



HOUSE OF LORDS

European Union Committee

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The Rt Hon Nick Hurd MP
Minister of State for Policing and the Fire Service
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14 September 2018

Dear Nick,

On 18 July 2018 the House of Lords EU Home Affairs Sub-Committee held an evidence session with Professor Michael Levi, Professor of Criminology, Cardiff University; Mr Richard Martin, Deputy Assistant Commissioner, Metropolitan Police; Mr John Binns, Partner, BCL Solicitors LLP; and Professor Estella Baker, Professor of European Criminal Law and Justice, De Montfort University.

On 5 September 2018, the Sub-Committee held a further evidence session with Claude Moraes MEP, Chair of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE). Mr Moraes also sent the Sub-Committee a written evidence submission.

Full transcripts, to which the quotations and question numbers in this letter refer, are available at the EU Home Affairs Sub-Committee website, <https://www.parliament.uk/eu-home-affairs-subcommittee>.

The aim of these sessions was to investigate the operation of the United Kingdom's Justice and Home Affairs (JHA) opt-in during the proposed transition or implementation period. This letter draws on these sessions, and consists of a series of questions.

The JHA opt-in during transition

The Sub-Committee's evidence sessions focused on the provision set out in Part Four of the draft Withdrawal Agreement (published on 19 March 2018), and particularly Article 22(5), which states:

“During the transition period, in relation to measures which amend, build upon or replace an existing measure adopted pursuant to Title V of Part Three of the TFEU by which the United Kingdom is bound before the date of entry into force of this Agreement, Article 5 of Protocol (No 19) on the Schengen acquis integrated into the framework of the European Union and Article 4a of Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice shall continue to apply mutatis mutandis. The United Kingdom shall, however, not have the right to notify its wish to take

part in the application of new measures pursuant to Title V of Part Three of the TFEU other than those referred to in Article 4a of Protocol No 21.

“In order to support continuing cooperation between the Union and the United Kingdom, under the conditions set out for cooperation with third countries in the relevant measures, the Union may invite the United Kingdom to cooperate in relation to new measures adopted under Title V of Part III TFEU.”

The Sub-Committee’s understanding of this provision is that, in effect, the UK will retain the responsibilities of EU Membership without any of the privileges of the UK’s opt-in arrangements. The draft Agreement provides that the UK will remain bound during the transition period to those measures that the UK has opted into by 30 March 2019, when the transition period begins. For those measures, the status quo will be maintained until December 2020, when the transition period is set to end.

During the transition period the UK will not be able to opt into any new JHA measures. However, the UK will have the option to opt into any measures which amend, replace or build on existing JHA measures in which the UK already participates.

On the scrutiny of JHA measures during transition, Claude Moraes MEP told us (Q18): “We just do not know how [scrutiny] will happen because it will be very difficult for a kind of skeleton UKRep to follow everything, so of course mistakes will be made and it will be difficult ... If we have to build on a particular measure, we may miss out.”

1. What avenues will be open to the UK to scrutinise or influence JHA measures during transition, once it loses its seats in the European Parliament and Council?

Other Member States’ influence on the UK’s JHA opt-in during transition

The draft Withdrawal Agreement maintains the section of Protocol 21 (Article 4a) under which EU Member States can “urge” the UK to opt-in and/or “bear the financial consequences” when the UK’s non-participation “makes the application of that measure inoperable for the other Member States of the Union”.

We asked witnesses about this draft provision (Q13). John Binns felt that “the likelihood of [this] happening during the transition period of 21 months” was “low”, and Professor Estella Baker agreed. However, Mr Binns felt that if Member States were to invoke this provision, “I think there would need to be a vote in Council ... by qualified majority.”

2. What, in your view, is the likelihood that other Member States will take advantage of the provisions in the Withdrawal Agreement to “urge” the UK to opt into JHA measures? How would this work in practice: would there need to be a vote in Council? What would be the European Parliament’s role?

JHA legal basis

Following his evidence session, Mr Moraes wrote to us with a description of the UK Government’s “long history of not agreeing with the concept of ‘legal basis’ for non-JHA measures but that include JHA content”. According to Mr Moraes, the Government

“argues that measures with JHA content fall into three categories:

- If an international agreement pursued solely a JHA purpose, which it describes as a ‘whole JHA measure’, the normal legal base rules would require just a JHA legal base for the relevant Decision containing the negotiating mandate or on signature or conclusion;
- If an international agreement pursued both a JHA and another objective with neither being incidental, what the UK Government calls ‘a partial JHA measure’, two legal bases would be needed for the relevant Decision—a JHA legal base and a legal base corresponding to the other objective;
- If an international agreement pursued two objectives, a JHA objective and a non-JHA objective, with the JHA objective being incidental to the non-JHA objective, an ‘incidental JHA measure’, then under the normal legal base rules the relevant Decision would only require the legal base that corresponded to the non-JHA objective.”

3. Would you agree with Mr Moraes’ categories?

We asked witnesses whether the opt-in provisions of the Withdrawal Agreement will apply to measures with JHA content, but without a JHA legal basis, and whether they believed that the EU could, once the UK becomes a third country, insist that the UK take part in measures that the UK had previously opted out of on the grounds that they contained JHA content.

Mr Moraes told us (Q20):

“It is still quite vague as to how the Council was going to deal with the encouragement to opt in. The general view on the [European Parliament’s] Brexit steering committee was that in the withdrawal agreement, because not everyone has access to what is happening in the negotiations, this is a kind of convenience thing about existing opt-in arrangements that are then built upon or replaced. The Council will enter into a discussion on it, and there will be a mechanism for that in the transition period, and the Parliament will enter into it if it is a consent point.”

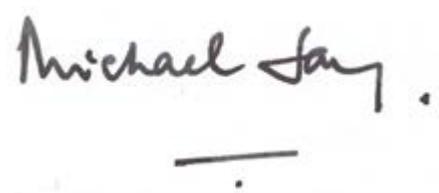
In his written submission, Mr Moraes suggested:

“The European Parliament would...have a clear role if an international agreement [on a measure with a JHA legal basis] was reached. Under Article 218 on EU agreements with third countries, consent by the European Parliament would be required for the adoption of such agreements. For example, if an agreement were reached to grant the UK access to Europol databases then this would need the consent of the European Parliament.”

4. What discussions has the Government had about the likelihood that the UK will be obliged to take part in JHA measures during the transition period that it had previously opted out of? Has the Government made an assessment of the potential role of the Council and European Parliament in such a decision?

I look forward to hearing from you within ten working days. I am copying this letter to Sir William Cash MP, Chair of the Commons European Scrutiny Committee; Lynn Gardner, Clerk to the Commons European Scrutiny Committee; Arnold Ridout, Legal Adviser to the Commons European Scrutiny Committee; Les Saunders, Department for Exiting the EU; and Alex Bernal, Home Office.

Yours sincerely,

A handwritten signature in black ink that reads "Michael Jay." Below the signature is a horizontal line with a small dot underneath it, serving as a signature mark.

Lord Jay of Ewelme Chairman of the EU Home Affairs Sub-Committee