HOUSE OF LORDS
European Union Committee

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London
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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 June 2017 – 31 September 2017

EU JUSTICE SUB-COMMITTEE

CONTENTS

PROPOSAL FOR A COUNCIL DECISION ESTABLISHING A MULTIANNUAL FRAMEWORK FOR THE EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS FOR 2018-2022 (10901/16)

Letter from Dr Phillip Lee MP, Parliamentary Under-Secretary of State for Justice, Ministry of Justice

Your committee cleared the proposal for a new multiannual framework (MAF) for the Fundamental Rights Agency on 25 August 2016 (sift 1628). I am writing to provide an update on negotiations and to alert you to forthcoming domestic procedures.

Following the conclusion of negotiations on this proposal at a technical level, COREPER (the committee of permanent representatives) agreed to transmit the draft proposal to the European Parliament, whose consent must be secured given the legal base (Article 352 of the Treaty on European Union). The European Parliament gave its consent on 1 June 2017. As the European Scrutiny Committee has not cleared this proposal from scrutiny, the UK indicated that it is still subject to a parliamentary scrutiny reserve.

During negotiations the issue of police and judicial cooperation in criminal matters has been excluded from the list of thematic areas in which the FRA may work. After considering this and the other minor changes to the MAF, the Government has concluded that the proposal falls within the exempt purpose set out in Section 8(6)a of the European Union Act 2011 as it makes 'provision equivalent to that made by a measure previously adopted under Article 352 of TFEU, other than an excepted measure'. An Act of Parliament is therefore not required before a minister can support it at Council and I will be laying a statement shortly to that effect as required by Section 8(5) of the EU Act.

17 July 2017

PROPOSED REGULATION ON THE CROSS-BORDER EXCHANGE BETWEEN THE UNION AND THIRD COUNTRIES OF ACCESSIBLE FORMAT COPIES OF CERTAIN WORKS AND OTHER SUBJECT-MATTER PROTECTED BY COPYRIGHT AND RELATED RIGHTS FOR THE BENEFIT OF PERSONS WHO ARE BLIND, VISUALLY IMPAIRED OR OTHERWISE PRINT DISABLED (12264/16)

PROPOSED DIRECTIVE ON CERTAIN PERMITTED USES OF WORKS AND OTHER SUBJECT-MATTER PROTECTED BY COPYRIGHT AND RELATED RIGHTS FOR THE BENEFIT OF PERSONS WHO ARE BLIND, VISUALLY IMPAIRED OR OTHERWISE PRINT DISABLED AND AMENDING DIRECTIVE 2001/29/EC ON THE HARMONISATION OF CERTAIN ASPECTS OF COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY (12270/16)

PROPOSAL FOR A COUNCIL DECISION ON THE CONCLUSION, ON BEHALF OF THE EUROPEAN UNION, OF THE WORLD INTELLECTUAL PROPERTY ORGANISATION TREATY TO FACILITATE ACCESS TO PUBLISHED WORKS FOR PERSONS WHO ARE BLIND, VISUALLY IMPAIRED, OR OTHERWISE PRINT DISABLED (14617/14)

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

Further to my letter of 11 April 2017, which informed you of the opinion of the CJEU regarding the exclusive competence of the European Union to ratify the Marrakesh Treaty, I am writing to update you on the progress of negotiations on the above referenced Directive, Regulation and proposed Council Decision. In addition, I will update you on the legal base of the proposals, as requested in your letter dated 28 April 2017.

<u>Update on progress and request to lift scrutiny</u>

On 9 May 2017, the European Parliament, European Commission and Council of the European Union reached political agreement, via the trilogue process, on compromise texts of the Regulation and Directive which together implement the Marrakesh Treaty. We expect to vote on these texts at a forthcoming meeting of the Council.

A central part of these discussions concerned how to ensure that the exception provides sufficient safeguards for copyright owners without placing excessive burdens on charities and other organisations who are authorised to make accessible copies.

While the compromise texts preclude Member States from limiting disability copyright exceptions to instances where accessible format copies are not commercially available, which is the approach currently taken in the UK, they contain a number of other safeguards for right holders. These safeguards include:

a) The option for Member States to provide schemes to compensate for any harm that exception may cause right holders;

b) The requirement that domestic exceptions of Member States apply only in certain special cases which do not conflict with the normal exploitation of the work, and do not unreasonably prejudice the legitimate interest of the right holder (the 'three step test');

c) An obligation on the European Commission to assess any negative impact the proposals may have on commercial markets, after five years.

The Government believes that these safeguards, along with the targeted nature of the exception, will help to mitigate any negative impacts on commercial markets. It intends to consult with affected parties on these safeguards when implementing the Directive.

Overall, the Government believes that the compromise texts achieve an effective implementation of the Marrakesh Treaty, which will benefit blind and visually impaired people in the UK and the rest of the world, while ensuring that copyright owners' rights are protected.

In view of the compromise which has been reached, I request that scrutiny be lifted so we can vote in support of these texts at the Council.

<u>The legal basis of the proposals</u>

Your letter dated 28 April 2017 requested an update on the legal basis of the proposals.

On 14 February, the Court of Justice of the European Union held that "the conclusion of the Marrakesh Treaty does not fall within the common commercial policy defined in Article 207 of the Treaty on the Functioning of the European Union (TFEU)"1, but the obligations of the Marrakesh Treaty do fall within an area that is already covered to a large extent by EU rules2. It therefore ruled that the conclusion of the Marrakesh Treaty falls within the exclusive competence of the European Union3.

In view of this ruling, the legal base of the Regulation, which had been Article 207 in the Commission's original proposal, has been amended to Article 114 TFEU in the latest compromise text. This legal base has the backing of both the Council and the Parliament, and is acceptable to the Government.

The future Estonian Presidency of the Council has indicated that it intends to make ratification of the Marrakesh Treaty a priority. Following the ruling of the Court of Justice, we would expect the Decision on Conclusion of the Treaty to be based on Article 114 TFEU, but no proposal has yet been made on legal base.

3 July 2017

[1] Opinion 3/15, para 101
[2] Opinion 3/15, para 129
[3] Opinion 3/15, para 130

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

Thank you for your letter dated 3 July 2017. It was considered by the EU Justice Sub-Committee at its meeting of 18 July.

We decided to clear the proposed Regulation (Doc 12264/16) and Directive (Doc 12270/16) from scrutiny.

We are grateful for your confirmation that the necessary changes to this legislation have been made that take account of the Court of Justice's Opinion and note your conclusion that their agreement by the EU represents an "effective implementation" of the Marrakesh Treaty.

With regard to the proposed Decision (Doc: 14617/14), in light of your statement that "no proposal has yet been made" that takes account of the Court of Justice's view that the legal basis of this proposal required change, we decided to retain the Decision under scrutiny.

We look forward to considering your update on the proposed Decision in due course.

18 July 2017

Letter from Jo Johnson MP, Minister of State for Universities, Science, Research and Innovation

Thank you for your letter of 18 July, in which you cleared the proposed Regulation and Directive from scrutiny.

In my letter dated 29 June 2017, I informed you that we were expected to vote on the abovementioned compromise text of the Directive and Regulation which together implement the Marrakesh Treaty. The vote in Council was subsequently tabled for 17 July 2017. It was not possible to foresee the vote taking place at such an early stage, at the time of writing of my previous letter.

Due to the early vote, and the interruption caused by the General Election, the Regulation and Directive were voted on at Council before the Committee granted clearance from scrutiny. In view of the special reasons below, including the Marrakesh Treaty's important humanitarian aims, I had taken the decision to override the scrutiny reserve of the Committee and vote in favour of the compromise texts on the Regulation and Directive.

'Commercial availability'

The Explanatory Memorandum (EM 12264/16), highlighted the possibility for some limited costs to businesses and rights holders, particularly if the UK were unable to limit the creation of accessible format copies to situations where they are not commercially available on reasonable terms[4]. In October 2016, the Intellectual Property Office released a 'Call for Views' on the European Commission's draft legislation to modernise the European copyright framework, including the proposed Regulation and Directive implementing the Marrakesh Treaty. Through the call for views, and contact with organisations representing publishers and the interests of visually impaired people, we sought to gain evidence on the impact of the commercial availability clause in UK law, what its removal would mean in terms of the number of accessible format copies available to visually impaired people, and the costs to commercial markets. The call for views ended on 6 December 2016 and provided little economic evidence on the impact of commercial availability clauses, and none that would allow us to monetise costs and benefits.

During the course of negotiations, groups representing visually impaired people argued that commercial availability restrictions would place unreasonable burdens on organisations which make accessible format copies, and that there was little evidence that such restrictions were needed to protect commercial markets. Reflecting this view, the agreed texts do not provide flexibility for Member States to maintain commercial availability clauses in their national exceptions. They do, however, provide other market safeguards, including:

a. The option for Member States to provide schemes to compensate for any harm the exception may cause for rights holders;

[4] EM 12264/16 at para 43

b. The requirement that domestic exceptions of Member States apply only in certain special cases which do not conflict with the normal exploitation of the work, and do not unreasonably prejudice the legitimate interest of the right holder;

c. An obligation on the European Commission to assess any negative impact the proposals have on commercial markets, 6 years after the date of entry into force.

On implementing the Directive and Regulation, we will consult on the impact of removing the commercial availability provision in UK law, and on the scope and options to safeguard commercial markets.

'*Compensation schemes'*

The compromise texts for the draft Regulation and Directive do not provide full flexibility for Member States, but allow Member States to provide certain market safeguards. One of these safeguards is the option for Member States to provide schemes to compensate rightsholders for any harm the exception may cause to them. The UK does not currently take this approach in its disability exception, as it considers rightholders' interests to be sufficiently protected via a number of safeguards, including a commercial availability clause. The UK's future approach to compensation schemes will depend on the outcome of the consultation, including potential impacts from the removal of the commercial availability clause.

'Implementation'

We intend to implement on the transposition deadline set by the Directive, which is expected to be before the UK exits the EU.

7 August 2017

PROPOSAL FOR A DIRECTIVE ON THE FIGHT AGAINST FRAUD ON THE EU'S FINANCIAL INTERESTS BY MEANS OF CRIMINAL LAW (12683/12)

Letter from the Chairman to the Rt Hon Mel Stride MP, Financial Secretary to the Treasury, HM Treasury

Thank you for the letter dated 19 December 2016. It was considered by the EU Justice Sub-Committee at its meeting of 4 July 2017.

We decided to retain the proposal under scrutiny.

We apologise for the time it has taken us to consider the Government's response to our letter of 16 November 2016. Despite the fact that the department sent us your predecessor's letter, our failure to consider it was not discovered until our secretariat undertook an internal audit of outstanding scrutiny correspondence during dissolution.

Since we undertook an inquiry into fraud on the EU's budget and published the subsequent report in 2013, this Committee has repeatedly pressed the case for the inclusion of VAT fraud within this proposal's scope; a position that the Government has opposed. We remain unconvinced by your arguments against our view and we are pleased to note that the Council has agreed with us that the final text of the proposal should (at least) include serious forms of VAT fraud within its scope. Are we correct in assuming that, unfortunately, the Government will not be opting in, or might you reconsider your position?

We look forward to receiving formal confirmation from you, in due course, that this proposal has been adopted by the Council.

5 July 2017

Letter from Margot James MP, Minister for Small Business, Consumers & Corporate Responsibility, Department for Business, Energy and Industrial Strategy

I refer to your letter of 28 April in which the Committee granted a scrutiny waiver in advance of the meeting of the Justice and Home Affairs Council of Ministers meeting on 8 June.

I thank the Committee for granting the waiver from scrutiny and am pleased to confirm that with the support of the UK the Council agreed a text of a General Approach at that meeting.

While recognising that the text reflects a balanced compromise among Member State views, we believe it achieves the key objectives of establishing a clear, consistent, and proportionate set of rights for consumers across the EU. In doing so we are also of the view that it contains the right balance of business obligations to achieve an adequate level of consumer protection while not stifling innovation and growth.

I should like to take this opportunity to provide the Committee with a brief update on how the negotiation in Council progressed, and of the outcome.

You will recall that the UK has been supportive of the proposal and that we have already regulated in this area in the Consumer Rights Act 2015. Nevertheless, there were elements which had caused us some concern.

A significant stumbling block emerged during the Slovakian Presidency: that the relationship between the Directive and EU data protection and e-privacy law needed to be better clarified and that any effect on those regimes must be avoided. In the light of the opinion requested from the European Data Protection Supervisor this has now been resolved satisfactorily.

On the situation set out in my letter of 3 April concerning the proposed right to terminate any contract at 12 months or any time thereafter irrespective of renewal or re-contracting, which was of particular interest to the Committee, the majority of Member States felt there was value in a right to terminate long-term stand-alone contracts. However, I am pleased to report that the text has resolved most of the issues we had identified. The text exempts the digital content element of bundled contracts which include electronic communications elements from the 12 month right to terminate. The 12 month right to terminate now applies only to contracts of a fixed term of 12 months or longer so that renewals and re-contracting start the clock again rather than being subject to a continued right to terminate at any time after the first 12 months. On the final issue concerning digital content which is bundled with hardware or TV contracts, for example, the 12 month right to terminate will only apply to the digital content element so that the costs of hardware which might be spread over a longer period can continue to be recouped by the supplier where appropriate. In the UK our digital content rights and remedies also apply only to digital content elements.

As expected, the scope of the proposal is wider than that of our domestic legislation, because content and services provided in exchange for personal data are included as well as those supplied in exchange for money. However, it is narrower and far less burdensome than the original proposal.

In addition to the above, we have achieved other significant improvements in line with our overall objectives:

- a clear and relevant set of objective criteria by which conformity with the contract will be assessed (substantially mirroring our approach and based on that already established in respect of the purchase of goods);
- Member State flexibility on liability and limitation periods, meaning we can continue to apply our approach in the UK;
- limiting a burdensome requirement to notify on a durable medium all modifications to digital content or services to only those where the modification is significant, and clarifying that day to day fixes and updates are acceptable as part of contracts;
- clarity on the treatment of goods which rely on embedded digital content to function. Where digital content which is essential to the operation of goods, for example a

programme which governs the cycles in a washing machine, is faulty, the goods in which it is embedded will be faulty and therefore subject only to existing goods rights and remedies;

- clarification that the point of supply of digital content from which consumer rights start to apply is always the point at which the consumer receives the content;
- remedies are proportionate to the circumstances, and the first option generally available provides that suppliers can put matters right before the option to terminate the contract;
- suppliers' obligations on termination of the contract, particularly in respect of returning consumer content and data, are practical. They should meet consumers' reasonable expectations and do not impinge on data protection obligations;

The joint IMCO/JURI committee of the European Parliament which is considering this proposal is scheduled to vote on its position in late September. The informal trilogue process will begin shortly after. We understand it is the ambition of incoming Estonian Presidency to see the proposal finally adopted by the end of the year.

14 July 2017

Letter from the Chairman to Margot James MP, Minister for Small Business, Consumers & Corporate Responsibility

Thank you for your letter dated 14 July 2017 which was considered by the EU Justice Sub-Committee at its meeting of 12 September.

We decided to retain the proposal under scrutiny.

We thank you for providing us with a post-Council summary, as requested, and welcome your conclusion that the General Approach text agreed by the Member States in June meets the UK's "overall objectives". We also note your view that the text which now passes to the European Parliament represents a "clear, consistent, and proportionate set of rights for consumers across the EU" and your expectation that the Estonian Presidency will aim to agree the final text by the end of the year.

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

12 September 2017

PROPOSED DIRECTIVE ON CERTAIN ASPECTS CONCERNING CONTRACTS FOR THE ONLINE AND OTHER DISTANCE SALE OF GOODS (15252/15)

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

Thank you for your letter dated 5 September 2017. It was considered by the Justice Sub-Committee at its meeting of 10 October.

We decided to retain this proposal under scrutiny.

As you know, it has been over a year since we last discussed this matter and, given the "grave concerns" expressed by our expert witnesses with this proposal that we shared with you in June 2016, we welcome the events highlighted in your letter; in particular, the key development that both the Council and the Commission are attempting to avoid potential confusion to consumers caused by the introduction of a distinct set of consumer protection rules for the online sales and distance selling of goods, which would operate in parallel to the existing consumer protection regime applying to face-to-face purchases.

Turning to the choice facing the EU's legislative institutions between the introduction of a new proposal and continuing the Council's negotiations on the basis of the Commission's original text, we agree with your view that a new proposal would represent "a very considerable extension of the

scope of the original proposal" because it would "bring in over 90% more sales transactions across the EU", and in our view, these factors alone necessitate the production of a new or revised text supported by its own original impact assessment.

We look forward to considering, in due course, your update on the outcome of the Council's deliberations.

11 October 2017

PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON COUNTERING MONEY LAUNDERING BY CRIMINAL LAW (15782/16)

Letter from Ben Wallace MP, Minister of State for Security, Home Office

I am writing to inform you that the Government has decided that the UK will not opt in to this Directive. Our reasons for this decision are that the UK's domestic legislation is already largely compliant with the Directive's measures, and in relation to the offences and sentences set out in the Directive, the UK already goes much further. Therefore we do not believe that opting in would enhance the UK approach to tackling money laundering.

The UK has worked closely with other EU Member States to tackle money laundering, and I would like to emphasise that we will continue to do so

11 September 2017

DRAFT REGULATION ON THE MUTUAL RECOGNITION OF FREEZING AND CONFISCATION ORDERS, REPEALING FRAMEWORK DECISIONS 2003/577/JHA AND 2006/783/JHA (15816/16)

Letter from the Chairman to Ben Wallace MP, Minister of State for Security, Home Office

Thank you for your letter dated 21 April 2017, which was considered by the EU Justice Sub-Committee at its meeting of 4 July.

We decided to retain the proposal under scrutiny.

Unfortunately, your letter was received too late to be considered by the Committee before Parliament was dissolved ahead of the general election, and we therefore lost our opportunity to comment on the merits of opting in to this proposal before the deadline by which the Government must inform the Council expired on 12 June. Nevertheless, whilst we have not, as yet, received formal notice of the Government's decision, we note your clear arguments in favour of the UK's participation in the negotiation of this proposal and your confirmation that the Government "is considering opting in".

Your letter does give rise to one matter that we wish to pursue with you. When setting out the factors that the Government are weighing with regard to opting in, we note that you are optimistic that the UK's policy goals (tackling terrorist financing and the "swift movement" of illicit finances) can be achieved through the cooperation at the EU level embodied in this proposal. Your optimism, however, is undermined later on in the letter by your recognition that it is unlikely that this Regulation will be in force in the UK before we leave the EU. Focussing on this specific proposal, how do you expect to reconcile this contradiction?

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

5 July 2017

Letter from Ben Wallace MP, Minister of State for Security

May I congratulate on your reappointment as Chair of the European Union Committee.

I am writing to inform you of the decision of the Government in relation to whether the UK will opt in to this Regulation, and in response to the letter from you of 5 July 2017.

The Government has reached agreement that the UK will opt into this Regulation.

The proposed Regulation would replace and build upon the two existing mutual recognition instruments that were fully transposed into UK law in 2014. Opting in to this measure is consistent with the UK's approach to participating in EU mutual recognition measures to improve practical cooperation between Member States and will ensure that the UK continues to benefit through strengthening the ability of our operational agencies to have our asset recovery orders recognised and executed efficiently and effectively.

You also asked specifically about the risk to the UK of meeting our policy goals of improved cooperation in this area, as the Regulation is unlikely to come into force until after we leave the EU. It is not possible to say what our future relationship will look like but by opting into the Regulation we underline our commitment to maintain ongoing security cooperation with our EU partners.

19 July 2017

Letter from the Chairman to Ben Wallace MP, Minister of State for Security

Thank you for your letter dated 19 July 2017, which was considered by the EU Justice Sub-Committee at its meeting of 12 September.

We decided to retain the proposed Regulation under scrutiny.

We note the Government's decision to opt in to this proposal and your view that in so doing the UK stands to benefit from participating because it will strengthen "the ability of our operational agencies to have our asset recovery orders recognised and executed efficiently and effectively". However, we are disappointed, but not surprised, by your inability to reconcile the Government's optimism for this proposed Regulation (which will come into effect after we leave) with the UK's imminent departure from the EU.

We look forward to considering updates on this proposal's progress through the Council in due course.

12 September 2017

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),

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ADAPTING A NUMBER OF LEGAL ACTS PROVIDING FOR THE USE OF THE REGULATORY PROCEDURE WITH SCRUTINY TO ARTICLES 290 AND 291 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (5623/17)

Letter from the Rt Hon Baroness Anelay of St Johns, Minister of State for Exiting the European Union, Department for Exiting the European Union

I am writing further to above Explanatory Memorandum relating to EU proposals to align pre-Lisbon comitology procedures to the post-Lisbon Delegated Acts and Implementing Acts system.

I thank you for your clearing the document from scrutiny. I am writing to inform you about the Government's decision to opt-in to three regulations affected by the proposals and to provide you with a copy of the Written Ministerial Statement that is being laid in Parliament.

On 9 June, the Government opted in to a proposal to change the updating mechanism of three civil judicial cooperation Regulations – the 2001 Regulation on taking evidence in other Member States,

the 2004 Regulation that created that European Enforcement Order and the 2007 Regulation on service of documents - from the old comitology procedure to the post-Lisbon treaty Delegated and Implementing Act procedures.

The substance and effect of these Regulations are not being amended, but instead becoming subject to the same updating procedures as apply to other, post-Lisbon Regulations. As outlined in the WMS, these changes were merely a technical adjustment forming part of a wider effort to streamline legislation, which the UK is wholly in support of. By opting in, we have protected the UK's position in relation to three crucial procedural instruments in the area of civil judicial cooperation, and demonstrated the UK's commitment to its rights and obligations as an EU Member State until exit negotiations are concluded.

18 July 2017

PROPOSAL FOR A COUNCIL DECISION ON THE SIGNING, ON BEHALF OF THE EUROPEAN UNION, OF THE COUNCIL OF EUROPE CONVENTION ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCEN (6695/16)

PROPOSAL FOR A COUNCIL DECISION ON THE CONCLUSION, BY THE EUROPEAN UNION, OF THE COUNCIL OF EUROPE CONVENTION ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE (6696/16)

Letter from Sarah Newton MP, Minister for Crime, Safeguarding and Vulnerability, Home Office

I am writing to update you on negotiations on the proposal for the EU to sign the Istanbul Convention.

As mentioned in my letter of 24 April, the Maltese Presidency were intending to put the two Council Decisions authorising the EU to sign the Convention to Coreper on 26 April to seek resolution on the outstanding issues. At that meeting, the Council Decisions were agreed by a qualified majority. The only amendment to the versions in documents 14756/16 REV 2 and 14757/16 REV 2 (referenced in my 24 April letter) was to remove the specific references to the provisions that these Council Decisions are authorising the EU to sign for.

One Member State voted against the proposals. As the UK has not opted into these Council Decisions, the UK did not vote at Coreper. The Council Decisions were subsequently adopted at the Agriculture and Fisheries Council on 11 May.

I expect negotiations in relation to the Council Decisions on conclusion to begin under the Estonian Presidency. However, as half of Member States have not yet ratified the Convention, I do not expect the Decisions on conclusion to be adopted until 2018 at the earliest. Discussions this year are likely to focus on the Code of Conduct proposed in Article 4(2) of document 6696/16, which seeks to regulate the relationship between the EU and Member States in relation to monitoring, reporting, voting arrangements and the functioning of the coordinating body referred to in Article 10 of the Convention. I expect that this discussion, and the European Parliament's comments on 11 May in relation to the adoption of the Council Decision on signature which supported a broader EU accession, indicate that there may yet be further discussions on the extent the EU exercises competence in relation to the Convention.

14 July 2017

Letter from Margot James MP, Minister for Small Business, Consumers & Corporate Responsibility, Department for Business, Energy and Industrial Strategy

EU Consumer Protection Cooperation (CPC) Regulation

Thank you for your letter of 14 March regarding the above Regulation. I would like to reiterate my regret that there was insufficient time for your Committee to consider my 1 February update before the Council General Approach was voted on. It was not my intention to deny your Committee an opportunity to scrutinise. I am aware of the Committee's enquiry into the implications of EU withdrawal for consumer protection rights, and I would be happy to give evidence at a future date if it is reinstated.

My Department updated the Committee on progress in the CPC negotiations most recently on 9 June as part of an update on the results of the Commission's regulatory fitness ('REFIT') review of consumer law. As explained in that update, Council entered into the trilogue process with the European Commission and Parliament at the end of April. I am now writing to request clearance from scrutiny as it is possible that Council will be asked to approve the final text at some point in July under the Estonian Presidency. It seems likely that trilogues will conclude in the coming weeks, as progress has been made, and the file remains a priority for the Maltese and Estonian presidencies.

In line with the Committee's previous questions, and the government's main priorities, I can give the following updates:

The government's position and approach to negotiations

The government affirms support for this proposal as set out to you by the previous government. We welcome reform of the existing CPC Regulation so that enforcement of EU consumer law remains effective in the digital environment. Consumers and businesses must have the confidence to engage in cross-border transactions in the knowledge that, in the event that something goes wrong, authorities have efficient and effective procedures for cooperation, and appropriate and proportionate powers are available in all parts of the Union.

Minimum powers for investigating and enforcing cross border infringements (Articles 8 and 9)

In light of this overall position, the UK supported all of the proposed new and updated minimum powers. As explained in my letter of 1 February, the power to levy a civil fine would represent a new power for UK authorities in cross-border cases (it is not currently available in domestic cases),and we have supported this with the proviso that our proportionality objectives outlined below are satisfied.

We have also supported the power in the Commission proposal to order redress for consumers via consumer compensation and restitution of profits. These powers were removed from the Council General Approach following opposition from many Member States, but we have worked with the Presidency, European Parliament and Commission to seek their reintroduction in a form offering greater flexibility for Member States. For example, to demonstrate how redress could work, we provided Member States with a paper outlining the Enhanced Consumer Measures introduced by the Consumer Rights Act 2015. We are now hopeful that a compromise allowing authorities to secure voluntary remedial commitments from traders for affected consumers is possible.

The compromise text provides the ability for enforcers to 'reverse engineer' products (disassemble them to investigate a particular infringement), which, if agreed, would be a more detailed power than UK enforcers currently have in EU cases.

In our support for the uplift in powers we have been very clear that the Regulation must require authorities to exercise them proportionately and, where necessary, in line with national procedural safeguards. We worked very closely with the Home Office and Competition and Markets Authority to ensure that this was adequate to avoid conflicting with requirements of the Investigatory Powers Act 2016 in terms of access to sensitive communications data. Furthermore we have defended drafting which allows Member States to decide for themselves which authorities should be assigned

which power, as long as every power is available, if deemed appropriate, for any type of infringement of EU consumer law. This now has widespread support and is likely to remain.

On the issue of a harmonised 5-year limitation period for the imposition of penalties (Article 4), the Council has maintained its firm opposition; this is in line with the UK position.

The Cooperation Procedure and the Role of the Commission

An area of ongoing debate has been the launch procedure for common actions in the event that several Member States are affected by an infringement (Chapter IV of the original proposal). The Parliament has supported the Commission in arguing that the Commission should have a role in initiating cases which it coordinates, with Council arguing that Member States should have control over their authorities' resource allocation. The Presidency is exploring compromises in which the Commission has a clear role, but Member States remain ultimately responsible for initiating an action, and we are supportive of this approach in principle.

The UK has sought to preserve the scale threshold in the original proposal that must be reached before the Commission takes an automatic coordination role. This was set at infringements affecting three -quarters of Member States accounting together for at least three-quarters of the Union population. We believed this to be an appropriate level which prioritised Commission resources towards only the most serious Union-wide cases. The European Parliament, however, and several Member States preferred this level to be a majority (without specifying the size). It is likely that a compromise will be reached at a threshold of a two-thirds majority, which we view as acceptable on the basis that this still represents a large section of the Union concerned by one infringement.

In terms of the grounds available for opting out of actions, we have supported a balance, ensuring that all reasons are fully justified so that the impact of the overall regime is not weakened unnecessarily, and it is likely that the compromise proposal will achieve this.

EU withdrawal

Until we have left the EU, the UK remains a member of the EU with all the rights and obligations that membership entails. How the provisions of this Regulation are applied in the UK following our withdrawal will depend on the nature of our new relationship with the EU. In the meantime therefore, the UK's focus has been on taking a positive and constructive approach to CPC negotiations in order to achieve a framework which works as well as possible for consumers and businesses and which further strengthens the single market in the digital age.

Other issues

The government affirms the position, as set out by the previous government, that Implementing Act powers conferred on the Commission should be limited to the most technical of issues. There is broad support for this position and it is likely that the compromise will include these acts only for operational arrangements for the electronic database.

We have worked closely with the Ministry of Justice to seek minimal impact on the functioning of national courts, including on national rules for the admissibility of evidence (particularly Articles 9 and 42). We are hopeful that the compromise text will achieve this. We have also worked closely with the Department for Culture, Media and Sport to help ensure that the Regulation works alongside data protection rules.

There has been pressure from the EU Commission and Parliament to strengthen the roles of wider organisations such as consumer and trader associations, something about which the Council has generally been more sceptical. We have supported a greater role for these bodies because the market intelligence and expertise they provide can be valuable for enforcement.

We are hopeful that a compromise will be reached giving these organisations a right to participate in the alert system, but giving Member States some flexibility on when to consult consumer bodies about action taken on infringements.

I hope that this update allows you to clear this proposal from scrutiny thereby facilitating our full participation once the Presidency decides it is time to seek Council's agreement on a final text. I will of course keep you updated on further progress with this file.

23 June 2017

Letter from the Chairman to Margot James MP, Minister for Small Business, Consumers & Corporate Responsibility

Thank you for your letter dated 23 June 2017. It was considered by the EU Justice Sub-Committee at its meeting of 4 July.

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

Your summary of these negotiations and the final text suggests to us that you have secured a proposal that meets the Government's negotiating aims, but it also illustrates that in the area of the Commission's powers to coordinate and/or initiate cross-border investigations, the Presidency of the Council continues to search for a compromise. We note, in particular: (i) the balance to be found between the precise detail of the Commission's power to initiate investigations and the Member States' desire to retain control of national resources; and, (ii) the exact threshold that must be reached before the Commission takes an automatic coordinating role in multi-Member State infringements.

Given that these matters remained to be resolved we were therefore reluctant to clear this matter from scrutiny, but we are grateful for your efforts to avoid a scrutiny override. We ask that when the final text emerges you update us, in due course, on its contents

5 July 2017

Letter from Margot James MP, Minister for Small Business, Consumers & Corporate Responsibility

Thank you for your letter of 5th July to Margot James in which you waived scrutiny of the above file in case the Council was asked to approve a final text in July. I write with a further update because working-level negotiations are now complete and there will be no further substantive changes to the text. On this basis I would like to request clearance from scrutiny and explain the outcome of the final text.

The final trilogue meeting between the EU Council, Parliament and Commission took place on 21st June. We expect Coreper will be asked to prepare the text for approval at Council in late November. The Regulation will apply from 24 months after the date of entry into force.

Throughout the negotiations the UK took a constructive and flexible approach. We used our high standards and expertise in consumer protection to improve the proposal for consumers while also respecting sensitive proportionality requirements.

The government's position and approach to negotiations

Proportionate use of new and updated minimum powers for investigating and enforcing cross-border infringements (Articles 8 and 9)

As explained in previous correspondence, the government welcomed reform of the existing CPC Regulation and supported all of the proposed new and updated minimum powers. It is important that consumers and businesses have the confidence to engage in cross-border transactions in the digital environment. The power to levy a civil fine would represent a new power for some UK authorities in cross-border cases, and this power remains in the final text. We supported this with the proviso that our proportionality objectives outlined below are satisfied.

We also supported the power in the Commission proposal to order redress for consumers via consumer compensation and restitution of profits. These powers were removed from the Council General Approach following opposition from many Member States, but we worked with the Presidency, European Parliament and Commission to seek their reintroduction in a form offering greater flexibility for Member States. For example, to demonstrate how redress could work successfully, we provided Member States with a paper outlining the Enhanced Consumer Measures introduced by the Consumer Rights Act 2015. We are pleased that a compromise has been reached so that authorities have an option, if appropriate, to secure voluntary remedial commitments from traders for affected consumers.

The final text provides a power for authorities to make test purchases and to 'reverse engineer' goods (disassemble them to investigate the component parts or processes) in order to determine the presence of a consumer law infringement. UK authorities already have powers to conduct test purchases as part of their suite of investigatory tools, and this could, in principle, include dismantling them. We therefore welcome specifying this power in the Regulation, especially in order to strengthen enforcement capabilities in other Member States.

In our support for the uplift in powers we were very clear that the Regulation must require authorities to exercise them proportionately and, where necessary, in line with national procedural safeguards. We worked very closely with the Home Office and Competition and Markets Authority to ensure that this was adequate to avoid conflicting with requirements of the Investigatory Powers Act 2016 in terms of access to sensitive communications data.

We defended drafting which allows Member States to decide for themselves which authorities should be assigned which power, as long as every power is available, if deemed appropriate, for any type of infringement of EU consumer law. This received widespread support and remains in the final text.

On the issue of a harmonised 5-year limitation period for the imposition of penalties (Article 4), the Council maintained successfully its firm opposition (in line with the UK position) and the final text simply requires Member States to declare their individual requirements to the Commission.

The Cooperation Procedure and the Role of the Commission

A contentious issue throughout was how to respond to a single infringement which may affect several Member States concurrently (Chapter IV of the original proposal). The proposal newly-recognises this serious level of infringement and defines it as "widespread infringements with a Union dimension". The definition applies to infringements affecting more than two-thirds of Member States accounting together for two-thirds of the Union population and gives the Commission an automatic role coordinating the overall Union response (with investigation and enforcement activity itself remaining the responsibility of individual authorities).

The UK sought to preserve the scale-threshold of the original proposal, set at infringements affecting three-quarters of Member States accounting together for at least three-quarters of the Union population. We believed this to be an appropriate level which prioritised Commission resources towards coordinating only the most serious Union-wide cases. Facing opposition from the Parliament and several Member States, who preferred a threshold of a simple majority, the Presidency reached a compromise at the two-thirds level. We view this as acceptable on the basis that it still represents a significant section of the Union concerned by one infringement.

In terms of the launch procedure itself, the Parliament supported the Commission in arguing that the Commission should also have a role in initiating cases, as well as coordinating them. However, Council argued that Member States should retain sole control over this decision given the resource implications of enforcement action. The Presidency reached a compromise in which Member States are solely responsible for initiating actions, as long as they conduct initial investigations to establish whether an infringement has taken place within a deadline of one month following initial notification. The text was amended to further clarify that only if these initial investigations confirmed earlier suspicions would Member States "start with" a coordinated action. We are content that this overall compromise balances efficiency in the system while maintaining respect for proportionality and subsidiarity.

In terms of the grounds available for opting out of actions, we supported a balance, ensuring that all reasons are fully justified so that the impact of the overall regime is not weakened unnecessarily. The final text achieves this.

EU withdrawal

Until we have left the EU, the UK remains a member of the EU with all the rights and obligations that membership entails. How the provisions of this Regulation are applied in the UK following our withdrawal will depend on the nature of our new relationship with the EU. In the meantime therefore, the UK's focus was on taking a positive and constructive approach to CPC negotiations in order to achieve a framework which works as well as possible for consumers and businesses and which further strengthens the single market in the digital age.

Other issues

The government has taken the position throughout that Implementing Act powers conferred on the Commission should be limited to the most technical of issues. There was broad support for this position and the final text relies on these acts only for operational arrangements for the electronic database.

We worked closely with the Ministry of Justice to seek minimal impact on the functioning of national courts, including on national rules for the admissibility of evidence (Articles 9 and 42). We have also worked closely with the Department for Culture, Media and Sport to help ensure that the Regulation works alongside data protection rules. There was pressure from the EU Commission and Parliament to strengthen the roles of wider organisations such as consumer and trader associations, something about which the Council was generally more sceptical. We supported a greater role for these bodies because they can provide valuable market intelligence and expertise. We are supportive of the compromise that was reached, giving these organisations a right to participate in the alert system while retaining flexibility for Member States on when to consult consumer bodies about action taken on infringements.

I hope that this update allows you to clear this proposal from scrutiny, thereby facilitating our full participation when the Presidency decides it is in a position to seek Council's agreement. I will of course keep you updated on further progress with this file.

24 August 2017

EUROPEAN COURT OF AUDITORS SPECIAL REPORT: GOVERNANCE AT THE EUROPEAN COMMISSION – BEST PRACTICE? (UNNUMBERED)

Letter from the Chairman to Rt Hon Baroness Anelay of St Johns, Minister of State for Exiting the European Union, Department for Exiting the European Union

Thank you for your letter dated 27 June 2017 which was considered by the EU Justice Sub-Committee at its meeting of 12 September.

We decided to retain the report under scrutiny.

Your reply, and the enclosed Council Conclusions agreed in May, illustrate the serious response that both the Commission and the Council have given to the European Court of Auditors' (ECA) Special Report and its recommendations for reform. We are also pleased to note your confirmation that the ECA will continue to monitor the Commission's compliance with the report's findings.

We welcome your promise to update us on the Commission's progress in implementing the report's conclusions and look forward to considering a further update from you in December.

12 September 2017

GENERAL CORRESPONDENCE:

SECURITY, LAW ENFORCEMENT AND CRIMINAL JUSTICE: A FUTURE PARTNERSHIP PAPER

Letter from Baroness Williams of Trafford, Minister of State for Countering Extremism, Home Office

I am writing to highlight the publication of a paper setting out the Government's vision for the future relationship between the UK and the EU on security, law enforcement and criminal justice. This publication is one of a series of papers setting out key issues that form part of the UK Government's approach to the future deep and special partnership between the UK and the EU.

The paper outlines the UK's view that it is in the clear interest of all our citizens that the UK and the EU sustain the closest possible cooperation on security, law enforcement and criminal justice after the UK's withdrawal from the EU. The UK and the EU should work together to design new, dynamic

arrangements that go beyond the existing, often ad-hoc arrangements for EU-third country relationships in this area –arrangements that reflect our geographical proximity, the volume of cross-border movements between us, and the high degree of alignment in the scale and nature of the threats we face.

The paper will be published on gov.uk today, Monday 18 September.

I look forward to working with your Committee as we take forward our proposals.

18 September 2017

PROVIDING A CROSS-BORDER CIVIL JUDICIAL COOPERATION FRAMEWORK –A FUTURE PARTNERSHIP PAPER

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

I am writing to inform you that the Government has today published a paper on its vision for cross-border civil judicial cooperation once the UK exits the EU, a copy of which you have already received.

It is in the mutual interests of the UK and the EU that there continues to be an effective framework for resolving cross-border legal disputes after we leave. Our proposals will provide confidence and certainty to families, business and individuals that they can effectively settle cross-border disputes in the future – whether these relate to international commercial contracts, consumer or employment problems, or arguments about child/parent contact or maintenance arrangements. All these groups will want clarity as well on how judgments in cross-border cases will be recognised and enforced.

The UK has a long history of cooperation in this area with the EU, and internationally, and we want that to continue. Any future agreement with the EU should therefore maximise certainty and minimise delay and expense for those involved in cross-border disputes. To that end, we want to agree a clear set of rules about which country's courts will hear a case, which country's law will apply to resolve it, and the way in which judgments given in one jurisdiction can be recognised and enforced in another. Our paper sets out the approach we will take to these issues in the negotiations.

The paper and further information can also be found online at www.gov.uk/government/publications

I aim to provide a response to your Committee's report on the subject of civil judicial co-operation shortly, but in the meantime, I would be happy for my officials to provide you and your clerks with a briefing on the Government's position if that would be helpful.

Later this week, we also expect to publish a paper which will look at the various possibilities for how disputes between the EU and the UK under the separation and future agreements would be resolved. The Secretary of State for Exiting the EU and I would be very grateful to know your views on that once it's published also.

22 August 2017

COMMITTEE'S REPORT 'THE LEGALITY OF EU SANCTIONS'

Letter from the Chairman to Sir Alan Duncan KCMG MP, Minister for Europe and the Americas, Foreign and Commonwealth Office

At its meetings of 18 July and 12 September 2017 the EU Justice Sub-Committee considered the Commission's formal response to our report "The legality of EU sanctions", 11th Report of Session 2016-17, (HL Paper 102) published 2 February 2017.

As you will recall, in the report, at paragraphs 103 and 104, we concluded on the process of relisting individuals post-annulment, that:

"We recognise that the General Court has upheld the practice of re-listing individuals or companies on amended statements of reasons after the annulment of the original listing, but conclude that this practice gives rise to a perception of significant injustice, namely that there is no effective remedy

against sanctions listings. Put in non-legal language, the judgment of the General Court is of no consequence because further sanctions are imposed before it comes into effect. The Council should bear this in mind when considering whether to re-list a targeted individual or company after the original listing has been annulled.

Were listings to be better substantiated in the first place, there would be less need for re-listing. A codified standard of proof would help to ensure that listings are better substantiated in the future".

In reply, the Commission argued that our view "does not reflect either the manner in which [CJEU judgments] are regarded nor the Union's re-listing practice". In defence of this position, the Commission suggested that the risk that once an annulment is effective that "an individual is able to transfer all or part of his assets" out of the EU gives rise, in turn, to the "potential risk" of asset flight. Adding that: "an individual is not re-listed on an identical basis once a listing has been annulled nor is re-listing systematic".

We were disappointed with this aspect of the Commission's reply and, therefore, sought the views of Maya Lester QC who gave evidence to us during our inquiry. (A copy of her supplementary evidence to the inquiry can be viewed on the Sub-Committee's website.)

Ms Lester QC suggests that once the European Court has made a decision to annul a listing decision then "an effective remedy" would be to remove the individual from the list "unless there were a compelling reason not to do so". In her view, the fact that the European Court "almost always" suspends for two months the effect of an annulment decision in order to afford the Council an opportunity to remedy the illegality identified in the Court's judgment, "does not … decrease the perception of injustice identified by the Sub-Committee, and highlights the potential for this practice to result in remedies being ineffective".

Turning to the post-annulment risk of asset flight, Ms Lester QC brings four mains concerns to our attention. First, with regard to the two month post-annulment suspension of de-listing orders, Ms Lester argues with "great respect to the European Commission" that this "is not … compatible with the rule of law" because:

> (i) the Court almost always delays the effect of an annulment order "without there being any evidence at as to whether or not an individual or entity has any assets in the European Union that could be dissipated"; and,
>
> (ii) in many cases individuals are added to the EU sanctions lists "not because of a risk that if they are not listed their assets will be used / dissipated for a particular nefarious purpose … but because (for example) they are associated with the Government of a regime on which the EU has imposed sanctions, or because they used to be employed by a company connected with a particular regime". For this reason she argues that it is "difficult to see why the potential risk of asset dissipation outside the EU … could justify delaying an annulment order".

Second, Ms Lester QC points out that the practice of re-listing individuals does not occur only during the two-month post-judgment phase. In her view, "often" the Council or the Commission will re-list an individual "before a Court judgment has been given but after the written or oral stage of the Court proceedings have closed" (emphasis in original). This leaves the individual with no choice "but to bring an additional costly and lengthy application for annulment in the European Court, regardless of whether or not the Court delays the effects of the annulment order".

Third, whilst Ms Lester QC acknowledges as "correct" the Commission's assertion that re-listing is not "systematic", in her view, re-listing after annulment is "very common". In her support, she cites the evidence given to us during our inquiry by Michael Bishop, Senior Legal Adviser to the Council, who could recall only two or three cases in recent times where the Council had not re-listed an individual. In light of the Senior Legal Adviser's evidence to our inquiry, can you tell us how often since the Kadi II judgment in 2013, those who have successfully challenged their listing in the EU's Courts, are re-listed post-annulment?

Four, Ms Lester QC accepts the Commission's statement that individuals are not always relisted on an "identical basis". However, as she correctly points out, our concern was not with re-listings being

identical, instead the report focussed on the denial of an effective remedy. As Ms Lester QC puts it in her reply to us, this is "because the basis for the re-listing is … the same allegations as the original listing expressed with slightly different words, or on criteria or allegations or evidence that could have been relied on at the time of the original listing but were not". Citing the House of Commons EU Scrutiny Committee, herconcern is that re-listings of this kind might in some cases be "an artificial legal device to prolong restrictive measures that have a weak foundation".

We have written in similar terms to the Commission. We look forward to considering, in due course, your views and response to Ms Lester QC's concerns with the Commission's reply to our report.

14 September 2017