HOUSE OF LORDS
European Union Committee

House of Lords
London
SW1A 0PW
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The primary purpose of the House of Lords European Union Select Committee is to scrutinise EU law in draft before the Government take a position on it in the EU Council of Ministers. This scrutiny is frequently carried out through correspondence with Ministers. Such correspondence, including Ministerial replies and other materials, is published where appropriate.

This edition includes correspondence from 1 August 2018 – 31 December 2018

EU JUSTICE SUB-COMMITTEE

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Letter from the Chairman to the Rt Hon David Gauke MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice

Thank you for your letter dated 17 July 2018. It was considered by the EU Justice SubCommittee at its meeting on 16 October.

We decided to retain the proposed Regulation under scrutiny.

We are grateful for the very detailed update on the Council's negotiation of this complex, but important Regulation. It illustrates that the Member States are focused on addressing the technical aspects of the proposal that will facilitate its day-to-day operation. Given the number of issues that remain under discussion, we note the current Presidency's ambition of agreeing this Regulation by the end of the year.

We are keenly aware of the importance of this Regulation to the UK's family law system and have repeatedly expressed our view that the loss of the suite of Brussels Regulations would have a profound impact upon families, and especially upon children. We have written a separate letter to you, based on our recent follow-up work to our 2017 report: Brexit: justice for families, individuals and businesses? (17th Report of session 2016-17, HL Paper 134), which sets out our deep concerns in this regard.

We ask to be kept informed of significant developments in the negotiations in due course.

17 October 2018

Letter from the Rt Hon David Gauke MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice

As you are aware the UK is seeking to maintain effective civil judicial cooperation with the EU, including in family matters, when we leave the EU. We have therefore sought to actively engage in the negotiations on the Recast of this Regulation.

I last wrote to you about this proposal on 17 July and explained then that the Austrian Presidency hoped to make as much progress as possible with the ambition of achieving adoption by the end of the year. Instead of adoption, the Presidency now plans to seek agreement at next month's JHA Council on a general approach on the text of the Articles and the most important recitals. The remaining recitals and the standard forms will be finalised early next year with formal adoption under the Romanian Presidency. That means that the UK will not have a vote on the adoption if it is after the date of the UK's exit. It is currently envisaged that the Regulation will enter into force on 1 July 2022, which will be after the proposed Implementation Period ends. On that basis, therefore, it is unlikely that the rules of the Regulation will apply to the UK unless they are included in a future agreement between the UK and the EU and/or unless the Implementation Period is extended beyond June 2022 under the terms of the draft Withdrawal Agreement. **As the Presidency is seeking a general approach I am seeking your Committee's clearance for the UK to support the text.**

For ease of reference I will describe the most recent changes to the text using the same headings in the Explanatory Memorandum and my previous letter.

Procedures supplementing the 1980 Hague Convention regarding abducted children

There was significant discussion on the 'override' provision (which allows a custody judgment from the state of habitual residence of an abducted child to 'override' a non-return order from the state of abduction) - Article 26 of the Commission proposal. As I explained in my previous letter it was a UK suggestion which led to the final draft of the provision. All the outstanding issues I mentioned in July have been resolved satisfactorily. The suggested deadlines for courts to act are workable and the previous provision requiring Member States to concentrate jurisdiction in a limited number of courts

(Article 22) has been deleted and replaced by an encouragement to do so in a recital. As I also mentioned in my letter in July, the UK sought and has achieved clarification about the concept of how an ordinary appeal should be interpreted in Ireland, Cyprus and the United Kingdom. We had some concerns on subsidiarity in relation to courts having to provide information in judgments in what was Articles 10(5) and 26(1). Both have been removed from the text, although in the latter case there is an instruction in a recital for courts to refer to the relevant articles of the 1980 Hague Convention on which a refusal to return a child was based.

The Government considers that the provisions as now drafted clarify the rules applicable to intra-EU child abduction cases and the relationship between the Regulation and the 1980 Hague Convention.

Placement of a child in another Member State (Article 65)

The text clarifies that the consent procedure for placement of children in another Member State should be applicable to all types of placements except for those with parents or other close 'relatives' (as defined by the receiving Member State in notifications to the Commission) that the Member State where the placement is contemplated has said do not require consent. The new rules also include a three-month deadline for giving or refusing consent, and a possibility for appropriate exceptions for urgent cases and allow special agreements and arrangements to be made between Member States that simplify the consent procedure. A recital will explain that where a placement is contemplated a child's ethnic, religious, cultural and linguistic identity should be taken into account and that where a court is aware of such a connection to another Member State notification of the child's situation to the consular authorities in that Member State or a request for information about a parent, a relative or other person who may be suitable to care for the child. These statements in the recital are consistent with domestic law on placement of children, including cross-border placements.

The Government considers these changes are a significant improvement on the equivalent provision in the current Regulation, which left much uncertainty between authorities in Member States about when and how it applied.

Automatic recognition of judgments

The model I explained in my previous letter for the abolition of exequatur (the procedural step that requires that a judgment from another Member State is registered before it can be recognised as valid) is the one that is in the text for agreement at the Council. This means that all decisions under the Regulation which are enforceable in the Member State where they were given will be enforceable in another Member State without any registration being required. The grounds of refusal of recognition and enforcement for non-privileged decisions (see below) will be public policy, irreconcilability, lack of effective service in cases of default of appearance, lack of opportunity of holders of parental responsibility to be heard, lack of opportunity of the child to be heard in line with a new provision in the Regulation (see further below), and non-compliance with the consultation procedure for cross-border placement. As under the current Regulation, it is left to national law whether these grounds may be examined by a court of its own motion or upon application by any interested party as defined by national law.

The current Regulation has already abolished exequatur for 'privileged decisions', which are orders for contact with children and orders in custody decisions that entail the return of an abducted child. The text of the proposed new Regulation maintains this privileged status but strengthens the protection for defendants by creating a legally binding certificate to accompany such decisions which will be capable of being rectified or withdrawn in the Member State of origin where it was wrongly granted. Against the recognition and enforcement of privileged decisions only the ground of irreconcilability will be available in the Member State where recognition and enforcement is sought.

While the Government would have preferred one system for all types of decision it is satisfied with the proposed compromise and the safeguards in relation to each type of decision.

Enforcement of decisions

The Government is pleased that its concerns about harmonisation in relation to the actual enforcement procedure that were in the Commission's proposal have been resolved during the negotiations. In addition to the changes described in my previous letter, the text no longer requires courts to explain why enforcement action takes longer than six weeks (Article 32(4)) and the competence of courts to deal with enforcement matters will be left to national law. It has been agreed

that provisional or protective measures ordered by a court that does not otherwise have jurisdiction under the Regulation to make such orders should not be capable of enforcement in other Member States except where a court is considering the return of an abducted child. As I explained in July, this will mean, for example, that in cases where allegations of abuse have been made against a left behind parent and a court decides a child can be returned only where there is supervised contact with that parent, the orders of that court need to be applied by the court in the Member State to which the child is to be returned until such time as the latter court makes its own decision on the matter. The hope is this will give courts fewer reasons not to return a child and will increase protection for children who might be re-abducted to another country.

Cooperation between central authorities

The provisions relating to the functions of central authorities have received general support from all delegations. The Government's objective has been to minimise extra burdens on the central authorities and to ensure there is clarity in relation to their responsibilities. While the UK did not achieve all of the changes it sought the Government is satisfied with the proposed text. As I explained before, the most controversial provision was Article 61 which would have obliged Member States to ensure that central authorities had adequate resources to enable them to carry out their functions under the Regulation. This is now in a recital only.

Authentic instruments and agreements

A new issue on which recent negotiations have concentrated is to clarify existing rules in relation to the recognition and enforcement of authentic instruments and agreements. This clarification was thought necessary because of the growing number of Member States that now allow non-court divorces and parental agreements on child arrangements with minimal or no court oversight. The text makes it clear that the recognition and enforcement of such instruments and agreements should be allowed subject to certain safeguards. It states that a public authority in the Member State of origin has to approve or register these agreements and these authorities should check their jurisdiction on the basis of the Regulation's rules and that there should be grounds for refusal of recognition and/or enforcement, such as public policy.

Hearing the child

In my previous letter I explained the challenges arising for the UK in relation to the new requirement for courts or other authorities to provide an opportunity for a child to express his or her views in proceedings under the Regulation (Article 20). The UK has sought and secured clarity to ensure that the requirements for hearing the child need only be done in accordance with national law and procedure. While negotiations on this point have not yet concluded, the UK is hopeful it will also secure some clarifications about the scope of the duty.

A related issue is what changes should be made to the ground for refusal of recognition and enforcement of a decision from another Member State based on if and how a child was heard. Currently the ground allows a court of the Member State of enforcement to refuse recognition or enforcement if a child was not heard in the other Member State in line with the law of the Member State of enforcement. The changes will allow a court to refuse recognition and enforcement if the child was not heard in line with the new requirement in the Regulation, but negotiation continues on the detail of this ground.

The Government recognised that there was a need to compromise on this issue and it welcomes the changes that have been secured and the work that continues on further changes. It believes these will mitigate the concerns it had, in particular in relation to the fact that this provision will create a new right in EU law that will be directly enforceable in UK courts notwithstanding the fact that the UK has not incorporated into domestic law the similar requirement to hear the child under Article 12 of the UN Convention on the Rights of the Child.

20 November 2018

Letter from the Chairman to the Rt Hon David Gauke MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice

Thank you for your letter dated 20th November 2018. I have considered this matter, and have decided to grant a scrutiny waiver for the vote on general approach at the Council meeting on 6-7 December.

Please write to us again with an update on the discussions at the Council meeting and the outcome of the vote, to be considered by the EU Justice Sub-Committee. We look forward to your response within the usual ten days.

5 December 2018

Letter from the Rt Hon David Gauke MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice

Thank you for your letter of 5 December in which you granted a scrutiny waiver for the vote on the general approach on this proposal at the JHA Council on 7 December. You asked for an update on the discussions at the Council.

I am pleased to be able to report that the general approach was agreed by the Council. As I explained in my letter of 20 November this means that agreement has been reached on the Articles and the most important recitals. The text that has been agreed follows the outline I provided in my previous letter. The one area I said on which discussions were continuing was in relation to the provision on hearing the child. The agreed text includes a recital which clarifies the scope of the provision. It states that the Regulation will leave the question of who will hear the child, and how the child is heard, to be determined by national law and procedure, and that while remaining a right, hearing the child will not constitute an absolute obligation, but must be assessed taking into account the best interests of the child, for example, in cases involving agreements between the parties.

As I explained in my previous letter the remaining recitals and the standard forms will be finalised early next year with formal adoption under the Romanian Presidency. Whether the UK will have a vote on adoption will depend on whether the proposal is referred to the Council before or after the date of the UK's exit. The date of application will be three years after the publication of the Regulation.

12 December 2018

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING A CENTRALISED SYSTEM FOR THE IDENTIFICATION OF MEMBER STATES HOLDING CONVICTION INFORMATION ON THIRD COUNTRY NATIONALS AND STATELESS PERSONS (TCN) TO SUPPLEMENT AND SUPPORT THE EUROPEAN CRIMINAL RECORDS INFORMATION SYSTEM (ECRIS-TCN SYSTEM) AND AMENDING REGULATION (EU) NO 1077/2011 (10940/17)

Letter from the Chairman to the Rt Hon Nick Hurd MP, Minister for Policing and the Fire Service, Home Office

Thank you for your letter of 24 July 2018 which was considered by the EU Justice SubCommittee at its meeting of 16 October. We decided to retain the proposal under scrutiny.

We would be willing to continue to grant a scrutiny waiver if the Government wishes to support a text in Council prior to the Christmas recess, provided that there are no significant changes to the proposal.

As before, we would ask that you keep us up to date with any developments in respect of this proposal (and in particular how the proposal may impact the UK as a third country after Brexit).

We look forward to a reply in due course.

16 October 2018

Letter from the Rt Hon Nick Hurd MP, Minister for Policing and the Fire Service, Home Office

I am writing to provide an update to your Committee on the progress of this dossier.

As you may recall, the two key outstanding issues in the dossier which prevented the conclusion of the trilogue discussions under the Bulgarian Presidency were on the inclusion of dual nationals and determining the criminality threshold above which fingerprints must be loaded into the centralised system. In an effort to reach a political compromise on these issues, the Bulgarian Presidency sought to bring them together in a package.

The key concern for the European Parliament (EP) was that dual nationals were effectively EU nationals who also held a third country nationality and so treating them differently by requiring their fingerprints to be taken under certain circumstances in ECRIS-TCN would be discriminatory, given there is no such requirement for EU nationals in ECRIS.

To address those concerns, while recognising the high ambition of Member States to see the continued inclusion of both dual nationals and a fingerprint "threshold" in the proposal, the compromise proposed the inclusion of dual nationals in ECRIS-TCN on the proviso that the taking of their fingerprints would not be subject to a minimum threshold, but in accordance with national law. I believe that this compromise is one which the UK could support, given the inclusion of dual nationals was a key UK objective for ECRIS-TCN, ensuring that an important loophole is not exploited whereby those who hold dual nationality can hide previous criminality.

However, the EP were unable to accept this approach, arguing that the mere fact that dual nationals are put into a different database is a discrimination because they are not treated the same way as EU-citizens are in ECRIS.

Given that the outstanding issues in the dossier remain unresolved, it is expected that the dossier will not be put forward for agreement at October Council. The Presidency will continue to seek a compromise with the EP, with the view to putting the dossier to a vote at December Council. I will endeavour to keep your Committee updated on the progress and developments on ECRIS-TCN as promptly as possible.

18 October 2018

Letter from the Rt Hon Nick Hurd MP, Minister of State for Policing and the Fire Service, Home Office

Thank you for your letter of 16 October 2018. I am writing to provide an update to your Committee on the progress of this dossier. I apologise for the delay in replying. The last meeting between Member States and the Presidency on the trilogue negotiations took place on Monday (6 December) and in responding to your letter I wanted to set out the most recent position to you.

As you may recall, the two key outstanding issues in the dossier are on the inclusion of dual nationals and determining the threshold above which fingerprints must be loaded into the centralised system. The key concern for the European Parliament (EP) remains that dual EU-TCN nationals are effectively EU nationals who also hold a third country nationality and by treating them differently by requiring their fingerprints to be taken under certain circumstances in ECRIS-TCN would be discriminatory, given there is no such requirement for EU nationals in ECRIS.

The EP continues to be opposed to the inclusion of dual nationals in the dossier and has enquired whether Member States can show further flexibility on the fingerprints issue. The EP has proposed removing the minimum rule on fingerprints in its entirety, meaning that fingerprints of all TCNs and dual nationals would only be entered in accordance with national law.

In seeking a compromise with the EP, Member States had offered to concede the lower threshold for fingerprints in order to ensure dual nationals were included in the ECRIS-TCN system. However, the EP's counter proposal - that the threshold for taking fingerprints of all TCNs is required only where it is permissible under a Member State's national law - is one which Member States have rejected given it significantly undermines the effectiveness of the system. As fingerprints are the primary form of identification, the UK supports a high ambition for fingerprints in the ECRIS-TCN proposal and will continue to do so.

Given that the majority of Member States were strongly opposed to the EP's suggestion, the Presidency will return to trilogues with the mandate to hold firm on fingerprints and continue to seek an agreement on the outstanding issues.

These issues remain unresolved and so at present I consider it unlikely that this dossier will be resolved under the Austrian Presidency and will thus fall to the Romanian Presidency to progress. As requested, I will endeavour to keep your Committee updated on the progress and developments on ECRIS-TCN as promptly as possible.

With regard to how the proposal may impact the UK as a third country after Brexit, the draft text does provide a facility for third countries to indirectly enquire about identity information held in the ECRIS-TCN centralised system. Indeed, the draft text states that Eurojust should also have direct access to the ECRIS-TCN system in order to act as a conduit for third country access in relation to requests for criminal records information for the purposes of criminal proceedings. Whilst this does not allow for third countries to make requests for other purposes, it does offer a helpful route in for third countries and other international organisations to identify where TCN convictions are held across the EU.

I trust this addresses your concerns.

11 December 2018

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE IMPORT OF CULTURAL GOODS (11272/17)

Letter from Michael Ellis MP, Minister for Arts, Heritage and Tourism, Department for Digital, Culture, Media and Sport

I am writing to give you an update on this proposal.

I am sorry that I have not been in touch about this proposal for some time. Unfortunately, there was little progress in negotiations in Council for several months. However, the Austrian Presidency has now grasped the nettle and is aiming to begin trilogue negotiations with the European Parliament in November.

I attach, in confidence, a copy of the Presidency's most recent revised text. It is a significant improvement on the original proposal, and it addresses many of the concerns we have been articulating to our EU partners over the last year. Overall, I consider that it is a far more practicable, reasonable and proportionate proposition than the original proposal, and that it forms a good basis for negotiations with the European Parliament. This text will be considered by Coreper on 7th November, with a view to agreeing a mandate for the Presidency to begin trilogue negotiations. I will keep the Committee informed as negotiations progress.

The revised proposal:

- reduces the volume of cultural goods which will require an import licence or an importer statement by: excluding cultural goods which were created or discovered in territory which is now part of the EU from the scope of the Regulation; reducing the number of categories of cultural goods which will require an importer statement; and applying a minimum value threshold of €10,000 (as well as the minimum age threshold of 250 years) to all categories of cultural goods which require an importer statement and to the category of rare books and incunabula which requires an import licence;
- removes the Commission's power to amend the categories of cultural goods, including the age and value thresholds, by delegated acts;
- further reduces the volume of cultural goods which require an import licence or importer statement by expanding the exemptions to include returned EU cultural goods which were temporarily exported, and cultural goods which are being temporarily imported into the EU for conservation, exhibition, digitisation and public performance purposes;
- requires evidence (for the import licence) or a declaration (for the importer statement) of legal export from the country where the cultural goods were created or discovered;

however, in cases where that country cannot be reliably determined, or where the goods were exported from that country before 24 April 1972 (when the 1970 UNESCO Convention came into force), or where that country is not a State Party to the 1970 UNESCO Convention, evidence or a declaration of legal export from the last country in which the goods were located for at least 5 years and for purposes other than temporary use, transit, export or transhipment may be provided;

- makes clear that the operation of the Regulation must be supported by an IT system from the outset - a paper-based system would not be acceptable to us or to most other Member States, even as an interim measure;
- provides for an implementation period of up to six years (to allow for development of the IT system) from the date on which the Regulation comes into force before the provisions relating to import licences and importer statements come into effect.

A new element, which did not feature in the Commission's original proposal, is a general prohibition on bringing cultural goods of any age or value into the customs territory of the EU if they have been unlawfully exported from the country where they were created or discovered. Other Member States considered that it was important to state this clearly in the Regulation. We have secured an agreement that it is a statement of the principle - cultural goods should not be imported if there is information to suggest that they have been unlawfully exported from another country - and it does not require any new procedures for border and customs authorities or for importers. This provision would come into effect 30 months after the Regulation comes into force.

The Presidency has sought to introduce a partial relaxation of the requirements for cultural goods destined for art fairs: goods which would otherwise require an import licence when they are imported into the EU will only require an importer statement if they are imported under temporary admission for a commercial art fair. If they are subsequently sold and remain in the customs territory of the EU after the fair, they will then require an import licence. However, we consider that the text which is currently proposed for this does not meet the policy intention and may be unworkable. We are continuing to discuss this with the Presidency.

I should note that, despite our support for the Presidency's proposed text, we remain concerned at the lack of a proper evidence base for the Regulation. However, it is clear that there is an appetite across the Member States for a Regulation on the import of cultural goods as part of the fight against terrorist financing and the illicit trade in cultural goods.

Also, we have not been able to secure the deletion of the proposal for an importer statement for a range of categories of cultural goods, despite our misgivings about the potential and practical impacts of this measure. There is not enough support in the Council to remove it. However, the latest text ensures that it will be a light-touch measure, and as I have outlined above, the volume of cultural goods for which an importer statement will be required has been reduced.

There were a couple of outstanding issues from previous correspondence.

You asked to be informed of any further representations we receive from interested stakeholders. We have received views and representations from the antiquarian book trade, the UK National Committee of the Blue Shield and from a partner in a firm of lawyers which advises art market clients, all expressing concerns about various aspects of the proposed Regulation and its potential impacts. We have also had further discussions with the British Art Market Federation and other art market stakeholders.

You also asked for further explanation of the information note from Germany which suggested that the Regulation is not sufficient to preclude the import of illicit cultural goods into the EU. Some Member States, including Germany, consider that the EU needs to be more vigilant and active in preventing the import of cultural goods which have been stolen, looted and unlawfully exported. We would not disagree that further efforts are needed, but we do not think this Regulation is the right vehicle to address this wider issue. The general prohibition, outlined above, underlines that unlawfully exported cultural goods should not be imported into the EU, but without introducing any new import procedures.

I hope this is helpful.

1 November 2018

Letter from the Chairman to Michael Ellis MP, Minister for Arts, Heritage and Tourism, Department for Digital, Culture, Media and Sport

Thank you for your letter of 1 November 2018 which was considered by the EU Justice Sub-Committee at its meeting of 6 November. We decided to retain the proposal under scrutiny.

We note that, whilst the revised proposal may not address all the concerns raised by the UK Government, it is nonetheless likely to be agreed at Coreper in November. We would raise one further issue of concern – namely the fact that the €10,000 thresholds listed in the Annex does not appear to be indexed to inflation. This would clearly impact the proportionality of the proposed measure.

We ask that you keep us up to date with any developments.

We look forward to your response to this letter in due course.

6 November 2018

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL LAYING DOWN RULES ON THE EXERCISE OF COPYRIGHT AND RELATED RIGHTS APPLICABLE TO CERTAIN ONLINE TRANSMISSIONS OF BROADCASTING ORGANISATIONS AND RETRANSMISSIONS OF TELEVISION AND RADIO PROGRAMMES (12258/16)

Letter from Sam Gyimah MP, Minister of State for Universities, Science, Research and Innovation, Department for Business, Energy and Industrial Strategy

Thank you for your letter of 17 April 2018, in which you granted a scrutiny waiver in order to vote on this file.

I am writing to update you on 12258/16 Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmission of television and radio programmes file, and also to request for this to be cleared from scrutiny.

Subsequent to your letter, trilogue discussions proceeded more slowly than expected, due to disagreements between the Council and European Parliament on the scope of the country of origin rule, the inclusion of direct injection and also the possible conversion of the Regulation to a Directive.

Country of origin rule

As per my letter of 17 April, The European Parliament seeks a country of origin rule which is limited to news and current affairs, applying to a very narrow amount of audio visual content. The Government considers that a narrowing of scope of country of origin can help to protect the well-established practice of territorial licensing in the sector, and is supportive of this. The Council text includes productions which are made 'in-house' by the broadcasting organisations. While this has not yet been formally agreed in the trilogue process, it looks likely that the file will be agreed with a very narrow scope, whether or not in-house productions are included.

Direct injection

As previously, the Commission has resisted the inclusion of new provisions relating to 'direct injection', which the Parliament has advocated. Direct injection is a technical means of broadcast, where the broadcasting organisation provides the signal directly to a distributor. Some Member States have argued for inclusion and others are willing to do so on the basis that the Regulation be changed to a Directive (see below). As a middle ground in trilogues it appears that the file will be agreed with direct injection included. Direct injection will be treated as a retransmission where a broadcast is distributed by a distributor in parallel with the original broadcasting organisation, which will attract mandatory collective rights management. It is expected that so-called 'pure' direct injection (where

the broadcaster provides the signal to a distributor but does not broadcast itself) will require both the broadcasting organisation and the signal distributor to obtain authorisation, although Member States can choose how this should be done. As long as the provision on pure direct injection is an optional, 'may', provision - which Member States can choose to implement or not, according to their domestic circumstances – and right holders were sufficiently protected, e.g. by requiring mandatory collective rights management, the Government would support this provision.

Conversion to a Directive

Several Member States have made their support for the trilogue position adopted thus far, as being contingent to the Regulation being converted to a Directive. A Directive would allow Member States to implement the cross-border provisions on broadcasting in a way which is compatible with their existing domestic arrangements, avoiding creating a two-tier system which would be complex for stakeholders to navigate. While the Government does not share these specific concerns, a Directive would give greater freedom in the implementation of the rules around online transmissions, and ensure greater consistency with existing legislation stemming from the implementation of the Satellite and Cable Directive.

The Austrian Presidency has scheduled a final trilogue for the near future and should this prove successful, we would expect the results to be put to a Council vote shortly thereafter. As per my previous letter, should the trilogues establish a text which protects territorial licensing, and meets the Government's negotiation objectives, the Government would wish to vote in favour in any subsequent Council meeting under the Austrian Presidency.

13 November 2018

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE EUROPEAN UNION AGENCY FOR CRIMINAL JUSTICE COOPERATION (EUROJUST) (12566/13)

Thank you for your Explanatory Memorandum dated 22 November 2018. It was considered by the EU Justice Sub-Committee at its meeting of 11 December 2018.

We decided to clear this matter from scrutiny, including all the texts of the proposed Regulation reforming Eurojust deposited in Parliament since July 2013.

We welcome the Government's decision to opt in to this matter after its adoption by the Council on 6 November 2018 and are pleased that the Government has endorsed the position advocated by this Committee in October 2013. We note your conclusion that the final text has addressed the Government's concerns with the Commission's proposal and your desire to maintain "operational continuity" and "minimise disruption for UK law enforcement and prosecution authorities ahead of the UK exiting the EU".

However, there are inevitable and serious consequences for the Government's continued participation in the EU's agencies inherent in Brexit and the Withdrawal Agreement (see for example Articles 7 and 128). Our recent report, Brexit: the Withdrawal Agreement and Political Declaration (24th Report of Session 2017-19, 5 December 2018, HL Paper 245) expressed concern about the sudden removal of the UK's institutional privileges, particularly those relating to the EU's many executive agencies (paragraph 122).

We do not expect a response to this letter.

11 December 2018

Letter from Kelly Tolhurst MP, Minister for Small Business, Consumers and Corporate Responsibility, Department for Business, Energy and Industrial Strategy

Thank you for your letter dated 17th July 2018, in reply to Andrew Griffiths' letter of 18th June.

Update

i. Timetable

I would like to update the Committee on progress with the negotiations for this draft Directive. Since our letter of 18th June, a second draft of the proposal was published based on the outcome of the 4th June Justice and Home Affairs (JHA) Ministerial Council meeting. Technical working group meetings are continuing throughout the autumn. There is ambition to complete EU negotiations on both this file and the related draft Digital Content Directive ('DCD') before the European Parliament elections in May. As a result, it is likely that the EU Presidency will seek to achieve a Council General Approach in December, for which I will write again in the coming weeks to request that the Committee considers granting a scrutiny waiver. I note your comment on the impact assessment, but it appears unlikely that there will be another opportunity to discuss this given the stage that the negotiations are in.

ii. Consumer remedies

The UK has presented a drafting proposal that sets the regime for consumer remedies at minimum harmonisation, which would allow Member States to retain or adopt provisions on consumer remedies that go beyond existing minimum EU law. This would avoid requiring the UK to weaken certain aspects of its existing consumer remedy regime, such as abolishing the short-term right to reject a faulty good, meeting a key UK negotiating objective. At present, evidence suggests that there is enough support for the UK's proposal to represent a blocking minority. However, these are only initial positions and it will not be debated until late October.

iii. Time limits for a consumer remedy

On the period within which a fault must arise for the consumer to be entitled to a remedy (known commonly as the 'liability period'), the new draft text reflects JHA Council's desire to set this at minimum harmonisation and this is supported by most Member States. However, we do not yet consider that this drafting fully meets our objectives because the text assumes that Member States have a liability period in the first place. This is not the case in the UK. UK laws provide for limitation periods (six years in England and Wales and five years in Scotland), which serve a different purpose by setting a time limit for pursuing legal action. In practice, the existence of a limitation period acts as a de facto liability period because the fault must arise before the deadline for bringing a claim, but it is a distinct legal concept. Our objective is to resist introducing a new concept of a liability period into UK consumer law, and we will therefore press for more clarity in the drafting.

iv. Period for a reversed burden of proof

On the period for the reversed burden of proof in favour of the consumer (during which any fault is presumed to have been present at the time the consumer acquired the goods, unless it can be proven otherwise or unless the presumption is incompatible with the nature of the goods or with the nature of the lack of conformity), Council currently supports setting this at a period of one year, aligning it with the current position in the draft DCD. The existing period in most Member States, including the UK, is six months, so this would represent an increase in consumer protection in the UK.

EU withdrawal

Finally, on EU withdrawal, the Committee will be aware that the Government published its White Paper on the future relationship between the UK and EU on 11th July. Section 1.6.6 sets out the government's commitment to maintaining high standards of consumer protection in the future relationship and that there should be a negotiated agreement on future cooperation on cross-border enforcement. The European Union (Withdrawal) Act 2018 will retain UK consumer protections that are based on EU law. This means that after we leave the EU, and when buying from UK-based traders, UK consumers will be able to rely on the same rights they have now, delivering stability and continuity for consumers and businesses. This will protect the majority of purchases by UK consumers.

I will continue to keep the Committee updated on the progress of these negotiations. The Committee will note that I have today also provided a written update on the parallel negotiation for the DCD, which is in the interinstitutional ('trilogue') phase.

6 November 2018

Letter from the Chairman to Kelly Tolhurst MP, Minister for Small Business, Consumers and Corporate Responsibility, Department for Business, Energy and Industrial Strategy

Thank you for your letter dated 6 November 2018 which was considered by the EU Justice SubCommittee at its meeting of 18 December.

We decided to retain the proposal under scrutiny.

We are grateful for your timely update on this proposal's progress through the Council. We welcome the Government's efforts to secure a proposal that introduces so-called minimum harmonisation measures which would, in turn, avoid the need to reduce the consumer protection standards operating in the UK (for example, the rules regarding consumer remedies and time limits). We also endorse your attempts to avoid the introduction into UK consumer law of the new concept of the so-called "liability period".

As for your request for a waiver ahead of the Council's agreement of a General Approach in early December, we understand that you have decided not to vote in favour of the proposed text, so the issue of a waiver no longer arises.

We look forward to considering, in due course, your summary of the December Council's discussion of this matter.

19 December 2018

PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON CERTAIN SPECTS CONCERNING CONTRACTS FOR THE SUPPLY OF DIGITAL CONTENT ('DCD') (15251/15)

Letter from Kelly Tolhurst MP, Minister for Small Business, Consumers and Corporate Responsibility, Department for Business, Energy and Industrial Strategy

Thank you for your letter dated 12th September 2017, in reply to Margot James' letter which summarised the General Approach reached in Council on the above file. My officials provided an update to your clerks on 15th December, and I would like to update the Committee on how the inter-institutional ('trilogue') phase of the negotiations for this file has progressed.

As detailed in my officials' update, the European Parliament reached its position on 21st November 2017, thus paving the way for the trilogue phase to begin in December. This has taken longer than expected due to the complexity of the instrument, the nature of the differences between the Parliament and the Council, and the delays in the negotiations for the associated draft Sale of Goods Directive ('SGD'). However, trilogue is now nearly complete, and it is a priority of the current Austrian Presidency of the EU to make progress on the SGD so that the two files can progress more evenly together. There is increasing pressure in Brussels to finish both instruments in time for the European Parliament elections next spring.

Below I describe some of the key issues that have been discussed in trilogue phase.

Scope: Links with the proposed Sale of Goods Directive

The two draft Directives are closely linked. A key issue concerned the scope of each Directive and, specifically, how embedded digital content should be treated. The precise definition of embedded digital content is yet to be agreed, but in general it refers to content the absence of which would render a good inoperable or would prevent it from performing its main functions. A good example is the software that controls the functioning of a washing machine. The outcome is likely to be that embedded digital content comes within scope of the SGD rather than the DCD, which was the Council's starting position, on the basis that this would be the clearest outcome for consumers because they are more likely to think about a good as a whole and not its component parts.

Scope: Links with the new European Electronic Communications Code ('EECC')

The new EECC completed EU negotiations earlier this year. It provides common EU rules regulating the telecoms industry and has been updated to reflect developments in the digital economy. There are a couple of links with the DCD. The first concerns scope to ensure that regulation is appropriate and proportionate depending on the type of service provided. The

EECC takes a service-blind approach and has categorised interpersonal communication services as either number-based or number-independent, depending on whether it is connected to the national numbering plan. Most consumer protection matters in the EECC, such as contract information and duration provisions, regulate number-based communication services (in addition to internet services), whether they are traditional (such as mobiles and landlines) or 'over-the-top', such as Skype. Number-independent interpersonal communication services (known as 'NIICs') such as Whatsapp are not connected to the national numbering plan, and are therefore considered to be a digital service within the scope of the contractual provisions of the DCD.

This approach aligns consumer protection with the service provided, thereby ensuring that companies are not burdened with unnecessary provisions.

Links with the new European Electronic Communications Code ('EECC'): bundles

The second link concerns cases in which electronic communication services (as regulated by EECC) and digital content or services (as regulated by DCD) are bundled together when provided to consumers.

The EECC provides that where a bundle comprises, as a minimum, an internet-access service (such as broadband) or a traditional number-based interpersonal communication service (connected to the national numbering plan), then consumer rights as provided for by EECC apply to the whole of the bundle (for example, where a consumer has the right to terminate one element of the bundle, they would have the right to terminate the whole bundle). This helps to prevent a situation in which a consumer could be locked into a bundle in which only some of the services operate (this concept also applies where the bundle includes tangible goods and is explained in my separate letter on the SGD). This outcome is in line with UK objectives.

Compensating traders for the termination of long-term contracts

The DCD allows consumers to terminate, free of charge, a contract for digital content or services any time after the first twelve months, including where an initial contract duration has been extended beyond this period. Following discussions, the Presidency proposed drafting that would entitle the trader to some proportionate compensation for any promotional advantage that may have been enjoyed by the consumer and that is of direct link to the agreed contract duration. This would also include goods, where they have been provided, although the consumer would also have the option of returning the good to the trader as part of the free of charge termination right. A recital would provide more detail on how this compensation could be calculated. This proposal is due to be discussed in the autumn, so it is unclear presently whether it will be agreed, but our initial reaction is that it represents a sensible balance. This requirement for trader compensation came at the insistence of the European Parliament and was also a concern for traders.

Consumer remedies and the level of harmonisation

It was agreed in trilogue to reserve these issues until the autumn so that they can be discussed in one context together with the parallel provisions in the SGD. In general, there has been convergence on

consumer protection measures between the two Directives, but this won't be agreed until later in the year.

EU withdrawal

Finally, the Committee will be aware that the Government published its White Paper on the future relationship between the UK and EU on 11th July. Section 1.6.6 sets out the government's commitment to maintaining high standards of consumer protection in the future relationship and that there should be a negotiated agreement on future cooperation on crossborder enforcement. The European Union (Withdrawal) Act 2018 will retain UK consumer protections that are based on EU law. This means that after we leave the EU, and when buying from UK-based traders, UK consumers will be able to rely on the same rights they have now, delivering stability and continuity for consumers and businesses. This will protect the majority of purchases by UK consumers. Furthermore, UK exporters will benefit from there being a single set of contract rules in the EU.

I will keep the Committee updated on the progress of the trilogue negotiations. It is possible that the EU Presidency will seek to achieve a final vote on the file by December, for which I will write again in the coming weeks to request that the committee considers granting a scrutiny waiver. The Committee will note that I have today also provided a written update on the parallel negotiations for the SGD.

6 November 2018

Letter from the Chairman to Kelly Tolhurst MP, Minister for Small Business, Consumers and Corporate Responsibility, Department for Business, Energy and Industrial Strategy

Thank you for your letter dated 6 November 2018 which was considered by the EU Justice Sub-Committee at its meeting of 18 December.

We decided to retain the proposal under scrutiny.

Thank you for providing us with a detailed and technical analysis of the trilogue's discussion of this proposal, which also illustrates its complexity. In addition, we note the complications for this proposal's progress through the trilogue stage caused by the difficulties facing the accompanying proposal dealing with the Sale of Goods.

We look forward to considering an update on the trilogue discussion in due course.

19 December 2018

PROPOSAL FOR AN INTER-INSTITUTIONAL AGREEMENT ON A MANDATORY TRANSPARENCY REGISTER - DRAFT COUNCIL DECISION ON THE REGULATION OF INTERACTIONS BETWEEN OFFICIALS OF THE GENERAL SECRETARIAT OF THE COUNCIL AND INTEREST REPRESENTATIVES (15336/17)

Letter from Lord Callanan, Minister of State for Exiting the European Union, Department for Exiting the European Union

I am writing in response to your letter dated 3 July 2018, regarding the proposal for an InterInstitutional Agreement (IIA) on a mandatory Transparency Register.

With regards to your request for further information on the upcoming stakeholder engagement sessions, these have been postponed indefinitely by the Presidency due to the impasse between the Commission, the Council and the EP in tripartite negotiations. When we receive information on the stakeholder sessions, I will update the Committee.

Since your letter of 3 July, the three institutions have continued to negotiate on this proposal and, while all parties are committed to reaching a meaningful improvement on the status quo, progress remains slow. On 4 September, representatives of the three institutions met for a technical meeting on the Transparency Register. The Commission announced that they had received a political instruction to halt negotiations given the unsatisfactory positions of the other two institutions. The

Commission continues to push for the Council and European Parliament to adopt the principle 'no register, no meeting'.

Both the EP and the Council have made attempts to reach an agreement with the Commission. The EP have endorsed an additional package of transparency measures that included a voluntary public declaration for MEPs to pledge to meet only registered interest representatives. The Presidency have proposed a similar voluntary declaration for those Member States who wish to make clear that any meetings between their Permanent Representative or Deputy Permanent Representative and lobbyists are conditional upon prior registration in the six months before or during their Presidency.

All three parties have made it clear that they are unlikely to move from their outlined position. The Commission has said that these voluntary measures proposed by the EP and Council are not sufficient. We therefore assess that progress is unlikely to be made on this proposal until after the European Parliament elections in May 2019.

I hope this update is helpful and I will provide you with further information as soon as stakeholder sessions are planned or the negotiations resume.

9 October 2018

Letter from the Chairman to Lord Callanan, Minister of State for Exiting the European Union, Department for Exiting the European Union

Thank you for your letter dated 9 October 2018 which was considered by the EU Justice Sub-Committee at its meeting of 23 October.

We decided to clear the proposal from scrutiny.

We note that the current discussion in the trilogue has reached an impasse; that the planned information sessions with stakeholders have been postponed indefinitely; and, your prediction that, as matters stand, there will be no further progress on this dossier until after the European Parliamentary elections in May 2019 which is, of course, after the UK will have left the EU. We take this opportunity to remind you of your undertaking to provide us with a new Explanatory Memorandum on the respective positions of the Commission and the European Parliament if, and when, they emerge.

We do not expect a response to this letter.

23 October 2018

REQUEST FROM THE COURT OF JUSTICE OF THE EUROPEAN UNION TO THE COUNCIL OF THE EUROPEAN UNION ON PROPOSED AMENDMENTS TO PROTOCOL 3 TO THE STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION (7586/18)

Letter from the Chairman to Lord Callanan, Minister of State for Exiting the European Union, Department for Exiting the European Union

Thank you for your letter dated 23 August 2018 which was considered by the EU Justice Sub-Committee at is meeting of 16 October.

Unfortunately, the Committee felt that the quality of the response was rather inadequate. In particular, on the question of the introduction of a "permission stage", it was far from clear from your letter what concerns were initially raised by the Council of Bars and Law Societies of Europe. Moreover, it is not sufficient to suggest in a letter to this Committee that a stakeholder was "probably consulted" – there should be clear evidence on this point one way or the other.

Nonetheless, we accept that the introductions of a permission to appeal stage does not appear to be a significant impediment to access to justice in cases where there would be a "dual check" in cases involving an appeal from an "independent administrative body". In those circumstances, we decided to clear the proposal from scrutiny.

We do not expect a response to this letter.

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE A NEW DEAL FOR CONSUMERS (7875/18)

PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING COUNCIL DIRECTIVE 93/13/EEC OF 5 APRIL 1993, DIRECTIVE 98/6/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, DIRECTIVE 2005/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AND DIRECTIVE 2011/83/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AS REGARDS BETTER ENFORCEMENT AND MODERNISATION OF EU CONSUMER PROTECTION RULES (7876/18)

PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON REPRESENTATIVE ACTIONS FOR THE PROTECTION OF THE COLLECTIVE INTERESTS OF CONSUMERS, AND REPEALING DIRECTIVE 2009/22/EC (7877/18)

Letter from Kelly Tolhurst MP, Minister for Small Business, Consumers and Corporate Responsibility, Department for Business, Energy and Industrial Strategy

Thank you for your letter dated 17th July 2018, in reply to Andrew Griffiths' letter of 26th June.

Since the letter of 26th June there have been three further working groups in Brussels to discuss the two separate files that are contained in the New Deal for Consumers proposal. There has been steady progress on the file which proposes targeted amendments to the consumer acquis with the intention of modernising rules and improving enforcement. The first line-by-line analysis of the proposal has been completed and Member States have been generally receptive although a few areas (such as amendments to the Right of Withdrawal) have proven to be contentious. Member States have been asked to provide written comments on this file to the Austrian Presidency by 12th September. Progress on the proposed Directive on representative actions has been slow so far with roughly half of the first line-by-line analysis completed. Many Member States have expressed concerns about the impact the proposal could have on existing national legal systems. Working groups are due to start again on 3'd September.

You asked the following specific questions in your letter:

(i) does the Government intend to align with these proposals post-Brexit?

It is not yet clear whether, or to what extent, the UK will align or diverge with EU consumer law, and more specifically these proposals, after EU withdrawal. This will depend on the terms of our future economic partnership. However, the Prime Minister made clear in her Mansion House speech that the UK believes in the importance of strong consumer rights; and the White Paper on the future relationship states our commitment to maintaining high levels of consumer protection. The exact nature of this commitment and how it is translated into the agreement

will be subject to negotiation. This would go beyond commitments seen in traditional free trade agreements, and would ensure a fair trading environment for both sides.

(ii) are there areas covered by these proposals where the Government would want to diverge from the EU's rules after we leave?

Given that both proposals are in the early stages of negotiation, it is too early to say what form the final Directives will take and therefore whether the Government would want to diverge from any particular aspects. As I noted above, however, many Member States are concerned about the impact of the 'collective redress' proposal on national legal systems. In any event, it is not in the UK's interests to see a 'race to the bottom' in standards.

I will continue to keep the Committee updated regularly on the progress of the negotiations and the UK's objectives.

4 September 2018

Letter from the Chairman to Kelly Tolhurst MP, Minister for Small Business, Consumers and Corporate Responsibility, Department for Business, Energy and Industrial Strategy

Thank you for your letter dated 4 September 2018. It was considered by the EU Justice SubCommittee at its meeting of 16 October.

We decided to retain the three documents under scrutiny. We are grateful for your update on the Council's discussion of these proposals. We were interested to note that some Member States fear that the proposal on protecting consumers' collective interests (doc: 7877/18) may have a negative impact on national legal systems. In contrast, we recall that the UK consumer organisation Which? described it as "a significant development for consumers". We ask that you provide us with a detailed analysis of the Member States' concerns.

We note your replies to our Brexit related questions. Since the result of the referendum in June 2016, we have taken a keen interest in the impact of Brexit on consumer protection and, in December 2017, published a report Brexit: will consumers be protected? (9th Report of Session 2017-19, 19 December 2017, HL Paper 51). Our previous letter dated 17 July 2018 on these proposals, noted the Government's wish, as expressed in its White Paper (Cmnd 9593), to "maintain reciprocal high levels of consumer protection". We take this opportunity to state that we would not wish to see any Brexit-related diminution in the consumer protection rights currently applying within the UK, and intend to continue to keep a close eye on the impact of Brexit on consumer protection issues.

We look forward to considering your response within the usual 10 day deadline.

16 October 2018

Letter from Kelly Tolhurst MP, Minister for Small Business, Consumers and Corporate Responsibility, Department for Business, Energy and Industrial Strategy

Thank you for your letter dated 16th October 2018, in reply to my letter of 4th September 2018.

Since the letter of 4th September there have been two further working groups in Brussels, one on each of the two separate files that are contained in the New Deal for Consumers proposal. The first set of written comments on the file which proposes targeted amendments to existing EU consumer law (the 'Omnibus Directive') have been submitted by Member States, some of which were reviewed at a working group on 10th October. Another working group on that file has been arranged for 16th November where I anticipate that the written comments will be discussed further. As I mentioned in my previous letter, progress on the proposed Directive on representative actions has been slower than that on the Omnibus Directive, however the first line-by-line read through has now been completed. Member States have been asked to provide written comments on Articles 1-4, 7 and 15 by the 31 October, followed by comments on the remaining Articles by 23rd November which I would expect to be reviewed at a working group scheduled on 4th December.

In my previous letter I highlighted that many Member States had concerns about the impact the proposal on representative actions could have on their existing national legal systems. You have asked the following specific question in your letter in response to this:

We ask that you provide us with a detailed analysis of the Member States' concerns.

As I mentioned above the first line-by-line read through on this proposal has just been completed and Member States are now compiling their first set of written comments. It is therefore too early to provide a detailed analysis of the Member States concerns as the concerns raised so far have generally been provisional comments. In addition, many of these provisional comments were made with a scrutiny reservation in place so I cannot guarantee that these comments will stand after Member States have cleared their positions in their respective capitals. Although I cannot provide a detailed

analysis at this stage, I have provided a summary of key themes and issues that have emerged so far in discussions.

Minimum harmonisation approach

The European Commission (the Commission) has left it to the discretion of Member States whether to integrate existing national collective redress systems for consumers into the mechanism they envisage, or to put in place an additional system alongside existing national systems to comply with the Directive (i.e. it is being set at minimum harmonisation). They explained that their intention is to ensure that at least one collective redress system is in place in each EU Member State. When this was discussed, Member States (including the UK) were supportive of the minimum harmonisation approach, adding that they would strongly oppose maximum harmonisation as this would conflict with existing national systems, or systems currently being put in place nationally. Despite support of the minimum harmonisation approach, concerns were still raised about how the new system being proposed could co-exist with national systems.

Qualified entity criteria

There have been general concerns raised about the criteria being proposed to determine who can be designated as a qualified entity under the proposal, and therefore able to bring forward representative actions. The current drafting of the proposal says that Member States must designate an entity as a qualified entity if it is properly constituted according to national law, not-for-profit and has a legitimate interest in compliance with relevant EU law (Article 4(1)). The proposal sets out that the new collective redress scheme should contain "appropriate safeguards to avoid abusive litigation" (Article 1(2)) and the Commission has made clear that their intention is to avoid the potential for abusive litigation under the instrument. However, a number of Member States (including the UK) have commented that they have more stringent criteria for enforcers in their domestic laws and feel that the criteria proposed is not sufficient and is open to abuse. There has therefore been a push for more stringent criteria to be developed which the Commission is currently considering. Furthermore, the same group of Member States were unhappy that the criteria had been set at maximum harmonisation, despite the general minimum harmonisation approach to the Directive, meaning that they could not introduce or retain additional criteria domestically to align with their existing national laws. I expect the minimum/maximum harmonisation character of this element of the proposal to be a key issue as discussions progress.

Qualified entity funding

Alongside the criteria that qualified entities must meet, the Commission has included an additional safeguard in the proposal requiring qualified entities to declare at an early stage of an action seeking redress whether it has adequate resources to support the action, and to be fully transparent about the source of funding used for its activity in general. In particular, qualified entities are required to be fully transparent about any funding they get from a third party for a particular case to enable courts or administrative authorities to assess whether there may be a conflict of interest so as to avoid abusive litigation between competitors. A lot of Member States are concerned about the additional burden on courts and/or administrative authorities to assess a qualified entities funding for each redress order being brought forward. In addition, where funding is public, some Member States argue against the need for lengthy procedures to ensure funding is adequate for the action and argue that the risk of abuse is non-existent, so verification of the risk by the court should not be needed.

Low-value cases

Another issue which has proved to be controversial and has been opposed by most Member States is the proposal on 'low-value cases'. The Commission has proposed that where consumers have suffered such a small amount of loss that it would be disproportionate to distribute the redress back to the consumers, any funds awarded as redress should instead be directed to a public purpose serving the collective interest of consumers, such as awareness raising campaigns (Article 6(3)(b)). A lot of Member States disagreed fundamentally with the redress funds not going directly to affected consumers, with some again commenting that it raised legal and constitutional issues for them. Some felt that the provision is not in spirit with the intentions of the Directive and is essentially a fine rather than redress. Others commented that the consumer should at least be given the option to decide whether they would like to receive the fund, or if they endorse them going to a public purpose. My

officials highlighted that the UK has measures similar to this available to enforcers as part of the 'Enhanced Consumer Measures' in Part 8 of the Enterprise Act.

Effects of final decisions

The Commission has made it clear that they want to leave it to the discretion of Member States to decide whether representative actions can be brought in judicial or administrative proceedings, or both. As they have elaborated in Recital 12 of the proposal, the Commission believes that both procedures may effectively and efficiently serve the protection of the collective interests of consumers. In addition, discussions in the working groups have suggested that the Commission feels that giving Member States the choice of one or both is important to allow the proposed mechanism to be effectively implemented across the EU. This has caused some concern amongst Member States however when considering Article 10 (1) of the proposal which establishes that if a decision by an administrative authority or court has become final, it should be irrefutable evidence in any subsequent redress action in the same Member State. A number of Member States highlighted that their national systems do not allow an administrative decision to be final, and that courts cannot be bound by an administrative authority. This issue is compounded by Article 10 (2) which requires a final decision taken in one Member State by an administrative authority or court to be recognised by an administrative authority or court in another Member State as a 'rebuttable presumption' that an infringement has occurred. Some Member States highlighted that these two provisions raised serious constitutional issues for them.

I will continue to keep the Committee updated regularly on the progress of the negotiations and the UK's objectives.

6 November 2018

Letter from the Chairman to Kelly Tolhurst MP, Minister for Small Business, Consumers and Corporate Responsibility, Department for Business, Energy and Industrial Strategy

Thank you for your letter dated 6 November 2018. It was considered by the EU Justice Sub-Committee at its meeting of 18 December.

We decided to retain the three documents under scrutiny.

We are grateful for your thorough description of the concerns that some Member States have raised about the proposal dealing with representative actions (doc: 7877/18). It illustrates the technical nature of the Member States' provisional concerns and the Working Group's efforts to address the practical implications of this proposal for national legal systems.

We look forward to considering in due course further updates on the three proposals' progress through the Council.

19 December 2018

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON EUROPEAN PRODUCTION AND PRESERVATION ORDERS FOR ELECTRONIC EVIDENCE IN CRIMINAL MATTERS (8110/18)

PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL LAYING DOWN HARMONISED RULES ON THE APPOINTMENT OF LEGAL REPRESENTATIVES FOR THE PURPOSE OF GATHERING EVIDENCE IN CRIMINAL PROCEEDINGS (8115/18)

Letter from the Rt Hon Nick Hurd MP, Minister for Policing and the Fire Service, Home Office

I am writing to inform of you of the Government's decision not to opt in to the Proposal of the European Parliament and the Council on European Production Orders and European Preservation Orders for cross-border access to electronic evidence in criminal matters.

Law enforcement access to data held by service providers is an important issue and we support the underlying objective of improving cross-border access to electronic evidence. However, from the start of discussions on this issue, we have not supported the need for new EU legislation. That is because it is not clear how new EU legislation will be a practical and effective way to address the global issue of providing lawful access to data held anywhere in the world, even outside of the EU's jurisdiction.

Opting into the EU proposal would also mean that the EU would maintain exclusive competence in this area, and would impact on the UK's ability to conclude a UK-US Data Access Agreement which, once implemented, will allow companies in each country to comply with lawful orders for the production of electronic communications from the other without any conflict of law.

I will place a copy of this letter in the House Library to inform Parliament of the Government's opt in decision.

28 September 2018

Letter from the Chairman to the Rt Hon Nick Hurd MP, Minister for Policing and the Fire Service, Home Office

Thank you for your letter dated 28 September which was considered by the EU Justice Sub-Committee at its meeting of 6 November. We decided to retain the matter under scrutiny.

We note your decision not to opt in to the proposal on European Production Orders and European Preservation Orders for cross-border access to electronic evidence in criminal matters. However, your letter makes no reference to our letter of 21 June 2018 (enclosed for information). Nor does it answer all the queries that we posed in that letter. We ask that you revert to us in short order with the additional information requested.

Finally, please ask your officials to include the official document numbers in future correspondence so that our staff can easily cross reference previous work.

We look forward to your response to this letter in ten days.

6 November 2018

Letter from the Rt Hon Nick Hurd MP, Minister for Policing and the Fire Service, Home Office

I am writing to respond to your recent letter regarding the Government's decision not to opt in to the EU's e-evidence proposals. I apologise for the delay in responding to your letter of 21 June 2018, the letter was not received by the relevant officials due to an administrative error. I will endeavour to ensure that this does not happen again.

You asked for further information about the existing tools in this area. UK law enforcement can currently use Mutual Legal Assistance (MLA) and the European Investigation Order (EIO) for cross-border gathering of evidence. MLA is a formal method of cooperation between States for obtaining assistance in the investigation or prosecution of criminal offences. Evidence obtained via MLA can be used in court proceedings as admissible evidence. The EIO builds on MLA and allows us to obtain data from participating EU Member States within prescribed timeframes. This has proven, so far, to be an effective measure for combatting cross-border crime.

The UK is also supporting the work to develop an additional protocol to the Council of Europe (Budapest) Cybercrime Convention to enhance the provisions on sharing cybercrime evidence across jurisdictions. The aim is to ensure operational cooperation remains relevant and responsive to evolutions in cybercrime over the coming years.

Secondly you asked what concerns the Government had about the impact a decision to opt in to the Regulation would have on the UK's ability to progress the UK-US Data Access Agreement. If and when it is adopted, the proposed regulation will create a set of common rules which overlap significantly with the subject matter of the proposed agreement with the United States. For this reason, and had the United Kingdom opted in to the proposal and the proposal subsequently adopted, there would have been a significant risk of successful infraction by the EU on the basis that we had not

complied with our duty of sincere cooperation. A finding to this effect would have prevented the United Kingdom from concluding the agreement. Of course, as we chose not to opt in to the Regulation, this risk does not arise.

The Committee also requested further information on the obligations that would arise under the proposed Directive and who would bear any costs involved. The UK will need to fully implement the Directive if it comes into force before we leave the EU or during any Implementation Period. That means that any UK Communication Service Providers (CSPs) offering services within the EU will need to comply with the EU model. Under the Directive, any UK communication service provider that has no physical presence in the Union, but provides services to the EU, will be obliged to designate a legal representative to be based in at least one Member State. The Service Providers will incur the cost of the appointment of a legal representative.

Finally, you asked what analysis has been conducted on the suggested legal base of the Directive and whether the Government accepts that Articles 53, 56 and 62 TEFU are an appropriate legal base for the measure. The Government considers the current legal base to be appropriate, as the measure does not contain JHA content. The sole purpose of the Directive is to harmonise the way Member States oblige companies providing services within the EU to designate a legal representative in an EU Member State, to remove obstacles within the internal market. Whilst the intention is for the legal representative to respond to requests for electronic evidence, it is the Regulation rather than the Directive that requires legal representatives to do so.

21 November 2018

Letter from the Chairman to the Rt Hon Nick Hurd MP, Minister for Policing and the Fire Service, Home Office

Thank you for your letter dated 21 November 2018 which was considered by the EU Justice Sub-Committee at its meeting of 18 December. We decided to retain the matter under scrutiny.

We note your apologies for the delay in responding to our earlier correspondence. We are grateful for the clear explanations that you have set out in response to our queries.

We ask that you keep us up to date with any developments in respect of these proposals.

We look forward to your response to this letter in due course.

19 December 2018

PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL LAYING DOWN RULES FACILITATING THE USE OF FINANCIAL AND OTHER INFORMATION FOR THE PREVENTION, DETECTION, INVESTIGATION OR PROSECUTION OF CERTAIN CRIMINAL OFFENCES AND REPEALING COUNCIL DECISION 2000/642/JHA (8411/18)

Letter from the Rt Hon Ben Wallace MP, Minister of State for Security and Economic Crime, Home Office

I am writing to inform you that the Government has decided to opt in (under the UK's JHA opt-in Protocol) to the proposed Directive. I would also like to address the questions raised by you in your letter of 24 July.

The proposed Directive seeks to improve the sharing of financial information, including bank account details, and financial analysis, to support law enforcement investigations and prosecutions. The Directive would repeal but not replace the existing Council Decision covering cooperation arrangements between financial intelligence units (FIUs), as these arrangements are now contained in the Fourth Money Laundering Directive (4MLD), which the UK participates in.

Through our Serious Organised Crime Strategy and our Action Plan for anti-money laundering and counter terrorist finance, we have made it clear that being able to tackle money laundering and share information internationally is a priority. The proposed Directive will bring benefits to the UK through ensuring that our operational agencies are able to seek and receive financial intelligence, including

bank account details, where appropriate, in order to tackle both money laundering and wider criminality.

You have asked two questions relating to the detail of the Directive. You have asked for my assessment of the impact of the proposal that EU financial intelligence unit (FIU) requests would have a higher priority than those from non-EU FIUs. You have also asked whether there would be domestic procedural safeguards in place to prevent inappropriate or disproportionate disclosures of information. We intend to seek changes to the draft Directive to ensure that the timeframe for requests for information are the same as those currently in use for requests from both EU and non-EU FIUs. We also intend to seek to amend the Directive to ensure that the decision on whether to share information lies with the FIU, rather than the FIU being automatically required to provide the information. The UK FIU already determines whether sharing of information is necessary and proportionate, and such an amendment would be in line with current operations. We believe that many Member States have similar concerns, and there is support for both of these amendments.

You have also asked how the national register of bank accounts, as required by the Fifth Anti-Money Laundering Directive, will be developed and implemented, and when the consultation on the Directive will take place. The Government is considering which agency will host the national register of bank account ownership, and will announce this in due course. The transposition deadline for the Fifth Anti-Money Laundering Directive falls on 10 January 2020, with a further deadline of 10 September 2020 for national registers of bank account ownership to be established. HM Treasury will consult on the transposition of this Directive in due course.

20 September 2018

Letter from the Rt Hon Ben Wallace MP, Minister of State for Security and Economic Crime, Home Office

I am writing to update your Committee on the progress of negotiations on this measure.

As you will be aware from my letter of 20 September, the Government has decided to opt in to this measure. The Government strongly supports the intention behind the Directive of improving the sharing of financial information, including bank account details, and financial analysis, to support law enforcement investigations and prosecutions.

While we, along with all other Member States, had some concerns with the original draft of the text, particularly regarding the proposed mandatory sharing of information by financial intelligence units, which the UK believed contravened the Fourth Money Laundering Directive, and the timeframes for sharing information, which the UK believed was contrary to existing international standards, these issues have now been negotiated out of the text. The mandatory requirement for the Financial Intelligence Units (FIU) to share information and analysis has been removed from all sections of the text where such a requirement occurred. Any such sharing is now a matter for the FIU.

The Austrian Presidency has recently indicated that it wishes to seek a General Approach at the next COREPER on 21 November. Given the changes that the UK has succeeded in making, I believe that the text is sufficiently acceptable for the UK to support the General Approach. I would be grateful for your Committee to clear this measure, or provide a waiver, so that the UK can vote in favour of the measure at this meeting. In the absence of clearance or a waiver, the UK will abstain from the vote.

19 November 2018

Letter from the Chairman to the Rt Hon Ben Wallace MP, Minister of State for Security and Economic Crime, Home Office

Thank you for your letters dated 20 September and 19 November 2018 which were considered by the EU Justice Sub-Committee at its meeting of 20 November. We decided to retain the matter under scrutiny, but we are content to grant a scrutiny waiver as requested.

We ask that you keep us up to date with developments in respect of this proposal.

We look forward to your response to this letter in due course.

21 November 2018

Letter from Kelly Tolhurst MP, Minister for Small Business, Consumers and Corporate Responsibility, Department for Business, Energy and Industrial Strategy

Thank you for your letter dated 24 July 2018. You asked a number of questions relating to the proposed Directive on whistleblowing. I will answer your questions in turn.

Firstly, you asked if the Government is satisfied that the UK has adequate provision for whistleblowing in the current regime. The Employment Rights Act, provides employment protection for workers in all sectors who have blown the whistle. It enables them to seek redress if they are dismissed or suffer detriment at the hands of the employer because they have made a 'protected disclosure' about specified types of wrongdoing. Over recent years the Government has made improvements to the whistleblowing framework, such as guidance for whistleblowers on how to make disclosures and legislation to require most prescribed persons to produce an annual report on whistleblowing disclosures made to them by workers. With these improvements, the Government believes that the whistleblowing framework is proportionate and effective. However, we are committed to review changes made to the framework next year.

You asked for our detailed assessment as to whether these issues would be better tackled at a Member State level. The Government considers the reasoning for EU-level action proposed by the Commission has some justification, particularly in the case where breaches may have effects across several borders and therefore have an uneven effect. But as we set out in the Explanatory Memorandum, the Government does have concerns relating to proportionality. For example, in the United Kingdom, the whistleblowing framework allows 'prescribed persons' to operate their own policies and procedures in relation to handling and investigating complaints, in line with the legislation that applies in their own regulatory fields. Independent regulators and other bodies are sufficiently supervised within existing frameworks and set their procedures within those frameworks, based upon practice and need. The Government believes the current proposals should reflect the flexibility in the UK approach, whereby the Government has issued guidance and a code of practice for employers, and guidance for prescribed persons, on how to handle whistleblowing disclosures.

You asked which court(s) would hear these types of complaints. Article 14 of the proposed Directive provides a list of forms of 'retaliation' that may be taken against a whistleblower which must be prohibited. This is a non-exhaustive list and could include intimidation, harassment, discrimination, damage to reputation, financial loss and termination of a contract for goods or services as well as dismissal or detriment in employment. These various forms of 'retaliation' cover a wide array of civil and criminal actions, which could be heard by a variety of courts or other forums across the various jurisdictions of the United Kingdom, As the Directive is still in the early stages of negotiation, the Government has not yet assessed the impact that these complaints could have on existing forms of action or their impact upon capacity and other associated issues.

Finally, you asked how any national security exemption would operate in practice. The Government, alongside other Member States, have raised these issues during initial negotiations. In response, the Commission has noted recital 21 of the proposal, which states that 'the Directive should be without prejudice to the protection of national security and other classified information which Union law or the laws, regulations or administrative provisions in force in the Member State concerned require, for security reasons, to be protected from unauthorised access'.

On the understanding that the Directive does not offer any protections for third parties reporting on 'unlawful activities' or 'abuse of law' related to national security information, we believe that the existing legal framework would continue to apply to any such reporting. The Government shall continue to monitor the scope of the Directive and will request more explicit reference to an exemption for national security information during negotiations of the text.

3 September 2018

Letter from the Chairman to Kelly Tolhurst MP, Minister for Small Business, Consumers and Corporate Responsibility, Department for Business, Energy and Industrial Strategy

Thank you for your letter dated 3 September 2018 which was considered by the EU Justice Sub-Committee at its meeting of 16 October. We decided to retain the proposal under scrutiny.

We note that the Directive is still "in the early stages of negotiation". In those circumstances, we would ask that you continue to keep us updated on four outstanding matters:

- Your assessment of the proportionality of the final proposed text (in light of the concerns expressed in your letter);
- Your assessment of the impact that any complaints made under the Directive could have on the UK courts system; and,
- Your final assessment of the operation of the national security exemption. In particular, we would ask you to elucidate on the specific concerns expressed by the UK Government on this issue and any further reassurance that you receive.
- Your letter notes that the Government is committed to review changes to the UK framework next year. Please could you tell the Committee what form this review will take and when it will be made public?

We look forward to your reply in due course.

16 October 2018

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING REGULATION (EC) NO 469/2009 CONCERNING THE SUPPLEMENTARY PROTECTION CERTIFICATE FOR MEDICINAL PRODUCTS (9485/18)

Letter from Sam Gyimah MP, Minister of State for Universities, Science, Research and Innovation, Department for Business, Energy and Industrial Strategy

Thank you for your letter dated 3 July 2018.

You asked a number of questions relating to the European Commission's proposal for a supplementary protection certificate (SPC) manufacturing waiver. I will answer your questions in turn.

1) **The outcome of our assessment of the proposal's impact.**

In your letter, you note the Government's reservations about the published studies on the impacts of the SPC manufacturing waiver, and asked for further information on the analysis of the impacts of the proposed Regulation.

A full impact assessment is currently being prepared, but work carried out by economists at the Intellectual Property Office (IPO) since the Explanatory Memorandum was submitted suggests that, based on the UK's current share of EU pharmaceutical exports, we would expect the manufacturing waiver to result in a small net gain to the UK.

However, there are caveats to this analysis as it relies upon the existing published studies. More detailed information is provided in Annex A, which will form the basis of the final impact assessment.

2) **A summary of the views of the pharmaceutical industry and the National Health Service.**

Following submission of the Explanatory Memorandum to Parliament, my officials met with representatives of the pharmaceutical industry, both originator companies and generic manufacturers, to get their views. The sector does not have a single view on the proposals.

<u>Originators</u>

Originators, who broadly speaking generate and own intellectual property, acknowledge that there is significant political will to implement an export waiver, although they dispute the value of the measure since other countries with significant generic sectors will respond in kind. It is of key importance to

innovators that any export waiver is kept as a targeted measure. They welcome the fact that the waiver will not apply to SPCs which have already been granted, but consider pending applications should also be exempt from the waiver, in part because of the time required for business planning.

Their main concerns are to ensure that stockpiling of products for the EU market remains out of scope of the proposals and to ensure that the waiver does not extend to patents. More detailed and technical comments raised include ensuring that adequate safeguards exist e.g. preventing leakage of products for export onto the EU market, a preference for an increased notification period to at least 90 days before the start of manufacture, and some issues relating to legal drafting of the proposals, in particular the potential for legal challenge of certain definitions contained within the proposals.

Originators also expressed concern that the proposals do not appear to take account of the complexity of the manufacturing process for pharmaceutical products, in relation to "the maker" and sub-contractors, and that this could result in increased litigation.

Generic manufacturers

Generic manufacturers welcome the proposals, which will allow them to manufacture SPCprotected products in the EU for export to countries where IP-protection has expired. They are of the opinion that in order for the waiver to achieve its stated aims in a reasonable timeframe, granted SPCs should be in scope.

Generic companies will need to assess the potential benefits of using the waiver against the risks of legal challenges from innovators or revealing commercial information to competitors, and in this respect raised concerns in relation to the requirement to provide potentially commercially sensitive information for publication by competent authorities. They are of the opinion that the current 28 day notice period is adequate for innovators to make a legal challenge if required.

National Health Service

The Department for Health and Social Care and NHS England are of the view that although the manufacturing waiver will have little impact during the waiver period (as medicines produced in accordance with the waiver are for export only), some positive benefits may be realised after expiry of relevant IP rights if manufacturing capacity in the UK and EU increases. A greater number of potential suppliers of generic medicines could be beneficial in terms of price competition, continuity of supply and speed of access to these products.

3) How the UK will retain flexibility to reframe SPC legislation whilst retaining the proposed measure in UK law.

Supplementary protection certificates are national intellectual property (IP) rights provided for by EU Regulations. In line with the Government's approach to exit, EU legislation will be retained in UK law at exit to prevent a cliff-edge and provide legal certainty for business. We anticipate the export waiver will come into force during the implementation period and will therefore be retained in domestic legislation at exit. If we do not agree a Withdrawal Agreement with the EU and there is no implementation period, the Government will consider whether it would be in the UK's interest to reframe SPC legislation, including with respect to an exporting waiver.

As explained in the Explanatory Memorandum, our ability to reframe SPC legislation after the UK's exit from the EU will depend on the specific nature of any future economic partnership agreement with the EU, which is a matter for negotiation. If the agreement allows, the UK would have freedom to make changes if it was in the UK's interests to do so.

7 August 2018

Letter from the Chairman to Sam Gyimah MP, Minister of State for Universities, Science, Research and Innovation, Department for Business, Energy and Industrial Strategy

Thank you for your letter dated 7 August 2018. It was considered by the EU Justice Sub-Committee at its meeting of 16 October.

We decided to retain the proposal under scrutiny.

As we noted in our letter dated 3 July 2018, pharmaceuticals is a significant sector for the UK economy and, with this in mind, we welcome your helpful summary of the stakeholders' views of this proposal. They illustrate the delicate balance that this EU legislation seeks to achieve between the competing interests that converge in this sector. We note, for example, that the so-called originators of intellectual property rights wish to ensure that the proposed waiver should only apply to future Supplementary Protection Certificates (SPCs) whilst the manufacturers of generic medicinal products (those most likely to benefit from the proposed policy change) would wish to see it apply to certificates that have already been granted "in order … to achieve its stated aims in a reasonable timeframe". These competing interests may explain why you have not, as yet, completed your impact assessment.

Your response ignores a number of considerable Brexit-related difficulties which, in turn, undermine your claim that the Government's approach to Brexit is providing certainty for business. These factors include:

- the current "impasse" in the Brexit negotiations;
- the lack of clarity over whether Brexit will be on 29 March 2019 or at the end of a negotiated transition period (currently 31 December 2020); and,
- the question mark hanging over a Brexit based on the Government's July White Paper (the Chequers plan).

We note that on 24 September 2018, as part of its plans for a no-deal Brexit, the Government published a paper "Patents if there's no Brexit deal" which sets out your contingency plans for the loss of this Regulation should the UK leave the EU on 29 March 2019 without a deal. The paper states that the "relevant EU legislation … will be retained in UK law under the EU Withdrawal Act 2018" and argues that the existing system "will therefore remain in place" after we leave, "operating independently from the EU regime, *with all the current conditions and requirements*" (emphasis added). It continues: "Any UK legislation supporting the existing systems will also continue to function as normal. This means that the EU's legislation on supplementary protection certificates will be kept in UK law. This law … will form the UK's own supplementary protection certificate regime on exit".

We are not convinced by your arguments that in the event of a no-deal Brexit the existing system "will remain in place … with all the current conditions and requirements". There is no national legislative mechanism under which the UK Government can unilaterally replicate via-national legislation the EU mechanisms that provide for the reciprocal recognition of rights and responsibilities such as those inherent in the current system of SPCs, nor are we aware of any plans to create one.

The paper "*Patents if there's not Brexit deal*" ignores the fundamental aspect and limitations of a no-deal Brexit: the sudden, overnight loss of the responsibilities and privileges of EU membership including access to the institutional and administrative framework that underpins access to the EU's Single Market, most crucially in this context, the European Medicines Agency. (The scope of the Regulation that this proposal seeks to amend and which you claim can be maintained unilaterally via national legislation is defined as "any product protected by a patent *in the territory of a Member State*" (emphasis added) (Article 2). It also includes references to medicinal products licensed and regulated via the European Medicines Agency (Article 3(b)) and similar phrases are repeated throughout the Regulation and other EU legislation that supports its operation, including Directives 2001/83/EC or Directive 2001/82/EC.)

We also note that, whatever position the UK adopts for the time of its departure from the EU, these Regulations will not remain static. The Regulations will continue to evolve such that the UK and EU could diverge, and the UK would have to decide how to respond to such divergence.

We look forward to your reply within the usual ten days, and to discussing this matter (and others) when you appear before us.

17 October 2018

Letter from Sam Gyimah MP, Minister of State for Universities, Science, Research and Innovation, Department for Business, Energy and Industrial Strategy

Thank you for your letter dated 17 October 2018 regarding the European Commission's proposal for a Supplementary Protection Certificate (SPC) manufacturing export waiver in which you asked a series of supplementary questions about this proposal.

Firstly, you pointed to a number of potential issues relating to EU Exit and the impact on business uncertainty.

While I hope to provide some useful insight on EU exit issues in this letter, the proposal for which I am seeking the committee's review is not a feature of the ongoing withdrawal negotiations and its status in the future economic partnership will only be established through detailed negotiations that have not started yet. The UK retains the ability for the time being to play a full part in negotiations on this reform while we are a Member State of the EU.

Regarding your question about the withdrawal negotiations, we remain confident that – building on the progress we have made on the Withdrawal Agreement and the Political Declaration on our future relationship – a good deal can be agreed with the EU, one that works for businesses in both the UK and EU. The Government continues to work hard to finalise agreement on the remaining issues.

You noted some doubt about when the UK will leave the EU. The UK will cease to be a Member State of the EU on 29 March 2019. We have agreed in principle a time-limited implementation period that will mean that we retain market access on current terms after that date - but we will not be a Member State during that period. The precise nature of the future economic partnership between the UK and the EU is, of course, subject to negotiation with the EU. However, the Government has clearly set out its preferred position in a White Paper in July. For intellectual property, the Government has stated its intention to seek continued participation in the Unified Patent Court as well as to explore other arrangements for cooperation, where this is in our mutual interest.

You raised concerns about how the SPC system would function in the unlikely event of there being no agreement between the EU and the UK. It is worth noting that, whilst the law operates at EU level, individual Member States have responsibility for examining and granting applications for supplementary protection certificates.

The resulting certificate is valid only in the Member State in which the application is made; there is not, at present, a single certificate granted for the whole of the Union. Similarly, there is no reciprocity or recognition of that certificate in other Member States. Therefore, retaining the Regulations in UK law would not require that the UK provide for reciprocal recognition of rights and responsibilities.

You also commented on the potential loss of the role of the European Medicines Agency. The Agency has no direct involvement in the SPC system; the Regulations require only that an authorisation has been granted which has effect in the relevant Member State, and is agnostic as to which authority has done so. It is for national IP authorities to decide that such an authorisation has been granted.

Your letter identifies certain references in the Regulations as being potentially problematic. The European Union (Withdrawal) Act contains powers which can be used to correct inoperabilities caused by our departure from the EU, such as the ones you identify. Where those issues are corrected, the aim is that, as far as possible, the law which applies before exit day is the same as that which applies on and after that day. In retaining the Regulations, the application and granting process for a certificate in the UK would therefore be the same and the scope of the right granted would be equally unchanged.

Finally, you noted that the SPC Regulation could evolve after the UK's exit from the EU. As indicated in your letter, the UK would have to decide how to respond to such divergence in due course if and when it arises, in line with whatever arrangements for intellectual property issues are agreed in the future economic partnership negotiations.

30 October 2018

Letter from the Chairman to Chris Skidmore MP, Minister of State for Universities, Science, Research and Innovation, Department for Business, Energy and Industrial Strategy

Thank you for the letter dated 30 October 2018. It was considered by the EU Justice Sub-Committee at its meeting of 11 December.

We decided to retain the proposal under scrutiny.

We are grateful for the Government's answers to our questions and note that the (former) Minister's replies align with the expert evidence provided to us in writing by Mr Stephen Jones of the Chartered Institute of Patent Attorneys (CIPA) on the operation of the EU's system for Supplementary Protection Certificates (SPCs). In particular, with regard to the view that the EU SPC system is not built on reciprocity and is, in principle, amenable to being carried over to the UK via national legislation after either a negotiated or a 'no-deal' Brexit.

Turning to the Government's Technical Note "Patents if there's no Brexit Deal" and the statement that the existing SPC system "will … remain in place, operating independently from the EU regime, with all current conditions and requirements", Mr Jones did, however, highlight one area of uncertainty arising in the context of the important role played in the SPC system by what he called "EU marketing authorisations". The European Medicines Agency currently sits at the apex of this system, and while the (former) Minister argues in his response that the EU Regulation is "agnostic" about which regulatory authority grants the authorisation, Mr Jones warns us that the Government's plan to address this aspect of the current system through the Withdrawal Act gives rise to uncertainty. After Brexit: (a) who will grant a UK marketing authorisation; and, (b) pursuant to what legislative instrument?

We were also concerned by the suggestion that this proposal is "not a feature of the ongoing withdrawal negotiations" as Article 60 of the Withdrawal Agreement deals specifically with SPCs during/after transition and refers directly to the 'parent' Regulation that this proposal seeks to amend (Regulation 469/2009).

We look forward to considering your response within the usual 10 day deadline.

11 December 2018

Letter from Chris Skidmore MP, Minister of State for Universities, Science, Research and Innovation, Department for Business, Energy and Industrial Strategy

Thank you for your letter dated 11 December 2018 regarding the European Commission's proposal for a Supplementary Protection Certificate (SPC) manufacturing export waiver in which you asked further questions about this proposal.

You asked about the operation of the UK medicines regulatory system after Brexit. UK marketing authorisations will continue to be granted by the Medicines and Healthcare products Regulatory Agency, under the provisions of the Human Medicines Regulations 2012 (S.I. 2012/1916). In the event of a no deal outcome, these regulations will be amended appropriately to reflect the fact that the UK would no longer be part of the EU medicines regulatory framework.

In addition, the committee may be aware of the draft Patents (Amendment) (EU Exit) Regulations 2018, laid before the House on 28 November. If approved, these regulations will maintain the connection between the SPC system and the regulatory regime which applies in the UK. My officials have been working together with officials at the Medicines and Healthcare products Regulatory Agency to ensure continued functioning.

You also raised concerns about the suggestion that this proposal is "not a feature of ongoing withdrawal negotiations". The committee may be aware that the provision on treatment of pending SPC applications (then Article 56) was agreed at negotiators' level ahead of the June European Council, as set out in the Joint Statement of 19 June 2018 . The reference to "ongoing" negotiations was intended to note simply that the provision was not a live matter at the time my predecessor wrote to you, and was not one of the outstanding issues still being discussed at that stage.

Political agreement was reached with the EU on the Withdrawal Agreement on 25 November. There are two areas of the Withdrawal Agreement with potential relevance to the SPC manufacturing waiver proposal.

Firstly, a time-limited implementation period until 31 December 2020 has been agreed as part of the Withdrawal Agreement. The implementation period provides certainty to businesses and individuals and ensures they only have to adjust to one set of changes in line with the future relationship with the EU. During this time, common rules will remain in place with EU law continuing to apply in the UK subject to the terms set out in the Withdrawal Agreement. Should the manufacturing waiver proposal come into force during the implementation period, it will apply to the UK during the implementation period. In this case, any decision on whether and how a manufacturing waiver will apply to the UK after the end of the implementation period will depend on the final scope of the proposal and what is agreed in the future economic partnership negotiations with the EU.

Secondly, the Withdrawal Agreement includes separation provisions which wind down ongoing processes and arrangements at the end of the implementation period. These separation provisions provide the technical basis for the winding down of those arrangements to ensure an orderly withdrawal. Some of these arrangements could be superseded by the agreement on the future relationship. Article 60 of the Withdrawal Agreement concerns the separation provision for SPCs and provides that where an application for a UK SPC is in progress at the end of the implementation period, that application will be determined in accordance with the relevant EU law (Regulation (EC) 1610/96 and Regulation (EC) 469/2009). Article 60 also provides that the UK SPCs granted based on a pending application must provide the same level of protection as that provided for in the Regulation (EC) 1610/96 and Regulation (EC) 469/2009.

As Article 6(1) of the Withdrawal Agreement states, references in the Agreement to Union law are to be read as references to that law as applicable on the last day of the implementation period. The reference in Article 60 to Regulation 469/2009 will therefore include any amendments introduced by the manufacturing waiver proposal, should it be approved and come into force before the end of the implementation period.

In the meantime, the UK will be an EU Member State, with the rights and obligations that this entails, until we leave the EU on 29 March 2019. During this period, the Government will continue to negotiate on EU legislative proposals and play an active role in Council working groups, including on the manufacturing waiver proposal.

19 December 2018

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING COUNCIL REGULATION (EC) NO 1206/2001 OF 28 MAY 2001 ON COOPERATION BETWEEN THE COURTS OF THE MEMBER STATES IN THE TAKING OF EVIDENCE IN CIVIL OR COMMERCIAL MATTERS (9620/18)

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING REGULATION (EC) NO 1393/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE SERVICE IN THE MEMBER STATES OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS (SERVICE OF DOCUMENTS) (9622/18)

Letter from the Rt Hon David Gauke MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice

I am writing to you, following your letter of 24 July 2018, to confirm that the Government has decided to opt in to the proposal on the service of documents, but not at this stage to the proposal on the taking of evidence. A Written Ministerial Statement to that effect is being laid in Parliament.

The Explanatory Memoranda of 19 June set out in some detail our thinking on the relative merits of these two proposals and highlighted the concerns about particular aspects that we are pursuing during the negotiations. In the event, while I am confident that the Government's reservations about certain

points in the service of documents proposal are such that an opt in is appropriate, the Government could not agree to do so at this moment in respect of the taking of evidence proposal.

The Government notes that if an Implementation Period with the EU is agreed it is envisaged that the UK will be able to apply for a post-adoption opt in for proposals such as this. It will consider doing so if the negotiations resolve the issue of the removal of the current right of a witness to refuse to give evidence directly to another Member State court, without coercion. This is one of the principal issues in relation to the taking of evidence proposal which concerns the Government, as you acknowledged in your letter of 24 July 2018.

The implication of this particular provision is that, for the first time, a witness will be compelled to give evidence to a foreign court taking that evidence directly. The current Regulation provides that this need be done only on a voluntary basis. Coercive measures are able to be applied at the moment where a court is taking evidence from a person located in the same Member State, at the request of a court in another Member State. The current Regulation contains safeguards in that situation. However, the Commission's proposal in relation to the direct taking of evidence by a foreign court contains no such safeguards for a witness. The Government is very concerned about this proposed change to how evidence can be taken directly and will seek to restore the need for it to be voluntary or to include appropriate safeguards.

Notwithstanding the Government's decision in respect of taking of evidence, the UK will participate fully in the negotiations of both proposals for as long as the UK is a member of the EU.

27 November 2018

PROPOSAL FOR A COUNCIL DECISION ADOPTING THE PROVISIONS AMENDING THE ACT CONCERNING THE ELECTION OF THE MEMBERS OF THE EUROPEAN PARLIAMENT BY DIRECT UNIVERSAL SUFFRAGE (UNNUMBERED)

Letter from Chloe Smith MP, Minister for the Constitution, Cabinet Office

Thank you for your letter dated 16 July 2018. It was considered by the EU Justice Sub-Committee at its meeting of 16 October.

We note your confirmation that the UK's responsibilities to facilitate the ability of the 3.7 million EU citizens lawfully resident here to exercise their European Parliamentary election rights did not arise in the Council. We are grateful for your update on the text that has been endorsed by the European Parliament and subsequently agreed by the Council, and we further note that this legislation must now be approved by the Member States in accordance with their own constitutional arrangements.

We cleared this proposal from scrutiny in June and do not expect a response to this letter.

16 October 2018

FOLLOW-UP TO THE COMMITTEE'S REPORT: BREXIT: JUSTICE FOR FAMILIES, INDIVIDUALS AND BUSINESSES?

Letter from the Chairman to the Rt Hon David Gauke MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice

Thank you for your letter dated 13 September 2018 to the Chairman of the EU Justice Sub-Committee. As you know, the Committee published its report *Brexit: justice for families, individuals and businesses?* (17th Report of session 2016-17, HL Paper 134) in March 2017. It concluded that the so-called Brussels regime of EU Regulations (the Brussels I Regulation (recast); the Brussels IIa Regulation; and, the Maintenance Regulation) creates a system of civil justice cooperation which plays a "significant role in the daily lives of UK and EU citizens, families and businesses, who work, live, travel and do business within the EU".

Together, these regulations provide "certainty, predictability and clarity" about where legal disputes should be pursued, whilst providing for the automatic recognition and enforcement of judicial decisions, orders and judgments throughout the EU.

The report argued that if the Government stuck too rigidly to its red line on the jurisdiction of the Court of Justice of the EU it would "severely limit" its post-Brexit options for adequate alternatives to these Regulations. Regardless of the outcome of the Brexit negotiations, it was clear to the Committee that "civil justice cooperation of the type dealt with by these Regulations will remain a necessity". Without alternatives in place by the time the UK leaves the EU there would be "great uncertainty for UK businesses and citizens". The report called on the Government to produce a "coherent plan for addressing their post-Brexit application".

The Government's response

We received the Government's formal response in the days before the report was debated in December 2017. Beyond repeatedly advocating a "deep and special relationship" with the EU27 post-Brexit, the Government's response offered little detail on a coherent plan to address or replace the operation of these important Regulations after the UK leaves the EU in March 2019.

Follow-up work

In April 2018, we decided to follow-up our report and take stock of the Government's efforts to address the impact of Brexit on this important area of EU– based cooperation. To that end, in May, we held two evidence sessions with: the Law Society of England and Wales, and the Bar Council; and three specialists in family law: Tim Scott QC; Professor Rebecca Bailey-Harris; and, Jaqueline Renton. Furthermore, in July, Lucy Frazer QC MP, Parliamentary Under Secretary of State at the Ministry of Justice gave evidence on behalf of the Government. (The transcripts of these sessions have been published on our website.[1])

Technical note: "Handling civil legal cases that involve EU countries if there's no Brexit deal"

On 13 September 2018, the Government published its technical note "*Handling civil legal cases that involve EU countries if there's no Brexit deal*" which, as you explain in your covering letter to the Chairman of the Sub-Committee Baroness Kennedy of The Shaws, sets out "information for businesses and citizens" that the Government hopes will assist them in making "informed plans and preparations" for a 'no deal' Brexit.

We considered your letter, and the contents of the technical note, at our meeting of 16 October 2018, during which we also reflected on the evidence we took in May to July earlier this year. **Four** broad themes have emerged. Addressing each in turn, our main conclusions and recommendations appear below in bold. Questions on which we seek answers from you are numbered and shown in bold italics.

(i) Transition arrangements in the draft Withdrawal Agreement

The draft Withdrawal Agreement published in late February this year included a provision which addressed the application of these Regulations during a proposed transition period running until 31 December 2020 (Article 63). The Law Society tentatively welcomed this aspect of the draft Agreement. Dr Helena Raulus said, she found increased "certainty … in the proposed draft withdrawal treaty and the transition or implementation arrangements, because that would effectively extend the time period available for the negotiations". But, she predicted that "at the end of 2020, we would essentially face the same question again … So, there is still uncertainty as to whether civil justice will be included in the new treaty" (Q 1). Alex Layton QC, on behalf of the Bar Council, said: "… uncertainty continues, not least because Article 63 … has not yet been agreed even within the

[1] https://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-justice-subcommittee/inquiries/parliament-2017/civil-justice-cooperation-post-brexit-follow-up/

passages of the withdrawal agreement". He believed that "while that continues, initiatives are being taken in other member states to attract legal business from London" (Q 1).

Of the family practitioners we heard from, Tim Scott QC said that "in general terms" Article 63 "is good" (Q 18). Jaqueline Renton stated that "it is obviously ideal if you continue with the Regulation in the meantime on the understanding that you would have the CJEU and full reciprocity. It is what happens [after transition] that is the difficulty". She was also concerned that: "They seem to have put in place the Brussels II revised jurisdictional rules—the rules on recognition enforcement and the good practice in co-operating with central authorities—and left out Article 11 on all the rules on child abduction. I cannot quite understand why there is that *lacuna*", adding that it "needs to be sorted out" (Q 18).

By the time Lucy Frazer QC MP appeared before us in July, Article 63 of the draft Withdrawal Agreement had been provisionally agreed by all parties to the negotiation (see the "Joint Statement on the progress of negotiations" published on 19 June 2018). The Minister confirmed that "the text of the agreement on [the] transition period is now complete. This is now confirmed and there are no outstanding matters in our area for transitional provisions". On the *lacuna* raised by Jaqueline Renton, the Minister said that she had "read that evidence" and she assured us "that it is covered by Article 63(1)(c)" (Q 20).

We welcome the successful (initial) resolution of this aspect of the Withdrawal Agreement and the arrangements for transition. This, at least, addresses the Bar Council's concern, expressed to us in May, about the shadow of uncertainty over Article 63 of the draft Withdrawal Agreement.

However, with regard to the *lacuna* in Article 63 and the rules on child abduction, Article 63(1)(c) relates to "the provisions of Regulation (EC) No.2201/2003 regarding jurisdiction". Jurisdiction in the Regulation is governed by Articles: 8, 9, 10, 12, 13 and 14 in respect of issues of parental responsibility. Article 11 in the Regulation, however, does not relate to "jurisdiction" but instead relates to "return of the child" and encompasses the rules that apply in international child abduction cases. **If, as the Minister appears to suggest, it is intended that Article 11 of the Regulation is covered by Article 63(1)(c) of the draft Withdrawal Agreement, then we recommend, despite the Minister's statement that "there are no outstanding matters in our area for transitional provisions" that it is amended so that it is made explicitly clear that this includes Article 11 of Regulation (EC) No.2201/2003.**

> ***Question 1: We ask for an update on any progress you have made in this regard when you reply to this letter.***

(ii) The Government's plans for the post-transition relationship with the EU27

Brexit position papers

In August last year, the Government published two Brexit position papers that touched on this area of EU cooperation: (i) *"Providing a cross-border civil judicial cooperation framework"*, and (ii) *"Enforcement and dispute resolution: a future partnership paper".* The Bar Council described these papers as containing "some fine but really very non-specific words on the topic. We know what fine words do—the parsnips remain largely unbuttered" (Q 2). Tim Scott QC was "confident that the Government, at ministerial and civil servant level, are aware of the problems. That is the good news". But, he continued, "What is being done about them is another matter … Very little positive progress has been made … the two reports that the Government put out in the summer of last year … were, to put it politely, aspirational—ruder words could be used" (Q 11). Later on, he added that the situation "is compounded by the fact that the Government has not yet put forward any specific plan for what should take the place of the Regulations" (Q 14).

Professor Rebecca Bailey-Harris said: "to use academic parlance [the Government's position papers were] *gamma minus*—extremely superficial analysis and a statement of aspirations without any analysis

at all". She continued that, the Government's plans were "deeply disappointing … They were, frankly, utterly superficial" (Q 11). Jaqueline Renton said that: the "main political issue is the CJEU … The difficulty is that if the CJEU is the one that interprets the Regulation, politically that is the difficulty for the Government" (Q 14).

On 14 June, you wrote to the Committee setting out "further detail" on the framework for the UK-EU partnership: civil judicial cooperation. (Unfortunately, this was after we held our sessions with representatives of the legal profession.) Lucy Frazer QC MP referred to the documents covered by your letter in her evidence to us in July. She said, "We presented a slide pack, which is public, to Task Force 50 recently, explaining the benefits of continued co-operation" (Q 22). **The slides called for an "ambitious future partnership" and a "bespoke agreement" with the EU 27 after Brexit, built on "existing precedents" but, in our view, offered little detail as to how these aims could be achieved.**

Government's White Paper on the "Future Relationship between the United Kingdom and the European Union"

In July, in the week before Lucy Frazer QC MP appeared before us, the Government published its White Paper on the "Future Relationship between the United Kingdom and the European Union" (Cmnd 9593). The White Paper confirmed the Government's intention "to participate in the Lugano Convention after exit" and your keenness "to explore a new bilateral agreement with the EU which would cover a coherent package of rules on jurisdiction, choice of jurisdiction, applicable law, and recognition and enforcement of judgments in civil, commercial, insolvency and family law matters".

Lucy Frazer QC MP confirmed the Government's plans. In her words, "We are focusing on a framework that would be separate from and more extensive than Lugano. If it became appropriate to discuss something broader in relation to Lugano, of course we would have those discussions, but at the moment we are working towards a new agreement that is more comprehensive than Lugano in the Brussels sphere". She continued, "We are working towards a mechanism that does not have the ECJ giving direct jurisdiction" and the Government is "very pleased that, knowing that red line" the EU has included family related matters "in its guidelines as an area in which it is very interested in mutual co-operation" (Q 25).

Our concerns

We welcome the Government's White Paper to the extent that it articulates a plan for this area of EU cooperation after Brexit. However, we retain significant concerns, in particular for family law, which are not addressed by September's technical note on "Handling civil legal cases that involve EU countries if there's no Brexit deal".

First, given our conclusions in our March 2017 report: *Brexit: justice for families, individuals and businesses?* about the impact of the loss of this EU legislation on the UK's family court system, we are concerned that there is insufficient time between now and our exit from the EU (either in March 2019 without the safety net afforded by the Withdrawal Agreement, or 31 December 2020 at the end of the proposed transition period) "to explore a new bilateral agreement with the EU" covering family law matters.

Despite the Minister's reassurance in the debate of our report that "there will be no cliff edge" (Hansard, 20 December 2017, vol. 787, No. 73, page 2143) (a stance now further undermined by the publication of the technical note on handling civil legal cases) the biggest danger, in particular given the current doubt over the formal agreement of the draft Withdrawal Agreement, is that in six months'time in March 2019 we leave the EU without adequate replacements for these Regulations in place. We concluded in March 2017 that "leaving the EU without an alternative system in place will have a *profound and damaging impact on the UK's family justice system* and those individuals seeking redress within it" (paragraph 32) (emphasis added).

One of the stated aims of the technical note published on 13 September 2018 is to help families and individuals make informed decisions about their futures. But, in our view, it

does little more than encourage concerned individuals to seek legal advice. We are unable to ascertain any plan that will address our core concerns about the "profound and damaging" impact of a no-deal Brexit on the UK's family law system and those that these courts seek to protect: children. (We address the suitability of falling back on the various Hague Conventions below.)

If, however, the negotiations are successful, and we leave the EU in March next year with a transition period in place, we recognise that this buys the UK further time to negotiate alternative arrangements. Whilst we note the Government's intentions as set out in the White Paper on the Future Relationship, we are concerned that the Council's negotiating guidelines of March 2018 referred to judicial cooperation only in "matrimonial, parental responsibility and other related matters".

The Law Society warned us that that: "there is still uncertainty as to whether civil justice will be included in the new treaty". Dr Raulus said, "We did not see that in the Council guidelines from March as one of the negotiation topics. We are therefore uncertain whether it would be part of the [future] arrangements". Adding that: "civil justice normally does not form a part of free trade agreement arrangements. So, while we have certainty that things will continue as the *status quo* during the transition period, we still do not know whether this will be included in the future arrangements or whether there will be a cliff edge" (Q 1). The Bar Council raised the absence of civil justice cooperation from the Council's mandate as a "matter of real concern" (Q 2).

The Minister, Lucy Frazer MP, said "it is absolutely part of our negotiating mandate to include all those areas … the White Paper is very clear … that we want a deal that spans civil and commercial law, including family and insolvency". When asked whether the Government had persuaded the EU27 to widen the discussions to include all civil judicial cooperation she replied: "the Justice Secretary went to the informal Council on Justice and Home Affairs last Thursday and Friday, continuing to make that case … the Council knows it is our view, so we are talking to it about that" (Q 23).

We welcome the Government's intention to include all areas of civil justice cooperation in its plans for its negotiations with the EU27, but the Council apparently needs to change its stance.

> ***Question 2: Please provide an update about the progress you have made in persuading the Council to change its negotiating mandate.***
>
> ***Question 3: How confident are you that: (i) the Council will include all areas of civil justice cooperation in its plans for its negotiations with the UK; and, (ii) that you can secure agreement on all areas of civil justice cooperation before the transition period expires in December 2020?***

(iii) Alternatives to the Brussels regime

The Lugano Convention

Our report of March 2017 recognised that after Brexit UK membership of the Lugano Convention offered "at least a workable solution" to the loss of the Brussels suite of Regulations. However, the report also pointed out that this solution "will come at a cost": it will involve "a return to the Brussels I Regulation, with all its inherent faults" and "save for the provisions of the Lugano Convention on cases involving maintenance, there is no satisfactory fall-back position [offered by Lugano] in respect of family law".

With these limitations in mind, we explored with our witnesses the Minister's claim in the subsequent debate of our report that "there is no legal barrier to [the UK] becoming a party to the Lugano Convention" (Hansard, 20 December 2017, vol. 787, No. 73, page 2141).

The Bar Council said, "it is not strictly true to say that there are no legal barriers". Alex Layton QC said: "there are two routes by which the United Kingdom, once it is out of the EU and no longer bound by the Lugano Convention as a member of the European Union, could adhere to it: One route is that if we are a member of EFTA … If we are not a member of EFTA, the notification requirements … apply … but unanimity would be required on the part of all the other parties to the Lugano Convention". He continued: "That is to say, the EU itself … and … Denmark … Iceland, Norway, and, importantly, Switzerland" (Q 6).

Dr Helena Raulus, on behalf of the Law Society, explained that: "On the question of ratification of the Lugano Convention, the parties have one year to express their consent". This raised the question of time: "when will the negotiations on the Lugano Convention need to be begun in order for the UK to continue its participation in the Convention seamlessly?" (Q 6). Later on, she added "Lugano should not be dismissed, because it provides for recognition and enforcement of judgments between Switzerland and the UK, so in any case Lugano is needed" (Q 15).

The Minister, Lucy Frazer QC MP, confirmed our witnesses' views: "We need the unanimous consent of all those who are party to it, which includes the EU". She confirmed that "We as a department are engaged with the EU, Switzerland, Iceland and Norway … We have had separate meetings with all of them on Lugano and we have made it very clear in our White Paper that we want to rejoin Lugano. It is no secret, and we are taking steps to ensure that that happens". She added that the Government "would like to ensure a seamless transition between" our membership of the Convention "as members of the EU and us being members in our own right. That is one of the discussions that we are having" (Q 24). However, the Minister had to ask her officials "to clarify … that [the Ministry of Justice] are in charge of Lugano" (Q 24).

Having reassured us that the Ministry of Justice is the Department responsible for the UK's post-Brexit membership of the Lugano, and had been pursuing the issue, we were surprised that the Minister had to consult with her officials during the session to confirm her statement. This undermined our confidence in the Government's preparations for this solution and cast considerable doubt on the Minister's claim that the Ministry of Justice is "engaged" on this issue.

UK membership of the Lugano Convention was highlighted by our report in March 2017 as a workable, but imperfect, solution. The Minister, Lord Keen of Elie, shared this view during the subsequent debate in December 2017. Yet, in the meantime, we have been left with the impression that the Government has done little, so far, to take this solution forward. If the Government had been better prepared it could have been on the verge of securing our membership. With the current dangers of a no-deal Brexit and the potential loss of the safety net provided by the transition period, it is deeply regrettable that the opportunity to achieve membership of the Lugano Convention before March 2019 appears to have been lost; the Government's aspiration of securing a "seamless transition" has been missed.

> ***Question 4: Please confirm precisely what steps the Government has taken to secure the UK's participation in the Lugano Convention after Brexit.***
>
> ***Question 5: If, as the Minister suggests your department is "engaged" with the EU, Switzerland, Iceland and Norway on the issue, what has been the outcome of your discussions so far?***
>
> ***Question 6: How confident are you that agreement can be reached before we leave the EU (either in March 2019 or at the end of the proposed transition period)?***
>
> ***Question 7: What are the Government's contingency plans to deal with a hiatus in coverage, if you are unable to secure participation in the Lugano Convention before we leave the EU (either in March 2019 or at the end of the proposed transition period)?***

The Hague Conventions

Our 2017 report considered the viability, in the context of family law, of falling-back on the 1996 Hague Convention on jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, and concluded that it "offers substantially less clarity and protection" than the Brussels suite of Regulations.

We revisited the issue during this follow-up inquiry. Dr Helena Raulus of the Law Society said: "On family law, we have some international options [but] the so-called Hague Conventions, relate only to certain specific areas, such as child abduction or maintenance". She argued that "there is not good coverage on divorce" concluding that this would be "the biggest problem" because "that is where there is no comprehensive framework from The Hague" (Q 8).

Tim Scott QC said: "So far as divorce jurisdiction is concerned, there are no Hague Conventions that provide any fallback position at all. If we lose the divorce jurisdiction provisions of Brussels IIa, we are going to have to create our own jurisdictional rules. We could fall back on the pre-Brussels II rules. That would create various problems, one of which—this is a very important point that has not been much addressed—relates to the recognition by other countries of divorce decrees granted in England" (Q 14).
Jaqueline Renton said: "In terms of children, there is the 1980 Hague Convention on child abduction, which gives you a return remedy if your child is abducted to this country … The benefit of the EU law is that it bolsters protection for children who have been abducted and makes it more straightforward for the parent who has had their child abducted to secure a return". She stated that "I am concerned when I read everything that the Government think that they are similar enough and therefore it is good enough if you let the Regulation fall away… It is simply not the case, but it involves quite a lot of detailed analysis to be able to show why in practice it is not the same" (Q 14).

> ***Question 8: Please tell us what analysis the Government has undertaken about the differences between the Brussels regime of regulations and alternative options, and please share the findings with us.***

With regard to maintenance, Professor Rebecca Bailey-Harris said that "there is The Hague Convention on the recovery of maintenance 2007". But, she added that it "has quite significant gaps" including: no general jurisdictional rules showing the link between the country and the court of action; and no rules for working out priority between competing jurisdictions (Q 14).

The Minister, Lucy Frazer QC MP, was more positive: "You have had extensive evidence from practitioners in the field who have identified that there is co-operation to varying degrees in different areas of family law". She continued that the Bar Council had made it "very clear that Hague was a good substitute in relation to the protection of children. In relation to maintenance, we have Lugano and the 2007 Maintenance Convention". But, she acknowledged that with regard to divorce "we are back to our old rules", concluding that "there are different degrees of protection according to the area of family law" (Q 26).

We note that the Government's technical note on "Handling civil legal cases that involve EU countries if there's no Brexit deal" concludes that the various Hague Conventions "provide an effective alternative to the EU rules". The experienced family law practitioners we heard from were clear that this is simply not the case (see for example, Tim Scott QC and Jaqueline Renton above (Q14)). The contents of the technical note confirm our view that a worrying level of complacency has taken hold in the Government that assumes that we can leave the EU without alternatives in place and that other international arrangements will fill the void left by this important EU legislation.

(iv) Government preparations for change / no deal

We took evidence on the ramifications of the UK leaving the EU without alternatives in place either in March 2019 or at the end of the transition period, before the Government published its technical

note on "Handling civil legal cases that involve EU countries if there's no Brexit deal" in September 2018.

The Bar Council was concerned that civil justice cooperation was "being used as a bargaining chip by the EU, and indeed by this country, because it is regarded as politically unimportant, whereas in business terms and in terms of people's real lives it is actually very important". Referring specifically to family law matters, Alex Layton QC said that leaving without a deal "would be a nightmare" (Q 5).

Tim Scott QC said that "At one level, it is good news if the Government is making preparations for a plan B" because the "possibility of no overall deal being reached has to be addressed". But, he was concerned that the Government had given "no idea at all" about what would replace these Regulations. He said that "there has been no consultation, even on a fallback 'what if?' basis, as to what rules would or might be considered if we were to lose the benefit of the two [family law] Regulations" (Q 12). He concluded that, "Unless the two Regulations are kept in force, whatever else happens there will be a major change in the law" (Q13).

The Bar Council said that "there is another practical point here that is very important. If we take these steps backwards, it would be a major change in the law ... Our family courts are under enormous pressure. The underfunding of the court system is a problem across the board, but is particularly acute in the family courts". Alex Layton QC warned that: "There is an idea that we could have this major change in the law, but the last time we had such a change there were intensive training programmes for the judges, who were given detailed assistance in trying to implement the new law. Such a thing would have to happen again, and the money would have to be found for it, if we were to make these backward steps, removing particularly the Maintenance Regulation, and Brussels II bis" (Q 8).

Tim Scott QC echoed these concerns and warned that "The last thing we are getting" is any hint of "additional resources to deal with the extra body of work that we anticipate will happen if we lose these Regulations and fall back on the old rules". He continued: "a whole generation of family lawyers has grown up with these rules … There will be a need for a massive retraining process" (Q 13). Jaqueline Renton said that a plan was needed "as soon as possible" because "it will take extensive consultation once a plan is put on the table". Rebecca Bailey-Harris agreed (Q 13).

When the witnesses' concerns were put to the Minister, she said that "We are looking at the downstream impacts of any changes across all departments …we are looking at the impacts of Brexit". She repeatedly asserted that "we are preparing as a department for no deal" (Q27). "We are very alive to what issues we need to resolve. We understand, and my officials very clearly understand, the regimes that we have in place at the moment and the regimes that we would have if we did not have Brussels, both in the family sphere and in other spheres, and we are working very hard to ensure that we have as comprehensive an arrangement as possible" (Q 23).

All our witnesses described leaving the EU without alternatives in place as a major change to our legal system. They were concerned that the Government was underprepared for such an outcome. Your technical note does little to address these concerns. For example, you claim in the technical note that the loss of the Brussels IIa's '*lis pendens*' rule can be addressed by using the current rules that apply to cases falling outside the Regulation's scope. But, this statement ignores significant concerns inherent in such a major change to our family law system. These include: considerable individual expense and inconvenience for litigants; and, resource implications for a family law system under considerable pressure and struggling with limited funds.

> ***Question 9: What are your plans for preparing the UK's family law system for: (i) a no-deal Brexit; or (ii), a negotiated/orderly withdrawal at the end of the proposed Transition Period in December 2020?***
>
> ***Question 10: What resources does the Government intend to make available to prepare for such a major change in the UK's law, including (but not limited to) training for judges and family law practitioners?***

It will be individual litigants in family law proceedings who will have to deal with the uncertainty caused by Brexit, for example, in relation to the recognition of divorces.

> ***Question 11: Given that the technical note setting out the Government's plans for a no-deal scenario is predicated on repeated calls for concerned individuals to consult lawyers, what plans does the Government have to make funds available to such litigants through legal aid?***

Concluding comments

Our 2017 report highlighted the significant role this legislation plays in the daily lives of UK and EU citizens, families and businesses, who work, live, travel and do business within the EU. Our chief concerns expressed in this letter relate to the post-Brexit operation of the Brussels suite of Regulations and their importance to the everyday lives of UK/EU citizens; in particular, the two Regulations that play such an important role in the operation of the family courts in this country and the dangers posed by their potential loss in six months-time in March 2019.

The Minister sought to reassure us in July that the Government is "alive" to the need for "certainty as quickly as possible" and is focussed "on ensuring that we get the best possible deal". With less than six months to go until the UK leaves the EU, beyond the (initial) agreement of Article 63 in the potential Withdrawal Agreement, and the initial plan expressed in the Government's White Paper, we find certainty is lacking. The technical note has not alleviated our concerns.

In July, Lucy Frazer MP QC sought to reassure us that, after Brexit, Britain will remain a "centre of commercial excellence". She pointed to Government initiatives such as "the 'Legal Services are GREAT' campaign" and to continued efforts "to explore our legal services abroad outside the EU". She explained that "We recently went to Kazakhstan, we are planning a trip to Nigeria, we have been to China. There is a lot of work on a number of levels" (Q 21).

Whilst we welcome such initiatives, the negotiation of similar arrangements with Kazakhstan, Nigeria or China cannot compensate for the loss of the Brussels regime, or any negotiated equivalent, when we leave the EU; nor can it address the significant problems that will occur either in March 2019 or at the end of the transition period if we leave the EU without adequate alternatives to these Regulations in place. The significant problems that will inevitably flow from such a failure will be felt particularly acutely by the UK's family law courts and by those that these courts ultimately seek to protect: children.

We look forward to considering your response to our conclusions and recommendations, and your answers to our eleven questions, within the usual 10 day deadline.

16 October 2018

Letter from the Rt Hon David Gauke MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice to the Chairman

Thank you for your letter dated 16 October 2018, *'Follow-up to the Committee's report: Brexit: Justice for families, individuals and businesses?'*. I welcome the committee's continuing work in this crucial area. Your report and evidence sessions have raised important questions and I am pleased that my Ministerial colleagues have had the opportunity to respond to these in person and clarify the Government's position where necessary. Your most recent letter covers a number of different topics, which I have addressed in turn.

Your first question asked for an update on our assessment of a perceived lacuna in the coverage of the draft Withdrawal Agreement, specifically in regards the child protection provisions of Article 11 of the Brussels IIa regulation.

As Lucy Frazer QC MP explained to the Committee when she appeared before you, Article 11 has been dealt with in the Withdrawal Agreement. Provided that the proceedings under the Brussels IIA Regulation relating to an abducted child (and as distinct from the application under the 1980 Hague Convention itself) are commenced prior to the end of the transition period, the provisions of Article 11 (being contained in the jurisdictional rules of the Brussels IIA Regulation to which Article 63(1)(c)) will continue to apply. During the transition period, these provisions will continue to apply as they do now (this is the effect of Article 122 of the Withdrawal Agreement).

Should there be no agreement with the EU on a future relationship, the UK and the EU Member States are all party to the 1980 Hague Convention on the Civil Aspects of International Child Abduction. We will therefore continue to operate the provisions of that convention to ensure the prompt return of abducted children, as well as the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, which can equally be invoked (in parallel to the 1980 Convention if need be) to assist in the return of an abducted child, although it does not contain the particular effect of overriding a non-return order under the 1980 Convention which the provisions of Article 11 of Brussels IIA provide as between EU Member States. The same position will apply to cases ongoing at exit day in the unlikely event that no withdrawal agreement is concluded.

Your second and third questions requested an update on the progress we have made persuading the Council to consider all elements of civil judicial cooperation in its negotiating mandate and in our confidence of achieving a future deal on civil judicial cooperation.

The Government's White Paper 'The future relationship between the United Kingdom and the European Union' published in July 2018 clearly set out that the Government remains committed to exploring a new agreement with the EU on civil judicial cooperation. We have presented our argument to the EU, most significantly in our June presentation to the EU Task Force 50, that it is our mutual benefit to conclude a new, bespoke agreement including all areas of civil justice cooperation as a combined package.

As you state, the Council has already recognised in its March guidelines that our future relationship should include cooperation on family law matters, an area of cooperation on internal EU rules that it does not currently extend to any other third country. However, we have also been clear the relationship should also include cooperation in wider civil and commercial matters.

To support our discussions with Task Force 50, we have undertaken extensive direct engagement with EU Member States and the European Parliament at official and Ministerial level. Ministers and officials have undertaken significant engagement with EU Member States on justice matters over the past year. Since the summer alone ministers and officials have met with many of their European counterparts where they have raised the issue of civil judicial cooperation, including at the recent Justice and Home Affairs Council in Luxembourg, at the International Bar Association Conference in Rome and while meeting MEPs at the European Parliament. Over the course of the year ministers and officials have met with the vast majority of EU Member States to improve their understanding of the importance of continued civil judicial cooperation for both EU and UK citizens and businesses.

Many of our European interlocutors, at both government and non-governmental level, support our arguments and analysis on the necessity of continued civil judicial cooperation. We are calling on EU Member States to make this case to Council as we approach negotiations on the future relationship.

Your letter asked us to detail what steps we are taking to continue the UK's participation in the Lugano Convention after our exit from the EU (Q4) and our confidence of achieving this outcome (Q6). You also asked for an update on our discussions with the Lugano contracting states, namely the EU, Switzerland, Iceland and Norway (Q5).

We have long made clear our intention to continue the UK's participation in the Lugano Convention after our exit from the EU, in order to maintain our existing civil judicial cooperation relationship with the relevant EFTA states (namely Norway, Iceland and Switzerland). We expect our continued participation in this convention to form part of the wider agreement on civil judicial cooperation we will reach with the EU.

Throughout our Exit discussions, the EU has been clear that the UK's continued participation in the Lugano Convention is a 'future state' issue, which can only be negotiated once we have concluded the Withdrawal Agreement. As you have heard, any formal application to join the Lugano Convention is subject to a period, of up to a year, where any of the existing contracting parties (including the EU) can express, or withhold, their consent to a new party joining this convention. We remain confident of reaching agreement on the Withdrawal Agreement which will secure our continued participation in the Convention to the end of the Implementation Period. This will provide time until the end of 2020 to enable the UK, the EU and all the other parties to the convention to come to an agreement on a legally secure permanent transition for the UK. This may require a formal application to be made, giving the contracting parties up to a year to consent to the UK's continued membership. It is important to note that, if all the contracting parties are in agreement, consent can be given at any point within the 12 months, enabling a faster conclusion to the process. We are continuing to make preparations with all the contracting parties to the Convention to begin these negotiations once the Withdrawal Agreement is concluded.

The UK continues to have active discussions with the relevant European Free Trade Association (EFTA) contracting Lugano states. We have met with Switzerland, Iceland and Norway to make clear our desire to seek to continue to participate in the Lugano Convention on Exit and / or end of the implementation period. We consider our continued participation in the Lugano Convention as an important focal point of negotiations with both our EU and relevant EFTA contracting Lugano state partners. We will continue to engage with all contracting parties to this convention, as we move into active negotiations with the EU on our future relationship.

Your seventh question asked what are the Government's plans in the event we are unable to continue our seamless participation in Lugano Convention on exit from the EU.

As noted in our recent civil judicial technical notice, if we are unable to secure a future agreement with the EU on the Lugano Convention then the UK would fall out of the convention, as well as the broader EU civil judicial framework. If this were to happen the UK would revert to the existing common law and statutory rules which currently apply in cross border cases concerning the rest of the world, to govern our relationship with the EU and other Lugano contracting states (Iceland, Norway and Switzerland). This would not preclude the UK from seeking to re-join the convention in the future, but as you know this would be subject to the consent of all the contracting states (including the EU). We maintain that it would be to the greater benefit of the EFTA contracting Lugano states for the UK to remain party to the convention. We are considering what further mitigation may be possible in the 'No Deal' scenario and will keep you informed of developments.

Your letter asked what analysis the Government has made about the differences between the Brussels regime and alternative fall-back options, in the context of the existing family law rules (Q8).

We have undertaken detailed analysis of the differences between the existing Brussels regime and other fall backs, including the Hague Conventions. We have consulted stakeholders and experts in each individual field, including some that have appeared before your committee. Our analysis is that the Hague Conventions provide suitable alternative rules that will work for UK citizens in the event we are unable to reach a satisfactory deal with the EU in the majority of family law areas, whilst we acknowledge that some aspects of these rules do not provide as efficient arrangement as the current EU framework.

Your letter rightly highlights important areas of the current EU family law framework that are not covered by any suitable fall-back agreements, namely divorce jurisdiction, maintenance jurisdiction and a specific element of the Brussels IIa child protection rules (the "child abduction override"). This

is why we have been clear on the need for a future relationship with the EU which covers these areas. The Technical Notice makes clear the UK approach in each of these three areas and what rules will apply in the event we leave the EU without a deal. How these will affect individuals will be very much dependent on the individual circumstances of those involved, which is why we recommend those involved to seek legal advice. My department and I do not take these matters lightly, nor have we been complacent in ensuring that the UK will continue to have effective rules, processes and resources in place if we leave the EU without a suitable deal, as I will detail below.

Your letter asked what plans are in place for preparing the UK's family law system for a no-deal Brexit (Q9i).

Extensive work to prepare for a 'no deal' scenario is taking place and we are taking the necessary steps to ensure the country continues to operate smoothly from the day we leave. Our objective is to minimise disruption by taking action where possible to prioritise continuity and stability.

Our civil judicial technical notice clearly sets out that the approach the UK will take in a 'no deal'. In this scenario there would be no guarantee that any unilateral application of current rules (you cite the Brussels IIa '*lis pendens*' rules as an example) would be reciprocated by EU member states and we therefore we would be unable to prevent the risk to both UK and EU litigants of parallel proceedings, cases taking longer and the risk that judgments are not enforced in EU Member States.

We have therefore made the decision to repeal the majority of the existing EU family rules which rely on reciprocity. The technical notice sets out detail of the rules that will instead apply in family and civil matters. To be clear, this is not our preferred option and we are working to agree a mutually beneficial future arrangement which is based on our current levels of cooperation.

If we are unable to reach a future deal with the EU we are anticipating impacts on the courts in terms both of increased volume and of complexity of cases. We understand that this would represent a significant change from the existing status quo and we are engaged with the judiciary and HMCTS in preparing for this.

The second part of the question (Q9ii) asked what plans are in place for preparing the UK's family law system for a successfully negotiated outcome.

As I have previously mentioned, the future deal we are seeking to reach with the EU is based on continuing our current levels of cooperation, across the broad range of the existing civil judicial framework. In order to limit disruption for both UK and EU citizens we would be seeking a seamless transition, which would minimise the impact on the UK's family law system. The exact form and content of the future arrangement is a matter for negotiations, but we are preparing to make necessary arrangements for this transition at the end of the Implementation Period.

In the event that no future relationship in the area of civil judicial cooperation is agreed at the end of the implementation period, we have successful agreed with the EU how ongoing cases will be wound down and those arrangements are reflected in Title VI of the draft Withdrawal Agreement.

Question 10 asks what resources are we intending to make available in a 'no deal' scenario, including training for judges and family law practitioners.

The need for additional judicial resource as a result of our exit from the EU is being evaluated as part of our ongoing planning process for judicial recruitment. The likely need for additional recruitment as a result of our exit from the EU formed part of a successful bid for an additional £17.3 million for the 2018/19 financial year, to aid in department's EU exit work. HMCTS is also considering the need for additional staff to ensure that the courts and tribunals system has sufficient capacity to manage any impacts.

As Lord Chancellor I have a duty to ensure that the judiciary are adequately resourced to fulfil their responsibilities. The judiciary are responsible for the delivery of judicial training and work is ongoing across government and with the judicial college to establish what judicial training will be required.

Finally question 11 asks about the impact of a 'no deal' outcome on individual litigants, particularly in terms of any potential increase in demand on legal aid.

Litigants will, of course, continue to be able to make applications under the legal aid framework. Our technical notice sets out clearly the rules that will apply in the event we are unable to reach a deal with the EU. As the effects of these changes in the rules will vary between individual cases it is important that those engaged in or considering a dispute do take advice where appropriate, as they would be under the current arrangements.

You will be aware that we are currently working to agree the final elements of the Withdrawal Agreement with the EU. Negotiations are ongoing and we are making good progress. Once these negotiations are concluded we stand ready agree the breadth and scope of our future relationship with the EU. The practical reality is that, post Exit, the UK and EU will continue to trade and invest across borders, that consumers and businesses will continue to purchase goods and services and citizens will continue to live and work in one another's countries. It is clearly in the mutual interest of the UK and EU to agree a new civil judicial framework that protects efficient access to justice, legal certainty and the rights of citizen's families and businesses, and we remain confident of achieving that outcome. Finally, I want to reassure you and the Committee that I completely share your views on the importance of maintaining our cooperation with the EU in this area. My officials and I will continue to work at all levels to secure this.

29 October 2018

Letter from the Chairman to the Rt Hon David Gauke MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice

Thank you for your letter dated 29 October 2018 which was considered by the EU Justice Sub-Committee at its meeting of 20 November.

We note its contents, in particular your reassurance that Article 122 of the draft Withdrawal Agreement avoids the potential lacuna identified in Article 63(1)(c).

We look forward to returning to these very important Brexit related issues in the future.

21 November 2018

INSOLVENCY (AMENDMENT) (EU EXIT) REGULATIONS 2018

Letter from Kelly Tolhurst MP, Minister for Small Business, Consumers and Corporate Responsibility, Department for Business, Energy and Industrial Strategy, to Baroness Kennedy

I am writing to you to notify you that the Government has laid before Parliament the Insolvency (Amendment) (EU Exit) Regulations 2018 ("the Regulations"). The Regulations will make appropriate and necessary changes to the UK insolvency regime to address the UK's exit from the EU, in the event that we are unable to secure a deal with the EU on cross-border insolvency.

It has always been the case that preparations for a 'no deal' scenario must be accelerated as we get nearer to March 2019, including taking steps to ensure that UK law will continue to operate effectively.

The statutory instrument deals with two discrete policy areas relating to insolvency:

- it addresses deficiencies that arise in relation to cross-border insolvency, specifically the EU Insolvency Regulation (EU 2015/848) (the "EUIR"); and
- it addresses the deficiencies created by the UK's exit from the EU in relation to the Employment Rights Act 1996, Pension Schemes Act 1993, Employment Rights (Northern

Ireland) Order 1996, and the Pension Schemes (Northern Ireland) Act 1993 which set out certain guaranteed employee protections that arise on the insolvency of an employer.

It also sets out savings provisions for insolvency proceedings that are opened under the EUIR before exit day.

The primary purpose of this instrument is to modify the retained EUIR and related domestic legislation so that UK insolvency law will operate effectively after exit day. The Regulations maintain a modified version of the EUIR's jurisdictional tests for the opening of insolvency proceedings that-will sit alongside the UK's domestic provisions on jurisdiction rules (Part 1 of the Schedule to the Regulations). However, the modified EUIR will no longer restrict the opening of proceedings under other UK jurisdictional tests, so it will be possible to open insolvency proceedings under any of the tests set out in our domestic UK law where the debtor is based elsewhere in Europe.

Retaining the EUIR jurisdiction tests in this way ensures that the UK courts will continue to have jurisdiction to open insolvency proceedings in appropriate cases. The Regulations also provide clarity as to the grounds for jurisdiction of UK insolvency orders in cases where the debtor's centre of main interests ("COMI") is in the UK or the debtor has an establishment here, which will assist foreign courts when assessing whether to recognise those UK orders in their jurisdiction. The rest of the EUIR, which forms the majority, relies on reciprocity between EU member states, and so those provisions are repealed.

In order to promote certainty and avoid additional costs (so far as possible) the instrument continues to apply the existing law where main proceedings have been started in the EU before exit day. Regulation 5 contains a safeguard mechanism that can be exercised on a case by case basis where the continued application of the EUIR in the UK would create a prejudicial outcome as a result of an EU member state no longer treating the UK in the same way following our exit from the bloc.

The Regulations (Parts 11 & 13 of the Schedule) also make amendments to ensure certain insolvency-related employee protections continue to function in the same way as before exit day; and Part 12 of the Schedule aligns the Northern Ireland legislation with the legislation applying to England, Wales and Scotland following amendments made to that legislation in December 2017.

The UK has one of the best insolvency and restructuring regimes in the world according to the World Bank rankings, and our insolvency practitioners, legal professionals and judges are all highly regarded internationally. The Regulations will ensure that our law will continue to operate effectively, and preserve the UK's reputation in this field.

A copy of the Regulations and the accompanying explanatory memorandum can be obtained by searching for the full title under "All Draft Legislation" on legislation.gov.uk.

18 December 2018

EUROPEAN E-JUSTICE STRATEGY AND ACTION PLAN FOR 2019-2023

Letter from the Rt Hon David Gauke MP, Lord Chancellor and Secretary of State for Justice, Ministry of Justice

My predecessors have informed your committee about EU a-justice work and the agreement and development of the European e-justice Strategy and Action Plan for 2014-2019. In recent months consideration has been given to the outcomes of both and preparations have been made for a new Strategy and Action Plan for 2019-2023. While these were being discussed they were classified as Limite and therefore not depositable. As they were agreed at this month's JHA Council and have now been made public I am able to provide them to you and explain their contents.

The Strategy gives background to the development of European e-justice and explains that the work is based on three objectives - access to information, facilitation of electronic communication, and interoperability between national IT systems. It states that implementation of the Action Plan should be based on six main elements. The first of these is voluntary participation, which has always been one of the UK's main objectives. It means that Member States can decide for themselves whether to participate (and therefore provided necessary resources) for any project unless a specific legal instrument imposes obligations. A wide participation amongst Member States is envisaged before a

project can be considered sustainable. Sustainability is the second element and encompasses organisational, legal, technical and financial aspects, although financial sustainability is considered separately as the third main element. Fourthly is the principle of decentralisation that is based on interconnection between the existing systems in Member States, unless the objectives or legislation require a centralised approach. The fifth element is organisation through a Council expert working group. Lastly cooperation with practitioners is seen as essential.

The Action Plan contains a list of the projects considered for implementation in the 2019-2023 period, with an indication of the participants, actions for practical implementation and respective contributions of the participants. The Strategy makes clear that the inclusion of projects in the Action Plan should be on the basis of: (i) prioritisation (that is the importance to citizens, businesses and the judiciary as well as the cost effectiveness); (ii) continuity of ongoing projects that have already demonstrated positive results; (iii) flexibility in relation to future developments, both legal and technical; and (iv) cooperation with practitioners.

The extent to which the UK might participate in any of these projects after it leaves the EU will depend on whether an Implementation Period is agreed and the extent and content of any future agreement with the EU on justice matters. While a-justice work does not at the moment have any legislative foundation, the Government notes that some of these projects are included within legislative proposals. Your committee will be aware, for example, that the proposed revisions to the Service and Taking of Evidence Regulations include a suggested use of e-Codex (e-Justice Communication via Online Data Exchange) for transmission of requests between national authorities. If any e-justice projects remain included in such proposals once they are adopted and the resulting instruments form part of a future agreement with the EU, the UK will need to implement them then.

12 December 2018