



HOUSE OF LORDS

European Union Committee

House of Lords
London
SW1A 0PW

Tel: 020 7219 6083
Fax: 020 7219 6715
euclords@parliament.uk
www.parliament.uk/lords

Rt Hon Nick Hurd MP
Minister of State for Policing and the Fire Service
Home Office
2 Marsham Street
London SW1P 4DF

28 November 2018

UK's JHA Opt-In Protocol

Dear Minister,

Thank you for your letter dated 1 November 2018 regarding the UK's Justice and Home Affairs Opt-in Protocol. The EU Home Affairs Sub-Committee considered your letter at its meeting on 28 November 2018.

I note that the latest text of the Withdrawal Agreement allows the transition period to be extended to 31 December 2022.

- In light of the possibility that the transition period could be extended to 31 December 2022, and your statement that it takes “on average around 2 years” to negotiate and implement new EU legislation, would you still maintain that it is “highly unlikely” that legislation setting up new JHA tools will come into force during the transition period? What assessment have you made of the risk to the UK from not being able to exercise its JHA opt-in during an extended transition period?

We note your arguments regarding the exercise of the UK's opt-in, including in respect of international agreements. The House of Lords EU Committee has, since 2011, repeatedly rejected the Government's arguments regarding its unilateral assertion of the UK's opt-in arrangements to EU measures brought forward without a Title V legal basis. The Lords EU Committee, along with the European Scrutiny Committee in the Commons, the Council and the Commission, has taken the view that the UK's Opt-in Protocol is only engaged when a proposal cites a Title V legal basis. With regard to international agreements, the EU Justice Sub-Committee undertook an inquiry into this issue, and its report, published in March 2015, challenged, among other matters, the Government's broad interpretation of the Opt-in Protocol particularly, the meaning of the phrase “pursuant to [Title V]”, and criticized the Government's “misconceived” approach to the determination of the legal base of an EU measure with JHA content. We note that notwithstanding your reference to the consistent view of “previous administrations since 2011”, the Government failed to submit a formal response to our 2015 report; a failure we reluctantly accepted after the result of the EU referendum in 2016.

Our 2015 report warned that the Government's policy on the unilateral assertion of the UK's opt-in, albeit in the context of international agreements, gave rise to a “very considerable” risk of legal uncertainty. While we note your expectation that the Government will not be

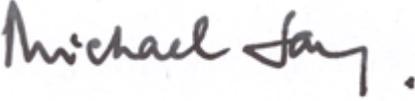
“required to take opt-in decisions in relation to JHA obligations in measures that do not cite a JHA legal base, often, if at all” during any transition period, we are now concerned that, as 29 March 2019 draws near, the Government’s history of unilaterally asserting the application of the UK’s opt-in to EU legislation that has not been brought forward pursuant to a Title V legal basis has the potential to create domestic legal uncertainty; in particular, but not limited to, those occasions where the UK has asserted that it is not bound by a specific EU measure (or any included JHA content) brought forward without a Title V legal basis and where there is nothing within the text of the EU legislation indicating that the UK has decided that it is not bound. An example is Regulation 2017/2402 of 12 December 2017, laying down common rules on securitisation and creating a European framework for simple, and transparent and standardised securitisation.

In light of the Government’s policy, we would be grateful for your answers to these questions:

- Since 2011, on how many occasions has the Government unilaterally asserted in the Council that the UK’s opt-in arrangements apply to EU measures that do not include a Title V legal basis? How many times has the Government indicated that it is not participating in such measures? How many of these measures will apply to the UK on 29 March 2019?
- How does the Government plan to deal with the uncertainty that may arise as a result of these past actions? The Government’s Explanatory Notes to the EU (Withdrawal) Bill said that the purpose of the legislation was to “convert EU law as it stands at the moment of exit into domestic law before the UK leaves the EU and preserve laws made in the UK to implement EU obligations”. In light of this aim, do the provisions of the European Union (Withdrawal Act) 2018 offer a solution to the uncertainty created by the Government’s unilateral assertion of the UK’s opt-in arrangements? If so, which provisions?

I look forward to a response within 10 working days.

Yours sincerely



Michael Jay

Lord Jay of Ewelme

Chairman of the EU Home Affairs Sub-Committee