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Lord Jay of Ewelme  
Chair, Home Affairs Sub-Committee  
European Union Committee  
House of Lords  
London  
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01 November 2018

Dear Lord Jay,

I apologise for the delay in responding to your letter of 14 September on the application of the UK's JHA Opt-in Protocol during the proposed Implementation Period (IP). I had hoped to be able to provide confirmation of the opt-in / opt-out processes during the IP, to help guide your planning for scrutiny of opt-in / opt-out decisions during this period. Whilst the relevant text in the Withdrawal Agreement has been agreed, we are waiting for confirmation of those processes. The response below reflects our understanding, to be confirmed, that the current processes will not change significantly.

**Your letter commented that “The Sub-Committee’s understanding of this provision (i.e. Article 122(5) of the Withdrawal Agreement 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.”**

I do not agree with this assessment. The UK will continue to be bound by the EU measures that we have already opted into. JHA opt-in and Schengen opt-out decisions taken since the Referendum have been taken in the full knowledge of our impending departure from the EU and after considering the operational, legal and political benefits of participating, alongside any impacts arising from the UK's forthcoming exit. The Withdrawal Agreement allows the UK to continue to participate in the tools and legislation we have already chosen to participate in for the Implementation Period, and to participate in amendments to those measures if we choose to do so. Given the length of time it takes the EU to negotiate and implement new EU legislation (on average around 2 years), it would be highly unlikely that any legislation setting up substantively new JHA tools, proposed by the Commission after March 2019 would come into force before December 2020. The UK therefore loses little from not being able to choose to be bound by such EU legislation.

**Your letter asked: 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?**

The UK will no longer be a EU Member State during the implementation period and will no longer attend most Council or Commission led meetings. However, as set out in the Withdrawal Agreement, common rules will remain in place and the UK may continue to participate in EU agencies and bodies where the presence of the United Kingdom is necessary and in the interest of the Union, or where the discussion concerns the UK and its citizens.

The UK will also retain the ability to choose whether to participate in measures amending or replacing existing EU legislation in which the UK participates, and the UK can also be invited to cooperate in any new JHA measures during the implementation period.

Whilst our ability to scrutinise or influence JHA measures during the IP will be limited, any JHA measures will only impact the UK where we choose. We will therefore need to place a greater emphasis on influencing the EU by influencing EU institutions and Member States outside of institutional structures and bilaterally.

**Your Committee also asked what 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; and what would be the European Parliament’s role?**

The provisions in the Withdrawal Agreement maintain the effect of Article 4a of Protocol (No. 21) to the EU Treaties, including the procedure which applies where there is a determination by the Council that the UK’s non-participation in an amended version of an existing measure makes the application of that measure inoperable for other EU Member States or the Union. Since the Treaty of Lisbon came into force in 2009, I am not aware of a single instance where this mechanism has been exercised to urge the UK to participate in a measure.

The Article 4a mechanism requires a determination by the Council by qualified majority voting. The European Parliament has no role in this process. If, two months after that determination, the UK has not chosen to opt in under either Articles 3 or 4 of Protocol (No. 21), the existing measure will no longer be binding or applicable on the UK. The EU may, on the basis of a proposal from the Commission agreed by a qualified majority of the Council, require the UK to pay costs associated with the cessation of this measure. The UK can nevertheless still choose to opt-in post-adoption at a later date.

I agree with your expert witnesses that it is unlikely those provisions would be used during the Implementation Period. At the very least, I would expect the UK to have the opportunity to consider a post-adoption opt-in decision, as we did with the Europol legislation and as we will do with the Eurojust legislation, before the Commission seeks to trigger the ejection mechanism under Article 4a.

**Your letter asks whether I agree with the description set out by Claude Moraes MEP that:**

**“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.”**

I agree with the assertion that there are three categories of documents and that Mr Moraes has set out the ‘normal’ legal base rules as defined by the CJEU. It is worth noting that in the instances where there are two main objectives of an international agreement, the EU’s position has generally been to split the Council Decisions on signature and conclusion into two separate Council Decisions, one covering the JHA aspects and one covering the non-JHA aspects.

It is also worth pointing out that Article 2 of Protocol (No. 21) applies specifically to measures and provisions in international agreements. Therefore, because of this wording in Protocol (No. 21), the position taken by this and previous administrations since 2011 is that because of the existence of the JHA opt-in Protocol, a JHA legal base should be cited for any obligations that fall within scope of the competences set out in Title V of Part III of the TFEU .

Nevertheless, even where a JHA legal base is not cited, including in a Council Decision authorising the signature or conclusion of an international agreement, the Government considers that the UK’s JHA opt-in applies to JHA obligations. This is to ensure that the UK is not bound by JHA obligations where we do not choose to be so bound, which is the aim of the opt-in Protocol. In the case of a Council Decision relating to an international agreement, the opt in would apply to the extent that the Decision authorised the EU to enter into provisions of the international agreement falling within the scope of Title V of Part III of the TFEU.

The Withdrawal Agreement (Article 122) uses the same language as used in Protocol (No. 21) to the EU Treaties<sup>1</sup>. Protocol (No. 21) applies unmodified with the exception in Article 122(5), and therefore does not require a change in the UK’s current approach to the application of the JHA opt-in to JHA obligations.

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<sup>1</sup> Withdrawal Agreement Article 122(5): “.....measures which amend, build upon or replace an existing measure adopted pursuant to Title V of Part Three of the TFEU...”. Protocol (No. 21): “...proposed measures pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union....”.

However, the opt-in provisions in Article 122(5) of the Withdrawal Agreement only apply to amending or replacing measures, and most measures, such as international agreements with third countries, which contain JHA obligations, are unlikely to be amended or replaced during the IP. Therefore, I would not expect the UK to 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 the Implementation Period.

**Your letter asked what discussions the Government has 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, and whether the Government made an assessment of the potential role of the Council and European Parliament in such a decision.**

Article 122(1) is clear that measures the UK has previously chosen not to participate in would not apply to the UK during the IP. The provisions in the Article 122(5) of the Withdrawal Agreement are there to ensure that the UK can continue to participate fully in the EU tools in which we already participate, by allowing the UK to participate in any amendments to those tools. If the UK decided not to participate in such amendments, then Article 4a of Protocol (No. 21) allows the EU to consider ejecting the UK from the underlying measure. The UK may be invited to participate in new tools, but there is no obligation to do so.

I am copying this 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.



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