Dear Convener,

THE LAW ENFORCEMENT AND SECURITY (AMENDMENT) (EU Exit) Regulations 2018

EU EXIT LEGISLATION – PROTOCOL WITH SCOTTISH PARLIAMENT

I am writing in relation to the protocol on obtaining the approval of the Scottish Parliament to the exercise of powers by UK Ministers under the European Union (Withdrawal) Act 2018 in relation to proposals within the legislative competence of the Scottish Parliament.

As you know, Mike Russell wrote to the Conveners of the Finance & Constitution and Delegated Powers and Legislative Reform Committees on 11 September setting out the Scottish Government’s views on EU withdrawal. That letter also said that we must respond to the UK Government’s preparations for a No-Deal scenario as best we can, despite the inevitable widespread damage and disruption that would cause. It is our unwelcome responsibility to ensure that devolved law continues to function on and after EU withdrawal.

I attach a notification which sets out the details of the SI which the UK Government propose to make and the reasons why I am content that Scottish devolved matters are to be included in these SIs.

This SI is being brought forward by the UK Government as preparation for the scenario of the UK leaving the EU without a deal being reached.

The SI will make provision for a number of pieces of legislation relating to retaining EU law in the area of security, law enforcement, and criminal justice. The SI covers a range of reserved and devolved matters and it makes sense to make these technical fixes as part of a UK wide approach. The regulations will ensure a continuity of law and functioning statute book on exit from the EU.
I am copying this letter to the Convener of the Delegated Powers and Law Reform Committee.

I look forward to hearing from you within 28 days from the date of this letter.

HUMZA YOUSAF
The name of the instrument in question (if known) or a title describing the policy area:

The Law Enforcement and Security (Amendment) (EU Exit) Regulations 2018 ("the proposed Regulations")

Brief explanation of law that the proposals amend:

**General overview**

The proposed Regulations are being brought forward by the UK Government under powers in the EU (Withdrawal) Act 2018. They provide in respect of a number of pieces of legislation relating to retained EU law in the area of security, law enforcement and criminal justice.

The purpose of the proposed Regulations is to provide technical fixes to UK legislation to deliver a functioning statute book on exit. In line with the scope of the powers provided for in Section 8 of the Act, the regulations will revoke or amend retained directly applicable EU legislation and domestic legislation for EU security, law enforcement and criminal justice measures where no negotiated agreement is reached with the EU – i.e. the ‘no deal’ scenario.

The Regulations relate to a mixture of reserved and devolved matters. Some Parts of the Regulations relate to areas which are wholly reserved; others relate to areas where there is legislation which is a mix of reserved and within the legislative competence of the Scottish Parliament, including criminal justice, criminal law and policing. These latter areas are described below.

The proposed Regulations are due to be laid in the Westminster Parliament in mid-November.

**Child Pornography**

The proposed Regulations revoke Council Decision 2000/375/JHA to combat child pornography on the internet. This Decision requires member states to take actions to tackle the production, possession and distribution of ‘child pornography’ on the internet.

**Cross Border Surveillance**


The proposed provision relates to emergency cross border surveillance arrangements to enable foreign police officers to continue their operations in Scotland (and the rest of the UK) in implementation of the UK’s obligations under the article 40(2) of the Schengen Convention. Article 40(2) of the Convention
requires police officers from one country to be enabled (where necessary and subject to conditions) to continue their surveillance operations in another country for up to 5 hours where a suspect unexpectedly crossed the border. The provision covers exceptional circumstances where it is not reasonably practicable for cooperation to allow surveillance under the Regulation of Investigatory Powers (Scotland) Act 2000.

Judicial Co-operation and Police Powers

Eurojust.

Council Decision 2002/187/JHA of 28 February 2002 sets up Eurojust with a view to reinforcing the fight against serious crime. This measure establishes a unit, referred as “Eurojust”, as a body of the EU. Eurojust’s objectives are: to stimulate and improve the coordination, between competent authorities of the Member States; to improve cooperation between the competent authorities of the Member States, in particular by facilitating the execution of requests for, and decisions on, judicial cooperation; and to further support the competent authorities of the Member States in order to render their investigations and prosecutions more effective

Exchange of Information and Intelligence between Law Enforcement Authorities and Disclosure in Foreign Proceedings

European Criminal Record Information System (ECRIS); European Judicial Network (EJN) Europol PRUM Schengen Information System (SIS II) EU-Lisa – EU agency for the operational management of large scale IT systems in the area of freedom, security and justice European Agency for Law Enforcement Training (CEPOL)

These are all tools in the data and intelligence sharing and co-operation arrangements in the EU in which the UK participates and allows for the effective sharing of criminal records, judicial advice, alerts, expertise and intelligence across member states.

The proposed Regulations repeal and amend various pieces of EU and UK legislation on data and information and intelligence sharing as follows. Scotland’s participation in these measures has been via the UK, as the competent member state, and the legislation covers a complex mix of reserved and devolved matters:

- ECRIS – Council Decision 2009/316/JHA on the establishment of the European Criminal Records Information System and the associated domestic legislation, Part 6 of the Criminal Justice and Data protection (Protocol No.36) Regulations 2014 which sets out the UK legislative framework for the computerised exchange of information on convictions in the EU, designating the central authority for the whole of the UK and the obligations around storing information and procedures to be followed.
- Council Decision 2008/976 establishing the European Judicial Network This measure provides for a network of judicial contact points to improve judicial
cooperation between EU Member States particularly in actions to combat forms of serious crime.

- Regulation (EU) No.1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, justice and security
- Part 5 of the Criminal Justice and Data Protection (Protocol No.36) Regulations 2014 which provides in relation to information exchange and use of data. This is the UK wide domestic legislation associated with Council Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of member states of the EU. It also has provision relating to information received by Joint Investigation Teams.
- PRUM -Council Decisions 2008/615 and 2008/616 on the stepping up of cross border co-operation in combating terrorism and cross-border crime through the automated exchange of DNA, dactyloscopic and vehicle registration data.
- SIS II – Council Decisions relating to the UK participation in the Schengen acquis in so far as they relate to the Schengen Information System and Council and Commission Decisions relating to the establishment, operation, use and data protection of SIS II.
- Council Decision 2005/681/JHA establishing the European Police College to train senior officers of police forces of Member States. (CEPOL). Note that this is simply a tidying up exercise as the UK no longer participates in CEPO.

Football Disorder

Council Decisions 2002/348/JHA and 2007/412/JHA both concerning security in connection with football matches with an international dimension. The Decisions require the setting up of football information points for co-ordinating and facilitating police information exchange in connection with football matches with an international dimension.

Joint Investigation Teams

Council Framework Decision 2001/465/JHA sets the EU Framework for the setting up of Joint Investigation Teams. It enables the competent authorities of two or more Member States to agree to set up a joint investigation team for a specific purpose and a limited period, which may be extended by mutual consent, to carry out criminal investigations in one or more of the Member States setting up the team. The composition of the team is set out in the agreement.

The proposed Regulations include amendments to Part 5 of the Criminal Justice and Data Protection (Protocol No.36) Regulations 2014 which provides in relation to information exchange and use of data by JITs and to a provision in the Police and Fire Reform (Scotland) Act 2012 relating to JITs.
Mutual Legal Assistance in Criminal Matters

Directive 2014/41/EU on the European Investigation Order was implemented across the UK by the Criminal Justice (European Investigation Order) Regulations 2017. The Directive sought to streamline requests for mutual legal assistance requests between EU member states for the purpose of obtaining evidence for use in criminal investigations or proceedings. There are also consequential provisions in the Criminal Procedure (Scotland) Act 1995 and the Criminal Law (Consolidation) (Scotland) Act 1995.

Council Decisions relating to the UK participation in the Schengen acquis in so far as they relate to the mutual legal assistance in criminal matters and aspects of international police co-operation are revoked. The proposed Regulations also amend the domestic legislation setting out the processes and mechanisms to deliver international mutual legal assistance i.e. The Crime (International Co-operation) Act 2003 and the Investigatory Powers At 2016. This legislation is a mix of reserved and devolved competence.

Proceeds of Crime

The proposed Regulations amend the legislation dealing with proceeds of crime which is a complex mix of reserved and devolved competence. This includes amendments to the regime for recovering proceeds of crime under the Proceeds of Crime Act 2002 and the Serious Organised Crime and Police Act 2005. The law in this area is concerned with powers to prevent money laundering, counter terrorist financing and make the recovery of the proceeds of crime more efficient and effective.

The Criminal Justice and Data Protection (Protocol No 36) Regulations 2014 is also amended. Schedule 1 of those Regulations (foreign property and foreign orders: Scotland) relates to the role and responsibilities of the Lord Advocate in relation to the sending to and receiving from other EU member states of orders for the restraint and confiscation of assets which are understood to be being used to commit crime or to be the proceeds of crime.

Serious Crime and Fraud

The proposed Regulations amend section 34 of the Serious Crime Act 2007. Part 1 of the 2007 Act makes provision in relation to Serious Crime Prevention Orders (SCPOs) and the terms in which they can be made by UK Courts. These civil orders are made to place a restriction or obligation on an individual or organisation such as travel or business restrictions aimed at tackling serious organised crime.

Section 34 of the 2007 Act provides that an SCPO may only place restrictions on the freedom of a service provider established in an EEA state (other than the UK) to provide information society services to an EEA state, if certain conditions, set out in the legislation, are met. It also limits the terms which can be included in an order imposed on service providers of intermediary services (i.e. conduits or hosts).
Section 34 was included in implementation of Directive 2000/31/EC on certain legal aspects of information society services— the “E commerce” Directive. The implementation of the E commerce Directive in this area is a complex mix of reserved and devolved competence.

**International Agreements**

The proposed Regulations include provision in relation to any potentially directly effective rights, powers, liabilities, obligations, restrictions, remedies and procedures which are derived from a number of international agreements entered into by the EU with third countries in the areas of mutual legal assistance in criminal matters, cross border co-operation in combatting terrorism and crime and the Schengen acquis.

**Financial Sanctions – offences created using section 2(2)**

Section 144 of the Policing and Crime Act 2017 Act modifies the application of section 2(2) of the European Communities Act 1972 to increase the maximum term of imprisonment for offences created under that power relating to financial sanctions.

**Summary of the proposals and how these correct deficiencies:**

**Child Pornography**

The proposed Regulations revoke Council Decision 2000/375/JHA to combat child pornography on the internet. This Decision requires member states to take actions to tackle the production, possession and distribution of ‘child pornography’ on the internet. It does not appear that revocation would have any practical effect as the decision is directive in nature and the steps required to address indecent images of children are in place in Scotland in domestic law. The Decision will therefore be redundant.

The Council Decision also includes some material on co-operation and for the European Council to monitor compliance which will not be appropriate when the UK is no longer a member of the EU.

**Cross Border Surveillance**

The proposal is to revoke the directly applicable EU Council Decisions governing reciprocal arrangements for cross-border surveillance. The UK will no longer be part of this co-operation on exit from the EU and in the absence of any on-going agreement it will no longer be appropriate to retain the associated rights and obligations in our domestic law. Section 76A of the Regulation of Investigatory Powers Act 2000 will be consequentially amended to omit references to the Schengen Convention which is the principal source of EU law in this area. Transitional provision is also proposed in relation to surveillance begun before exit day.
Eurojust

The Eurojust Decision will become part of domestic law in the UK on exit day in terms of the EU (Withdrawal) Act 2017. The proposal is to revoke the Decision as it makes provision in connection with an EU entity of which the UK will no longer be part in the absence of on-going agreement with the EU. These reciprocal arrangements will cease to exist in so far as the UK is concerned. There will be some saving of the Decision in relation to information received by the UK before exit.

Police Powers

Exchange of Information and Intelligence between Law Enforcement Authorities and Disclosure in Foreign Proceedings
European Criminal Record Information System (ECRIS);
European Judicial Network (EJN)
Europol
PRUM
Schengen Information System (SIS II)
EU-Lisa – EU agency for the operational management of large scale IT systems in the area of freedom, security and justice
European Agency for Law Enforcement Training (CEPOL)

The proposal is to revoke the directly applicable EU legislation identified above which will become part of domestic law in terms of the EU Withdrawal Act 2018. These measures will be redundant when the UK is no longer a member of the EU in the absence of on-going agreement with the EU. For domestic law, the proposal is also to revoke parts 5 and 6 of the Criminal Justice and Data Protection (Protocol No.36) Regulations 2014 relating to ECRIS and exchange of information and intelligence which will likewise be redundant. Provision is made for savings as appropriate to deal with requests received immediately prior to exit but not yet replied to at the point of departure.

Football Disorder

The proposal is to revoke Council Decisions 2002/348/JHA and 2007/412/JHA both concerning security in connection with football matches with an international dimension. These measures will be redundant when the UK is no longer a member of the EU in the absence of on-going agreement with the EU.

Joint Investigation Teams

The Council Framework Decision on JITs will be redundant when the UK is no longer a member of the EU in the absence of on-going agreement with the EU. The proposal is to amend the associated domestic legislation (the Police and Fire Reform (Scotland) Act 2012) to remove provision which defined ‘international joint investigation team’ as teams formed in accordance with various EU instruments. Similar provision is proposed in relation to the Crime and Courts Act 2013. This relates to NCA officers who may operate in Scotland with the authority of the Lord Advocate.
Mutual Legal Assistance in Criminal Matters

The Criminal Justice (European Investigation Order) Regulations 2017 are the vehicle by which changes required in mutual legal assistance by the European Investigation Order Directive (2014/41/EU) are made in the legal systems of the UK. The Regulations will be redundant when the UK is no longer a member of the EU in the absence of on-going agreement with the EU. The proposal is therefore to revoke the regulations and undo the consequential amendments made by the Regulations to the provisions of the Criminal Procedure (Scotland) Act 1995 and the Criminal Law (Consolidation) Act 1995.

The proposal is also to revoke the various directly applicable EU Council Decisions relating to the UK participation in the Schengen acquis in so far as they relate to mutual legal assistance in criminal matters and aspects of international police co-operation. The proposal is also to amend provisions in the Crime (International Co-operation) Act 2003 and the Investigatory Powers Act 2016 which deal with mutual legal assistance, to reflect the fact that various EU instruments furthering mutual legal assistance, and setting out how this is to be carried out, will no longer be applicable. Since the UK will no longer be part of the EU these instruments, and the arrangements they specify, will no longer be appropriate.

Proceeds of Crime

The proposed amendments to the Proceeds of Crime Act 2002 are all technical changes to either remove redundant EU references or make existing references work reflecting that the UK is no longer a member of the EU. The term “EEA Firm” is removed from the definition of “bank” in sections 131ZA (seized money;Scotland) and 303Z7 (forfeiture of money) of, and in Schedule 3 (administrators). In sections 282D and 408A, which relate to the procedure by which assistance can be requested from overseas countries, references to individuals authorised under “EU Treaties” to receive such requests are removed. In section 396B, which make provision for unexplained wealth orders, minor amendments are made to reflect the fact that the UK will not be an “EEA state” after exit day.

The Serious Organised Crime and Police Act 2005 is to be amended to omit section 96. That section makes provision empowering the Scottish Ministers to give effect to rights and obligations arising under Framework Decision 2003/577/JHA of 22nd July 2003 on the execution in the European Union of orders freezing property or evidence. The UK will not participate in that Framework Decision after exit day in the absence of any ongoing co-operation.

For the Criminal Justice and Data Protection (Protocol No 36) Regulations 2014, the proposal is to revoke Part 2 of and Schedule 1 to the Regulations and put in place transitional provisions with respect to Schedule 1 around the time of the UK’s exit.

These contain provisions allowing for freezing orders and confiscation orders to be sent to Member States, and for such orders received from Member States to be given effect in the United Kingdom, under Framework Decision 2003/577/JHA and
Framework Decision 2006/783/JHA of 6th October 2006 on the application of the principle of mutual recognition to confiscation orders. After exit day, in the absence of any ongoing co-operation, the UK will not send or process any new requests under this mechanism. The transitional provisions will ensure that the procedure in domestic law continues to apply where a request was sent or received prior to exit day.

It also proposed to revoke Council Decision 2000/642/JHA concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information and Council Decision 2007/845/JHA concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime. Savings provisions will ensure that the provisions relating to the use of information (including personal data) in those Council Decisions is preserved in respect of any information provided under those procedures prior to exit day.

**Serious Crime and Fraud**

The proposal is to amend section 34 of the Serious Crime Act 2007 to remove the limits set out in subsections (1) to (4) on the terms a Court can include in a SCPO on service providers established in an EEA state other than the UK. These conditions arise from certain Articles in the E Commerce Directive to which the UK will no longer be subject on exit from the EU. The relevant Articles involve reciprocal arrangements among EEA states which will not be appropriate when the UK leaves the EU, in the absence of any on-going co-operation.

It is also proposed that the existing limits on the terms in which a SCPO can be granted in relation to service providers of intermediary services (i.e. service providers which are mere conduits or hosts) are retained and modified to take account of UK exit. This is to ensure that notwithstanding the fact that the E Commerce Directive will not bind the UK on exit day, these limits will still apply.

**International Agreements**

The proposal is that any rights, powers, liabilities, obligations, restrictions, remedies and procedures which are derived from a number of international agreements entered into by the EU with third countries in the areas of mutual legal assistance in criminal matters, cross border co-operation in combatting terrorism and crime and the Schengen acquis and which are saved by section 4(1) of the EU (Withdrawal) Act 2018 will cease to be recognised and available in domestic law.

These international agreements are concluded by the EU with third countries and will no longer be effective for the UK when it ceases to be a member of the EU and so any such rights etc will be redundant. All of these arrangements involve reciprocal rights and obligations which will no longer apply to the UK after exit. Accordingly, to the extent, if any, that these rights are retained by the Withdrawal Act, it is no longer appropriate to retain the rights in domestic law.
### Financial Sanctions – offences created using section 2(2)

The proposal is to omit section 144 of the Policing and Crime Act 2017. This is to correct a deficiency in domestic law in that section 144 relates to section 2(2) of the ECA 1972 which is repealed by the EU Withdrawal Act 2018.

### An explanation of why the change is considered necessary:

#### Child Pornography

In the absence of any on-going agreement between the UK and the EU these measures are redundant.

#### Cross Border Surveillance

In the absence of agreement between the UK and EU to continue this co-operation as part of Schengen these provisions will be redundant.

#### Eurojust

In the absence of any on-going agreement between the UK and the EU these measures are redundant. The directly applicable EU legislation is redundant and has no ongoing purpose.

#### Police Powers

- **Exchange of Information and Intelligence between Law Enforcement Authorities and Disclosure in Foreign Proceedings**
- **European Criminal Record Information System (ECRIS); European Judicial Network (EJN)**
- **Europol**
- **PRUM**
- **Schengen Information System (SIS II)**
- **EU-Lisa – EU agency for the operational management of large scale IT systems in the area of freedom, security and justice**
- **European Agency for Law Enforcement Training (CEPOL)**

In the absence of any on-going co-operation in relation to these measures between the EU and the UK they are redundant and need to be removed from the statute book. The amendments to the domestic legislation is in consequence of this and to make transitional provision to provide clarity.

#### Football Disorder

In the absence of any on-going co-operation in relation to these measures between the EU and the UK they are redundant and need to be removed from the statute book.
Joint Investigation Teams

The changes proposed in relation to domestic regulations relating to JITs are necessary because the UK will no longer be part of the EU and so arrangements based on EU agreements are no longer appropriate.

Mutual Legal Assistance in Criminal Matters

The revocation of the Criminal Justice (European Investigation Order) Regulations 2017, and the changes to the relevant provisions of the Criminal Procedure (Scotland) Act 1995, the Criminal Law (Consolidation) Act 1995, the Crime (International Co-operation) Act 2003 and the Investigatory Powers Act 2016 which deal with mutual legal assistance are necessary because the UK will no longer be part of the EU and so arrangements based on EU agreements and standards are no longer appropriate.

Proceeds of Crime

The proposed amendments to the Proceeds of Crime Act 2002 are all technical changes to either remove redundant EU references or make existing references work reflecting that the UK is no longer a member of the EU. These are necessary to ensure a functioning statute book following exit.

The proposed amendment to the Serious Organised Crime and Police Act 2005 and the Criminal Justice and Data Protection (Protocol No 36) Regulations 2014 is also to remove redundant provision when the UK ceases to participate in the relevant EU measures. The transitional provisions with respect to Schedule 1 of the 2014 Regulation are necessary to provide clarity about orders received or sent before the date of the UK’s exit but not carried out by that date.

The revocation of the Council Decisions is required because these will become part of domestic law on exit but will be redundant in the absence of ongoing cooperation. The savings will provide clarity.

Serious Crime and Fraud

The changes proposed to Section 34 of the Serious Crime Act 2007 are necessary to remove provision which will be inappropriate when the UK ceases to be a member of the EU and to ensure that the provision which is being retained can continue to work effectively.

International Agreements

The proposed changes are required to clarify that any directly effective rights etc. deriving from these international treaties concluded by the EU do not continue in domestic law when the international law basis ends with the UK ceasing to be a member State.
### Financial Sanctions – offences created using section 2(2)

The proposed change is necessary to tidy up the statute book consequential on the repeal of section 2(2) of the European Communities Act 1972.

### Scottish Government categorisation of significance of proposals:

It is considered that all of the proposals fall within category A. The changes proposed all have one or more of the following characteristics:

- Minor and technical in detail.
- Ensuring continuity of law.
- No significant policy decision for Ministers or there is limited policy choice given the “no deal” scenario and there is an “obvious” policy answer.
- Updating references which are no longer appropriate once the UK has left the EU

### Impact on devolved areas:

Criminal justice, criminal law and policing are within devolved competence. The removal of these provisions will reduce the scope of tools available to support tackling crime.

This impact will be across the UK and is not specific to Scotland.

### Summary of stakeholder engagement/consultation:

Relevant officials in COPFS were consulted to check their understanding of the significance and impact of the proposed changes from an operational perspective. They confirmed that they thought the proposed changes were appropriate in a “no deal” scenario.

### A note of other impact assessments (if available):

The UK Government has prepared an impact assessment for this SI, which will be provided when the SI is laid.

### Summary of reasons for Scottish Ministers’ proposing to consent to UK Ministers legislation:

The proposed Regulations relate to a complex mixture of reserved and devolved matters.

In many of these areas, notably proceeds of crime and mutual legal assistance Scottish Ministers of all parties have been content previously for legislation to be taken forward through the UK Parliament (with LCMs being introduced to the Scottish Parliament where appropriate.) This reflects (a) the complex mix of reserved and devolved powers in this area (b) the value of consistency across the UK, given the movement of criminals and proceeds of crime around the UK and (c) the shared objectives of the UK and Scottish Governments in this policy area. In
addition the proposed amendments to proceeds of crime and mutual legal assistance legislation are considered appropriate and relatively minor.

In other areas such as Child Pornography, Cross Border surveillance, Joint Investigation Teams, Serious Crime and Fraud, Football Disorder, International Agreements and Financial Sanctions (offences under section 2(2), the proposal is, as appropriate in each case, to revoke redundant directly applicable EU legislation and/or update references in associated domestic legislation. The policy is the same across the UK and it makes sense in terms of efficiency for this to be done at a UK level. In addition where this legislation covers a complex mix of reserved and devolved competence it appropriate to take forward the legislation at a UK level.

In relation to participation in EU agencies such as Eurojust and Europol and in the EU Measures noted above relating to police and judicial co-operation, information and intelligence sharing, participation is required at a UK level. In the absence of on-going agreement between the UK and EU to continue UK participation in these measures there is no scope for separate devolved policy. In addition the legislation covers a complex mix of reserved and devolved matters and so it is appropriate for the proposals to amend to be taken forward at the UK level.

**Intended laying date (if known) of UK instrument arising from the notification**

The UK Government have advised their intention to lay these Regulations in the UK Parliament on 15 November 2018, given this intention it would be helpful to have a response at the Committee's earliest convenience.

**If the Scottish Parliament will not have 28 days to scrutinise Scottish Minister's proposal to consent, why not?**

**Information about any time dependency associated with the proposal:**

**Any significant financial implications:**

None