

## Policy briefing

# Brexit safeguards for co-operatives

April 2017

### Summary of recommendations to government

#### EU competition law:

- Specific accommodations for agricultural co-operatives within EU competition law need to be retained in full
- Other sector-specific accommodations of economic co-operation within EU competition law need to be retained in full
- More general accommodations for economic co-operation provided by the '*acquis*' of EU law, including Block Exemptions and case law, must all be retained in full

#### EU co-operative law:

- Government should provide a steer as to its intentions regarding the Great Repeal Bill and the potential repatriation of European Co-operative Society law into UK law, taking account to risks and opportunities for existing UK co-operative law

#### Consumer, worker and environmental protections in the EU:

- Co-operatives require the retention of the protections for consumers, workers and the environment currently provided by EU law on the day of departure from the EU
- We oppose the use of 'delegated powers' by government after Brexit to alter current protections without proper public consultation and Parliamentary scrutiny

#### EU public procurement directives:

- The repatriation of EU procurement law should occur in such a way that the current UK Public Contract Regulations remain unchanged on the day of departure
- We require assurances that government will not use 'delegated powers' after Brexit to change current regulations without proper public consultation and Parliamentary scrutiny
- It is important that co-operatives and other social economy organisations are provided with an opportunity to participate fully in a review of UK public procurement regulations after Brexit

#### EU recognition of, and support for, co-operatives

- The UK government should seek to replicate the official recognition of, and support for, co-operatives provided by the European Commission

#### EU structural and investment funds:

- Support for key co-operative development activities needs to be protected after Brexit
- Co-operatives should be provided with an opportunity to participate in government's review of structural and investment funds

## 1 Introduction

- 1.1 In response to the UK's vote to leave the European Union Co-operatives UK set out three overarching principles to guide our policy work through the Brexit process:
1. Despite the Brexit workload for government, our basic policy needs must still be met
  2. Co-operatives should not be put in a disproportionately worse position by the Brexit process
  3. The potential for co-operatives to give people control and build a better economy should be harnessed
- 1.2 Now, with the triggering of Article 50 and policymakers' attention turning towards the Great Repeal Bill, we believe it is timely to put forward our key positions in relation to the second principle. This document sets out what needs to be safeguarded for co-operatives during the Brexit process. Though naturally, given the potential for co-operatives to give people control and build a better economy, there are also points where discussion of safeguards blends into discussion of opportunities.
- 1.3 We are primarily addressing the Westminster government here. The exact audience in government depends on the policy area, though we would also expect the Department for Exiting the European Union (DExEU) to provide overarching assurances to the co-operative sector.
- 1.4 In identifying our Brexit safeguards we have focused on areas of public policy that will be central to the Brexit process, namely the repatriation of EU law into UK law, and the replacement (or otherwise) of EU policy and competency with UK policy and competency. Within this we have focused on aspects where co-operatives have a distinct interest, and defined what we believe needs to be safeguarded.
- 1.5 This paper therefore sets out key Brexit Safeguards in the following areas:
- The repatriation of EU competition law into UK law (see **part 3**)
  - The repatriation of EU co-operative law into UK law (see **part 4**)
  - The repatriation of EU consumer, employment and environmental law into UK law (see **part 5**)
  - The repatriation of EU public procurement law into UK law (see **part 6**)
  - EU recognition of and support for co-operatives (see **part 7**)
  - EU structural funds and co-operatives (see **part 8**)
- 1.6 There are of course other hugely significant parts of the Brexit process we are not covering.

- 1.7 We have not defined safeguards for trade and access to labour. This is because while co-operatives as businesses have a significant stake in these matters, there are few instances where these interests are distinctly co-operative.
- 1.8 We have also chosen not to discuss those areas of EU law, policy and competency that are significant for parts of the UK co-operative economy but which lack clearly defined safeguards. For example, EU State Aid rules have reduced the scope of the UK to support community energy schemes. They are also seen as a check on the state's ability to forge nurturing 'public-social partnerships' in the delivery of services. There may be opportunities outside the EU for a more progressive approach to State Aid but that does not mean there is anything to safeguard at this point.

## **2 What is at stake?**

- 2.1 The co-operative sector comprises almost 7,000 independent businesses with a combined turnover of £34.1 billion, employing 222,785 people, and owned by 17.5 million members.<sup>1</sup>
- 2.2 Co-operatives are distinct in the economy because they give ownership and control to those stakeholders whose needs and aspirations they exist to serve. This includes customers and communities owning retailers or credit unions, workers owning their livelihoods, or farmers clubbing together to process and sell their produce.
- 2.3 The economic, social, cultural and environmental value created through this approach must not be understated and makes a significant difference in the lives of millions of people in the UK. Now more than ever, as people seek new ways to work, live and create wealth in an uncertain world, this co-operative difference needs to be protected and enhanced, during and after Brexit.

## **3 EU competition law**

- 3.1 EU competition law, most notably 'Article 101 of the Treaty for the Functioning of the European Union (TFEU)', could be interpreted as preventing some forms of economic co-operation, such as farmers' co-operatives, consortia and buying groups.<sup>2</sup> But this currently does not prevent many forms of UK co-operative activity in practice. There are many 'derogations' in EU legislation, some general, others specific to certain industries, which provide accommodations for forms of economic co-operation.

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<sup>1</sup> <http://reports.uk.coop/economy2016/>

<sup>2</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:HTML>

- 3.2 The repatriation of this body of law must be done in a way which retains these crucial accommodations.
- 3.3 In EU law 'agreements' between 'undertakings' can only be subject to Article 101 TFEU when they could potentially affect trade between member states. In practice this test is very broad and does not have to involve cross border activity. There is a '*de minimus*' threshold of market share and turnover, below which agreements cannot be said to affect trade between member states. Article 101 TFEU does not apply below this threshold.<sup>3</sup>

### Agriculture

- 3.4 Many forms of agricultural co-operation are exempted from Article 101 TFEU by Articles 38 to 44 of the TFEU, so as to take account of the aims of the Common Agricultural Policy (CAP).<sup>4</sup> This special accommodation for agricultural co-operation is further provided for through a raft of regulation<sup>5</sup> including the Common Market Organisation (CMO) Regulation (No 1308/2013).<sup>6</sup>
- 3.5 At least some of these accommodations for agricultural co-operation are given form in UK law through Schedule 3 of the Competition Act 1998, in ways that rely explicitly in EU law.<sup>7</sup> The Great Repeal Bill and related legislation will need to ensure that Schedule 3 and the entire Competition Act continues to function.
- 3.6 **It is vital for the future of UK farming that these accommodations remain fully in place on the day of departure from the EU.**
- 3.7 The complications that might arise because these accommodations relate to the CAP, rather than any post-Brexit UK agricultural policy, will need to be dealt with efficiently and effectively so as to ensure UK competition law does not reduce the scope for essential farmer co-operation after Brexit.
- 3.8 **Looking further ahead, the UK's agricultural co-operatives would welcome the opportunity to review and refine competition rules, as part of a cohesive UK agricultural policy.**
- 3.9 While the accommodations for agricultural co-operation in the EU are crucial they are also suboptimal. Copa-Cogeca, the EU-wide representative body for agricultural co-operatives, states:

*"The current agricultural derogations as laid down in the CMO regulation are*

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<sup>3</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2014.291.01.0001.01.ENG&toc=OJ:C:2014:291:TOC](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2014.291.01.0001.01.ENG&toc=OJ:C:2014:291:TOC)

<sup>4</sup> [http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuld=FTU\\_5.2.9.html](http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuld=FTU_5.2.9.html)

<sup>5</sup> [http://ec.europa.eu/competition/sectors/agriculture/overview\\_en.html](http://ec.europa.eu/competition/sectors/agriculture/overview_en.html)

<sup>6</sup> <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013R1308>

<sup>7</sup> <http://www.legislation.gov.uk/ukpga/1998/41/schedule/3>

*the result of a historically grown patchwork of ad hoc approaches and solutions, sometimes the result of institutional compromise, which lack a common organising principle."*<sup>8</sup>

- 3.10 There is a clear opportunity for UK policymakers outside the EU to 'tidy up' the accommodations for agricultural co-operation within UK competition law.

Other specific sectors

- 3.11 EU law also accommodates forms of economic co-operation in other specific sectors, such as insurance, transport, shipping and airlines.<sup>9</sup> While agreements between undertakings in these contexts are not necessarily co-operatives, they often represent vital, broadly beneficial collaboration in the economy of a kind that should be encouraged in the UK after Brexit.
- 3.12 **These accommodations must be retained on the day of departure from the EU.**

General accommodations

- 3.13 Crucially Article 101 TFEU (3) sets out conditions where the application of Article 101 TFEU (1) could be inappropriate. It says that forms of economic co-operation that improve productivity, promote technological and economic progress and have clear benefits for consumers should be allowed.<sup>10</sup> This has broadly been characterised as allowing co-operation that increases 'economic efficiency' with consumer benefits.
- 3.14 While there has been some ambiguity as to how narrowly or widely Article 101 TFEU (3) should be interpreted, the most recent rulings suggest that in the *acquis* of EU law, a wide interpretation of 'economic efficiency' is allowed.<sup>11</sup>
- 3.15 Because of Article 101 TFEU (3), EU competition law also contains a series of 'Block Exemptions' for forms of both vertical and horizontal co-operation. These set out how co-operation in areas like research and development can be allowed in order to increase economic efficiency.<sup>12</sup> While the functionality of some older Block Exemptions has been criticised, newer Block Exemptions have been well received.<sup>13</sup>
- 3.16 These aspects of EU law have already been given form in the UK through the Competition Act 1998, Sections 4 to 9, with the 'economic efficiency' criteria

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<sup>8</sup> [https://ec.europa.eu/agriculture/sites/agriculture/files/agri-markets-task-force/improving-markets-outcomes\\_en.pdf](https://ec.europa.eu/agriculture/sites/agriculture/files/agri-markets-task-force/improving-markets-outcomes_en.pdf)

<sup>9</sup> [http://ec.europa.eu/competition/antitrust/legislation/handbook\\_vol\\_3\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/handbook_vol_3_en.pdf)

<sup>10</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:HTML>

<sup>11</sup> Chalmers, Damian Davies, G. T. (Gareth Trevor), 1970-; Monti, Giorgio (2014) 'European Union law' Cambridge University Press

<sup>12</sup> [http://ec.europa.eu/competition/antitrust/legislation/handbook\\_vol\\_2\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/handbook_vol_2_en.pdf)

<sup>13</sup> Chalmers, Damian Davies, G. T. (Gareth Trevor), 1970-; Monti, Giorgio (2014) 'European Union law' Cambridge University Press

for individual and block exemptions set out in Section 9.<sup>14</sup> The Great Repeal Bill and related legislation will need to ensure that these sections and the entire Competition Act continues to function.

- 3.17 Crucially the EU Court of Justice has ruled that in practice EU competition objectives must at times be balanced with social objectives.<sup>15</sup> This recognition of the need to balance objectives, so as to ensure socially beneficial co-operation is permitted, will also need to have effect in UK law on the day of departure from the EU.
- 3.18 **The scope to allow economic co-operation provided by Article 101 TFEU (3), the Block Exemptions, and the wider legal interpretations of economic efficiency in the *acquis* of EU law, must all be retained on the day of departure from the EU.**

#### 4 EU co-operative law

- 4.1 This section discusses potential opportunities and risks for UK co-operative law in the possible repatriation of the co-operative law from the EU through the Great Repeal Bill.
- 4.2 In theory, the Great Repeal Bill will repatriate all EU law into UK law. EU law contains a ‘Statute for European Co-operative Society (SCE)’<sup>16</sup>, an EU-wide legal form, which reasonably could be repatriated as part of this process.
- 4.3 Given that UK law already contains a very similar legal form; a co-operative society under the Co-operative and Community Benefit Societies Act<sup>17</sup> (CCBSA); we believe it would be unnecessary and inappropriate to repatriate the SCE legislation wholesale.
- 4.4 However, there may be elements of the SCE that the UK co-operative society legal form could benefit from. We could explore the potential for the Great Repeal Bill to repatriate these elements, by adapting and applying them to co-operative societies under the CCSBA.
- 4.5 In particular the SCE legislation includes provisions for ‘indivisible reserves’ and an ‘asset lock’. These are statutory features we know through consultation many of our members and stakeholders would like to see in UK co-operative society law.<sup>18</sup> At present we have no expectation of making these types of strategic reform to the CCBSA because we lack opportunities for primary

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<sup>14</sup> <http://www.legislation.gov.uk/ukpga/1998/41/part/I/chapter/I/crossheading/exemptions>

<sup>15</sup> <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52012PC0130>

<sup>16</sup> [Council Regulation \(EC\) No 1435/2003](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32003R1435)

<sup>17</sup> <http://www.legislation.gov.uk/ukpga/2014/14/contents/enacted>

<sup>18</sup> <https://www.uk.coop/asset-lock-co-operative-societies>

legislation, partly because of the coming Brexit workload in Whitehall.

- 4.6 The Great Repeal Bill may in fact provide opportunities to improve UK co-operative law.
- 4.7 However we should also be clear that there are aspects of the SCE legislation we do not want repatriated in UK co-operative law.
- 4.8 These opportunities and risks for UK co-operative law are discussed in more detail in a separate paper ‘Repatriation of co-operative law from the European Union’, which recommends the following:
- HM Treasury and DExEU should provide a steer as to their intentions regarding the Great Repeal Bill and the SCE legislation
  - Co-operatives UK should be ready to conduct more detailed forensic analysis of SCE legislation if required
  - Co-operatives UK should be ready to consult all co-operative societies on any potential reforms

## 5 EU consumer, employment and environmental law

- 5.1 The International Co-operative Alliance ‘Statement on the co-operative identity’ is normally read as requiring co-operatives promote decent standards for consumers, workers and the environment in the course of their business.<sup>19</sup>
- 5.2 The UK’s consumer retail co-operatives and worker co-operatives, among others, have long been at the forefront of progress in these areas and are overwhelmingly ethical, mission-led businesses.
- 5.3 Co-operatives have a significant interest in ensuring the protections for consumers, workers and the environment provided by EU law are not degraded through Brexit. If these protections are degraded, co-operatives, along with other mutuals, mission-led business and social enterprises, could be put at a competitive disadvantage, as they lose out to less scrupulous firms in a damaging and irresponsible ‘race to the bottom.’
- 5.4 **Co-operatives require an economy after Brexit in which doing the right thing is rewarded. This means we must retain the protections for consumers, workers and the environment currently provided by EU law on the day of departure from the EU.**
- 5.5 **We would especially oppose the use of ‘delegated powers’ by government after Brexit to alter current protections without proper public consultation and Parliamentary scrutiny.**

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<sup>19</sup> <http://coopsday.coop/en/whats-co-op/co-operative-identity-values-principles>



## 6 EU public procurement law

- 6.1 The most recent EU Procurement Directives (2014)<sup>20</sup> have already been transposed into the UK Public Contract Regulations (2015).<sup>21</sup> While still seen by some as a check on the state's ability to forge 'public-social partnerships' in the delivery of services, this most recent iteration of EU procurement law contains some useful provisions for the social economy.
- 6.2 EU law has created a 'Light Touch Regime' in core public interest markets like health, social care and cultural services. This has introduced significant new flexibilities for commissioners which allow them to contract in ways that *"ensure quality, continuity, accessibility, affordability availability and comprehensiveness of the services"* and emphasise things like the *"involvement and empowerment of users."*<sup>22</sup>
- 6.3 Furthermore, Article 77 of the EU Procurement Directives allows commissioners to create 'Reserved contracts', which in UK parlance is often called the 'Mutuals Reservation'. This allows commissioners to reserve three-year contracts to deliver a range of care-related, educational and cultural services for mutual forms of social enterprise.<sup>23</sup>
- 6.4 **We require the repatriation of EU procurement law to occur in such a way that the current UK Public Contract Regulations remain unchanged on the day of departure.**
- 6.5 **We also require assurances that government will not use 'delegated powers' after Brexit to change current regulations without public consultation or Parliamentary scrutiny.**
- 6.6 **It is important that co-operatives and other social economy organisations are provided with an opportunity to participate fully in any review of UK procurement regulations after Brexit.**

## 7 EU recognition of, and support for, co-operatives

- 7.1 In the context of broader safeguards in Brexit there are aspects of EU policy in relation to co-operatives we would like to see replicated in the UK.
- 7.2 The European Commission (DG Growth) officially recognises co-operatives

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<sup>20</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0024&from=EN>

<sup>21</sup> [http://www.legislation.gov.uk/ukSI/2015/102/pdfs/ukSI\\_20150102\\_en.pdf](http://www.legislation.gov.uk/ukSI/2015/102/pdfs/ukSI_20150102_en.pdf)

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[https://www.uk.coop/sites/default/files/uploads/attachments/guidance\\_on\\_the\\_new\\_light\\_touch\\_regime\\_for\\_health\\_social\\_education\\_and\\_certain\\_other\\_service\\_contracts1.pdf](https://www.uk.coop/sites/default/files/uploads/attachments/guidance_on_the_new_light_touch_regime_for_health_social_education_and_certain_other_service_contracts1.pdf)

<sup>23</sup> <https://www.uk.coop/promoting-co-ops/social-co-ops/live-issues>



and the valuable economic and social contributions they can make.<sup>24</sup>

7.3 Since 2004, the work of the European Commission in relation to co-operatives has been guided by the ‘Communication on the promotion of co-operative societies in Europe.’<sup>25</sup> This focuses on three main issues:

- the promotion of the greater use of co-operatives across Europe by improving the visibility, characteristics and understanding of the sector
- the further improvement of co-operative legislation in Europe
- the maintenance and improvement of co-operatives' place and contribution to community objectives

7.4 The European Commission established ‘The Working Group on Cooperatives’ in 2013 to assess the specific needs of co-operative enterprises with regard to a wide variety of issues such as the appropriate EU regulatory framework, the identification of barriers at national level and the internationalisation of co-operatives.<sup>26</sup>

7.5 Upon the recommendations of the Working Group, two pilot projects are being implemented:

- Business transfers to employees creating a co-operative<sup>27</sup>
- Reduction of youth unemployment and the setup of co-operatives<sup>28</sup>

7.6 Our starting point is that UK co-operatives should not be disproportionately disadvantaged by Brexit. At present the UK government does not recognise co-operatives in the way the European Commission does. European Commission policy recognition provides a clear route for co-operatives in the EU to seek policy improvements, both at an EU and national level. We do not want to lose that through the Brexit process.

**7.7 We therefore request that the UK government officially recognises and undertakes to support co-operatives in a way similar to the European Commission. We would expect this recognition to come from the Department for Business Energy and Industrial Strategy and the Inclusive Economy Unit.**

**7.8 European Commission support for worker buyouts and co-operative entrepreneurship should also be replicated in the UK, as per our Budget**

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<sup>24</sup> [https://ec.europa.eu/growth/sectors/social-economy/cooperatives\\_en](https://ec.europa.eu/growth/sectors/social-economy/cooperatives_en)

<sup>25</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52004DC0018>

<sup>26</sup> <http://ec.europa.eu/DocsRoom/documents/10450/attachments/1/translations>

<sup>27</sup> [https://ec.europa.eu/growth/sectors/social-economy/cooperatives\\_en](https://ec.europa.eu/growth/sectors/social-economy/cooperatives_en)

<sup>28</sup> Ibid

## 2017 submission.<sup>29</sup>

### 8 EU structural and investment funds

#### Regional Development Funds

- 8.1 We have reviewed public data on projects and programmes that received Regional Development Funds (RDF) from 2007-13, and have identified those that were either wholly directed at co-operatives or the social economy, and those that had a significant focus on co-operatives or the social economy. From this we have arrived at estimates for how much RDF funding was directed at co-operatives and the social economy over this period, as a way of quantifying how important the RDF has been in supporting our sector in recent times.
- 8.2 We estimate that at least £82.6 million of RDF was directed at co-operatives and the social economy across the UK in the period 2007-13. While this represents only a small portion of total RDF spending, it has clearly been a significant source of development funding for the social economy.

#### Social Funds

- 8.3 Data suggests Social Funds have not been a significant source of direct support for co-operatives and the social economy.

#### European Investment Funds

- 8.4 It is much more difficult to survey the extent to which UK co-operatives have benefited from European Investment Funds. That said it is clear that initiatives like the 'Social Impact Accelerator' fund have the potential to support co-operatives and the social economy.<sup>30</sup>

#### A new model of local economic development

- 8.5 The likely form, function and size of whatever replaces EU structural and investment funds is wholly unclear. Some programmes and bodies for the development of the social economy around the UK rely at least in part on EU funding. **We need this vital support to be retained in some shape of form over the long term.**
- 8.6 Whatever replaces EU funding, the UK may need more bottom-up, co-contributory and collaborative approaches to local economic development. Due to our work in co-operative and community economic development, Co-operatives UK and others in the co-operative sector are well positioned to offer

<sup>29</sup> [https://www.uk.coop/sites/default/files/uploads/budget\\_2017\\_submission\\_-\\_broadening\\_ownership\\_in\\_an\\_inclusive\\_economy.pdf](https://www.uk.coop/sites/default/files/uploads/budget_2017_submission_-_broadening_ownership_in_an_inclusive_economy.pdf)

<sup>30</sup> [http://www.eif.europa.eu/what\\_we\\_do/equity/sia/index.htm](http://www.eif.europa.eu/what_we_do/equity/sia/index.htm)

innovative contributions in this space.

- 8.7 The UK needs strategies focused on people and place, led by and focused on the needs and capacities of communities. We need communities to create and crucially keep more wealth locally. Co-operatives are an essential ingredient here.
- 8.8 In his August 2016 letter to David Davis (Secretary of State for Exiting the European Union) David Gauke (Chief Secretary to the Treasury) stated HM Treasury will “*consult closely with stakeholders to review all EU funding schemes in the round*”<sup>31</sup> **It is important that co-operatives are provided with an opportunity to participate fully in this review.**

## 9 Concluding remarks and next steps

- 9.1 From the above it should be clear that co-operatives require certain safeguards across a range of policy areas in order to avoid being disproportionately disadvantaged by Brexit.
- 9.2 Co-operatives UK is already working with the Department for Environment and Rural Affairs to ensure the UK’s future agricultural policy utilises farmer co-operation. This work would be greatly assisted by clear assurances from the UK government in relation to competition policy.
- 9.3 We will ask HM Treasury in the first instance to provide a view on how the Great Repeal Bill is expected to deal with the European Co-operative Society legislation.
- 9.4 We will seek the relevant assurances from other government departments and keep a watching brief on these aspects of the Brexit process, especially as the Great Repeal Bill is introduced and future policy is considered.

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/545767/CST\\_letter\\_to\\_SoS\\_for\\_DExEU\\_August\\_2016.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/545767/CST_letter_to_SoS_for_DExEU_August_2016.PDF)

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