



MurrayBlackburnMackenzie

Policy Analysis Collective

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Dear Committee Members,

We would like to draw to your attention to EU legislation on the 2021 census that we think may be of relevance to your ongoing scrutiny of the census questions.

[Regulation \(EU\) 2017/543](#) (22 March 2017) lays down rules for the application of [Regulation \(EC\) No. 763/2008](#) of the European Parliament and of the Council on population and housing censuses.

The Regulation set out technical specifications for key census topics, to allow for Europe-wide consistency and comparability:

“To ensure that data from the population and housing censuses conducted in the Member States are comparable, and to allow reliable Union-wide overviews to be drawn up, the census topics need to be established and broken down in the same way in all Member States. Technical specifications for those topics and their breakdowns should therefore be adopted.

The measures provided for in this Regulation are in accordance with the opinion of the European Statistical System Committee.” ([para. 1 and 2](#)).

Additional explanatory notes on EU legislation on the 2021 population and housing censuses (2019 edition) can be accessed here:

<https://ec.europa.eu/eurostat/documents/3859598/9670557/KS-GQ-18-010-EN-N.pdf/c3df7fcb-f134-4398-94c8-4be0b7ec0494>

In relation to the sex topic, the technical specifications provide for a binary question: male/female. No other direction or guidance is provided, and there is no indication that the sex question could also be used to capture data on self-defined gender identity. The explanatory notes state that a ‘not stated’ or similar category is not permitted ([p.66](#)). The same specifications were set out in the Explanatory Notes to the 2011 census ([see p.68](#)).

We think that this potentially raises two issues in relation to the Committee’s deliberations on the sex question. Firstly, we note that the non-binary sex question proposed in the Bill as introduced may have been incompatible with the Regulation, and could potentially have been challenged by way of judicial review on this basis. We are not aware however, that this possibility was raised with the Committee.

Second, a lack of any other direction in the technical specifications (compared to other census topics) suggests that the provision of *additional* guidance that explicitly frames the sex question in terms of self-defined gender identity means that data collected in Scotland may – to an unknowable extent – be inconsistent with data collected in other European

jurisdictions. A lack of comparability in this respect may be detrimental for research and analysis purposes.

While the same point applies in principle to the 2011 census, we think it unlikely that the online guidance published at this time was widely known or referred to by respondents. The risk to data consistency in 2021 relates to the unknown increase in the size of the trans population, and the greater accessibility of the online guidance.

To the best of our understanding these regulations remain in force, and may continue to be in force under any arrangements for continuation of EU regulations following Brexit. However we assume that the Scottish Government will be able to advise further on the relevance of these regulations at the time the Bill was introduced and whether they are expected to be relevant when the census details are finalised.

Kind regards,

MurrayBlackburnMackenzie