

STATES OF JERSEY



DRAFT EU LEGISLATION (CUSTOMS UNION, IMPORT AND EXPORT CONTROL) (JERSEY) REGULATIONS 201-

Lodged au Greffe on 23rd October 2018
by the Minister for External Relations

STATES GREFFE



Jersey

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REPORT

Purpose

The purpose of the new EU Legislation (Customs Union, Import and Export Control) (Jersey) Regulations 201- (the “new Regulations”) is to create a framework of powers to enable the implementation of a customs union between the United Kingdom and Jersey. The new Regulations provide that such a customs union might be reflected in a “Jersey arrangement” (defined in Regulation 1 as an “*an agreement or arrangement recording the commitments of the Government of the United Kingdom and the Government of Jersey in relation to the Customs Union.*”). Such a new arrangement would build on Jersey’s existing ancient rights and privileges under the Royal Charters which, *inter alia*, grant that goods moving from Jersey to the UK are not charged any import duties.

The details and background of a Jersey arrangement as described are discussed further below. It should be noted that the final terms of the relevant text remain under negotiation.

In brief terms, Regulations 1 to 3 of the new Regulations provide all the required powers to give effect to a Jersey arrangement. They achieve this principally by amending Article 6 of the Customs and Excise (Jersey) Law 1999 (“the 1999 Law”) at Regulation 2, and then providing for further Order-making powers in relation to customs and excise matters more broadly at Regulation 3.

Relationship to UK Taxation (Cross-Border Trade) Act 2018

A “customs union,” as provided for in the Jersey arrangement and referenced in the new Regulations, is to be understood in accordance with section 31 of the United Kingdom’s Taxation (Cross-Border Trade) Act 2018 (“TCTA”), which provides that the UK can establish a customs union between itself and another country or territory where those arrangements –

- “(a) *provide that no duty is to be chargeable by reference to movements of goods, or goods of a specified description, between the United Kingdom and the country or territory, and*
- (b) *provide for the same, or substantially the same, rules for charging duty on imports of goods, or goods of a specified description, from places outside the United Kingdom or the country or territory.*”

The new arrangements for creating a customs union with Jersey will be given effect by Order in Council in the UK by virtue of section 31. The relevant interpretations and references in this regard are contained in Regulation 1 (“Interpretation”) of the new Regulations.

Detail of the new Regulations

The substance of how the new Regulations will work in practice is set out at Regulations 2 and 3. Regulation 2 amends Article 6 of the 1999 Law to enable the Agent of the Impôts to exercise powers under that Law to implement a Jersey arrangement. This is a power that the Agent already possesses to implement the arrangements set out in the EU Treaties. The wording is expanded in the new Regulations to include what may be required by Jersey under a Jersey arrangement. This is expressed in Regulation 2(3) as giving effect to “*reciprocal arrangements*”, which include those made: “*(i) between ... Jersey and the United Kingdom*”, and for “*securing, by exchange of information or otherwise, the due administration of customs laws, and the prevention or detection of fraud or of evasion of such laws.*”.

Similarly, the existing powers of the Minister for Home Affairs to make Orders for ensuring conformity with obligations necessary to implement arrangements under Article 6(4), will apply in relation to what is required by a Jersey arrangement. Article 6(5) is then amended to specify that Orders made under Article 6 may, in particular, make provision for the purposes of –

- (a) *applying, and maintaining consistency with, customs tariffs and customs law of the United Kingdom; and*
- (b) *maintaining a system of customs control of ships, aircraft, goods, passengers and crew similar to that of the United Kingdom.*

In addition, the Orders may make all such further provision by way of transitional, consequential, incidental, supplementary or savings provisions as may be considered necessary or expedient.

In line with the current provision of Article 6, the penalty threshold for failing to comply with the amended Article 6 (or with an Order made thereunder) remains an unlimited fine or imprisonment for a term not exceeding 2 years, or to both, unless otherwise indicated in the relevant Order.

Despite these amendments, however, the scope of the Ministerial Orders under Article 6 does remain limited in that they cannot include provision to impose or increase taxation, or impose a penalty of imprisonment for more than 2 years for a criminal offence, or take effect from a date earlier than the making of the Order itself. These same limitations also apply in relation to the Ministerial Orders, which may be made under Regulation 3.

Owing to the fact that the Order-making power in Article 6 is still relatively narrow in scope, even in its amended form, Regulation 3 confers upon the “*appropriate Minister*” additional powers to make Orders in relation to customs and excise matters, and for related purposes, including to give full effect to any Jersey arrangement (to the extent that this cannot already be achieved by the powers under Article 6 – see Regulation 3(6)). Regulation 3(7) defines the “*appropriate Minister*” as either the Minister for Treasury and Resources, the Minister for External Relations, the Minister for Home Affairs or the Chief Minister. An Order would fall within the competency of an appropriate Minister depending upon the primary purposes attaching to that particular Order. Before such an Order is made, Regulation 3(4) requires that the appropriate Minister consults with the Agent and “*any other appropriate Minister*”.

having responsibility for matters to which the Order relates.”. This provision is to ensure that all interested Ministries are appropriately engaged and at the right time.

The purposes for which the Orders may be made are listed as –

- (a) the *Implementation of a Jersey arrangement* (including, in particular, applying and maintaining consistency with the Customs Tariff (a term defined in the draft Jersey arrangement); compliance with relevant international obligations (defined in the draft Jersey arrangement); maintaining correspondence with Customs Law of the United Kingdom (defined in the draft Jersey arrangement); and maintaining a system of customs control of ships, aircraft, goods, passengers and crew similar to that of the United Kingdom (also referred to in the draft Jersey arrangement);
- (b) *the application to Jersey, and implementation of, any provision of the Guernsey arrangement or of the Isle of Man arrangement which does not otherwise apply;*
- (c) *without prejudice to sub-paragraph (a), making, in the absence of any Jersey arrangement, any such provision as may be made under that sub-paragraph.* For instance, in relation to defining “Customs Law” and other terms which (it is anticipated) will be covered by the finalised Jersey arrangement.
- (d) *without prejudice to sub-paragraph (a), making such provision as may be appropriate to prevent or remedy any breach arising from a relevant change, of an international obligation that applies or extends to Jersey and relates to customs matters;*
- (e) *making such similar provision, in relation to domestic goods within the meaning given to that expression by section 33 of the TCTA.* For example, provision may be made as to when goods in Jersey are regarded as “domestic goods”; reversing any presumption that goods are “domestic goods”; or providing as to the evidence which is to be required or is to be sufficient for the purpose of showing that goods are “domestic goods”.

Those provisions which may be made by Orders under Regulation 3 include –

- (a) provision to amend any enactment, including any Law other than the [European Union Legislation \(Implementation\) \(Jersey\) Law 2014](#) and the Human Rights (Jersey) Law 2000;
- (b) incorporation of or reference to any provision of the TCTA or any Regulations made under it (each Order may include any such exceptions, adaptations and modifications as may be specified in that Order. Further, the Orders can provide that a reference to the TCTA or any Regulations made under it may be ambulatory in nature);
- (c) extending to Jersey, in whole or in part, the application of any Order in Council of the UK made under TCTA;
- (d) treating anything done (including the making of any agreement, or acceptance of any international obligation) by the government of a country or territory as if done by the Government of Jersey;
- (e) applying or replicating, with or without modifications, provision relating to import or excise duty (or any duty of a country or territory, however described, of a similar character to import or excise duty) as that provision has effect from time to time;
- (f) transitional, consequential, incidental, supplementary or savings provisions.

Next, Regulation 3(5) provides that where court proceedings arise out of Orders made under Article 6 of the 1999 Law or under the new Regulations, the Jersey courts must, when interpreting corresponding provisions of Jersey Customs Law, have regard to any relevant decision of a court of the United Kingdom. This inclusion reflects a provision in the draft Jersey arrangement arising from a concern raised by HMRC relating to how interpretations of customs rules may diverge over time and the need to ensure a high degree of consistency. As is already the case for Regulations made pursuant to Article 2 of the [European Union Legislation \(Implementation\) \(Jersey\) Law 2014](#), a Jersey court or tribunal would interpret those Regulations by reference to decisions made by an EU Court and this reference therefore provides the same power with respect to Jersey's new customs relationship with the UK.

Finally, Regulation 4 provides that the new Regulations shall come into force 7 days after they are made.

Background

On 19th February 2018, Ministers agreed high-level principles with regard to negotiating with the UK on customs matters. Since February, regular discussions have taken place between Jersey and UK officials (also involving Guernsey and the Isle of Man) as to the formation of a customs union between the UK and Crown Dependencies. Powers under the TCTA at section 31 allow for the UK to form customs unions with other territories by agreeing customs arrangements to facilitate these relationships.

At present, Jersey forms part of the UK Member State for the purposes of the EU customs union to the extent provided for by Protocol 3 to the UK Act of Accession, 1972. In brief, Protocol 3 sets out that EU law concerning customs matters, quantitative restrictions and the movement of agricultural products (or products processed therefrom) is directly applicable in Jersey. The implementation of that relationship is provided for by certain powers given to the Agent of the Impôts and the Minister for Home Affairs at Article 6 of the 1999 Law. However, when the UK leaves the EU on the 29th March 2019, the relationship Jersey has to the EU and the UK through the EU Treaties, via Protocol 3, will come to an end. Under the [European Union \(Withdrawal\) Act 2018](#), EU customs law is not being retained, meaning that the UK will be providing for wholly new customs provisions. In the Report within [P.16/2018](#) (the [Draft European Union \(Repeal and Amendment\) \(Jersey\) Law 2018](#), lodged 23rd January 2018), the Minister for External Relations explained that as part of the suite of legislation for Jersey in response to the UK's departure from the EU, Jersey would need to bring forward new customs legislation to reflect and give effect to any new customs relationship.

Accordingly, the new Regulations amend Article 6 of the 1999 Law to allow for the same powers (although slightly expanded), which have implemented the requirements of the EU Treaties. Therefore, these will apply to any new customs arrangements with the UK, as well as for any new customs relationship that the UK might enter into with the EU (as part of a Future Economic Partnership ("FEP")). Owing to the considerable uncertainties attached to the UK's future customs arrangements with the EU and other countries, it is proposed that Jersey's new Regulations provide for wide Ministerial Order-making powers, with the scope explained above, in order to give effect to what might be required of Jersey as part of a new UK-CDs Customs Union.

The Jersey arrangement text is now in its fifth draft and is approaching completion, and will secure Jersey's ongoing tariff-free trade with the UK for the future. It is anticipated that the final version of the arrangement text will be agreed during the period between lodging these new Regulations and the States Assembly debate on

4 December 2018. It is important to recognise that the passage of these Regulations is the first stage in the suite of customs legislation that will be needed under the finalised Jersey arrangement. As explained in the Report within [P.16/2018](#), the States may make Regulations, and Ministers may make Orders, much more quickly than Laws can be enacted, and the uncertainties of Brexit and increasingly tight time-frames mean that Ministerial Orders are required for customs so that the Government of Jersey can respond suitably to the progress of negotiations and meet required levels of detail.

Conclusion

The new Regulations are necessary to implement the customs arrangement between Jersey and the United Kingdom.

Financial and manpower implications

There are no financial or manpower implications for the States arising directly from the adoption of these draft Regulations.

Explanatory Note

These Regulations would enable the implementation of a customs union between the United Kingdom and the Crown Dependencies, in particular as such a union might be reflected in a “Jersey arrangement” (defined by *Regulation 1*, the interpretation provision, as an arrangement recording the commitment of the Government of the United Kingdom and the Government of Jersey in relation to a customs union), in anticipation of the United Kingdom’s exit from the EU. (A “customs union” is to be understood in accordance with section 31 of the Taxation (Cross-border Trade) Act 2018 of the United Kingdom, which provides that arrangements establish a customs union if they (a) provide that no import duty or duty of a similar character is to be chargeable by reference to the movements of goods, or goods of a specified description, between the United Kingdom and another country or territory, and (b) provide for the same or substantially the same rules for charging duty on imports of goods, or goods of a specified description, from places outside the country or territory.)

Regulation 2 amends Article 6 of the Customs and Excise (Jersey) Law 1999 (the “1999 Law”), to enable the Agent of the Impôts to exercise powers under that Law for the purposes of implementing a Jersey arrangement (as the Agent may already do for the purposes of implementing arrangements for Jersey under the EU Treaties, which will fall away as a consequence of the United Kingdom’s exit from the EU). The powers of the Minister for Home Affairs to make Orders for the purpose of ensuring conformity with obligations necessary to implement arrangements under Article 6 will apply in relation to Jersey arrangements.

However, given that the Order-making power in Article 6 (even when expanded as by this proposed amendment) is relatively narrow in scope, *Regulation 3* confers upon the appropriate Minister additional powers to make Orders in relation to customs and excise matters, for related purposes, including: to give full effect to any Jersey arrangement (to the extent that this cannot be done by Orders under Article 6 of the 1999 Law); to implement or prevent any breach of international obligations relating to customs and excise matters; and to make provision for the contingency that a Jersey arrangement is not concluded, or that additional provision in this regard is required following the United Kingdom’s exit from the EU. The “appropriate Minister” is defined by *Regulation 3(6)* as the Minister for Treasury and Resources, the Minister for External Relations, the Minister for Home Affairs or the Chief Minister, depending on the subject matter of the Order concerned; under *Regulation 3(4)*, each of these must consult the Agent of the Impôts, and any of the other Ministers whose area of responsibility may be affected, before making an Order.

Regulation 3(5) also provides that, in any proceedings before a Jersey court, arising out of or relating to such Orders, the court is to have regard to any relevant decision of a United Kingdom court, to ensure consistency of interpretation in corresponding matters.

Regulation 4 gives the title by which these Regulations may be cited and provides for them to come into force 7 days after they are made.



Jersey

**DRAFT EU LEGISLATION (CUSTOMS UNION,
IMPORT AND EXPORT CONTROL) (JERSEY)
REGULATIONS 201-**

Arrangement

Regulation

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Jersey

DRAFT EU LEGISLATION (CUSTOMS UNION, IMPORT AND EXPORT CONTROL) (JERSEY) REGULATIONS 201-

Made [date to be inserted]
Coming into force [date to be inserted]

THE STATES have made these Regulations under Articles 5A, 5B and 6A of the European Union Legislation (Implementation) (Jersey) Law 2014¹ –

1 Interpretation

- (1) In these Regulations –
 - “1999 Law” means the Customs and Excise (Jersey) Law 1999²;
 - “Jersey arrangement” means an arrangement, within the meaning of section 31 of the TCTA, recording the commitments of the Government of the United Kingdom and the Government of Jersey in relation to a customs union between the United Kingdom and the Crown Dependencies;
 - “TCTA” means the Taxation (Cross-border Trade) Act 2018 of the United Kingdom.
- (2) Unless otherwise indicated, an expression used in these Regulations and also used in the Jersey arrangement has the same meaning for the purposes of these Regulations as the meaning that the expression has in the Jersey arrangement.

2 1999 Law amended

- (1) Article 6 of the 1999 Law is amended in accordance with this Article.
- (2) For the heading to Article 6 there is substituted –
 - “**EU and British Islands customs requirements**”.
- (3) After Article 6(1) there is inserted –
 - “(1A) The powers of the Agent of the Impôts conferred by paragraphs (2) and (3) are exercisable for the purposes of implementing –

- (a) the arrangements for Jersey which are set out in the Treaties;
 - (b) a Jersey arrangement, within the meaning of the EU Legislation (Customs Union, Import and Export Control) (Jersey) Regulations 201-³;
 - (c) such provision as may be made by Orders under those Regulations.”.
- (4) In Article 6(2) –
 - (a) for “For the purpose of implementing the arrangements for Jersey set out in the Treaties, the” there is substituted “The”;
 - (b) in sub-paragraph (b) after “EU” there is inserted “or United Kingdom”;
 - (c) for sub-paragraph (c) there is substituted –
 - “(c) may give effect to arrangements made –
 - (i) between member States, between member States and the United Kingdom, or between Jersey and the United Kingdom (in each case, with or without other countries or territories),
 - (ii) for securing, by the exchange of information or otherwise, the due administration of customs laws, and the prevention or detection of fraud or of evasion of such laws.”.
- (5) In Article 6(3) –
 - (a) for “into or from the EU” there is substituted “into or from the EU or the British Islands”;
 - (b) in sub-paragraph (a) for “provision of the EU” there is substituted “provision, of or under the arrangements mentioned in paragraph (1A)(a) or (b),”.
- (6) In Article 6(4) –
 - (a) for “the arrangements for Jersey set out in the Treaties” there is substituted “any arrangement falling within paragraph (1A)(a), (1A)(b) or (2)(c)”;
 - (b) at the end there is inserted “or any enactment, other than the Human Rights (Jersey) Law 2000⁴.”.
- (7) For Article 6(5) there is substituted –
 - “(5) An Order under this Article may, in particular and without derogation to the power conferred by paragraph (4), make provision for the purposes of –
 - (a) applying, and maintaining consistency with, customs tariffs and customs laws of the United Kingdom; and
 - (b) maintaining a system of customs control of ships, aircraft, goods, passengers and crew similar to that of the United Kingdom,and may make all such further provision (by way of transitional, consequential, incidental, supplementary or savings provision) as may be considered necessary or expedient.

- (6) But the provision which may be made by an Order under this Article does not include provision –
 - (a) imposing or increasing taxation;
 - (b) imposing a penalty of imprisonment for more than 2 years for a criminal offence; or
 - (c) taking effect from a date earlier than the making of the Order.
- (7) A person who fails to comply with this Article or an Order made under this Article is liable, in the absence of any provision to contrary effect in the Order, to a fine and to imprisonment for a term not exceeding 2 years.”.

3 Orders in relation to customs and excise matters

- (1) The appropriate Minister may by Order make provision, subject to and in accordance with this Regulation, for the purposes of –
 - (a) implementation of a Jersey arrangement, including in particular –
 - (i) applying, and maintaining consistency with, the Customs Tariff,
 - (ii) compliance with relevant international obligations,
 - (iii) maintaining correspondence with Customs Law of the United Kingdom, and
 - (iv) maintaining a system of customs control of ships, aircraft, goods, passengers and crew similar to that of the United Kingdom;
 - (b) application to Jersey, and implementation of, any provision of the Guernsey arrangement or of the Isle of Man arrangement which does not otherwise apply;
 - (c) without prejudice to sub-paragraph (a), making, in the absence of any Jersey arrangement, any such provision as may be made under clauses (i) to (iv) of that sub-paragraph;
 - (d) without prejudice to sub-paragraph (a), making such provision as may be appropriate to prevent or remedy any breach, arising from a relevant change, of an international obligation that applies or extends to Jersey and relates to customs matters;
 - (e) making such similar provision, in relation to domestic goods within the meaning given to that expression by section 33 of the TCTA, as may be made under subsection (8) of that section.
- (2) The provision which may be made by Orders under this Regulation includes provision –
 - (a) amending any enactment, including any Law other than the European Union Legislation (Implementation) (Jersey) Law 2014⁵ or the Human Rights (Jersey) Law 2000⁶;
 - (b) made by reference to or by incorporation (whether by reference, annexation or otherwise) of any provision of the TCTA or of Regulations (a “UK provision”) made under it –

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- (i) to such extent and subject to such exceptions, adaptations and modifications as may be specified in the Order concerned, and
 - (ii) including, where it is considered necessary or expedient to do so, provision that a reference to the UK provision is to be read as a reference to that provision as amended, substituted, extended or applied from time to time;
 - (c) making provision equivalent to any Order in Council of the United Kingdom made under the TCTA;
 - (d) treating anything done (including the making of any agreement, or the acceptance of any international obligation) by the government of a country or territory as if done by the Government of Jersey;
 - (e) applying or replicating, with or without modifications, provision relating to import or excise duty (or any duty of a country or territory, however described, of a similar character to import or excise duty) as that provision has effect from time to time;
 - (f) containing whatever may be considered necessary or expedient by way of transitional, consequential, incidental, supplementary or savings provision.
- (3) Before making an Order for any purpose under this Regulation, the appropriate Minister proposing to do so must consult –
- (a) the Agent of the Impôts; and
 - (b) any other appropriate Minister having responsibility for matters to which the Order relates.
- (4) In any proceedings before a court relating to, or arising out of, an Order under this Regulation or under Article 6 of the 1999 Law, the court must, when interpreting a provision of that Order that corresponds to a provision of Customs Law of the United Kingdom, have due regard to any relevant decision of a court of the United Kingdom.
- (5) The powers of an appropriate Minister under this Regulation are exercisable in addition to, and without derogation from, the powers of the Minister under Article 6 of the 1999 Law to make Orders in relation to such arrangements as described in paragraph (2) of that Article.
- (6) In this Regulation –
- “appropriate Minister” means –
- (a) for the purposes of an Order relating primarily to taxation or excise duty (other than one to which sub-paragraph (c) applies), the Minister for Treasury and Resources;
 - (b) for the purposes of an Order relating primarily to the implementation of any international obligation, the Minister for External Relations;
 - (c) for the purposes of an Order relating primarily to impôts and the control of imports and exports, or making general provision in relation to customs and excise, the Minister for Home Affairs; or
 - (d) for the purposes of any Order, the Chief Minister;
- “excise duty” means duty charged under Part 6 of the 1999 Law;

“Guernsey arrangement” means an arrangement, within the meaning of section 31 of the TCTA, recording the commitments of the Government of the United Kingdom and the Government of Guernsey in relation to a customs union;

“import duty” means any duty imposed by the 1999 Law on goods imported into, exported from or grown, produced or manufactured in Jersey, and includes both customs and excise duty;

“Isle of Man arrangement” means an arrangement, within the meaning of section 31 of the TCTA, recording the commitments of the Government of the United Kingdom and the Government of Isle of Man in relation to a customs union.

4 Citation and commencement

These Regulations may be cited as the EU Legislation (Customs Union, Import and Export Control) (Jersey) Regulations 201- and come into force 7 days after the day on which they are made.

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- 1* chapter 17.245
 - 2* chapter 24.660
 - 3* P.120/2018
 - 4* chapter 15.350
 - 5* chapter 17.245
 - 6* chapter 15.350