HOUSE OF LORDS
European Union Committee

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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 January 2019 – 31 March 2019

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 12 December 2018. It was considered by the EU Justice Sub-Committee at its meeting on 22 January 2019.

We decided to retain the proposed Regulation under scrutiny. We are grateful for your update on the outcome of the Council in December and look forward to considering further updates on this proposal's discussion in due course.

23 January 2019

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) AND AMENDING REGULATION (EU) N° 1077/2011 (10940/17)

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

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

You may recall in my previous letter that the European Parliament (EP), in an attempt to reach agreement on the text, had offered a proposal in which the fingerprints for all TCNs are required only where it is permissible under a Member State's national law. Member States had previously offered to concede the lower threshold for fingerprints for dual nationals in order to ensure their inclusion in the ECRIS-TCN system. However, the EP's proposal was rejected by Member States as, without a minimum rule on fingerprints for any TCNs, there would be less fingerprints in the system, which was considered to significantly undermine the effectiveness of the system.

The Presidency was tasked to return to trilogues with the mandate to hold firm on fingerprints and to continue to seek an agreement on the outstanding issues in the dossier. It appeared that the dossier would not be resolved under the Austrian Presidency and would therefore pass to the Romanian Presidency to progress, however, on the 11 December 2018 the final text for ECRIS-TCN was agreed in trilogues. The final text includes dual nationals, although the threshold for taking fingerprints for dual nationals is lower - fingerprints are only required if permissible under a Member State's national law.

The EP had previously asserted that dual nationals are effectively EU nationals who also hold 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. The final text addresses this concern through the different requirements for fingerprint-taking, whilst maintaining a high fingerprint threshold for TCNs who do not hold EU citizenship.

The text (a copy of which I enclose for your Committee's consideration) therefore addresses the UK's concerns and I believe that the UK should support this text.

The ECRIS-TCN proposal was put to COREPER on 19 December 2018 and was passed. Ahead of an expected vote at Council, I trust this now offers sufficient clarity on the position to allow this dossier to be cleared from scrutiny.

21 January 2019

Letter from the Chairman to the Rt Hon Nick Hurd MP, Minister of State for Policing and the Fire System

Thank you for your letters dated 11 December 2018 and 21 January 2019. They were considered by the EU Justice Sub-Committee at its meeting on 22 January.

We decided to clear the proposed Regulation (doc 10940/17) and the proposed Directive (doc 5438/16) from scrutiny.

We note that a compromise on the text of the proposed Regulation has been reached with the European Parliament, and we understand that the matter will soon be voted on by the Council.

Whilst we have not received updates about the proposed Directive since our latest correspondence dated 9 February 2017, we recognise that its progress was contingent on the proposed Regulation, and we understand that they are being considered in parallel by the Council.

We do not expect a response to this letter.

23 January 2019

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 let you know that an agreement has been reached in negotiations between the Council and the European Parliament on the text of this proposed Regulation. We expect a final version to be approved by the European Parliament and submitted to a Ministerial Council for formal adoption in March. I propose to support the adoption of the Regulation, and I would be grateful if the Committee would now clear it from scrutiny.

I attach, in confidence, a copy of the consolidated text agreed between the Council and the European Parliament. It is very similar in substance to the text approved in October as the Council's mandate for the negotiations. Although some compromises have been necessary, these are mostly changes to the wording or to the explanatory text in the Recitals, rather than changes of substance. We expect there to be some further drafting amendments to ensure coherence, consistency and legal clarity, but further substantive changes are not likely to be accepted.

The final proposal:

- changes the title to 'Regulation on the introduction and the import of cultural goods', to reflect the fact that it includes provisions which cover goods which enter the EU customs territory but are not imported into the EU within the meaning of the Union Customs Code, for example goods which are in transit between two third countries;
- excludes cultural goods which were created or discovered in territory which is now part of the EU from the scope of the Regulation;
- establishes 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, to be implemented on a risk- and intelligence-led basis and coming into effect 18 months after the Regulation comes into force;
- requires an import licence for the import of cultural goods over 250 years old in only two categories - the category of rare manuscripts and incunabula has been moved and now requires an importer statement;
- requires an importer statement for the import of cultural goods in specified categories which are over 200 years old and over €18,000 in value - these thresholds are fixed (the value threshold has not been indexed to inflation) and can only be changed by amending the Regulation itself;
- exempts cultural goods imported for a range of purposes from the requirement for an import licence or importer statement, including returned EU cultural goods which were temporarily exported, cultural goods imported for safekeeping, and cultural goods which are being temporarily imported into the EU for educational, scientific, conservation, restoration, exhibition, digitisation, performing arts and research 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), 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;
- requires the establishment of an IT system to support the operation of the Regulation, which must be in place before the provisions relating to import licences and importer statements come into effect, and provides for an implementation period of up to six years to allow for development of the IT system.

The proposal also retains the Council's text for a partial relaxation of the requirements for cultural goods destined for art fairs, so that goods which would normally require an import licence 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 still consider that the text does not meet the policy intention and may be unworkable. We are continuing to pursue this point.

Overall, I consider that this final proposal represents the best outcome that can be achieved in the circumstances and given the strong opposing views of those, particularly in the European Parliament, who support greater regulation of the art market and the trade in cultural goods. I expect the Regulation to be adopted by the Council regardless of the UK's position. I consider that there is little to be gained from opposing the Regulation or abstaining in the Council, and that to do so could help to sustain the mistaken and unfair view in some quarters that the UK is more interested in protecting the art market than in tackling the illicit trade in cultural objects.

I therefore propose to support the adoption of the Regulation when it is submitted to the Council. I would be grateful if the Committee would now clear the proposal from scrutiny.

24 January 2019

Letter from the Chairman to Michael Ellis MP, Minister for Arts, Heritage and Tourism

Thank you for your letter of 24 January 2019 which was considered by the EU Justice Sub-Committee at its meeting of 19 February. We decided to clear the proposal from scrutiny.

We welcome your frank and detailed assessment of the current proposal. We engaged with the Government in some detail when the original text was first published and hope that this may have led to some improvement in the draft. As you know, we support proportionate regulation to combat illicit trafficking, particularly where it is used to finance terrorism. We were also keen to ensure that this Regulation was implemented in a sensible and effective fashion.

We regret that the final outcome is sub-optimal and, in the light of the stakeholder comments that you brought to our attention, have some concerns about the Regulation's likely impact on the British art market. Nonetheless, we accept your appraisal that this proposal "represents the best outcome that can be achieved in the circumstances."

It is unfortunate that, in the context of Brexit, there appears to be a loss of UK influence in discussions on proposed EU legislation. We do not expect a reply to this letter.

19 February 2019

PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON COPYRIGHT IN THE DIGITAL SINGLE MARKET (12254/16)

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

I am writing to update you on trilogue negotiations on 12254/16, COM(2016) 593: Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market. When my predecessor, Sam Gyimah, last wrote he outlined the positions of the Council and the Parliament on the most controversial aspects of the Directive, notably Articles 11 and 13, and the concerns in the European Parliament that would need to be considered during trilogue negotiations. Trilogue negotiations between the Parliament, Council, and Commission have now concluded and a

provisionally agreed Directive text has been produced, taking into account these concerns, to be voted on in Council and in the European Parliament. This letter focuses on the most contentious aspects of this diverse Directive.

Article 13 (value gap)

As predicted, Article 13, which aims to solve the 'value gap', proved the most difficult element of the negotiations. This is because it seeks to rebalance the liability framework to impose greater obligations on user-uploaded content sharing services, which may have impacts upon internet platforms and their users. Negotiations were temporarily halted in January when the Presidency was unable to find a mandate due to conflicting positions between Member States. After another two weeks of high-level political discussion between a very small number of Member States, regarding the nature of a new differentiated liability regime for small and micro enterprises, a new compromise Article 13 text was produced, and the final trilogue took place.

The agreed Article clarifies that online content sharing service providers, as defined in the Directive, can in certain circumstances communicate or make available works to the public, and are liable for these acts if performed without permission of the rightholder. In a concession to the technical realities of running such services, service providers can mitigate this liability if they comply with a series of obligations laid out in the Article. Service providers must first make best efforts to obtain an authorisation from the rightsholder for any content available on their services in order to mitigate their liability. Authorisations are most commonly achieved through a licensing agreement. We strongly supported the inclusion of these elements, and were one of the most influential Member States in their development

The second step relates to a situation where neither the rightholder nor platform wishes to enter into a licensing agreement. In an early draft of the Directive, one such obligation was the application of appropriate and proportionate measures, which may have included content filtering. However, given the European Parliament's concerns over content filtering, the text no longer includes references to these 'measures'. Instead it focuses on the requirement that service providers must make best efforts to prevent the availability of unauthorised works, by adhering to "high industry standards of professional diligence". This wording still ensures that service providers will be required to take action to prevent the availability of works, but is less focussed on formal 'measures'. The obligation occurs in two stages – the first being removal of content in a single instance (notice and takedown), and the second being an obligation to remove future instances of the same content (notice and stay-down).

One significant change to the draft Article since my predecessor last wrote is the inclusion of a carve out from liability for micro and small platforms (SMEs), as referred to above. This means that platforms which have been operating for under 3 years, with a turnover of less than 10 million Euros, and under 5 million unique yearly visitors will not have to comply with the Directive's more onerous conditions – including the duty to remove future instances of an infringing work (notice and stay-down) – until they breach one of those three criteria.

Another key change is the addition of a provision related to so called 'user generated content' (UGC). The provision states that Member States should ensure users can rely on certain exceptions and limitations when uploading user generated content. Earlier drafts of this provision appear to expand the scope of exceptions and limitations available in EU law. However, in the final draft this provision has been improved to more tightly reference the existing exceptions framework found in the Information Society Directive. This will be welcomed by rightsholders who were concerned about the potential expansion of the exceptions framework, and a subsequent reduction in licensing opportunities and enforcement of rights. It will also benefit users of these servicers, who will have clear access to these exceptions for the purposes of uploaded content.

Other aspects of the draft Article, including the complaints and redress mechanism and the obligation for the Commission to produce guidance on the application of the article, remain. We strongly support the inclusion of these elements.

In entering these negotiations, the Government collectively agreed a number of negotiating principles. Of particular relevance to this article are the following:

- Copyright reform should be **balanced and proportionate**, supporting the creative and digital economy, benefiting consumers, and promoting creativity, innovation and investment.
- Interventions should be **clear, targeted and justified by evidence**.

Government also agreed specific policy aims including: clarifying the obligations of, and responsibilities on, online services and to ensure they take appropriate action to remove copyright-infringing content;

and fostering greater cooperation between rights holders and online services to negotiate appropriate licensing agreements.

The negotiated Article 13 includes a clear statement that service providers can communicate works to the public, and then sets out actions that they need to take in order to mitigate liability, including entering into licensing agreements and removing unauthorised content.

However, less welcome additions to the text were also present in the final Article. In particular, there are legitimate concerns from stakeholders that the proposed Article is not as clear as is desirable, and that platforms, particularly SME platforms, will remain unsure of which obligations will apply to them or how the obligations will work in practice. Technology stakeholders have consistently argued that the Article will harm the digital economy. SMEs have also expressed concerns that the differentiated liability regime for SMEs may actually act as a barrier to investment.

Some parts of the music and audiovisual sectors are also expressing concern that Article 13 may harm the creative economy. This is because the new liability regime established under the Copyright Directive appears to exclude SMEs from the existing liability framework under current case law and the E-Commerce Directive, which they argue will leave them in a worse position than under the current framework. They are also concerned with the SME carve out as a matter of principle, arguing that small platforms can still do considerable damage to rightsholders' interests, though helpful clarifications in this respect were made to the corresponding Recital 38b during the Trilogue.

Given these concerns, we welcome the inclusion of Article 13(9) in the final Directive which calls for the Commission to produce, in conjunction with Member States, best practice guidance. This will help addresses some of the uncertainties present in the final text, particularly around the practical implementation of the Article. It is, however, likely that some elements will require judicial interpretation.

Article 11 (press publishers' right)

Another contentious aspect of the Directive is Article 11, which introduces a new right for press publishers. In the compromise Article, the right applies to online use of press publications by information society service providers, but not to private or non-commercial uses of press publications carried out by individual users. The right also does not apply to the act of hyperlinking or uses of individual words or very short extracts of a press publication. This is to ensure that basic navigational functions of the internet are unaffected. The term of protection of the right is 2 years. A new provision within the right is that Member States must provide that the authors receive an appropriate share of the additional revenues that press publishers receive for the use of their press publications by information society service providers. It is not yet clear how this provision will work in practice or how it will sit alongside contractual freedom between press publishers and journalists – this point may require further judicial interpretation.

I believe that negotiations on this Article have been successful from a UK perspective, and that the right will improve the position of press publishers in the value chain, giving them a better online environment that will allow them to more easily monetise and enforce the rights in their content, without undermining basic internet functionality.

Articles -14 and 16a (fair and proportionate remuneration, and revocation right)

As discussed in previous correspondence, prior to trilogues commencing the Parliament included a number of additional elements to the Directive that were not considered by the Council. Although most of these were deleted during trilogue negotiations, articles -14 and 16a now form part of the final Directive.

Article -14 provides that authors and performers should receive "fair and proportionate" remuneration when they transfer or license their rights to a third party for exploitation (e.g. a publisher or producer). The accompanying Recitals clarify that rightsholders are still free to assign their rights in return for a lump sum payment, provided that such remuneration is appropriate and proportionate. However, this is qualified by a statement that such payments "should not be the rule". It is not clear how this is likely to be interpreted in practice. The final wording of the Article grants Member States broad flexibility regarding how the right should be implemented in domestic law, taking into account their own national circumstances and the specificities of each affected sector.

Article 16a provides authors and performers with the ability to revoke rights granted to third parties which fail to commercially exploit their work. The compromise text builds in flexibility for Member States to determine how the right applies in practice, and to give authors or performers the ability to terminate the exclusivity of the contract instead of revoking their rights.

The UK did not support the addition of these Articles as they have not been the subject of an impact assessment. However, I believe that they are not contrary to the collectively agreed negotiating principle that creators and performers should be properly remunerated while maintaining incentives to invest in new content. Additionally, I believe that there is sufficient flexibility in these Articles that the Government will be able to consult fully ahead of domestic implementation to ensure that any new provisions complement existing UK regimes.

Article 9a (Extended Collective Licensing)

The Presidency was successful in negotiating the inclusion of a new Article 9a on Extended Collective Licensing (ECL). This corrects a deficiency in EU law that meant the status of ECL schemes, such as those allowed under UK law, was uncertain. The inclusion of this measure was a success in line with the UK's negotiation objectives.

Summary of other aspects of the negotiation

Trilogue negotiations on other aspects of the Directive went well and, in these areas, the final text is generally well-aligned to the Council approach and UK interests as outlined in the Government's agreed negotiating mandate. Further details of these provisions are provided in previous correspondence but a short summary is provided below:

- Article 3a introduces a text and data mining exception that would allow mining for journalism, commercial uses and by the general public, although rightsholders can protect their content by opting out of this. There was debate over whether this exception should be mandatory or optional and in trilogue it was agreed that it would be mandatory.
- Negotiations on Article 4, exceptions on cross-border digital use of educational materials and preservation, have gone well, and the compromise text is closely aligned with the Council position.
- The UK has supported Article 7, which aims to make it easier for cultural heritage institutions to use out-of-commerce copyright works by creating a legal mechanism for them to be licensed via collective management organisations (non-profit bodies representing right holders). This approach has been successfully agreed in trilogues. However, the Parliament has been successful in introducing a 'fall-back' exception which would allow cultural heritage institutions to use works without a licence if no licensing scheme was available. Although the exception contains certain safeguards for rightsholders, the Government is concerned that it is still too broad in scope and risks undermining the existing Orphan Works Directive (Directive 2012/28/EU).
- The negotiation on Article 10, a mechanism for video-on-demand platforms, went well and the final proposal for this article is closely aligned to that Council position, and is light-touch.
- Negotiations on the transparency provisions for authors and performers (article 14) and the contract adjustment mechanism (article 15) have progressed well.

Stakeholder reaction

Stakeholder reaction to the draft Directive has been mixed. The technology sector has long opposed the Directive, and though they have received some concessions in the form of mitigations to liability in Article 13 and protections for navigational use of press content in Article 11, they still have strong concerns about the practical impacts. In particular, they are unclear how the obligation to enter into licensing arrangements with rightsholders will affect their ability to mitigate their liability.

Rightsholders are split on whether or not they welcome the text. On the one hand, it has been welcomed by press publishers, authors, and song writers, who will see higher potential remuneration for creators of copyright works and increased licensing opportunities arising from the new liabilities imposed on platforms. However, the audio-visual sector, broadcasters, and some parts of the music industry are not supportive. These are the parts of the creative sector that are involved not only in licensing of copyright works, but also in their production. They argue that the Directive not only weakens their protections and ability to remove content from websites under the existing liability framework, but that it will disrupt established funding models through stricter rules on remuneration and rights of revocation for participants in the creation of works. They argue that these factors will undermine incentives to invest in the production of creative works in the EU.

Next steps

There will now be a period during which the provisional agreement is translated into all official EU languages. During this period MEPs will have the opportunity to consider the text before a vote in the

plenary session of the EU Parliament, which is expected to take place either in March or early April. The ability for UK MEPs to vote on the proposal in Parliament will depend on whether the vote takes place before or after the UK leaves the EU. If the Directive is approved by the European Parliament, it will then proceed to a final vote by Ministers in the Council of the EU. If the vote takes place after the UK has left the EU, we will of course not have the opportunity to vote in the Council. The Directive itself now imposes a 24 month period by the end of which Member States must have transposed it into domestic law.

In summary, whilst there remain stakeholder concerns that the negotiated Directive fails to fully achieve our policy aims with respect to elements of Article 13, other aspects of this Directive have been negotiated successfully in line with UK aims. Furthermore, should the UK need to implement this Directive, the Government will have the opportunity to fully consult with stakeholders to address their issues in implementation, where flexibility has been achieved (for example in relation to Articles -14 and 16a). I am confident that the final agreement will meet a successful balance between the needs of copyright owners, online service providers and consumers. I am therefore now requesting final scrutiny clearance of this measure in order that the UK can vote in favour when it comes to Council for formal adoption.

6 March 2019

Letter from the Chairman to Chris Skidmore MP, Minister of State for Universities, Science, Research and Innovation

Thank you for your letter dated 6 March 2019 which was considered by the EU Justice Sub-Committee at its meeting of 19 March.

We decided to clear this proposal from scrutiny.

In October 2016, we decided to undertake a "light-touch" approach to the scrutiny of this matter because the Commission's proposal broadly aligned with the UK's copyright regime.

We note: (i) your concerns with aspects of the final text (for example, Article 13 dealing with the so-called value-gap); (ii) your conclusion that overall the final text reflects the UK's negotiating aims and will strike a "successful balance between the needs of copyright owners, online service providers and consumers"; and, (iii) your confirmation that the trilogue discussions have completed and that the Council is ready to agree this matter. It is, therefore, unlikely that the text of this proposal is going to change further.

We do not expect a response to this letter.

20 March 2019

PROPOSAL FOR A REGULATION 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 the Chairman to Chris Skidmore MP, Minister of State for Universities, Science, Research and Innovation, Department for Education and Department for Business, Energy and Industrial Strategy

Thank you for your letter dated 13 November 2018, which was considered by the EU Justice Sub-Committee at its meeting of 15 January 2019. We decided to retain the proposal under scrutiny.

We are content to maintain the scrutiny waiver granted in our letter of 17 April 2018. We ask that you keep us up to date with any substantive developments.

We look forward to a reply in due course.

15 January 2019

Letter from Chris Skidmore MP, Minister of State for Universities, Science, Research and Innovation

Thank you for your letter of 15 January 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.

After your letter, trilogue discussions have once again advanced and come to an agreed text.

Conversion to a Directive

As set out in the letter from Minister Gyimah on 13 November 2018, several Member States made their support contingent to the Regulation being converted to a Directive. The Government did not share their concerns about existing domestic arrangements to the same extent, but agreed that a Directive would give greater freedom to implement the rules on online transmissions, and ensure greater consistency with existing legislation stemming from the implementation of the Satellite and Cable Directive. The final text confirms that the instrument will be a Directive rather than a Regulation.

Country of origin rule

As per the letters of 17 April and 13 November 2018, the European Parliament sought a country of origin rule which would be limited to news and current affairs for television ancillary online services, in addition to programming produced exclusively by the broadcaster, 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.

Retransmissions

Retransmissions of content over the internet, where in a secure environment which prevents casual piracy, should be subject to mandatory collective rights management to allow copyright clearance to be completed more easily.

Direct injection

Some Member States argued for the inclusion of direct injection in the Directive – a technical means of broadcast, where the broadcasting organisation provides the signal directly to a distributor, and this has been included in the final text. 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. The Government believes that there is adequate protection for rights holders in the way direct injection has been included, and sufficient flexibility in the way this should be implemented.

We expect the Directive to be put to a Council vote shortly. As the trilogues have established a text which protects territorial licensing, and meets the Government's negotiation objectives, the Government would wish to vote in favour in any Council meeting under the Romanian Presidency.

6 March 2019

AMENDED PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON CERTAIN ASPECTS CONCERNING CONTRACTS FOR THE SALES OF GOODS, AMENDING REGULATION (EC) NO 2006/2004 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AND DIRECTIVE 2009/22/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AND REPEALING DIRECTIVE 1999/44/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL (13927/17)

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 of 19 December 2018.I now write to ask that the Committee considers granting a waiver for the dossier from scrutiny ahead of final adoption, which may take place in early February 2019 at the Committee of Permanent Representatives (Coreper).

State of play

Member States agreed a general approach on 7 December 2018, with only the UK and Poland not supporting the text. I attach a copy of this. There was a wide divergence of views from the delegations on the value of maximum harmonisation, as opposed to allowing Member States flexibility to maintain their existing high level of consumer rights. This was demonstrated when many of the delegations

expressed a desire to see improvements to the text during the trilogue phase with the European Parliament. The general themes of Member States' positions concerned inconsistency as well as a lack of coordination with the Digital Content Directive and a dilution of maximum harmonisation, resulting in a continuation of disparity between national laws.

The UK successfully secured concessions that meet some of our key negotiating objectives. However, as the text did not fully meet the objective of maintaining existing UK standards of consumer protection in all affected areas, the UK abstained from the vote.

The overall position of the European Parliament suggests that it is unlikely the text will move significantly further towards the UK position because it favours a fully maximum harmonisation approach. If the final text continues to fail to meet our objective of maintaining existing UK standards of consumer protection in all affected areas, we will again not vote in favour of it. If the text moves in favour of the UK's negotiating objectives, maintaining existing UK standards of consumer protection in all affected areas, we would then be in a position to consider voting in favour.

The file has moved towards the UK's negotiating position in two significant respects:

The short-term right to reject defective goods

As explained in my last letter, the UK presented a drafting proposal that set the regime for consumer remedies at minimum harmonisation, which would have allowed Member States to retain or adopt provisions on consumer remedies that go beyond the provisions in the draft Directive. This would have avoided requiring the UK to weaken certain aspects of its existing consumer remedy regime, such as abolishing consumers' short-term right to reject faulty goods.

However, the Presidency decided instead to add a specific provision that would allow Member States to maintain or adopt this short-term right. The Presidency views this as a major concession, and it meets a key UK negotiating objective (in practice it would work slightly more restrictively than currently as there would be no prospect for consumers to pause the 30-day period if they wanted to try a repair instead).

Time limits for a remedy

The other, partial, success has been on time limits for a remedy. Since my last letter, we have successfully negotiated a text that meets our objectives insofar as it allows Member States to maintain only a limitation period (time limit for pursuing legal action) without having to introduce a liability period (time limit for a defect to arise for the consumer to be entitled to a remedy). This is a positive development, as UK consumer legislation does not provide for liability periods.

However, we have some outstanding concerns about the application of the time limit provisions to goods with digital elements ('smart goods'). For example, the current drafting on trader liability indicates that, for contracts requiring a continuous supply of digital content or digital services for a goods over time, any limitation period shall not be shorter than the length of the continuous supply period under the contract. The implication is that the UK's current limitation periods (five years in Scotland and six years in England and Wales) might not be sufficient where digital content or services are being continuously supplied for longer than these periods.

We are also concerned that this could give rise to asymmetric policy outcomes where liability can be limited to two years in some circumstances but is essentially open-ended in cases where digital content or services are supplied continuously. We query whether this is the policy intention and are working closely with like-minded Member States and MEPs to clarify the position and to agree drafting that would allow Member States to maintain their existing limitation periods, if they have them.

Areas in which change would be required

Despite these major and welcome developments, there are some areas where the UK would still have to weaken its current level of consumer protection. For example, the text fails to impose an explicit limit of one attempt by traders to repair or replace goods before consumers can seek a refund or price reduction, which is the case in UK law. Instead, the text requires that, if a first attempt at a repair or replacement fails, it should be objectively ascertained what is a reasonable step to take given the full circumstances of the case, such as the value of the goods and the nature of the defect. The benefit of this approach is that it allows the system to respond flexibly to the sheer complexity and diversity of the goods market, although it is unclear who would objectively ascertain the next step without the involvement of a court or dispute resolution body.

The current text also prohibits consumers from seeking a refund if a defect is 'minor', whereas in UK law there is no such prohibition. Further, the text does not provide enough clarity on the extent to which the UK could retain non-statutory (i.e. common law and equitable) remedies, which, although

not consumer-specific, are a source of UK consumer protections and remedies in addition to the statutory regime.

It is disappointing that we have not been successful in securing these concessions by way of a minimum harmonisation clause for consumer remedies. We are working with like-minded Member States and MEPs to try to achieve this in the trilogue phase.

Treatment of goods with embedded digital elements (smart goods)

The Committee will recall that the Justice Council agreed in June 2018 that goods with digital elements should be within the scope of the Sales of Goods Directive rather than the Digital Content Directive. The UK supported this position on the basis that it is the clearest outcome for consumers. Since then, working groups have focused on how to do this in practice. One issue has been how to ensure that the embedded digital content within smart goods is updated sufficiently to preserve the conformity of the overall good with the contract. As a result, providing a software update is listed as a requirement for conformity alongside more traditional requirements such as being fit for purpose.

While specific requirements for goods with digital elements provide useful legal clarity for consumers in what is a new and evolving market, EU retailers are concerned about the practicality of this requirement, such as how they would maintain relationships with consumers in order to provide an update. My officials are working with EU partners during the trilogue phase to clarify how the requirement would work in practice and to improve the clarity of the text.

Transposition

A two-year deadline still applies to implementation, although this may be extended by six months to allow greater time for adaptation. This deadline is likely to fall after the end of any implementation period following the UK's withdrawal (based on an end date of 31 December 2020).

17 January 2019

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

Thank you for your letter dated 17 January 2019 which was considered by the EU Justice Sub-Committee at its meeting of 5 February.

We decided to waive the scrutiny reserve ahead of the Council's agreement of this proposal.

Once again, we are grateful for your update on this proposal's progress through the Council which illustrates the technical nature of the discussions being undertaken and demonstrates the trilogue's efforts to agree a text that interacts effectively with the proposal dealing with digital content.

We support the Government's aims and reiterate our desire to avoid any reduction in the consumer protection standards operating in the UK. We note that your update shows that the Government has been unsuccessful in securing a text which would introduce minimum consumer protection standards and leaves the individual Member States discretion to legislate for higher levels of protection. By contrast, it is clear from your letter that the majority in the Council and the European Parliament appear to prefer a Directive that would introduce uniform consumer protection standards across all EU Member States (a so-called maximum harmonisation).

We look forward to considering, in due course, your summary of the final text agreed by the Council.

5 February 2019

PROPOSED DIRECTIVE ON CERTAIN ASPECTS CONCERNING CONTRACTS FOR THE SUPPLY OF DIGITAL CONTENT (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 of 19 December 2018. I am writing to request that the Committee considers granting a waiver for this dossier from scrutiny.

The associated Directive on certain aspects concerning contracts for the sales of goods ('SGD') reached general approach at the Council of the EU on 7 December. As a result, the two Directives are now being considered jointly in the interinstitutional trilogue phase of the negotiations with a view to completing both before the European Parliament elections in the spring. It is possible there will be a final vote on both at a meeting of permanent representatives ('Coreper') in early February 2019.

We would be in a position to vote in favour of the final text only if the UK's objectives on section i) below can be achieved. Since my last letter, there have been the following developments in the trilogue negotiations:

i) Preserving the UK's limitation period for claiming a remedy

A key UK negotiating objective is to protect the integrity of the UK's limitation periods (the period within which a legal claim must be commenced). The limitation period for simple breach of contract (including consumer contract) claims is six years in England and Wales and five years in Scotland. However, the most recent drafting on trader liability indicates that, for contracts requiring a continuous supply of digital content or digital services over time, any limitation period shall not expire earlier than two years from the end of the contract or from the moment the consumer becomes aware (or is deemed to have become aware) of the lack of conformity, whichever is the earlier.

This drafting is preferable to that in the Sales of Goods Directive in that it avoids an open-ended limitation period. However, UK limitation periods for simple contract claims start running when the breach of contract occurs, not when the consumer becomes aware of the breach. There is the possibility (even if unlikely) of a scenario where a consumer only becomes aware of a breach several years after it occurred, at a point where existing UK limitation periods had expired. Under the draft Directive, however, the consumer could still bring a legal claim.

We are concerned that this could give rise to asymmetric policy outcomes where seller liability can be limited in some circumstances (for a one-off supply of digital content or services) but is essentially open-ended in cases where digital content or services are supplied continuously over a long period. We query whether this is really the intention and are working closely with like-minded Member States and MEPs to clarify the policy position and to agree drafting that would allow Member States to maintain their existing limitation periods, if they have them.

ii) Compensating traders for the termination of long-term contracts

My last letter explained that it is undecided whether the Directive should introduce a right for traders to be compensated for the early termination of long-term contracts for digital content and services. A proposal from the European Council's general approach includes no compensation right, while that of the European Parliament does. The current text reflects the European Parliament's position that traders are entitled to proportionate compensation for promotional advantages directly linked to the duration of the contract. There has been some call for change from this position. However, some digital content providers are concerned that allowing for no right to compensation for early termination of long-term contracts, or limiting compensation only to goods or by capping it, would force them to raise prices or to stop providing some services where they are linked to the consumer taking a longer contract.

Currently in UK consumer law there are no provisions regarding compensation for traders for termination of longterm contracts for digital contenUservices. Traders may seek to address the issue in their consumer contracts, although they will be subject to consumer protection rules on unfair contract terms. The EU-level consumer organisation (BEUC) is opposed to longterm compensation obligations.

There is an ongoing discussion about how prescriptive the text should be. The Presidency has proposed drafting that would entitle the trader to proportionate compensation for any promotional advantage that may have been enjoyed by the consumer and that was directly linked to the contract duration, and that this compensation requirement had to be communicated clearly to the consumer before entering the contract. Promotional advantages would include goods, where they have been provided, although the consumer would also have the option of returning the goods as part of the termination right. Examples of promotional advantages might include offering an additional service or a reduced price based on the consumer agreeing to a contract longer than twelve months.

Some Member States are querying the need for any compensation and others contend that the compensation right should be limited strictly to goods (where they are provided within a broader contract for digital content, such as terminal equipment in a broadband package), and for the time threshold to be extended to two years, reflecting their concern that a compensation requirement would be a disincentive to switching.

We have considered the wider implications of limiting the right to compensation for traders but without an impact assessment, the consequences are difficult to predict. The nature of the digital services market and submarkets varies, containing a wide range of products and subscribing to a variety of different business models. No compensation may therefore cause different implications for the various submarkets and therefore, a true measure of the impact is uncertain. For example, limiting compensation may result in benefit for consumers. It could lead to businesses becoming more competitive and offering greater choice. This could lead to greater competition and more competitive

pricing and consumer protection. In theory, this model will seek to recreate the characteristics of more fluid and competitive markets. However, barring compensation rights for traders could also have a more negative impact on consumer rights, a limitation of choice, or raised prices.

Overall, our starting point is to leave this to the discretion of Member States as far as possible. In many Member States it is likely that these arrangements are already being managed under the contract between seller and consumer. We are however willing to listen to suggestions from other Member States that would offer a remedy and avoid putting consumers at unnecessary risk of unfavourable policy outcomes.

iii) Other issues covered by the UK's original negotiating objectives

The following is a summary of the state of play on issues covered in the UK's original negotiating objectives. At present, the text meets these objectives:

- clarity on scope: the current text provides clarity that the Directive does not apply to situations where the data is processed exclusively by the trader in order to meet their wider legal obligations;
- conformity with the contract: the text is now clear that the consumer's reasonable expectations are a necessary aspect of conformity; and
- there is clarity over the relationship with other EU rules such as the General Data Protection Regulation and the Electronic Communications Code. iv) Transposition deadline

As with the associated Directive on contracts for the sales of goods, a two-year deadline applies to implementation, but this may be extended by up to six months to allow greater time for adaptation. This deadline is likely to fall after the end of any implementation period following the UK's withdrawal from the European Union (based on an end date of 31 December 2020).

I have written separately on the associated Directive on contracts for the sales of goods.

17 January 2019

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

Thank you for your letter dated 17 January 2019 which was considered by the EU Justice Sub-Committee at its meeting of 5 February.

We decided to waive the scrutiny reserve ahead of the Council's agreement of this matter.

Once again, we are grateful for your detailed and technical update of the trilogue's discussion of this proposal. We may revert with some further questions on this dossier in due course.

We look forward to considering an update on the outcome of the Council.

5 February 2019

PROPOSED REGULATIONS ADAPTING REMAINING LEGAL ACTS IN JHA AND NON-JHA FIELDS USING PRE-LISBON COMITOLOGY TO POST-LISBON DELEGATED AND IMPLEMENTING ACTS PROCEDURE (5623/17)

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ADAPTING A NUMBER OF LEGAL ACTS IN THE AREA OF JUSTICE PROVIDING FOR THE USE OF THE REGULATORY PROCEDURE WITH SCRUTINY TO ARTICLE 290 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (5705/17)

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

I am writing to update you on a further three Friends of Presidency (FoP) meetings since my last letter, looking at the proposed regulations to adapt acts using pre-Lisbon comitology to the post-Lisbon delegated and implementing acts procedure. During these meetings, a full General Approach and a possible way forward in trilogue negotiations was discussed.

As outlined in my previous letter, this exercise is intended to align existing tertiary legislation to the new post-Lisbon tertiary legislation methodology. The substance and effect is not being amended, but this tertiary legislation will instead become subject to the same updating procedures as apply to other, post-Lisbon Regulations. These changes are merely a technical adjustment forming part of a wider effort to streamline legislation, which the UK supports.

On 26 October and 23 November, two FoP meetings took place to discuss six acts in total. Five of the acts, three of which were in the non-Justice area and a further two in the Justice area, were not covered in the partial General Approach agreed at General Affairs Council on 20 March 2018. The FoP meetings also reviewed one act that was covered in the partial General Approach, in light of a new Commission proposal in May 2018.

Following the FoP meetings, the Presidency proposed a full General Approach that was approved at Council on 20 December by qualified majority vote, on which the UK abstained as this file had not been cleared by the Commons European Scrutiny Committee.

The new General Approach includes the removal of four acts from the exercises following new Commission proposals to replace these pre-Lisbon directives and regulations. As these new proposals use post-Lisbon procedures, there is no need for these acts to be considered in this exercise. These were Act 98 (Motor Vehicle Directive) and Act 126 (Road Infrastructure Directive), as well as Act 1 (Cooperation Between Courts Regulation) and Act 3 (Extrajudicial Documents Regulation) from the Justice area. In addition to the removal of these four acts, the General Approach amends two acts - Acts 29 and 30 (Natural Gas Directives), so that they better reflect the views of Member States.

During the most recent trilogue discussions, the Commission proposed that, in light of the EP elections and the appointment of a new Commission in 2019, the institutions should align the acts where there is agreement amongst all three institutions before the EP elections in May 2019. The EP is open to agreeing to this approach, on the condition that it is guaranteed that the remaining acts will not be withdrawn.

The UK Government welcomes any move to reach agreement on the alignment of these acts and the UK would look to support this in the future.

22 January 2019

PROPOSAL FOR A DIRECTIVE 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 AS REGARDS BETTER ENFORCEMENT AND MODERNISATION OF EU CONSUMER PROTECTION RULES (THE "OMNIBUS DIRECTIVE") (7876/18)

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 19 December 2018, in reply to my letter of 6 November 2018. I am writing to request that the Committee considers granting a waiver for this dossier from scrutiny.

Since my last letter the Romanian Presidency has begun its tenure and set out an ambitious timeline on the legislative file which proposes making targeted amendments to key EU consumer legislation with the intention of modernising rules and improving enforcement (the "Omnibus Directive"). They have scheduled working groups throughout January and are aiming to have a General Approach cleared at a Competitiveness Council on 18 February. I expect the proposal to also be tabled at a COREPER meeting the week prior to this.

As you may recall, the Omnibus Directive is part of the New Deal for Consumers package which also contains a proposal regarding representative actions in the collective interest of consumers (the "Collective Redress Directive"). I have previously written on the two legislative proposals together even though they have been progressing at different speeds. Since the Romanian Presidency has clearly indicted that they are prioritising the Omnibus Directive for the time being I have decided to write to you separately on this file. I will however write to you at a later date on the draft Collective Redress Directive which the Romanian Presidency are aiming to secure a General Approach on by May.

Regarding the Omnibus Directive, we would be in a position to vote in favour of a General Approach only if the UK's objectives below can be achieved, which are currently undergoing Cabinet Committee approval. These objectives are anchored by a desire not to see UK consumer protection reduced or limited by the proposals and concern the changes proposed which are most relevant to this desire.

i) Preserving UK consumers existing right to withdraw from a contract

A key UK negotiating objective is to protect existing rights enjoyed by UK consumers. This includes the existing EU right of withdrawal within the Consumer Rights Directive that allows consumers to cancel a distance (including online) or off-premises contract within 14 days, without having to give a reason. Regarding contracts for sale of goods, the trader must reimburse the consumer within 14 days once the consumer has given evidence of sending the good back if this is earlier than when the trader actually receives the goods back; however, the consumer is liable for any diminished value as a result of handling the product more than necessary to inspect the good. The rationale is that a consumer should have the same opportunity to inspect a good bought at a distance as they would get if they bought it in a shop. The right of withdrawal is an important source of consumer and business confidence. It is one of the best-known consumer rights in the UK, with 78% of consumers being aware of it[1].

The European Commission has argued that the right of withdrawal puts disproportionate burdens on business and is open to abuse (e.g. a consumer purchases a dress online and uses it before sending it back and asking for a refund). As was outlined in the Explanatory Memorandum sent to your Committee on 4th May 2018, they therefore proposed to amend this right in two ways:

1. Removing the obligation for the trader to accept the right of withdrawal when a consumer has 'handled' a good more than necessary.
2. Removing the obligation for the trader to reimburse the consumer before they have received the returned goods and have had a chance to inspect them (e.g. for overuse).

While I am generally supportive of simplifying burdens on business I feel that these amendments unfairly shift the burden on to the consumer. Firstly, there is likely to be a difference between how a consumer 'handles' a product before purchase in a shop compared to following an online purchase. The consumer may have to unwrap and assemble a good bought online in order to properly inspect it.

Secondly, in reality, many traders offer the consumer a pre-paid envelope or courier collection rather than collecting the goods themselves. However, this results in a gap between the goods leaving the consumer and reaching the trader, with the consumer losing control once they have posted or handed the good over. I am concerned that under this proposal traders could refuse to reimburse consumers for non-return of goods even where this is due to factors outside the consumer's control. In my opinion the status quo where the consumer is liable for any diminished value is sufficient to safeguard abuse from consumers. In addition, the European Commission has not provided enough evidence to justify this change. The documents published show a small sample size of businesses (99 SMEs, 17 large companies) were consulted and a lack of monetized evidence of detriment to traders themselves.

This position has generally been shared by other Member States during working groups apart from a group of Nordic Member States who support the amendment. Consequently, the amendment has been deleted in the most recent compromise text from the Romanian Presidency. In addition, the European Parliament has also expressed a desire to maintain the existing right of withdrawal. I am therefore confident that this negotiating objective will be achieved.

ii) Preserving the UK's existing rules on secondary ticketing

The draft Directive contains amendments to the Consumer Rights Directive that would require online marketplaces to provide information to consumers on the main parameters determining the ranking of offers on the marketplace, whether the third party selling through the marketplace is a trader or private individual, whether EU consumer law rights will apply to the contract as a result and if so, how the trader and the online marketplace will share responsibility for enforcing them. Efforts to make online platforms more transparent are welcome and consumer protections should evolve to meet consumer needs in new online environments. The Consumer Green Paper launched by the Government last Spring looks at this area, amongst others, to ensure that modern consumer markets work for all.

The UK has already legislated to make online marketplaces liable for providing material information to consumers buying tickets that are re-sold online through the marketplace ('secondary ticketing'). This rule is important in ensuring that these marketplaces are themselves responsible for enabling material information such as seat location and face value to be provided to the purchaser. Since their introduction there have been improvements in the information available to consumers, who as a consequence have been more empowered to interact with the market. For example, on 27 November 2018 the Competition and Markets Authority secured a court order against one website which compels it to overhaul its business practices in relation to selling event tickets. The legally binding court order requires the website to comply with consumer protection legislation on a number of areas.

[1] EU Consumer Conditions Scoreboard 2017 – Consumers at home in the Single Market

I am supportive of the principles behind the requirements on online marketplaces in the draft Directive. However, as currently drafted they would be set at maximum harmonisation allowing no flexibility for Member States to go beyond these requirements. There is a high risk this would require the UK to scale back or remove our existing rule on the information required from marketplaces about tickets re-sold online and limit the scope for the UK to take further action domestically to protect consumers in this area. I am therefore seeking an amendment to the draft Directive to allow Member States discretion to make national laws that go beyond the requirements of this Directive regarding the information that must be given to consumers on online marketplaces.

Although my officials have repeatedly raised the UK's concerns at meetings in Brussels, the European Commission has been reluctant to consider changing the level of harmonisation of this provision or consider alternative drafting solutions. Our position has been supported by France and Finland however other Member States have not shared our concerns. France are similarly concerned about having to scale back on exiting domestic legislation they have implemented regarding online marketplaces. The most recent compromise text from the Romanian Presidency has not taken our concerns into account and it is unclear at this stage whether we will be able to achieve any concessions.

iii) Allowing flexibility on penalties for breaches of consumer law

Through the draft proposal the European Commission intends to improve traders' compliance with EU consumer law by adding to rules on penalties. The draft Directive would entail amendments to existing, less detailed provisions in the Price Indication Directive, the Unfair Commercial Practices Directive, the Consumer Rights Directive and the Unfair Contract Terms Directive. The proposed provisions are identical across the four directives and include:

1. A general discretion for Member States to set national rules on penalties that are effective, proportionate and dissuasive;
2. An obligation on Member States to ensure that courts or authorities, when deciding whether to impose penalties, have due regard to a list of non-exhaustive criteria;
3. An obligation to ensure that penalties for widespread infringements (including those with a Union dimension) include the possibility to impose a fine, the maximum amount of which must be set at a maximum of at least 4% of trader's annual turnover; i.e. any cap on fines should not be set at less than 4%.

The Government has already signalled its intention in the Consumer Green Paper, independent of actions in Brussels, to bring forward domestic legislation to give civil courts the power to impose financial penalties on traders for breaches of consumer protection laws. The Consumer Green Paper proposes that the financial penalty would be subject to a total cap of 10% of a firm's worldwide turnover, in line with the limits for fines in some of the regulated markets, which is why I am in favour of maintaining the current proposal to cap fines at a minimum of 4% of annual turnover, but with discretion for Member States to go beyond this. In addition, I am in favour of giving courts the flexibility to consider other relevant factors when deciding whether to impose a penalty which would be permitted if the criteria remain non-exhaustive. I therefore do not have any issue with the proposal as originally drafted but will resist any move towards maximum harmonisation in this respect. In other words, I am content as long as the fine is a maximum of at least 4%, and the criteria remain non-exhaustive.

Most Member States have shared the UK's desire for the rules on penalties to be clearly set at minimum harmonisation. In particular, there has been a strong push from Member States (including the UK) to make it clear that the list of criteria to be considered is only indicative and non-exhaustive. This has been reflected in the most recent compromise text from the Romanian Presidency. Although the European Parliament appears to be in favour of capping fines at 4% of annual turnover, this position has so far not been shared by Member States and the European Commission. I am therefore reasonably confident that this negotiating objective can be achieved.

Alongside the negotiating objectives I have highlighted above, it is also worth noting that the most recent compromise text produced by the Romanian Presidency has proposed extending the transposition deadline from 18 to 24 months. It is unclear at this stage whether this proposal will be accepted as the European Commission has expressed reservations however, if accepted, the transposition deadline would fall beyond the Implementation Period that has been provisionally agreed with the EU. This would reduce the likelihood that the UK would be required to implement the Directive.

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

31 January 2019

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

Thank you for your letter dated 31 January 2019. It was considered by the EU Justice SubCommittee.

We decided to waive the scrutiny reserve in respect of document 7876/18 ahead of the Council's agreement of a General Approach text and to retain documents 7875/17 and 7877/18 under scrutiny.

We welcome your clear explanation of the Government's negotiating objectives for the Council's discussion of the proposed Directive that seeks to modernise the EU's consumer protection rules (the so-called Omnibus Directive). We take this opportunity to express our support for both your negotiating aims and your efforts to avoid maximum harmonisation in this area.

Throughout our scrutiny of a range of recent EU proposals dealing with consumer protection we have repeated our desire to avoid any reduction in the UK's consumer protection rules either as a result of EU harmonisation or Brexit. The potential loss of the Member States' discretion to introduce higher standards than those required by EU law is aptly illustrated by your example of the UK's legislation regulating online marketplaces offering secondary ticketing services.

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

13 February 2019

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

The Presidency has confirmed that the final Coreper for this file is scheduled for February 13th. This will allow the Ambassadors of EU Member States to make any final comments on and approve the draft Directive, as negotiated in trilogues.

We believe that we have obtained most of the changes that we sought to the measure, although we cannot confirm this until the final text is provided. As the measure is under Qualified Majority Voting (QMV), the UK does not have to vote in order for it to be adopted, and if scrutiny were not lifted, the UK would abstain.

The Government has obtained most of the changes that we sought to the measure. Key changes made during recent trilogue negotiations, which the Government is content with, include:

- Under Article 7, the FIU is required to cooperate with the competent authorities specified in the Directive, and to explain any refusal to reply to a request for assistance. I do not see this as problematic given the purpose of the FIU is to co-operation with those authorities.
- Article 8 requires designated competent authorities to "reply in a timely manner to requests for law enforcement information, by the FIU". Given there is no definition of "timely manner", I am content with this amendment.
- Article 9(2) require FIUs to "endeavour to exchange such information promptly". Existing international agreements that the UK is party to, such as the Egmont group of FIUs, also require participating countries to share information promptly, so this is not a new requirement.
- Article 9 requires that Member States should ensure that information or analysis exchanged with other EU Member States is only used for the purpose for which it was provided, and that any further use is only possible with the prior consent of the FIU. Again, existing Egmont rules make the same requirement.

The final Coreper for this file took place on February 20th, and political agreement was reached on the measure. The UK abstained due to our outstanding Parliamentary Scrutiny Reserve.

I believe that the Government has obtained most of the changes that we sought to the measure to ensure it provides an effective basis for information exchange. I would therefore like the UK to be able to vote in favour of the adoption of the measure, likely at the JHA Council on 7 March. I am therefore

seeking the agreement of your Committee to lift scrutiny on this measure. We expect other Member States to vote in favour of this measure.

1 March 2019

PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE PROTECTION OF PERSONS REPORTING ON BREACHES OF UNION LAW (8713/18)

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 16 October 2018. I am writing to update you on negotiations on the EU proposal for a Directive on the protection of persons reporting on breaches of Union law, to request scrutiny clearance or a waiver.

The proposed Directive has progressed rapidly through negotiations in working parties. Numerous additional meetings were scheduled in the latter part of 2018 in an effort to progress the text and commence trilogues with the Parliament. On Friday 25 January, Coreper granted a mandate to the Presidency to proceed with trilogues with the European Parliament. The UK abstained from this vote. The Presidency has signalled its intention to bring the file to formal vote for a General Approach at the Justice and Home Affairs Council meeting of 7-8 March, although this date is subject to confirmation.

I would also like to respond to the questions that you had in relation to the Directive.

Firstly, you asked for an assessment of the proportionality of the final proposed text. The Government considers that the proposal should be proportionate and account for the varying practices and national systems of Member States. The domestic whistleblowing framework protects against any 'detriment', which is a concept expanded on in case law rather than statute, for a wide category of workers. The Directive would require penalties to be in place against a broad range of retaliation, for a wide category of persons including volunteers, shareholders and job applicants. It would also require that any restrictions on the disclosure of information would not apply to whistleblowers who reasonably believe that reporting information is necessary to reveal a breach; and that they be protected from any liability arising from that disclosure (including, for example, in relation to claims such as defamation, breach of copyright and breach of trade secrets). The Government is concerned that the broad protections of the Directive may be open to abuse, and may also require the creation of new causes of action for categories of persons who do not enjoy certain rights under domestic law.

The Government is in favour of allowing businesses and public authorities the flexibility to establish internal reporting systems, and to exercise investigatory functions in a way which accounts for their needs, their powers and the environments in which they operate. However, the proposal would impose prescriptive requirements upon businesses and public bodies. It would require them to have in place prescriptive whistleblowing policies and would require competent authorities to take on functions to provide assistance to whistleblowers. I believe that in bringing forward these provisions, the Commission has failed to provide sufficient evidence to justify why such requirements should be set at the EU rather than national level.

Secondly, you asked for an assessment of the impact that any complaints made under the Directive could have on the UK courts system. Within the domestic whistleblowing framework, whistleblowers have the freedom to choose whether to report wrongdoing internally (to their employer) or report to an external authority. However, the current proposal would require a whistleblower to first report suspected wrongdoing internally. It would require a whistleblower to make an assessment of their individual situation and determine whether reporting externally to a competent authority (equivalent to prescribed persons within the domestic framework) would qualify for protection. The uncertainty caused by this requirement would likely increase the number of whistleblowing cases before the UK courts system. The Government believes that any legislative action should take into account variances in Member State practice, including existing systems of employment protections and the rights afforded to different categories of people. The proposal would require penalties for specific action taken in relation to wide categories of individuals, including shareholders and volunteers. This could further increase the uncertainty and burdens for the court system, and would likely require the creation of new causes of action.

Thirdly, you asked for a final assessment of the operation of the national security exemption. The Commission had previously indicated that the proposal was not intended to interfere in issues relating to national security, and this was reflected in Recital 21 of the original proposal. The UK has successfully lobbied for greater clarity on this, and a series of changes has been made. The Recitals have been

expanded to affirm that national security remains the sole responsibility of Member States in the fields of both defence and security; and to specify that disclosure relating to procurement involving defence or security aspects covered by Article 346 Treaty on the Functioning of the European Union is not covered. This is further reflected in new Article 1bis: the operative text states that the Directive shall not affect Member State responsibility for national security. The peremptory "shall not" is helpful in clarifying that Member States' competence in this area is unaffected. The Article goes on to provide that the Directive does not affect the application of Union or national law on the protection of classified information, and it provides a specific exemption in relation to disclosures by registered informants to law enforcement authorities. Further, the qualified protection afforded to whistleblowers who make public disclosures (now in Article 12bis) does not extend to cases where competent authorities establish that the disclosure threatens essential national security interests. It is very important, though, that the critical reservation of Member State competence in the field of national security is not weakened during the trilogue phase.

Finally, you asked about commitments to review changes to the UK whistleblowing framework. The Government will conduct a tightly-focussed review of changes to the whistleblowing framework which were introduced by the Enterprise and Regulatory Reform Act 2013. It is envisaged that discussions will take place with key industry professionals regarding the impact of these reforms. Scoping work for the review has begun and it is envisaged that the review will be conducted in 2019.

For the above reasons I propose that the UK Government continues to seek amendments to the proposal during the trilogue process. I hope that I have provided enough clarity over our position that scrutiny can be lifted, or a waiver provided, to enable us to vote on this proposal if necessary. As noted above, this appears likely to happen in March.

11 February 2019

PROPOSED REGULATION AMENDING REGULATION 469/2009 CONCERNING THE SUPPLEMENTARY PROTECTION CERTIFICATE FOR MEDICINAL PRODUCTS (9485/18)

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

Further to my letter of 19 December 2018 in relation to the Commission's proposal for an SPC export waiver, I can now provide the following update.

The Romanian Presidency has secured a mandate for informal trilogue discussions with the Commission and the Parliament on the basis of the text at Annex A, which was put to Member States in Coreper on 16 January 2019. Any agreed text following trilogue negotiations would be subject to a vote in Council in due course.

The storage of SPC-protected medicines in a Member State for future sale on the EU market as soon as the SPC expires[1] was not included within the scope of the export waiver in the mandate agreed in Coreper. This is in line with the UK's aims of resisting attempts to extend the proposal to allow such storing of medicines.

The UK has also sought to minimise the impact of the export waiver on already granted SPCs. The text agreed in Coreper means that after a transitional period of three years the SPC export waiver would apply to a sub-group of already granted SPCs, but the impact is limited to only those SPCs which have not yet entered into effect when the Regulation comes into force[2].

4 February 2019

Letter from the Chairman to Chris Skidmore MP, Minister of State for Universities, Science, Research and Innovation

Thank you for your letters dated 19 December 2018 and 4 February 2019. They were considered by the EU Justice Sub-Committee at its meeting of 5 February 2019.

We decided to retain the proposal under scrutiny.

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[1] Such storage of medicines is sometimes referred to as 'stockpiling' of medicines. This 'stockpiling' of medicines relates to a proposed 'business as usual' activity which generic medicine producers would use to speed up launch in the EU after sPC expiry.

[2] An SPC only enters into effect after the expiry of the associated patent. Nevertheless, an SPC may be applied for, and granted, many years before the date of expiry of the associated patent on which the SPC is based.

We are grateful for your explanation as to how the Government intends to ensure the continued operation of the Supplementary Protection Certificate system in both a 'deal' and 'no-deal' Brexit. We also welcome the clarification of your predecessor's statement that this proposal was not subject to the ongoing Brexit negotiations.

We note the confirmation in your letter of 4 February that COREPER agreed an "informal" General Approach text on 16 January that will now be discussed by the trilogue. Whilst we recognise that this may not be a formal breach of the scrutiny reserve resolution, it is a breach of its spirit. There was no suggestion in your letter of 19 December 2018 that any agreement of this proposal by the Council was imminent. In the same letter, you said that until "we leave the EU" in March 2019, the UK "will be an EU Member State, with the rights and obligations this entails". We agree and take this opportunity to remind you of the Government's obligation to not to agree to matters in the Council without first seeking clearance or a scrutiny waiver from the relevant European Committees in the House.

We look forward to considering further updates on the trilogue discussion in due course.

5 February 2019

Letter from Chris Skidmore MP, Minister of State for Universities, Science, Research and Innovation

Further to your letter of 5 February 2019, I am writing to update you on the European Commission's proposal for a Supplementary Protection Certificate (SPC) manufacturing export waiver, and also to request that this proposal be cleared from scrutiny.

I would like to reassure the Committee that no formal vote took place in Coreper as the Presidency established an informal mandate for negotiations rather than formally seeking a General Approach. The UK did not signal its agreement to the mandate but instead expressed its concerns that the transition period of 3 years included in the Coreper text was too short due to its potential impact on acquired rights of SPC holders.

However I note your comments about the need not to agree to matters in the Council without first seeking clearance or a scrutiny waiver from the relevant European Committees in the House.

It has now become apparent that trilogue negotiations are likely to conclude on Thursday 14 February 2019. It is likely that Coreper will be asked to confirm the trilogue agreement imminently, with a final vote in Council taking place in due course.

As indicated in my previous letter to the Committee, the UK is not in favour of the inclusion of stockpiling within the scope of the proposal. The UK has also sought to minimise the impact of the export waiver on already granted SPCs.

13 February 2019

Letter from the Chairman to Chris Skidmore MP, Minister of State for Universities, Science, Research and Innovation

Thank you for the letter dated 13 February 2019. It was considered by the EU Justice Sub-Committee at its meeting of 19 February.

We decided to waive the scrutiny reserve ahead of the Council's agreement of this proposal later this month. This will enable the Government to vote in favour of the text, should it choose to, without incurring an override of the scrutiny reserve.

We note your three concerns with the text 'informally' agreed by the Council in January: the short transition period; the inclusion of stockpiling within its scope; and the impact of the export waiver on Supplementary Protection Certificates that have already been granted.

We look forward to considering an update on the outcome of the Council in due course.

19 February 2019

Letter from Chris Skidmore MP, Minister of State for Universities, Science, Research and Innovation

Further to your letter of 19 February 2019 in which you indicated that the Committee had decided to waive the scrutiny reserve in relation to the European Commission's proposalfor a Supplementary Protection Certificate (SPC) manufacturing export waiver, I am now writing to provide a further update on this proposal.

Trilogue negotiations between the European Parliament, Council and Commission have now concluded. In addition to allowing manufacturing for export outside the EU, the compromise text agreed in trilogues allows stockpiling of SPC-protected medicines in the EU ready for entry into EU markets on day 1 of SPC expiry. Under the compromise the waiver would apply immediately to SPCs applied for after the Regulation comes into force, and would also apply to earlier applications and already-granted SPCs after a transitional period of three years, providing they have not yet entered into effect when the Regulation comes into force.

The compromise text has been approved in Coreper. As indicated in my previous letter to the Committee, a final vote in Council will take place in due course. The UK's view is that the compromise text is not balanced or proportionate, and that the provisions allowing for stockpiling in particular have not been fully assessed. We are therefore currently minded to vote against the proposed Regulation in Council unless there are significant changes, which at this stage seems unlikely.

6 March 2019

Letter from the Chairman to Chris Skidmore MP, Minister of State for Universities, Science, Research and Innovation

Thank you for the letter dated 6 March 2019. It was considered by the EU Justice Sub-Committee at its meeting of 19 March.

We decided to retain the proposal under scrutiny.

We note that this proposal is now ready to be agreed by the Council and your assessment of the final text as "not balanced or proportionate". Given that the Government's three concerns with the text remain (the short transition period; the inclusion of stockpiling within its scope; and, the impact of the export waiver on Supplementary Protection Certificates that have already been granted) we ask you: (i) : After the UK leaves the EU, do you still intend to replicate this legislation here or do you plan to diverge from these EU rules? And (ii) if the Government decides to diverge from these EU rules, what impact will this have on the UK's medicines industry?

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

21 March 2019

PROPOSED REGULATION AMENDING REGULATION 1206/2001 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 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 27 November 2018 which was considered by the EU Justice Sub-Committee at its meeting of 15 January 2019.

We decided to retain both proposed Regulations under scrutiny.

We note that you have decided to opt in to the proposed Regulation on the service of documents (document: 9622/18) but, due to the inclusion of a provision under which witnesses can be compelled to give evidence directly, you decided not to opt in to the accompanying proposal on the taking of evidence (document: 9620/18).

We look forward to considering updates from you in due course on the progress of these negotiations.

15 January 2019

Letter from Baroness Kennedy of The Shaws to the Rt Hon Sajid Javid MP, Home Secretary

Thank you for appearing before the House of Lords EU Justice Sub-Committee on 22 January. We found it helpful to get an update from you on the Government's current work on citizens' rights after Brexit.

We mentioned at the meeting that we would have a number of detailed follow up questions which we did not have time to pose during the session itself. Please find these below:

1. Please provide us with an update about the position of EEA/EFTA nationals. Are they now able to make use of the settled status scheme? If so, will this change in the rules be made clear online (including updating all older webpages) and in all future information campaigns?
2. The Government has repeatedly said that granting settled status would depend on only three factors: an individual is an EU citizen, resident in the UK, who has not been convicted of a criminal offence. This appears to be contradicted by the scheme rules, published in June, which stated that the Home Office would refuse settled status to EU nationals who had been ordered to leave the UK for abuse or nonexercised of rights under EU treaties. Why are these parallel rules in operation?
3. In the event of a 'no deal Brexit', there would be no transition period and EU nationals who arrived after 29 March would not be able to benefit from the settled status scheme. Have any impact assessments been conducted on the potential impact of this change on the economy and the National Health Service?
4. During the evidence session the position of vulnerable people, such as victims of trafficking and children in care, was raised. Many of these people will not have the standard documents that have been requested by the Home Office. What provision will be made for them and what documentation could they reasonably be asked to provide to obtain the right to settled (or pre-settled) status?
5. What undertakings have been received from EU countries about reciprocal rights for UK nationals?

24 January 2019

Letter from the Rt Hon Sajid Javid MP, Home Secretary

Following my appearance before the committee on Tuesday 22 January, I am writing to address your supplementary questions. I have addressed each of the questions below, in turn.

Please provide us with an update about the position of EEA/EFTA nationals. Are they now able to make use of the settled status scheme? If so, will this change in the rules be made clear online (including updating all older webpages) and in all future information campaigns?

The EU Settlement Scheme is not currently open to citizens of EEA/EFTA countries because the negotiations with them were separate to, and concluded after, those with the EU. However, we have now reached agreement with them and these agreements were published on GOV.UK on 20 December at www.gov.uk/government/news/uk-agreements-with-the-eea-efta-states-and-switzerland.

Citizens of EFTA states (Norway, Iceland, Liechtenstein and Switzerland) will be able to apply to the Scheme when it is fully rolled out from March 2019. We are currently in the process of updating GOV.UK webpages to ensure that they accurately reflect the position for EFTA nationals.

The Government has repeatedly said that granting settled status would depend on only three factors: an individual is an EU citizen, resident in the UK, who has not been convicted of a criminal offence. This appears to be contradicted by the scheme rules, published in June, which stated that the Home Office would refuse settled status to EU nationals who had been ordered to leave the UK for abuse or non- exercise of rights under EU treaties. Why are these parallel rules in operation?

Applicants who apply under the EU Settlement Scheme only need to confirm their identity, prove that they live in the UK, and declare any criminal convictions they have. They are not generally required to demonstrate that they are exercising Treaty rights and applications will not be refused, or referred for consideration of enforcement action, on that basis.

However, the draft Withdrawal Agreement provides that EU free movement rules will continue to operate in the UK, through the EEA Regulations 2016, to the end of the planned implementation period on 31 December 2020. This means that, as a matter of law, it will be possible that a person may be removed from the UK pursuant to the EEA Regulations if they have not been exercising Treaty Rights, or if there has been a misuse of free movement rights. As it remains a point of law, this should be reflected in the Immigration Rules for the Scheme in Appendix EU.

The most recent Statement of Changes to the Immigration Rules for the EU Settlement Scheme made it clear that any decision to refuse on these grounds would be discretionary, not mandatory, enabling us to take a proportionate approach based on the particular circumstances of the case.

In the event of a 'no deal Brexit', there would be no transition period and EU nationals who arrived after 29 March would not be able to benefit from the settled status scheme. Have any impact assessments been conducted on the potential impact of this change on the economy and the National Health Service?

Although there would be no negotiated implementation period in the event the UK leaves the EU without a deal, the UK will apply an interim immigration regime to EU citizens arriving after 29 March 2019, until we put in place permanent rules. On 28 January, I announced the time-limited immigration arrangements for EEA and Swiss citizens who travel to the UK once free movement has ended until the end of 2020. A policy paper was also published at: https://www.gov.uk/government/publications/eu-immigration-after-free-movement-ends-if-theres-no-deal.

Under these arrangements, EEA and Swiss citizens arriving in the UK would be admitted under UK immigration rules and would require permission (leave to enter or remain). They would be able to come for up to three months without requiring a visa, and enter, as now, using e-Passport gates. Furthermore, they would not be restricted in terms of the activity they can do (they may be able to work, for example). If they wished to stay longer than three months, they would need to apply for further leave and, subject to criminality and security checks, they would be granted three years' European temporary leave to remain in the UK.

The approach will be pragmatic, to ensure that the UK stays open for business and there is no sudden shock to UK businesses as the future system is put in place.

These transitional immigration arrangements will be provided for in the UK's Immigration Rules. An impact assessment will also be published alongside the Rules before their commencement.

During the evidence session the position of vulnerable people, such as victims of trafficking and children in care, was raised. Many of these people will not have the standard documents that have been requested by the Home Office. What provision will be made for them and what documentation could they reasonably be asked to provide to obtain the right to settled (or pre-settled) status?

Provision will be made in Appendix EU, from 30 March 2019, for applicants to the EU Settlement Scheme without the standard proof of identity and nationality (a passport or national identity card for EEA nationals, or a biometric residence card for non-EEA nationals) to rely on alternative evidence. This will be the case where there are circumstances beyond the applicant's control or where there are compelling practical or compassionate reasons why they are unable to obtain or produce the required document.

There will be clear guidance published on what could constitute exceptional circumstances and caseworkers will consider them on a case-by-case basis. There have been discussions about such cases with representatives of vulnerable groups and guidance is being amended in line with the feedback we have received.

The flexibility to accept alternative evidence of UK residence is already included in the Scheme guidance. As with all aspects of the Scheme, we will be working closely with applicants to identify the most suitable evidence that they are able to provide in order for us to progress their application.

What undertakings have been received from EU countries about reciprocal rights for UK nationals?

EU Member States are bound by the terms of the Withdrawal Agreement. If the UK leaves without a Withdrawal Agreement, there would be no reciprocal legally binding undertakings. On 6 December 2018, the Government announced its policy towards EU citizens in the UK before 29 March 2019. Some Member States have made announcements about the policy they would apply unilaterally to UK citizens in a no deal scenario. The Department for Exiting the European Union and the Foreign and Commonwealth Office lead on this aspect.

I would be happy to provide further information to the Committee if requested.

7 February 2019

EU SETTLEMENT SCHEME

Letter from Baroness Kennedy of The Shaws to the Rt Hon Sajid Javid MP, Home Secretary

We would like to thank you for appearing before the EU Justice Sub-Committee on 22 January, and also your officials for facilitating a visit by representatives of the Committee to the Home Office's EU Settlement Resolution Centre (SRC) in Liverpool on 14 February.

As you know, the EU Justice Sub-Committee has a long-standing interest in the subject of EU/EEA citizens' rights, post-Brexit. We first highlighted our concerns in this area in our report Brexit: acquired rights, published in December 2016, and we have returned to the subject on several subsequent occasions. We recently met with representatives of embassies from EU/EEA countries and the European Commission, who are in regular contact with community groups and citizens. We have encouraged them to keep us up-to-date with issues, about which we may write to you again in future.

Those of us who visited the SRC were impressed with the way that it was organised and resourced, and that the ethos at the Centre was positive. We are writing because we still have several concerns about the EU Settlement Scheme ('the Scheme') which the Government is now in the process of rolling out. We see several major risks in the Scheme as currently constituted, that could lead to EU/EEA nationals missing out on their settlement rights and could plunge the UK's immigration policy into another entirely avoidable scandal.

We would like to highlight four principal areas where we believe that more needs to be done: awareness of the Scheme; assistance with applications; physical proof of status; and transfers from pre-settled to settled status. Notably, a theme throughout these issues is whether the Government is doing enough to engage with vulnerable EU/EEA nationals resident in the UK (including the elderly, disabled, trafficked individuals and others), as well as those who are hard to reach and those who believe that their residency is secured simply by its long duration. We also have some more technical questions, listed at the end of this letter.

Our principal concerns

A. Awareness of the Scheme: Good communication, beyond electronic engagement

When we met you on 22 January, we raised our concerns about the tone of the social media-based advertising adopted by the Home Office over the Christmas period. To be frank, we agree with those who found the message conveyed by those Twitter advertisements to be ill-judged and objectionable. Moreover, it did not accord with your promises, made to us in June last year, that EU/EEA nationals in the UK would be made to feel welcome and wanted. We do not agree with your implication that the adverts could not offer both a welcoming message and factual clarity.

I am sure that you would agree that the initial imposition of a fee was not a welcoming signal, so the announcement of its abolition was widely appreciated. However, it does not appear to have been well co-ordinated across your Department; it is unfortunate that it was announced on the first day of the Public Beta trial, so that those currently applying are still having to pay an upfront fee and to then wait for their money to be refunded. For some people the refund is a burden, and administering it is adding to the Home Office's costs; but, more importantly, we have heard that for some applicants the cost of the application is a deterrent. It is imperative that the abolition of the fee is implemented immediately through the necessary legislation and that refunds are accelerated.

Looking forward to the time when the Home Office rolls out the Scheme for mass participation, it is essential that it uses not only the correct tone and message, but also the correct medium of communication. It is clear from our engagement with officials from EU/EEA countries that it is felt that online advertising is not going to be a suitable way of engaging with vulnerable and harder-to-reach citizens. This includes some elderly citizens who are long-standing UK residents, who resist the notion that they have to apply and who may not see online advertisements. It is therefore paramount that the Home Office commits to a wide-ranging campaign to reach out to all EU/EEA citizens living in the UK, including advertising in jobcentres, NHS facilities, universities and public transport networks, and via billboards, radio and television. Organisations with national profile such as the Citizens' Advice Bureau must be properly engaged and resourced and promoted as sources of advice. Engagement with local authorities will be vital, and we have already seen some examples where local authorities have produced

much more sympathetic adverts, such as Tower Hamlets which uses the message "This is your home too" and spells out what EU/EEA nationals must do to secure their rights.

Without widespread and welcoming advertising, there is a risk that some EU/EEA nationals will not know that they need to apply, or will think that it is unreasonable to ask them to apply and will not know the consequences of failing to do so. The Government should be concerned about the danger of taking immigration enforcement action against EU/EEA citizens, in particular long-standing residents, and public perception of such enforcement.

B. Assistance with applications

We remain concerned by the Home Office's persistent emphasis on making applications online and providing evidence electronically (including using the Android app for passport verification and for providing additional evidence when automated checks do not suffice). Whilst these approaches are a welcome addition to the other routes that are available (by post, and in person at Home Office buildings), the emphasis has worried potential applicants who lack access to the appropriate technology or who lack the necessary IT skills. Moreover, potential applicants are worried about the traditional routes: visiting a Home Office building entails time and costs; and posting important documents leaves them vulnerable for a period of weeks if asked to prove their identity, and for longer should the documents be lost in the post or in the Home Office.

These concerns about the application process apply to many citizens, not just those who are vulnerable or lack access to IT systems. We believe that the unprecedented nature of this Scheme, in which citizens are being required to register in order simply to continue living as they currently do (which is very different, for example, to deciding to apply for a passport) warrants an even more proactive approach by the Home Office. We welcome the deployment of centres where passports can be scanned, although there will not be enough of these centres, and awareness seems to be low amongst both EU/EEA nationals and their embassies and consulates in the UK. We also welcome the funding made available for community groups to assist vulnerable people making applications, albeit we have heard concerns about eligibility for that funding. However, these initiatives will not help the majority of applicants to navigate each part of application process.

We recommend that the Home Office provides accessible application centres for anyone who would like assistance with their application, including administrative advice about answering the questions and what type of evidence to select, and technical assistance with scanning passports or uploading other documentation. These centres could be mobile, visiting key locations including large employers' sites and rural areas that are not well served by public transport; or they could be located in key buildings (much like polling stations) in each constituency that is home to large numbers of EU/EEA nationals. The infrastructure and staffing would need be similar to that provided for elections: the aim is of a similar importance for citizens' rights.

Without a widespread and accessible network to provide assistance with applications, EU/EEA nationals will face unnecessary barriers to registering their right to remain in the UK; the SRC will use more resources than necessary in resolving cases; completion of the Scheme will take longer than anticipated; and some applicants will fail to acquire the status that they warrant, through no fault of their own.

C. Physical proof of status

We understand that, under the current Scheme, individuals granted pre-settled status or settled status will not be provided with any official documentation to prove their status, but rather will receive an electronic code. Whilst they will receive an email or letter informing them of the decision, this will not amount to proof of status. As we discussed with you on 22 January, we believe that it essential that individuals who are granted pre-settled or settled status have the opportunity to acquire a document or other hard copy form of evidence of their right to be in the United Kingdom. Physical proof of status is provided in a number of analogous situations for third country nationals (which EU/EEA citizens will be in future) such as permits for Indefinite Leave to Remain.

Hard copy documentation will be necessary for some people, particularly in circumstances where they are required to provide evidence of their immigration status to access services, employment and healthcare. We have heard concerns that people who wish to access services and employment may be subject to discrimination when employers or service providers find it too complicated or troublesome to engage with electronic systems (or simply decide not to). Equally, some people may not be familiar with digital technology and should not be disadvantaged when they require services. We have also heard concerns about how EU/EEA nationals would provide evidence in unplanned interactions such as contact with the police or immigration authorities, or emergency admissions to hospital. Furthermore,

we have heard concerns that a digital-only proof could still be used by people traffickers and illegal gangmasters to exert control over their victims.

We are concerned as to what will happen if there is ever a failure of these electronic systems (whether accidental or due to a cyber-attack), which could leave EU/EEA nationals in limbo, unable to assert their rights. We are also conscious of the historical experience of some EU/EEA nationals that makes them understandably nervous about trusting a government to hold the sole record of their status and hence to hold control over their rights. We firmly believe that physical documentation should be provided to the successful applicants.

Finally, there should be a separate advertising campaign to raise awareness amongst UK citizens and businesses about EU/EEA citizens' rights and the operation of the system.

Without physical proof of status, EU/EEA nationals living in the UK could find it hard in some circumstances to access services; and in the worst case they could find it difficult to prove their status in a future dispute with the Home Office. Given the clear parallels with lack of documents contributing to the Windrush scandal, and the fear that this causes for EU/EEA citizens, the Home Office must provide physical documentation.

D. Transfers from pre-settled status to settled status

There does not appear to be a systematic scheme to move people from pre-settled status to settled status. Instead, the onus appears to be on the individual to provide an update whenever their details or circumstances change and to then re-apply for settled status when they can prove residence for a five-year period.

Our concern is that having obtained pre-settled status, individuals may not realise that they would then have to re-apply, potentially many years later. To ensure that the Scheme operates fairly and humanely, we would suggest that: (a) the Home Office undertake to notify individuals at the time when they would likely be eligible to re-apply for settled status; and (b) the Home Office show some flexibility in circumstances where vulnerable individuals, who have been granted pre-settled status, then fail to re-apply for settled status. We would be very troubled to see the attempted removal of individuals who would otherwise be entitled to settled status, simply because they failed to make an application in the requisite timescale.

We understand that all citizens who are granted pre-settled status will be treated the same, regardless of how many years of residency to that point they can prove: that is, they will all be given a five year "grace period" in which to reach five years' worth of proof of residency, and they will be able to re-apply at any time once they think that they have accumulated the remaining evidence. We can foresee there being cases with gaps in the evidence or difficulties in retrospectively proving continuous residence. We would like you to confirm that the SRC will apply the same principles as for the initial applications: namely, to look for reasons to approve the move from pre-settled status to settled status, as opposed to looking for reasons to reject that move.

Without a scheme to move people from pre-settled status to settled status there is a serious risk of simply postponing rejections of people's applications for settlement rights, undermining the Government's aim in creating pre-settled status in the first place.

We would like a response to the four key areas of concerns within the usual ten days, along with answers to the following more technical queries.

1. Only 1% of those people who went through the PB2 trial were categorised as vulnerable, and yet there are estimates that 10-20% of the EU/EEA population in the UK may be classified in this way (depending upon the definition). We understand that many of the individuals who went through the PB2 trials received help in person. How will such help be applied to such a large number of people who may have difficulties with some (or all) parts of the application process?

2. As noted above, we understand that there is some funding available for community groups to assist vulnerable applicants. We have heard complaints about how this works in practice, such that various community groups are not eligible to apply. What are the requirements, how many applications have you received, and which organisations have actually been funded?

3. We have been told about issues with inputting data, for example the system does not accept telephone numbers that are longer than those registered in the UK. How prevalent is this issue, and will it be resolved before the final Scheme is rolled out? Are applicants expected to have a UK-based telephone number, and if so why?

4. We are aware of reports about issues with recording names, including the application form lacking space for multiple surnames and the system storing some names using a non-Latin alphabet. Such issues could cause problems when comparing the records to other forms of identification. How many such issues are you aware of, and will they all be resolved before the final Scheme is rolled out?

5. We have been told that self-employed people who may need to provide several documents to cover the time period face limits on the number of documents they can upload. If they seek to combine these (which requires a certain level of IT skills) they then face a limit on the size of uploaded files. How prevalent is this issue, and will it be resolved before the final Scheme is rolled out?

6. We have been told that the facial recognition system does not work reliably for children or those whose appearance has changed (for example by growing or shaving a beard). How prevalent is this issue, and will it be resolved before the final Scheme is rolled out?

7. We understand that applicants can only update their details electronically, for example if they need to change the phone number on which they can be contacted to discuss their application. What is done to facilitate such updates for people who are not computer literate or who lack access to the relevant equipment?

8. As noted above, we can foresee people having difficulties with evidence for upgrading from pre-settled status to settled status, and that some of these issues could be avoided by providing reminders at key stages. For example, if someone accumulated five years' of evidence but did not re-apply immediately and instead re-applied when prompted by advertisements at the end of the five year "grace period", they might discover that some evidence had been lost in the interim. Or they might only re-apply after having been absent from the UK for long enough to breach the definition of continuous residence, such that the previous five years' of evidence would be negated. What prompts will the Home Office provide to citizens to apply for settled status, including personalised prompts based on their particular circumstances?

9. We remain concerned that two immigration schemes are operating in parallel. We believe that there is the potential for some people to be removed on the grounds of non-exercise of Treaty Rights even after they have applied for settled status under the Scheme. For what purposes does the Home Office currently plan to use data received under the EU Settlement Scheme, and what safeguards will be put in place to prevent additional uses in future?

10. The magnitude of the issues that we have identified will depend upon the number of people affected, but there is no accurate data about the numbers of EU/EEA citizens in the UK. What plans do the Home Office and the Office for National Statistics have for obtaining new and accurate estimates of the total number of EU/EEA citizens in the UK? Given the large numbers of people who are likely to obtain settled status and hence be eligible to apply for UK citizenship, will the Home Office have sufficient resources to cope with a potential future upsurge in citizenship applications?

11. We have heard of cases where data held by DWP is not interpreted in a manner that supports an application, in contrast to other examples where data held by HMRC is interpreted "generously" in support of an application. What is being done to maximise the value of data held by HMRC and DWP for approving applications as opposed to rejecting them?

27 February 2019