine changes to the Prüm framework, for example by including new categories of data and linking Prüm to other EU central databases. Further changes to the EU Passenger Name Record (PNR) Directive may also be needed to take account of Court of Justice (“CJEU”) case law and an ongoing review of Member States’ implementation of the Directive.

7.9 Although unclear at this stage, substantive changes to important EU law enforcement measures which go beyond a simple alignment with the Law Enforcement Directive may have implications for future EU/UK cooperation in this field. So, too, may the Commission’s efforts to make decentralised (Member State level) information systems (such as Prüm) interoperable with centralised EU information systems (such as the Schengen Information System—“SIS II”), given that the EU appears to have ruled out UK participation in SIS II (or similar data sharing arrangements) after transition. The Minister’s assessment that the proposals set out in the Communication will “not affect UK law” and “are not of direct relevance to the UK”, while technically accurate, may underestimate their wider implications for future law enforcement cooperation.

Action

7.10 Write to the Minister requesting further information on progress in securing an “adequacy decision” by the end of 2020 to allow the reciprocal free flow of personal data, and on other developments in the law enforcement field which may affect future EU/UK cooperation.

76 See Part Three, Title One, chapter 11, Article LAW.OTHER.44 of the Agreement on suspension and disapplication. An adequacy decision under the GDPR is also necessary for the sharing of passenger name record (PNR) data and the exchange of personal data for the purpose of combating money laundering and terrorism financing.

Letter from the Chair to the Lords Minister at the Home Office (Baroness Williams)

Thank you for your [Explanatory Memorandum of 18 August 2020](#) on the outcome of a Commission review identifying ten EU legal acts in the law enforcement field which may need to be amended so that their data protection provisions are fully aligned with the EU [Data Protection Law Enforcement Directive](#) (“the Law Enforcement Directive”).

You state that the post-exit transition period (during which nine of these ten legal acts continue to apply to the UK) will have ended before any new amending proposals are adopted and that, as a result, any changes will not affect UK law or be of direct relevance to the UK. As the Commission expects to bring forward proposals to amend two of these legal acts—on Joint Investigation Teams and on the European Investigation Order—before the end of 2020, it is disappointing that you do not address the possibility that the Government may have to consider two opt-in decisions, both in areas where the UK would like to maintain close cooperation with the EU after transition.⁷⁷

As well as reviewing the need to align a number of existing EU justice and home affairs laws with the Law Enforcement Directive, the Commission also indicates that feasibility studies are underway to inform “the possible future codification of EU law enforcement cooperation” and to examine changes to the Prüm framework, for example by including new categories of data and linking Prüm to other EU central databases. Further changes to the EU Passenger Name Record (PNR) Directive may also be needed to take account of CJEU case law and the outcome of a review of Member States’ implementation of the Directive.

We recognise that the nature of any changes to be proposed by the Commission, and their implications for the UK, are unclear at this stage. Nonetheless, any changes which go beyond a simple alignment with the Law Enforcement Directive may have implications for future EU/UK cooperation in this field, particularly if they raise the bar for cooperation with third countries.

You explain that the Government is seeking adequacy decisions to ensure that the EU and UK can maintain the reciprocal free flow of personal data after transition. The EU [draft text published by the EU in March 2020 for an Agreement on the New Partnership with the United Kingdom](#) makes future (post-transition) cooperation with the UK on law enforcement and criminal law matters conditional on the UK being awarded an adequacy decision under the Law Enforcement Directive and continuing to ensure standards of data protection essentially equivalent to those required by EU law.⁷⁸ We would welcome your assessment of the progress being made to secure the necessary adequacy decisions and the prospects for concluding discussions by the end of 2020, as envisaged in the Political Declaration. We would also welcome your insight into the feasibility studies being carried out by the Commission on the codification of EU law enforcement cooperation and possible changes to the Prüm framework (we assume there may have been some discussion of both studies before the UK left the EU on 31 January 2020) and your views on whether or how

77 See Article 127(5) of the [EU/UK Withdrawal Agreement](#) under which the UK’s Title V opt-in Protocol continues to apply to proposals amending EU justice and home affairs laws which remain binding on the UK during the transition period.

78 See Part Three, Title One, chapter 11, Article LAW.OTHER.44 of the Agreement on suspension and disapplication. An adequacy decision under the GDPR is also necessary for sharing passenger name record (PNR) data and exchanging personal data for the purpose of combating money laundering and terrorism financing.

they may affect future EU/UK cooperation in this field. Finally, as we have made clear in other correspondence with the Home Office, we would welcome an update on progress being made in negotiations with the EU on future arrangements for criminal justice and law enforcement cooperation after transition.

8 UK participation in the European Arrest Warrant⁷⁹

These EU documents are politically important because:

- they examine Member States implementation and use of the European Arrest Warrant (“EAW”), identifying possible deficiencies (including in the UK) which may hinder efforts to agree new arrangements on extradition/surrender between the EU and the UK to take effect after transition.

Action

- Write to the Minister for Security (Rt Hon. James Brokenshire MP) requesting further information on UK implementation of the EAW and the prospects for agreeing new extradition/surrender arrangements with the EU, as well as potential obstacles.
- Draw to the attention of the Committee on the Future Relationship with the European Union, the Home Affairs Committee and the Justice Committee.

Overview

8.1 The European Arrest Warrant (“EAW”) establishes an EU-wide mechanism for the arrest and surrender (extradition) of individuals who are wanted for a criminal prosecution or for the execution of a prison sentence or detention order. Operational since 1 January 2004, the EAW is based on the principle of mutual recognition: a warrant issued by one EU country’s judicial authority is valid and enforceable throughout the EU. The EAW is simpler and quicker than traditional forms of extradition because:

- it is based on direct contacts between judicial authorities, without political involvement;
- an EAW must be dealt with and executed as a matter of urgency and strict time limits apply;
- there is no double criminality check for 32 of the most serious criminal offences;
- there are limited grounds for refusing to execute an EAW; and
- EU countries cannot refuse to surrender their own nationals.

79 (a) Report from the European Commission to the European Parliament and Council on the implementation of Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member states; Council number 9339/20, COM(20) 270; Legal base —; Home Office; Devolved Administrations consulted; ESC number 41379.

(b) Commission Staff Working Document: Replies to questionnaire on quantitative information on the practical operation of the European Arrest Warrant—Year 2018; Council number 9341/20, SWD(20) 127; Legal base —; Home Office; Devolved Administrations consulted; ESC number 41383.

8.2 The EAW has resulted in a substantial reduction in the time taken to return and prosecute serious criminals who might otherwise seek to exploit free movement within the EU to evade justice.⁸⁰ Similar arrangements apply (since 1 November 2019) between the EU and Iceland and Norway.⁸¹

8.3 In July 2020, the European Commission published two documents concerning the EAW: the first, [a Commission report](#) on Member States' implementation of the EAW; the second, [a Commission staff working document](#) examining data provided by Member States on the operation of the EAW in 2018. Both documents include information and statistical data on the UK's implementation and application of the EAW.

8.4 The Commission report concludes that implementation of the EAW is “satisfactory [...] in a significant number of Member States” but highlights “issues of compliance in some” where Member States have departed from the Framework Decision establishing the EAW. Examples cited include importing a requirement for an EAW to be “trial ready” (meaning that there is sufficient evidence to charge and try the subject of an EAW at the time of surrender) or applying a proportionality test when deciding whether to execute an EAW. The Commission staff working document shows a steady increase in the number of EAWs that have resulted in the surrender of the person sought since 2015. The largest number of arrests in 2018 was in the UK (1,294). In the same year, the UK surrendered 873 individuals to other EU Member States (second only to Germany); the UK issued 176 EAWs (though the breakdown by category of offence indicates that the actual total is 276 EAWs); and 185 individuals were surrendered to the UK.

UK participation in the EAW

8.5 In December 2014, the then UK Government decided to opt out of all EU police and criminal justice measures because of a concern that the EU's Court of Justice (CJEU) would be given full jurisdiction to interpret these measures, with unpredictable consequences for the UK. It considered nonetheless that there were sufficiently compelling reasons to rejoin (with immediate effect) 35 of these measures, including the EAW and the Schengen Information System (“SIS II”), a centralised EU database used to circulate “real time” alerts on individuals subject to an EAW.⁸² According to the Government's Impact Assessment, participation in the EAW and SIS II were expected to “bring significant justice benefits for UK victims of crime by removing bars to extradition and thus increasing the UK's ability to extradite individuals back to the UK to face justice”.⁸³

8.6 Although the UK left the EU on 31 January 2020, the EAW will continue to apply until the end of the year under the transition provisions of the [EU/UK Withdrawal Agreement](#).⁸⁴

80 See the examples cited in [Command Paper 8897](#), published in July 2014, containing an Impact Assessment on the 35 EU police and criminal justice measures the UK proposed to rejoin following its “block opt-out” in December 2014.

81 See the [Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway](#) and the [Notice of entry into force](#).

82 Referred to as “Article 26 alerts”: see [Regulation \(EU\) 2018/1862](#) of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU.

83 See p.69 of [Command Paper 8897](#), July 2014.

84 See Article 127 of the EU/UK Withdrawal Agreement.

As envisaged in the Agreement, Germany, Austria and Slovenia have given notice that they may refuse to surrender their own nationals to the UK during the transition period “for reasons related to fundamental principles of national law”.⁸⁵ The EU and the UK both want to continue cooperation on surrender/extradition after transition. The Political Declaration agreed in October 2019 calls for:

... effective arrangements based on streamlined procedures and time limits enabling the United Kingdom and Member States to surrender suspected and convicted persons efficiently and expeditiously, with the possibilities to waive the requirement of double criminality, and to determine the applicability of these arrangements to own nationals and for political offences.

8.7 The [EU’s draft legal text](#) (published in March 2020) proposes a mechanism for surrender/extradition based largely on the EAW, but with the inclusion of a “political offence” exception and a nationality exception, more extensive rights for individuals arrested under a warrant, and greater flexibility in the application of time limits for individuals who do not consent to their surrender.⁸⁶ The [UK’s draft working text for an agreement on law enforcement and judicial cooperation in criminal matters](#) (published in May 2020) also includes provisions on extradition which are similar in many respects to the EU’s.⁸⁷ The UK text, however, includes proportionality and trial readiness as possible grounds for refusing to execute a warrant. Where there is a bar on the surrender of a country’s own nationals, it requires the country concerned to consider instituting proceedings in its own courts and to ensure that appropriate measures are in place to assist any non-resident victims and witnesses.

8.8 More substantial differences are evident in the approach taken by the EU and the UK to the protection of fundamental rights and to the role of the Court of Justice. The EU’s draft legal text stipulates that *all* criminal justice and law enforcement cooperation is conditional on the UK’s continued adherence to the European Convention on Human Rights (ECHR) and on the ECHR being given continued effect in the UK’s domestic law. The EU also gives the CJEU the final word in resolving any dispute concerning the interpretation or application of a provision of EU law or a concept of EU law referred to or contained in any agreement with the UK.⁸⁸ By contrast, the draft UK text foresees no role for the CJEU and omits any reference to the ECHR or to its significance in underpinning cooperation in this area, but makes clear that a judicial authority would not be able to execute a warrant which it considered would (according to its own national law) “be contrary to the fundamental rights of the person concerned”.⁸⁹

The Government’s position

8.9 In his [Explanatory Memorandum of 20 July 2020](#), the Minister for Security (Rt Hon. James Brokenshire MP) confirms that the EAW will remain operational in the UK until

85 See Article 185 of the EU/UK Withdrawal Agreement and the [Declaration by the European Union](#), OJ L29/188, 31 January 2020.

86 See Part Three, Chapter Seven of the draft legal text.

87 See Part Four of the draft text.

88 See Part Three of the draft EU text, Article LAW.OTHER.44 on suspension and disapplication and Part Five, Article INST.16 on disputes raising questions of Union law.

89 See Article SURR 4 of the UK’s draft text setting out the grounds for mandatory non-execution of the arrest warrant.

the end of the transition period and is implemented in the UK through Part 1 of the Extradition Act 2003. The EU/UK Withdrawal Agreement also includes provisions to ensure that EAW procedures can continue to their conclusion if the subject of an EAW has been arrested before the end of the transition period, even if they extend beyond 31 December 2020.

8.10 The Minister notes that the European Commission documents do not propose any changes to the EAW but make clear the Commission’s intention to continue monitoring Member States’ compliance with the EAW (including relevant CJEU case law) and to “take measures where appropriate”. He considers that “there are no recommendations within either report which concern the UK” and that there are no legal, policy or financial implications for the UK, but adds:

Under the Withdrawal Agreement, the UK and the EU have agreed to establish arrangements based on streamlined procedures and time limits to enable the UK and the EU to continue to surrender suspected and convicted persons efficiently and expeditiously.

Action

8.11 Ask the Minister to provide further information on UK implementation of the EAW and the prospects for agreeing new extradition/surrender arrangements with the EU, as well as potential obstacles.

Letter to the Minister for Security (Rt Hon. James Brokenshire MP), Home Office

Thank you for your [Explanatory Memorandum](#) on these documents which concern the implementation and use of the European Arrest Warrant (“EAW”) in the UK.

You indicate that there are no legal, policy or financial implications for the UK. We note, however, that the [Commission report](#) on Member States’ implementation of the [Framework Decision establishing the European Arrest Warrant](#) raises two concerns which may be relevant to any future extradition arrangements between the EU and the UK. First it says that the requirement for an EAW to be “trial ready” deviates from the Framework Decision, modifying the obligation to execute an EAW unless one of the stated grounds for non-execution applies. Second, the Commission report makes clear that the grounds for non-execution of an EAW are exhaustively listed in the Framework Decision itself. It highlights the “proportionality principle” as one of the additional grounds for non-execution provided for in the domestic laws of some Member States which are not compliant with the Framework Decision. Both of these grounds for non-execution of an EAW are enshrined in the [Extradition Act 2003](#)⁹⁰ and are also included in the [UK’s draft](#)

90 Sections 11 and 12A of the 2003 Act provide that the absence of a prosecution decision is one of the grounds for refusing to execute an EAW. Sections 2(7A) and 21A of the Act require a judge to consider whether extradition based on an EAW would be “disproportionate”, taking into account the seriousness of the conduct alleged to constitute the extradition offence; the likely penalty that would be imposed if the requested person was found guilty of the extradition offence; and the possibility of the relevant foreign authorities taking measures that would be less coercive than extradition.

[working text for an agreement on law enforcement and judicial cooperation in criminal matters](#).⁹¹ They do not form part of the [EU's draft legal text](#), nor are similar provisions contained in the [surrender agreement between the EU and Iceland and Norway](#).

The EU and UK positions appear difficult to reconcile. We ask you to clarify:

- your reasons for considering that a “trial readiness” test and a proportionality test are consistent with the EAW Framework Decision;
- the importance you attach to maintaining the same tests in any future arrangements on surrender/extradition agreed with the EU; and
- the progress being made on this aspect of the future relationship negotiations with the EU.

The [Impact Assessment](#) which the then Government published in July 2014 to inform its decision to rejoin the EAW concluded that participation in the Schengen Information System (SIS II) would “maximise the UK’s ability to identify and arrest people who pose a threat to public safety and security and make sure that they are brought to justice”.⁹² The European Commission considers that there are legal as well as political constraints which preclude the UK from participating in SIS II after transition. Should this view prevail in the future relationship negotiations (locking the UK out of SIS II), would it affect your assessment of the benefits of agreeing new extradition/surrender arrangements with the EU or the compromises the Government might be willing to make?

The [surrender agreement between the EU and Iceland and Norway](#) is the only precedent for a third country agreement offering terms similar to those provided under the EAW Framework Decision. The agreement requires the parties to set up a mechanism for sharing relevant case law of the CJEU and domestic courts in Iceland and Norway, including case law relating to similar surrender instruments (such as the EAW), with a view to ensuring “as uniform an application and interpretation as possible” of the agreement. Would such a mechanism address the Government’s concern that the CJEU should not have any jurisdiction in the UK after transition?⁹³

Finally, you state:

Under the Withdrawal Agreement, the UK and the EU have agreed to establish arrangements based on streamlined procedures and time limits to enable the UK and the EU to continue to surrender suspected and convicted persons efficiently and expeditiously.

In fact, the agreement you refer to reflects a common aspiration set out in the Political Declaration agreed by the EU and the UK in October 2019, not a legally binding commitment to establish such arrangements.⁹⁴ As indicated above, we would welcome regular updates on the progress made in securing new arrangements on surrender/extradition as negotiations enter their crucial final stages.

91 See Articles SURR 7 and 8 in Part 4 of the draft text.

92 See p.72 of Command Paper 8897.

93 See p.3 of Command Paper 211, published in February 2020, on The Future Relationship with the EU: The UK’s Approach to Negotiations.

94 See para 87 of the [Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom](#), agreed by the EU and the UK in October 2019.

9 Cross-border police cooperation: the automated exchange of DNA and fingerprint data under Prüm⁹⁵

These EU documents are legally and politically important because:

- they are the trigger for a decision taken by the Government in June 2020 to change its policy on the DNA profiles and fingerprints held in the UK's national DNA and fingerprint databases that may be searched by EU partners under the Prüm data sharing arrangements to tackle cross-border crime;
- the decision alters the basis on which Parliament (after a debate and Resolution agreed in December 2015) determined that the UK should take part in Prüm; and
- the documents concern an area of cooperation which the EU and the UK wish to maintain after the transition period ends on 31 December 2020.

Action

- No further action on these documents but write to the Minister for Security (Rt Hon. James Brokenshire MP) to: reiterate deep concern at the Government's side-lining of Parliament; seek further explanation of the way in which the policy review process was carried out and the decision to change policy reached; and request an update on the progress being made in negotiations with the EU to agree capabilities similar to Prüm as part of a future agreement on criminal justice and law enforcement cooperation.
- Draw to the attention of the Committee on the Future Relationship with the EU, the Home Affairs Committee, the Justice Committee, the Joint Committee on Human Rights, and the Science and Technology Committee.

Overview

9.1 The so-called “Prüm Decisions”—[Council Decision 2008/615 JHA](#) and [Council Decision 2008/616/JHA](#)—establish a framework for cross-border police cooperation to support the prevention and investigation of crime. At their core is a decentralised system for the rapid automated searching of DNA profiles, fingerprint and vehicle registration data held in the national databases of EU Member States (there is no central EU database).

9.2 The UK opted out of the Prüm Decisions in December 2014, before they had become operational in the UK, as part of a wider exit from EU police and criminal law measures

95 a) Council Implementing Decision (EU) 2019/968 on the launch of automated data exchange with regard to DNA in the UK; Legal base: Article 33 of Council Decision 2008/615/JHA on the stepping up cross-border cooperation, particularly in combating terrorism and cross-border crime, QMV, EP consultation; Department: Home Office; Devolved Administrations: consulted; ESC number 40679.

(b) Council Implementing Decision on the launch of automated data exchange with regard to dactyloscopic data in the UK; Council document 14247/19, —; Legal base: Article 33 of Council Decision 2008/615/JHA on the stepping up cross-border cooperation, particularly in combating terrorism and cross-border crime, QMV, EP consultation; Department: Home Office; Devolved Administrations: consulted; ESC number 41121.

reflecting the then Government’s unwillingness to accept the jurisdiction of the EU Court of Justice (‘CJEU’). The Government nonetheless undertook to carry out a [Prüm Business and Implementation Case](#) (published as a Command Paper in November 2015) which concluded “that there would be undoubted operational and public protection benefits” for the UK in rejoining Prüm, while making clear that the final decision would be for Parliament.⁹⁶

9.3 Following a [debate in the Commons on 8 December 2015](#), the House resolved that the Prüm Decisions were “an important aid to tackling crime” and voted in favour of UK participation. It did so on the understanding that certain safeguards set out in the Command Paper would be enshrined in domestic law. One such safeguard proposed by the Government was to specify in legislation that “when other Member States conduct searches through Prüm against the UK’s DNA and fingerprint databases, those searches will not be run across the DNA or fingerprints of those who have not been convicted”.⁹⁷ The motion debated and agreed to by the House endorsed UK participation in Prüm on the following terms:

That this House, wishing to see serious crimes solved, to counter terrorism and to see foreign criminals prosecuted and deported, supports opting in to the Prüm Decisions; notes the views of senior law enforcement officers that the Prüm Decisions are an important aid to tackling crime; notes the success of a pilot that demonstrated that the Prüm Decisions mechanism is both swift and effective; and further notes that *only a subset of the relevant national DNA and fingerprint databases, containing data relating to individuals convicted of recordable offences, will be made available for searching by other participating States*, and that the higher UK scientific standards will be applied to matches in the UK.⁹⁸ (Our emphasis added).

9.4 The first document under scrutiny is a [Council Implementing Decision](#), considered by our predecessor Committee in July 2019, authorising the UK to take part in the automated exchange of DNA profiles (“the DNA Decision”).⁹⁹ The Council gave its approval for the UK to begin DNA exchanges from 14 June 2019, but set a deadline of 15 June 2020 for the UK to “complete a review of its policy of excluding suspects’ profiles from automated DNA exchange”, failing which the Council would “re-evaluate the situation with regard to the continuation or termination of DNA exchange with the UK”. The Council underlined the “practical and operational significance” of including the DNA profiles of criminal suspects in tackling terrorism and cross-border crime.

9.5 The second document under scrutiny is a [draft Council Implementing Decision](#) (published on 5 December 2019, but only deposited in early March 2020) which would allow the UK to begin the automated exchange of fingerprint (dactyloscopic) data (“the Fingerprint Decision”). The proposal also set a 15 June 2020 deadline for the UK to review its policy of excluding the fingerprints of criminal suspects from Prüm data exchanges.

9.6 In May 2020, the European Parliament (which has a consultative role only) rejected the Council’s proposal to allow the UK to exchange fingerprint data, underlining the

⁹⁶ See Command Paper 9149.

⁹⁷ See p.79 of Command Paper 9149.

⁹⁸ See [Hansard, 8 December 2015, col 963](#).

⁹⁹ Council Implementing Decision (EU) 2019/968 was adopted on 6 June 2019. See our Seventy-second Report HC 301–lxx (2017–19), [chapter 3](#) (17 July 2019).

importance of data exchanges being based on the principle of full reciprocity of access and suggesting that the UK was out of step with other Prüm participants by excluding access to the fingerprint data of criminal suspects. Our [Fifteenth Report of Session 2019–21](#) provides further background on the documents under scrutiny.¹⁰⁰

9.7 In a [Written Statement issued on 15 June 2020](#)¹⁰¹ and [letter of the same date](#) to the Chairman of the European Scrutiny Committee (Sir William Cash MP), the Minister for Security (Rt Hon. James Brokenshire MP) noted that the Government’s policy of not sharing the DNA profiles of criminal suspects put the UK “out of step with EU Member States”. Following a policy review undertaken by Government officials and operational partners, the Government had decided to share the DNA profiles of criminal suspects held in databases in England and Wales and in Northern Ireland because it considered there to be “important public safety benefits”. He confirmed in his [Explanatory Memorandum of 26 June 2020](#) on the proposed Fingerprint Decision that the UK had notified the EU institutions on 15 June that “suspects’ profiles will be included in all automated biometric data exchanges within the shareable Prüm dataset, including fingerprints once sharing begins”, adding that the Government would be seeking a future internal security agreement with the EU which would provide capabilities “similar to those delivered by Prüm”. In [a further letter dated 30 June 2020](#), the Minister informed us that the Scottish Government had also agreed to “include suspects’ data captured in Scotland in automated biometric exchanges with connected EU Member States”, thereby ensuring the UK-wide sharing of suspects’ profiles.

9.8 We set out the reasons underpinning the Government’s decision in our earlier Report. We also examined the relevant parts of the [Political Declaration](#) agreed by the EU and the UK in October 2019, the [EU’s draft legal text on law enforcement and judicial cooperation in criminal matters](#) (itself part of an overarching agreement with the UK covering trade and security), the [UK’s standalone draft agreement on law enforcement and judicial cooperation in criminal matters](#), and existing precedents for Prüm data exchanges with third countries, with a view to considering the basis on which the EU and UK might be able to agree maintain “similar to those delivered by Prüm” when the post-exit transition period ends on 31 December 2020.

9.9 We asked the Minister to respond to a series of questions (set out in [our letter of 2 July 2020](#)) concerning the Government’s change of policy on the sharing of suspects’ profiles in the biometric exchanges authorised by the Prüm Decisions, engagement with Parliament during the policy review process, and the prospects for a Prüm data sharing agreement with the EU after transition.

The Minister’s response

Engagement with Parliament during the policy review process

9.10 We reminded the Minister that House of Commons approval for UK participation in Prüm in 2015 was given on the understanding that “only a subset of the relevant national DNA and fingerprint databases, containing data relating to individuals convicted of recordable offences, will be made available for searching by other participating States”.¹⁰²

100 Fifteenth Report HC 229–xi (2019–21), [chapter 5](#) (2 July 2020).

101 See Hansard, 15 June 2020, HCWS290.

102 See the [motion](#) agreed to by the House on 8 December 2015, Hansard col 963.

Given that the fingerprint and DNA data of criminal suspects were expressly excluded, we suggested that a change in policy merited particularly close scrutiny since it altered the very basis on which Parliament agreed to UK participation in Prüm data exchanges.

9.11 With this in mind, we asked the Minister to explain:

- the reason for the delays in depositing the Council Implementing Decisions for scrutiny and in submitting the Government’s Explanatory Memoranda;
- why we (and Parliament as a whole) were only notified of the Government’s policy review *after* it had concluded, and whether any efforts had been made to inform and consult with Parliament during the review process;
- why his Written Statement to Parliament of 15 June 2020 did not make clear that the policy review concerned the exchange of suspects’ DNA profiles and fingerprint data; and
- what effect the European Parliament’s decision (in May 2020) to reject the Council Implementing Decision on the exchange of fingerprint data might have on automated exchanges between the EU and the UK during transition.

9.12 In his [letter of 22 July 2020](#), the Minister acknowledges that there have been delays in Explanatory Memoranda, some attributable to the prorogation of Parliament and general election at the end of 2019, but undertakes to ensure that “best efforts” are made by his officials to meet the required deadlines. He says it was “implicit” in his Written Statement to Parliament in June that the exchange of criminal suspects’ data under the Prüm Decisions would include both DNA profiles and fingerprints but apologises that this was not made clearer. The policy review process was “necessarily undertaken in consultation with operational partners and informed by law enforcement data derived from the connections made to Prüm DNA data since July 2019”. The Government anticipated that there would be “similar operational benefits” once fingerprint exchanges began. The change in policy was “driven by operational partners’ view that there would be important public safety benefits in sharing suspects’ data”. The Minister reiterates that “a number of strong safeguards are in place to prevent UK citizens’ data being used unnecessarily and unreasonably and these remain unchanged”. He adds that, following the UK’s change in policy, the European Parliament has expressed its support for the proposed Council Implementing Decision authorising fingerprint exchanges, though its opinion is purely advisory. He expects COREPER to give the go-ahead for the adoption of the Council Implementing Decision and for “go live” fingerprint exchanges with the UK by the end of July and says he is satisfied that the inclusion of suspects’ DNA profiles and fingerprints will ensure that the UK is in full conformity with the Prüm Decisions.

Prüm data sharing arrangements after 31 December 2020

9.13 We noted that the EU and the UK had both put forward proposals to maintain the Prüm data sharing arrangements after transition, though these differed (in different ways) from the existing precedents established in EU agreements with Iceland, Norway, Switzerland and Liechtenstein. We asked why the Government had decided to depart from these precedents, particularly the provisions which sought to ensure consistent application and interpretation of the rules governing Prüm exchanges.

9.14 For any Prüm data sharing arrangements to operate effectively after transition, we suggested that some mechanism would be needed to ensure that the conditions governing access to data remained broadly the same in the UK and in the EU. We noted that the UK's draft legal text included a provision giving an EU/UK Joint Committee the power to agree, by mutual consent, amendments to the agreement "in light of changes to the legislation of the United Kingdom, the Union or the Member States". Amendments agreed to by the Joint Committee would "be confirmed by and enter into force upon the exchange of diplomatic notes between the United Kingdom and the Union, unless otherwise agreed" and so would not as a rule require approval by Parliament or ratification.¹⁰³ We asked the Minister:

- whether this provision might provide the vehicle for updating the EU/UK agreement on law enforcement cooperation to reflect changes in EU rules governing Prüm exchanges;
- how any necessary measures to keep the UK in step with future changes to the Prüm Decisions would be translated into domestic UK law after transition; and
- whether he accepted that changes of this nature would require close engagement with Parliament, not least to ensure no conflict between the commitments made in international law and how they are given effect to in domestic law.

9.15 The Minister does not address these questions in his response and makes no reference to existing third country precedents, noting only that the UK's draft legal text is based on (the main) Prüm Council Implementing Decision (2008/615/JHA) and "reflects day-to-day operating practice". He considers that it would be "unwise to prejudge the outcome of live negotiations", while adding that "where the Government brings forward new legislation, it will be scrutinised and passed through Parliament in the normal way".

Our analysis

9.16 As we explained in our earlier Report, the exclusion of the biometric data of criminal suspects from Prüm data exchanges with EU partners was a crucial factor in obtaining Parliament's consent for UK participation in Prüm. The Resolution agreed to by the House on 8 December 2015 states explicitly that Prüm data exchanges should be limited to "individuals convicted of recordable offences". In opening the debate, the then Home Secretary (Rt Hon. Theresa May MP) made clear that Prüm exchanges "should be about catching criminals", adding:

[...] so we will ensure that only the DNA profiles and fingerprints of those convicted of a crime can be searched against. We will write that into legislation.

9.17 She undertook to establish "an independent oversight board to ensure that Prüm operates in a just and effective manner", with representatives from the Offices of the Information Commissioner and the Biometrics Commissioner (and their counterparts in Scotland and Northern Ireland). Closing the debate, the then Immigration Minister (Rt Hon. James Brokenshire MP) observed:

103 See Parts 13 and 14 of the UK's draft legal text on institutional provisions and on general and final provisions.

Crucially, security, public protection and civil liberties all need to be balanced. I have been very clear about that from the outset. That is why I, along with the Home Secretary, have insisted that searches should be made only against the DNA and fingerprints of those convicted, that UK scientific standards apply before we release any personal data and that both the Biometrics Commissioner and the Information Commissioner will be involved in the process.

9.18 The Government's Prüm Business and Implementation Case included draft legislation ([Appendix J to Command Paper 9149](#)) to enshrine in law the Government's commitment to limit searches in the UK's national DNA and fingerprint databases to the DNA profiles and fingerprints of individuals convicted of a recordable offence. It seems that no steps were taken to enact the draft legislation as the Minister's [letter of 15 June 2020](#) informing us of the policy change says that the Police and Criminal Evidence Act (PACE) 1984 provides the legal base for sharing suspects' biometric data and "further legislation will not be required to enable this change".

9.19 In his most recent (2019) [Annual Report](#), the Biometrics Commissioner (Professor Paul Wiles) notes that the (then) Government's decision to rejoin Prüm in December 2015 followed assurances given to Parliament that only the DNA profiles and fingerprints of persons convicted of a crime would be made available for searching by EU Member States.¹⁰⁴ Reflecting this, [Guidance issued by the Forensic Information Database Service \(FINDS\) Strategy Board](#)¹⁰⁵ on *International DNA and fingerprint exchange policy for the UK* in June 2019 includes an Appendix on Prüm exchanges (at the time limited to DNA profiles in the UK's national DNA database, "NDNAD") which makes clear that, for the UK, "the reference data for Prüm is wholly limited to DNA profiles from crime stains (from the NDNAD), unidentified bodies/part(s) (from the MPDD) and *from subjects who have been convicted of a recordable offence in the UK and are present on the NDNAD.*" (Our emphasis added).

9.20 [Section 38 of the UK's Data Protection Act 2018](#) recognises that in processing personal data for law enforcement purposes, "a clear distinction must, where relevant and as far as possible, be made between personal data relating to different categories of data subject", listing as examples of distinct categories (a) persons *suspected* of having committed or being about to commit a criminal offence, and (b) persons *convicted* of a criminal offence. [Section 64 of the Act](#) requires the data controller to carry out a data protection impact assessment "where a type of processing is likely to result in a high risk to the rights and freedoms of individuals". It must include an assessment of the risks to the rights and freedoms of the data subjects likely to be affected and the measures envisaged to address those risks. Under [section 65 of the Act](#), the controller must consult the Biometrics Commissioner *before* beginning any processing if a section 64 data protection impact assessment indicates that the processing would result in a high risk to the rights and freedoms of individuals in the affected category (in the absence of measures to mitigate the risk).

104 See p.79, para 307, of the Commissioner's report. The report was submitted to the Home Office on 19 March 2020 but only published on 2 July 2020.

105 FINDS is part of the Home Office. It is responsible for the integrity and protection of the data held on the UK's national DNA and fingerprint databases.

9.21 The Security Minister's [Written Ministerial Statement of 15 June 2020](#) announcing the change in Government policy says that the Government has considered the impact of sharing suspects' data on individual freedoms and is "reassured by protections applicable to England and Wales which carefully govern the retention of biometric data, and which confer protections to data from individuals who have not been convicted". He continues:

The Police and Criminal Evidence Act 1984 (PACE) as amended by the Protection of Freedoms Act 2012 creates a strict retention regime which sets out that data must be deleted within a set period, depending on the circumstances under which it was collected. This regime considers factors such as the age of the individual at the time of the offence, the seriousness of the offence, and ensures that suspects' data constitutes only around 2% of the profiles in the DNA and fingerprint databases at any one time.

9.22 He also cites "a number of safeguards" introduced when Parliament voted in favour of joining Prüm in 2015, including "the introduction of an independent oversight board; the requirement that low-quality matches be excluded from Prüm searching; the introduction of an additional step where a 'hit' involves data which relates to a minor; and the exclusion of data held for only a short period in relation to vulnerable persons. These all work together to protect against innocent UK citizens being caught up inappropriately in overseas criminal investigations". The Minister concludes that "the important public safety benefits in exchanging suspects' data outweigh the risks associated with sharing it".

9.23 As we indicated in our earlier Report, the way in which the Government carried out its policy review and announced the outcome (by means of a Written Ministerial Statement) raises important questions about the transparency of the review process itself and the Government's accountability to Parliament for policy changes which contradict assurances set out in a Government motion as the basis for securing Parliament's approval for UK participation in Prüm.

9.24 The Council Implementing Decisions authorising the UK to take part in the automated exchange of biometric data under Prüm have both been agreed¹⁰⁶ and the UK's Prüm data exchanges now include the DNA profiles (from 3 August 2020) and fingerprints (from 13 August 2020) of criminal suspects, as well as those convicted of a criminal offence.¹⁰⁷ Whilst we have no further questions on the Decisions themselves, we remain deeply concerned at the Government's lack of engagement with Parliament during the review process or involvement of Parliament in evaluating and endorsing the outcome of the review and the change in the Government's policy, as well as the wider implications for scrutiny of the conduct and outcome of negotiations on a future law enforcement agreement with the EU.

Action

9.25 Write to the Minister for Security.

¹⁰⁶ See [Council Implementing Decision \(EU\) 2019/968](#) of 6 June 2019 on the launch of automated data exchange with regard to DNA data in the United Kingdom and [Council Implementing Decision \(EU\) 2020/1188](#) of 6 August 2020 on the launch of automated data exchange with regard to dactyloscopic data in the United Kingdom.

¹⁰⁷ See [Council document 9296/20](#), 10 July 2020.

Letter to the Minister for Security (Rt Hon. James Brokenshire MP), Home Office

Thank you for your [letter of 22 July 2020](#) responding to concerns we raised in our [Fifteenth Report of Session 2019–21](#) and in [our letter of 2 July 2020](#) about the Government’s decision to share the DNA profiles and fingerprint data of criminal suspects in the biometric exchanges authorised by the Prüm Decisions, its engagement with Parliament during the policy review process, and the prospects for a Prüm data sharing agreement with the EU after transition.

The starting point for our scrutiny of the Council Implementing Decisions authorising the UK to take part in the automated exchange of DNA profiles and fingerprint data is the position set out in the [Prüm Business and Implementation Case](#) published by the (then) Government in November 2015. It says:

In accordance with stated policy, if Parliament votes to rejoin the Prüm Decisions, it is the intention of the Government to allow Member States to only search the DNA profiles or fingerprints of those who have been convicted in the UK.¹⁰⁸

In the [debate seeking Parliament’s approval for the UK to rejoin Prüm](#) on 8 December 2015, the then Home Secretary (Rt Hon Theresa May MP) gave an undertaking that “only the DNA profiles and fingerprints of those convicted of a crime can be searched against” and that the Government would “write that into legislation”. In closing the debate, you recognised the “crucial” need to balance “security, public protection and civil liberties” and, to that end, made clear that you and the Home Secretary had “insisted that searches should only be made against the DNA and fingerprints of those convicted [...]” and that oversight arrangements would be put in place to ensure that Prüm protects the public in a way that fully respects civil liberties.¹⁰⁹

The Biometrics Commissioner (Professor Paul Wiles) forms part of these oversight arrangements. So too does the Forensic Information Database Service Strategy Board (FIND-SB) which monitors the performance of the UK’s national DNA and fingerprint databases and issues guidance to the police on the use of the databases.¹¹⁰ The Biometric Commissioner’s [annual report for 2019](#) sets out the safeguards agreed to by Parliament in December 2015, the first being a condition that “that only the DNA profiles and fingerprints of persons convicted of a crime will be made available for searching by EU Member States”. This is also reflected in the [policy document published by FINDS in July 2019](#) which makes clear that reference data for Prüm held in the UK’s national DNA database is “wholly limited” to those convicted of a recordable offence, not criminal suspects.

We accept that it is entirely appropriate for the Government to review its policy on the sharing of criminal suspects’ biometric data, to do so in close consultation with operational partners, and to be informed by their assessment of the public safety benefits. You do not,

¹⁰⁸ See p.49 of Command Paper 9149.

¹⁰⁹ Hansard 8 December 2015, cols 914–963.

¹¹⁰ FIND-SB is chaired by a representative of the National Police Chiefs’ Council (NPCC) and includes representatives of the Home Office and of the Police and Crime Commissioners who are the voting members. Also in attendance as observers are the Chair of the Biometrics and Forensic Ethics Group, the Forensic Science Regulator, the Biometrics Commissioner, the Information Commissioner and representatives of the devolved administrations.

however, address our central concern: the apparent lack of engagement with Parliament during the review process or involvement of Parliament in evaluating and endorsing the outcome of the review and the change in policy. We are also concerned that your Written Ministerial Statement makes no mention of wider stakeholder consultation on a policy change which has clear implications for the protection of civil liberties. We note your assurance that “strong safeguards” remain in place, but as you will be aware, they are no longer the same as those agreed to by Parliament in December 2015 when it determined the basis on which the UK would participate in Prüm.

The consequence of the Government’s policy change is that more data, with fewer safeguards, will be shared with EU Member States now that the UK has left the EU than was the case when the UK itself was a Member State. We consider that this requires further explanation and ask you to tell us:

- why the safeguard limiting Prüm exchanges to the DNA profiles and fingerprints of convicted criminals (as set out in the draft legislation proposed by the Government in [Annex J of Command Paper 9149](#)) was not enshrined in UK law when the Government indicated that it would be;
- if, as indicated in your [letter of 15 June 2020](#), no changes to UK law are necessary to allow the sharing of criminal suspects’ biometric data, what practical means have been taken to implement the Government’s policy change;
- whether the Government considered the need for a data protection impact assessment under [section 64 of the Data Protection Act 2018](#) before proceeding to the exchange of criminal suspects’ biometric data with EU partners;
- whether the Biometrics Commissioner and other interested stakeholders were consulted on the proposed policy change and how, in broad terms, they responded;
- whether the [policy advice](#) issued by the Home Office’s Forensic Information Database Service (FINDS) in June 2019 on *International DNA and Fingerprint Exchange Policy for the UK* has been updated to reflect the Government’s change in policy; and
- why the Government considered it appropriate to announce by Written Ministerial Statement a policy change which overturns the assurances accepted by Parliament in a Resolution of the House agreed in December 2015 without further recourse to and consultation of Parliament (through a debate and vote).

We recognise that all Prüm data exchanges will cease at the end of the transition period on 31 December 2020. However, the Government’s approach to its Prüm policy review and your unwillingness to address the questions we have raised about the implications and intended effect of provisions contained in the [UK’s draft agreement on law enforcement and judicial cooperation in criminal matters](#) in our [Fifteenth Report of Session 2019–21](#) and [our letter of 2 July 2020](#) does little to assure us that Parliament will have the information it needs, or adequate opportunity, to ensure effective and meaningful scrutiny as the end of the transition period approaches. Whilst we have no further questions to raise on the

Council Implementing Decisions, we ask you to provide an update on the progress being made in negotiations with the EU on agreeing capabilities similar to those delivered by Prüm as part of a future agreement on criminal justice and law enforcement cooperation.

We look forward to receiving your response within ten working days.

10 Documents not considered to be legally and/or politically important

Department for Business, Energy and Industrial Strategy

(41400) Communication from the Commission 3rd Amendment to the
 — Temporary Framework for State aid measures to support the
 economy in the current COVID-19 outbreak.

COM(20) 4509

Department for Environment, Food and Rural Affairs

(41398) Report from the Commission Annual Synthesis Report for the year
 — 2018 on the implementation of the FLEGT licensing scheme provided
 for in Regulation (EC) No 2173/2005 of 20 December 2005 on the
 establishment of a FLEGT licensing scheme for imports of timber into
 COM(20) 307 the European Community.

(41404) Proposal for a Regulation of the European Parliament and of the
 Council laying down management, conservation and control measures
 9549/20 applicable in the Inter-American Tropical Tuna Convention area and
 amending Council Regulation (EU) No 520/2007.
 + ADD1

COM(20) 308

HM Treasury

(41384) Draft amending budget No 7 to the general budget for 2020: Update
 of revenue (own resources).

9370/20

COM(20) 424

Annex

Documents drawn to the attention of select committees:

(‘SNC’ indicates that scrutiny (of the document) is not completed; ‘SC’ indicates that scrutiny of the document is completed)

Business, Energy and Industrial Strategy Committee: UK participation in EU programmes post-Brexit: financial contribution and role of the EU Court of Justice [Proposed Council Regulations (SNC)]; Review of the EU General Data Protection Regulation [Commission Communication (SNC)]

Digital, Culture, Media and Sport Committee: COVID-19: travel and tourism guidance [Commission Communications (SC)]; Review of the EU General Data Protection Regulation [Commission Communication (SNC)]

Environment, Food and Rural Affairs Committee: EU Farm to Fork Strategy [Commission Communication (SNC)]

Committee on the Future of the European Union: EU Farm to Fork Strategy [Commission Communication (SNC)]; UK participation in EU programmes post-Brexit: financial contribution and role of the EU Court of Justice [Proposed Council Regulations (SNC)]; UK participation in the European Arrest Warrant [(a) Commission Report, (b) Commission Staff Working Document (SNC)]; Standardising data protection rules in EU law enforcement instruments [Commission Communication (SNC)]; Cross-border police cooperation: the automated exchange of DNA and fingerprint data under Prüm [Council Implementing Decisions (SNC)]; Review of the EU General Data Protection Regulation [Commission Communication (SNC)]

Health and Social Care Committee: COVID-19: travel and tourism guidance [Commission Communications (SC)]; EU Farm to Fork Strategy [Commission Communication (SNC)]; Short-term EU health preparedness for COVID-19 outbreaks [Commission Communication (SC)]

Home Affairs Committee: UK participation in the European Arrest Warrant [(a) Commission Report, (b) Commission Staff Working Document (SNC)]; Standardising data protection rules in EU law enforcement instruments [Commission Communication (SNC)]; Cross-border police cooperation: the automated exchange of DNA and fingerprint data under Prüm [Council Implementing Decisions (SNC)]

Joint Committee on Human Rights: Cross-border police cooperation: the automated exchange of DNA and fingerprint data under Prüm [Council Implementing Decisions (SNC)]; Review of the EU General Data Protection Regulation [Commission Communication (SNC)]

Justice Committee: UK participation in the European Arrest Warrant [(a) Commission Report, (b) Commission Staff Working Document (SNC)]; Standardising data protection rules in EU law enforcement instruments [Commission Communication (SNC)]; Cross-border police cooperation: the automated exchange of DNA and fingerprint data under Prüm [Council Implementing Decisions (SNC)]

Northern Ireland Affairs Committee: EU Farm to Fork Strategy [Commission Communication (SNC)]

Science and Technology Committee: Regional policy post-2020 [Proposed Regulations (SNC)]; Green Deal Investment Plan [Commission Communication (SNC)]; Cross-border police cooperation: the automated exchange of DNA and fingerprint data under Prüm [Council Implementing Decisions (SNC)]; Review of the EU General Data Protection Regulation [Commission Communication (SNC)]

Transport Committee: COVID-19: Flight vouchers [Commission Recommendation (SNC)]

Formal Minutes

Thursday 3 September 2020

After consulting all Members of the Committee, the Chair was satisfied that the Report represented a decision of the majority of the Committee and reported it to the House.

(Order of the House of 24 March 2020).

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)

[Tahir Ali MP](#) (*Labour, Birmingham, Hall Green*)

[Jon Cruddas MP](#) (*Labour, Dagenham and Rainham*)

[Allan Dorans MP](#) (*Scottish National Party, Ayr Carrick and Cumnock*)

[Richard Drax MP](#) (*Conservative, South Dorset*)

[Margaret Ferrier MP](#) (*Scottish National Party, Rutherglen and Hamilton West*)

[Mr Marcus Fysh MP](#) (*Conservative, Yeovil*)

[Mrs Andrea Jenkyns MP](#) (*Conservative, Morley and Outwood*)

[Mr David Jones MP](#) (*Conservative, Clwyd West*)

[Stephen Kinnock MP](#) (*Labour, Aberavon*)

[Mr David Lammy MP](#) (*Labour, Tottenham*)

[Marco Longhi MP](#) (*Conservative, Dudley North*)

[Craig Mackinley MP](#) (*Conservative, South Thanet*)

[Ann Marie Morris MP](#) (*Conservative, Newton Abbot*)

[Charlotte Nichols MP](#) (*Labour, Warrington North*)

[Greg Smith MP](#) (*Conservative, Buckingham*)