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Lord Jay of Ewelme  
Chair, Home Affairs Sub-Committee  
European Union Committee  
House of Lords  
London  
SW1A 0PW

15 January 2019

Dear Lord Jay,

### **UK's JHA Opt-In Protocol**

Thank you for your letter of 28 November.

Your letter noted that the Withdrawal Agreement allows the transition period to be extended to 31 December 2022 and asks whether, in light of the possibility that the transition period could be extended, and my statement that it takes “on average around 2 years” to negotiate and implement new EU legislation, I would still maintain that it is “highly unlikely” that legislation establishing new JHA tools will take effect during the Implementation Period, although we will continue to monitor this.

If the provision (Article 132 of the Withdrawal Agreement) enabling the extension of the Implementation Period was activated, it would make it more likely that legislation establishing new JHA tools would take effect during the Implementation Period. If we considered such tools or measures to be useful additions to the current EU JHA toolbox, we would engage in a discussion with EU partners about the benefits of UK participation in those tools until the end of the Implementation Period. The final paragraph of Article 127(5) of the Withdrawal Agreement allows for the EU to invite the UK to cooperate in relation to new JHA measures under the conditions set out for cooperation with third countries in the relevant measures.

In terms of an assessment of the risk to the UK from not being able to exercise its JHA opt-in to JHA tools during an extended transition period, I consider the risk to be limited. To our knowledge, and reflecting the European Commission's 2019 annual work programme, there are no plans for the EU to propose entirely new JHA tools / measures where the UK has not already been involved in negotiations, and where appropriate opted in. At this stage, it is unclear what priorities the next European Commission will have – and we are unlikely to get any further understanding of priorities until after the May 2019 European Parliament elections and subsequent election of the next Commission.

In relation to the application of the JHA opt-in to JHA content in measures that do not cite a JHA legal base, your letter asks:

**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?**

Officials have undertaken a review of information available, including public reporting, and consider that the UK has asserted the opt-in on 59 occasions in relation to JHA obligations in measures where the original proposal did not cite a JHA (Title V) legal base.

**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?**

In relation to 10 measures, the UK Government considers that it did not opt in to JHA obligations and does not consider itself bound by those obligations. For the remainder of opt-in decisions relating to measures not citing a JHA legal base, the UK either opted-in (43 measures), or subsequent rulings by the CJEU have meant the UK now considers itself bound (6 cases). Those 10 measures where the UK did not opt in to JHA obligations within the measures are:

1. *Proposal for a Council Decision on the signature and conclusion of a Partnership and Co-operation Agreement between the EU and Singapore*
2. *Proposal for a Council Decision on signature and conclusion by the EU of the Stabilisation and Association Agreement with Kosovo*
3. *Proposal for a Regulation laying down common rules on securitisation and creating a European framework for simple, and transparent and standardised securitisation and amending Directives 2009/65/EC, 2009/138/EC, 2011/61/EU and Regulations (EC) No. 1060/2009 and (EU) No. 648/2012*
4. *Proposal for a Regulation of the European Parliament and of the Council on the protection of the individual with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)*
5. *Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 768/2005 establishing a Community Fisheries Control Agency*
6. *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1406/2002 establishing a European Maritime Safety Agency*
7. *Proposal for a Regulation of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading*
8. *Proposal for a Directive amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services*
9. *Proposal for a Council Decision on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part*
10. *Proposal for a Directive of the European Parliament and of the Council on credit servicers, credit purchasers and the recovery of collateral*

**How does the Government plan to deal with the uncertainty that may arise as a result of these past actions? 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?**

As your letter notes, the Government's Explanatory Notes to the European Union (Withdrawal) Bill state that the purpose of the legislation was to "convert EU law as

its 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”.

There are no specific provisions in the European Union (Withdrawal) Act 2018 clarifying which JHA obligations the Government does not consider itself bound by. However, the Act does not retain in domestic law exempt EU instruments as defined by Schedule 6 of the Act, which includes instruments or provisions of instruments insofar as they are not applicable as a result of the UK’s JHA opt-in Protocol.

The information provided in the Annual Reports to Parliament on the application of the JHA opt-in indicates where the UK Government has applied the opt-in and whether or not the Government has opted in. Where the UK has not opted into JHA obligations and does not consider itself bound, the UK will not be bound by such obligations during the Implementation Period. The Government considers that there is little if any, practical risk of uncertainty arising because of the nature of the JHA obligations in the 10 measures – either the obligations are on the EU or EU agencies, or the obligations are JHA in nature but do not substantively impact existing UK policy or practical co-operation.

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.

A handwritten signature in blue ink that reads "Nick Hurd". The signature is written in a cursive, slightly slanted style.

**RT HON NICK HURD MP**  
**Minister of State for Policing and the Fire Service**