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Sir William Cash
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Dear Sir William,

8713/18: Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law

I refer to the decision made by the European Scrutiny Committee on 20 June 2018.

The Committee asked for an update to be provided once negotiations had progressed on the Directive on whistleblowing. I will answer your questions in turn.

First, you asked whether the Government had identified any problems with the scope of the proposal or corresponding legal bases. At this stage the Government has not yet identified any disagreement with the legal bases relied upon, however the issue of legal bases is still to be substantively discussed during negotiations and we await the opinion of the Council Legal Service. The Government will update the Committee should there be any developments.

Second, you asked whether the Government considered that criminal penalties would be essential to ensure effective implementation of the Directive. Following discussions, it has become apparent that the Directive does not require criminal penalties to be introduced. The Government does not believe they would be necessary for effective implementation.

Third, you asked about developments related to disclosures which could undermine national security. Discussions relating to this issue are ongoing. Recital 21 is of interpretative value and Commission officials have expressed the view that it indicates that national security issues do not fall within the scope of the proposal. However, the Government would prefer if the text of the Directive made this more explicit. The Government has suggested an amendment to the text which has the effect of clarifying that the Directive will not apply to activities outside the scope of Union law, and in relation to national security in particular.

The UK Intelligence Community continues to place reliance on Article 4(2), but the interpretation of Article 4(2) is currently before the CJEU in the IPT (BCD) reference. Specifically, the question of interpretation is whether Article 4(2) provides a broad exemption from compliance with EU legislation in cases where, but for the existence of Article 4(2), the activities of the Member States may otherwise come within scope. As the interpretation of Article 4(2) may be subject to a restrictive construction by the CJEU, it would be preferable to make the text of the Directive more explicit.

Fourth, you asked whether the Government might align with the Directive as part of our future relationship with the EU. We have been clear that the implementation period should be based on the existing structure of EU rules and regulations, so that people and businesses only need to make one set of changes as we move to our future partnership. Of course, the Government needs to discuss how all of this will work in practice in the next phase of the negotiations, including how we will contribute UK views and share expertise during the implementation period. Beyond this, the UK's relationship to EU legislation will be a matter for negotiations on the future relationship.

Fifth, you asked about the scope of Article 4 regarding public bodies. The Commission has indicated that state legislatures are intended to be covered by the proposal.

Finally, you asked about the availability of legal aid. The Government understands the importance of individuals being able to raise concerns about possible wrongdoing and that in doing so, they should feel confident they will be heard with sensitivity in an effort to resolve issues properly. The Government also recognises the exemplary work undertaken by voluntary organisations in assisting individuals to achieve this.

The scope of civil legal aid is described in Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). When determining the scope of LASPO, cases involving the individual's life, liberty, physical safety and homelessness were considered to be of the highest priority.

Legal aid (both for initial advice and representation), subject to the statutory means and merits tests, remains available for civil legal services provided in relation to contravention of the Equality Act 2010. Publicly funded advice continues to be available for Employment Tribunal discrimination claims, and publicly funded advice and representation is available in the Employment Appeal Tribunal.

Subject to statutory means and merits tests, exceptional case funding (ECF) is available where failure to provide legal aid would breach, or risk breaching, the European Convention on Human Rights or enforceable EU law. A post-implementation review is currently underway of the changes made by Part 1 of LASPO. As part of the review, we will be looking at the major changes introduced to legal aid, including the changes to the scope of legal advice and legal representation.

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



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Minister for Small Business, Consumers & Corporate Responsibility