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Sir William Cash MP  
Chair, European Scrutiny Committee  
House of Commons  
London  
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18 June 2018

Dear Sir William,

**13927/17: 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 and Directive 2009/22/EC and repealing Directive 1999/44/EC**

Thank you for your report dated 22 November 2017 regarding the above revised proposal, for which the Government submitted an Explanatory Memorandum on 21 November 2017.

I would like to update the Committee on progress in the EU negotiations for this proposed Directive. Since the Commission published its amended proposal on 31 October 2017, the Council has met monthly. It has now completed its first reading, and there was a policy debate at the Justice and Home Affairs Council on 4 June 2018. The current Presidency of the Council of the EU, Bulgaria, will produce a second draft of the text before the next working group on 20 June. The European Parliament adopted its position in February. It favours minimum harmonisation applying in specific areas, including allowing Member States to maintain or introduce provisions for a right to reject, including the UK's existing short-term right to reject goods that do not conform to the contract.

The Government's negotiating objective is to have no reduction in the UK's existing consumer protection regime for goods sales. While we welcome greater harmonisation of EU law in principle, we do not support this at the expense of consumer protection in any Member State. The negotiations are still at an early stage, and it is too early to predict how easy it will be to achieve this.

The nature of the discussions in first reading focused on major themes such as the extent of support for full harmonisation and how much alignment there should be with the related draft Directive on certain aspects concerning contracts for the supply of digital content ('DCD' - COM (2015) 634).

*Interaction with the related draft Directive for the sale of digital content*

The Bulgarian Presidency of the EU also set itself the goal of completing trilogue negotiations with the European Parliament on the DCD during their tenure. However, progress has been slower than expected, predominantly because of the need to discuss the complex interactions between both Directives, as well as to achieve regulatory coherence between the DCD and

the European Electronic Communications Code (EECC). The main unresolved issue relates to the scope of both Directives. The Justice and Home Affairs Council on 4 June adopted the position that the Sale of Goods Directive should cover all consumer goods, including those that use digital content or services (i.e. goods which contain 'embedded' digital content), on the basis that this is the clearest outcome for consumers. The UK supports this position, in line with the DCD Council General Approach reached in June 2017. The European Parliament, however, is seeking the opposite approach, so that goods which have embedded digital content or services would be within scope of the DCD, leaving the Sale of Goods Directive to govern all other goods. At the same time, there is a general trend of convergence between the DCD and Sale of Goods, which is explained further below.

It is not yet clear when trilogue negotiations on the DCD will finish, and discussions are continuing this month. I will, however, write to both Committees with a substantial update on the outcome of these negotiations and the final agreement reached between the institutions, as soon as possible.

### *Level of harmonisation and implications for UK protections*

The draft Sale of Goods Directive is set at maximum harmonisation. As detailed in the Government's Explanatory Memorandum, this would have significant implications for the UK's current consumer protection regime for goods sales. Discussions have so far indicated that the biggest challenge for achieving the Government's objective of not weakening consumer protection concerns the regime for consumer remedies (Articles 9 – 13). Under current drafting, the UK would be required to abolish its short-term right to reject goods not conforming with the contract and the limit on the number of attempts a trader can make to repair or replace a good before termination of the contract or a price reduction must be offered.

So far Council has been divided between those Member States supporting a strict hierarchy of remedies (whereby a consumer would only be able to access remedies such as contract termination or price reduction after first attempting repair or replacement) and those preferring to allow consumers a free choice of remedy. The UK has a hierarchical regime, but supplements this with the added protections described above. Discussions have also focused on the level of harmonisation for the remedy regime, with France being most vocally supportive of a minimum harmonisation approach.

The Justice and Home Affairs Council on 4 June indicated general support for aligning the Sale of Goods rules on remedies with the main elements of the approach in DCD, on the proviso that further technical adaptations are made. What this means in practice is yet to be determined, but it is possible that this will not satisfy the UK's red lines because the DCD rules for remedies for the lack of conformity (Article 12 DCD) are not the same as the UK's existing short-term right to reject non-conforming goods (although the Article 12 DCD regime is more similar to the current UK rules than the original Sale of Goods proposal is, because paragraph 3(c) allows immediate price reduction or contract termination if a lack of conformity is of a "serious nature").

The Justice and Home Affairs Council also agreed to align the level of harmonisation on time limits (Article 14 Sale of Goods) with the outcome in Article 9a of the Council's General Approach on DCD. This would set it at minimum harmonisation so that Member States could go beyond the minimum. For example, the UK could keep its existing six-year (five years in Scotland) limitation period (the UK does not have a liability period), which would meet our negotiating objectives.

Justice and Home Affairs Council did not discuss the Commission's proposal to increase to two years after sale the period for the reversed burden of proof, and it is still unclear how this will develop in working group. As detailed in the Explanatory Memorandum, this would be an increase to consumer protection for the UK and many other Member States because during

this time, it is for the trader, not the consumer, to prove that a good was in conformity with the contract on the day on which the good was delivered. It is the UK's objective to maintain the existing six-month period due to the burden that a significant increase may place on small traders. However, we have left ourselves some flexibility to agree to extend this to no further than one year if that helps achieve the UK's wider negotiating objectives.

### *Committee Questions*

In their report, the Committee asked for an indication of when the amended proposal is likely to be adopted. It is too early to judge this with accuracy, but the best estimate currently is that the file will be adopted during the first quarter of 2019. This means that transposition of the Directive is likely to be required by the first quarter of 2021, which falls outside the proposed Implementation Period following the UK's EU withdrawal. The UK's future relationship with EU legislation regarding consumer protection is yet to be negotiated.

The Committee also asked how future civil justice cooperation may apply specifically to consumer rights. As the Government's future partnership paper made clear, we recognise the benefits of civil judicial cooperation with the EU for both UK and EU consumers. This is one of the reasons that we are seeking to ensure a close and comprehensive future relationship with the EU in this area. The exact nature of that relationship is a matter of negotiation with the EU. However, the Committee may have noted that, on 13 June, the Government published a presentation that sets out the UK's proposals for continued civil judicial cooperation.

I will keep the Committee updated regularly on the progress of the negotiations for the new Directive, including on its interaction with the DCD negotiations. I am writing in similar terms to Lord Boswell, Chair of the House of Lords European Union Committee, and copying this letter to Les Saunders (DExEU) and Jennifer Steinitz (BEIS Scrutiny Coordinator).

Yours sincerely

A handwritten signature in blue ink that reads "Andrew Griffiths". The signature is written in a cursive style with a large initial 'A'.

**ANDREW GRIFFITHS MP**  
**Parliamentary Under Secretary of State and Minister for Small Business, Consumers & Corporate Responsibility**