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Dear Bill,

15251/15: Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content ('DCD')

Thank you for your report dated 22nd November 2017 regarding the above file, about which my officials provided an update to your clerks on 15th December. I would like to update the Committee on how the inter-institutional ('trilogue') phase of the negotiations for this file has progressed since then.

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

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

Scope: Links with the proposed Sale of Goods Directive

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

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

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

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

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

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

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

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

Compensating traders for the termination of long-term contracts

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

Consumer remedies and the level of harmonisation

It was agreed in trilogue to reserve these issues until the autumn so that they can be discussed in one context together with the parallel provisions in the SGD. In general, there has been convergence on consumer protection measures between the two Directives, but this won't be agreed until later in the year.

Items of previous interest

In its report, the Committee asked me to bear in mind issues of historical interest to the Committee. I have addressed these below.

- i. *The relationship with the Commission's regulatory fitness (Refit) review of EU consumer law, and general alignment with the UK's Consumer Rights Act 2015*

The Commission's Refit review has had no direct bearing on the DCD discussions because DCD concerns an entirely new area of regulation for the EU. REFIT concerned the fitness for purpose of the existing acquis.

On alignment with the related aspects of the Consumer Rights Act 2015, the regimes have much in common. The main area of difference concerns scope, because the DCD covers not only paid-for digital content and services but also those provided where the consumer has supplied personal data to the trader (unless that data is processed exclusively to enable the supply of the digital content or service, or to comply with legal requirements).

- ii. *Transitional arrangements for purchases made pre-EU withdrawal*

Cross-border cooperation with the EU on consumer enforcement after exit is still under negotiation. However, the European Union (Withdrawal) Act 2018 retains UK consumer protections that are based on EU law. This means that after we leave the EU, and when buying from UK-based traders, UK consumers will be able to rely on the same rights they have now, delivering the stability and continuity consumers and businesses need. This will protect most purchases by UK consumers. Furthermore, UK exporters will benefit from there being a single set of contract rules in the EU.

Section 1.6.6 of the Government's White Paper on the future relationship between the UK and EU sets out our commitment to maintaining high standards of consumer protection in the future relationship and our desire for a negotiated agreement on future cooperation on cross-border consumer law enforcement.

- iii. *The future partnership with the EU*

Cross-border cooperation and alignment with the EU after exit is still under negotiation. As explained in this letter, it remains unclear whether negotiations on the DCD will complete before the UK's EU withdrawal in March 2019.

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

I am copying the letter to Lord Boswell, Chair of the House of Lords European Union Committee, Les Saunders (DExEU), and Callum Gray (BEIS Scrutiny Coordinator).

Yours sincerely



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Minister for Small Business, Consumers & Corporate Responsibility