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Ministry
of Justice



Home Office

Lord Boswell
Chairman of the European Union Committee
Committee Office
House of Lords
London
SW1A 0PW

Our ref: 7719

3 June 2014

Dear Tim

GOVERNMENT POSITION ON THE JHA OPT-IN

We are writing to set out the Government's position on the application of the UK's opt-in to justice and home affairs (JHA) measures under Protocol 21 to the Treaties. We are aware that your Committee has exchanged several letters with departments, including our own, on the subject of when the opt-in is available in the absence of a Title V legal base being cited. We are also aware that recent and prospective judgments from the Court of Justice of the European Union (CJEU) which touch on the question of citation of legal bases will be relevant to the UK's JHA opt-in.

As you know, the Government's starting position is that the UK's JHA opt-in Protocol is triggered when a proposal contains any JHA content, rather than on the basis of which legal base the Commission has chosen for its proposal. This approach seeks to prevent the Commission from circumventing our opt-in rights by including JHA content in measures that do not cite a Title V legal base.

Protocol 21 is clear that it applies in respect of measures "pursuant to" Title V, the JHA chapter of the Treaty. It does not explicitly restrict the ambit of the Protocol to measures which cite a Title V legal base. Nevertheless, the Government will push for the addition of a Title V legal base in EU negotiations on a measure that we consider to have JHA content, unless that content is removed from the measure in the negotiations. That approach has been taken both when the measure in question is wholly concerned with JHA issues and in cases where the JHA content might be characterised as ancillary to a principal purpose.

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However, the Government recognises that the principle of validity means that, as a matter of law, legislative acts of the EU must be assumed to be valid unless or until they are annulled by the CJEU. Accordingly, we recognise that, notwithstanding our opt-in decision, the UK would be bound by a JHA measure without a Title V legal base once it was adopted.

We should be clear that this only applies in cases where JHA is either the whole purpose of a measure (a "whole JHA" measure) or is one of two main purposes, neither of which is incidental (a "partial non-ancillary JHA" measure). In either case, asserting that we are not bound would call into question the validity of the entire measure.

The Government's position is that the principle does not apply to cases where the principal purpose or purposes are not JHA-related. It follows that where the UK does not opt in to such proposals, we do not believe we would be bound by such so-called "ancillary" JHA provisions, because we would not be calling into question the validity of the entire measure.

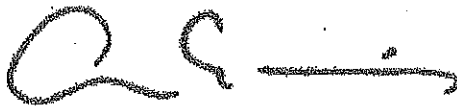
We appreciate that your Committee takes a different view to the Government on the application of the UK's opt-in. To be clear, where a proposal from the Commission does contain JHA content but does not cite a Title V legal base, the Government will, as usual, make an opt-in decision within three months of the publication of the final language version of the proposal. We will also give Parliament an opportunity (under the Ashton and Lidington commitments) to offer its opinion on whether the UK should opt in. Furthermore, in line with established policy, we will continue to consider bringing challenges before the CJEU where we believe there is JHA content but this is not reflected in the adopted text.

Because of the difficulties inherent in identifying JHA content in the absence of the correct legal base, there may be occasions where the Government fails to recognise JHA content in an EU proposal at the outset. We are endeavouring to keep these occasions to a minimum by raising the profile of JHA content in otherwise non-JHA dossiers across Whitehall. However, on those occasions where this is the case and we are subsequently successful in attaining a Title V legal base, we commit to going through the opt-in process post-adoption, including allowing a period for scrutiny before we finalise our decision. This would ensure that Parliament can scrutinise the Government's approach to the opt-in aspects of such proposals and would apply whether the Government is minded to opt in or not.

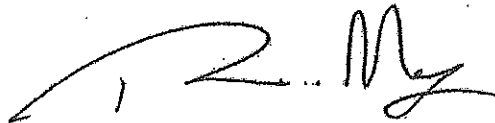
The CJEU is considering the question of citation of legal bases in the context of case C-377/12, where the European Commission is challenging the Council Decision on signing the Partnership and Co-operation Agreement between the EU, its Member States and the Philippines (2012/272/EU). Judgment in that case is expected within a few months, and, we expect, before the summer recess. We will write again to you on the Government's position in light of that judgment.

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We are writing in similar terms to Bill Cash. We are also copying this letter to the Minister for Europe; Sarah Davies, Clerk to the European Scrutiny Committee; Jake Vaughan, Clerk to the Lords Committee; Jonathan Worgan and Magdelana Williams, Scrutiny Co-ordinators in the FCO; Les Saunders (Cabinet Office); Deborah Maggs, Home Office Departmental Scrutiny Co-ordinator; and Patricia Zimmermann, MoJ Departmental Scrutiny Co-ordinator.

A handwritten signature in black ink, appearing to be 'C. Grayling', with a long horizontal stroke extending to the right.

**RT. HON CHRIS GRAYLING MP
LORD CHANCELLOR AND SECRETARY OF STATE FOR JUSTICE**

A handwritten signature in black ink, appearing to be 'Theresa May', with a large, stylized initial 'T'.

**RT. HON THERESA MAY MP
HOME SECRETARY**

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