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Corporate Services Scrutiny Panel

Implementation of European Union Legislation



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1. EXECUTIVE SUMMARY

- 1.1 *Draft European Union Legislation (Implementation) (Jersey) Law 201-* (P.164/2013) was referred to the Corporate Services Scrutiny Panel due to concerns that, if adopted, it would give the Minister for External Relations too much authority to implement or extend EU legislation without reference to the States Assembly.
- 1.2 Adoption of the draft Law would not in itself amend the Island's constitutional relationship with the EU; the Island is already obliged to implement EU legislation which is directly applicable and binding on the Island under Protocol 3. The Island can choose to extend EU legislation voluntarily which is not binding but where it is considered beneficial to do so. The States Assembly currently has the authority to do so through Regulations and the Assembly's Regulations-making powers in relation to the implementation and extension of EU legislation would not be materially affected by adoption of the draft Law.
- 1.3 The Minister for External Relations already has the authority to make Orders that give effect to EU sanctions measures and, indeed, it is the policy of the current Council of Ministers to extend and implement UN sanctions measures and EU restrictive measures to Jersey. The draft Law, if adopted, would maintain the Minister's powers to implement sanctions measures but would also give the Minister new Order-making powers by which further effect could be given to any EU provision that is directly applicable to Jersey under Protocol 3. Adoption of the draft Law would not affect the authority that other Ministers might already have under other Laws to make Orders which could in theory be used to give effect to EU legislation.
- 1.4 The draft Law has in part been proposed in order that recommendations arising from the visit of the International Monetary Fund in 2009 can be addressed and, in that regard, to facilitate the implementation of sanctions measures. The introduction of ambulatory references would indeed assist the speed and ease by which sanctions measures could be amended and would lead to the enactment of fewer Ministerial Orders than are currently required, thereby lessening the administrative burden. The changes to terminology proposed in the draft Law are to be welcomed and the powers the Minister would be given to make Orders that would ensure Jersey's legislation in future could be amended quickly to reflect changes in terminology are uncontroversial.
- 1.5 Guernsey and the Isle of Man have similar legislative frameworks to Jersey for the implementation and extension of EU legislation and, indeed, have already enacted some of the changes proposed in the draft Law. In terms of checks and balances, the draft Law would establish reasonable limits on the power to implement and extend EU legislation,

particularly in relation to the Minister's Order-making powers. Furthermore, the Order-making process currently contains sufficient checks and balances.

- 1.6 The Panel has ultimately found that, notwithstanding broader questions which our review has raised in respect of Order-making powers, the draft Law provides appropriate updates and amendments to the provisions of existing legislation and that it should therefore be adopted.

2. KEY FINDINGS AND RECOMMENDATIONS

Key Findings

1. The Minister for External Relations currently has the authority to make Orders that give effect to EU sanctions measures, delegated authority which dates back to 1999. (Paragraph 4.9)
2. It is not solely the 1996 Law which provides the legal authority for Ministers to give effect to EU legislation. Such legislation may also be given effect by Ministerial Orders under the authority of other Laws. This position would not be affected were the 1996 Law to be repealed and replaced by the draft Law. When any Law is adopted in which Order-making powers are given to a Minister, there is therefore a possibility that such powers could be used to give effect to EU legislation. (Paragraph 4.18)
3. Jersey is obliged to implement EU legislation which is directly applicable and binding on the Island under Protocol 3. A choice can be made to extend EU legislation voluntarily which is not binding but where it is considered beneficial to do so. (Paragraph 4.20)
4. The draft Law has been proposed as a means of improving the mechanisms by which Jersey gives effect to sanctions measures. (Paragraph 4.23)
5. Jersey is obliged to implement sanctions measures agreed in resolutions of the UN Security Council. (Paragraph 4.24)
6. Sanctions measures are now implemented in Jersey more often by the extension of EU restrictive measures to the Island than by the use of a UK Order in Council. (Paragraph 4.27)
7. There needs to be clarity as to whether or not sanctions Orders adopted in Jersey have their origin in a resolution of the UN Security Council. (Paragraph 4.30)
8. The Common Policy on External Relations of the Council of Ministers includes provision for the extension and implementation of UN sanctions measures and EU restrictive measures to Jersey. (Paragraph 4.33)
9. Guernsey and the Isle of Man have similar legislative frameworks to Jersey for the implementation and extension of EU legislation. Both the other Crown Dependencies have provision whereby decisions can be delegated from their respective parliaments to another body. (Paragraph 4.41)
10. The draft Law has in part been proposed in order that recommendations arising from the visit of the International Monetary Fund in 2009 and identified inefficiencies within the sanctions-making process can be addressed. (Paragraph 5.4)

11. The draft Law, if adopted, would give the Minister for External Relations new, limited Order-making powers by which the Minister could give further effect to any EU provision that is directly applicable to Jersey. (Paragraph 5.8)
12. The draft Law, if adopted, would maintain Order-making powers which the Minister for External Relations already has to implement provisions which relate to the EU's Common Foreign and Security Policy and which typically involve the introduction of sanctions measures. (Paragraph 5.10)
13. The introduction of ambulatory references under the draft Law would lead to the enactment of fewer Ministerial Orders in respect of sanctions measures than are currently required. This would lessen the administrative burden on the Chief Minister's Department and Law Draftsman's Office. The use of ambulatory references would not be automatic. (Paragraph 5.17)
14. Article 3 of the draft Law is intended to address one of the recommendations made in 2009 by the IMF that Jersey's legal framework should be amended to expressly include all types of financial services and related activities which are regulated in Jersey. (Paragraph 5.20)
15. The States Assembly's Regulations-making powers in relation to the implementation and extension of EU legislation would not be materially affected by adoption of the draft Law. (Paragraph 5.24)
16. The changes to terminology and references proposed in the draft Law are to be welcomed. (Paragraph 6.3)
17. Adoption of the draft Law would not in itself amend the Island's constitutional relationship with the EU under Protocol 3. (Paragraph 6.6)
18. Orders made by the Minister for External Relations to implement EU restrictive measures in Jersey would refer to the EU's Common Foreign and Security Policy. That Policy is not binding on the Island, however, and adoption of the draft Law would ensure that the Policy was explicitly excluded from the list of Treaties under which the arrangements for Jersey have legal effect, thereby recognising that it is not binding. (Paragraph 6.9)
19. Adoption of the draft Law would give the Minister for External Relations the power to make Orders that would ensure Jersey's legislation in future could be amended quickly to reflect changes in terminology. This would be a new Order-making power but is uncontroversial. (Paragraph 6.13)

20. Articles 2(5) and 2(6) of the draft Law would establish reasonable limits on the power to implement and extend EU legislation, particularly in relation to the Minister's Order-making powers. (Paragraph 7.6)
21. The Minister for External Relations does not consult the Council of Ministers before making an Order to implement EU restrictive measures as it is the policy of the Council that such measures should be implemented. (Paragraph 7.18)
22. The Order-making process contains sufficient checks and balances: Ministerial Orders are published and notification of their enactment and publication is provided in the Jersey Gazette and on the States Assembly's Order Papers. The Assembly is ultimately able to annul Orders which have been enacted. (Paragraph 7.19)
23. The Scrutiny Review has raised broader questions about the authority of Ministers to give effect to EU legislation by Order. However, in terms of what the draft law in itself seeks to deliver, the draft Law provides appropriate updates and amendments to existing legislation and there is as a result no reason why the draft Law should not be adopted. (Paragraph 8.8)

Recommendations

1. When signing future Ministerial Decisions for the implementation of sanctions measures, the Minister for External Relations should confirm whether or not the measures have their origins in a resolution of the UN Security Council and, if so, provide the reference for that resolution. (Paragraph 4.31)

3. INTRODUCTION

- 3.1 On 4th February 2014, *Draft European Union Legislation (Implementation) (Jersey) Law 201-(P.164/2013)* (the 'draft Law') was referred to the Corporate Services Scrutiny Panel under Standing Order 79.
- 3.2 The draft Law relates to the mechanisms by which European Union (EU) legislation can be extended to, or implemented in, Jersey. In that regard, it seeks to repeal and replace the *European Communities Legislation (Implementation) (Jersey) Law 1996* and, in so doing, "to improve and update the powers to give effect in Jersey to EU legislation, particularly sanctions."¹ The draft Law also seeks to update the terminology used in Jersey's legislation in respect of the EU by amending the *European Communities (Jersey) Law 1973*.
- 3.3 When the debate on the draft Law began in February 2014, several Members expressed concerns about the implications of adopting the draft Law. On a proposition of Deputy J.H. Young, the draft Law was therefore referred to us for review. The main concern expressed was that adopting the draft Law might give too much power to the Minister for External Relations to implement EU legislation at the expense of the States Assembly's powers in that regard. Some concerns were also expressed about whether the draft Law would impact negatively upon Jersey's sovereignty. Furthermore, given the Order-making powers ascribed to the Minister in the draft Law, questions were asked about the robustness of the checks and balances in the Order-making process.
- 3.4 These are the matters we set out to examine in our review, in particular the questions of what powers the draft Law seeks to give the Minister and whether the scope of those powers is appropriate. A copy of our Terms of Reference can be found in Appendix 1 to this report.
- 3.5 In this report, we shall consider the legislative changes which the draft Law proposes to make as well as the checks and balances which would exist were the draft Law to be adopted. We will begin, however, with a consideration of the current constitutional and legislative context.

¹ *Draft European Union Legislation (Implementation) (Jersey) Law 201- (P.164/2013)*, Page 4

4. THE CURRENT LEGISLATIVE FRAMEWORK

The Constitutional Context

- 4.1 Jersey's current relationship with the EU is founded upon the provisions of Protocol 3 to the United Kingdom (UK)'s Treaty of Accession to the EU (then known as the European Communities), which was signed in 1972.
- 4.2 The provisions of Protocol 3 were helpfully summarised by the Chief Minister in a response he tabled on 10th September 2013 to a written question on the subject of EU legislation. In that response, he stated that "*broadly, Protocol 3 relates to the free movement of goods by virtue of Jersey and the other Crown Dependencies being part of the customs territory of the EU. The common customs tariff, levies and agricultural import measures thus apply to trade between the Islands and non-EU third countries.*"²
- 4.3 The provisions of Protocol 3 are binding upon the Island as is the EU legislation which arises from those provisions. However, the other provisions of EU treaties are not binding on Jersey. This is recognised in Article 355(5)(c) of the Treaty on the Functioning of the European Union, in which it is stated that:

"Treaties shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22nd January 1972."

The 'arrangements' are those covered by Protocol 3.

The 1973 Law

- 4.4 The binding nature of Protocol 3 was incorporated within Jersey's own legislation with the adoption of the *European Communities (Jersey) Law 1973* (which the draft Law seeks to amend and which is referred to in this report as the '1973 Law'). The 1973 Law was adopted by the States Assembly "*to make provision for the implementation of the arrangements for the Bailiwick in connexion with the European Communities.*"
- 4.5 Article 2(1) of the 1973 Law is particularly significant in this regard and states that "*for the purpose of implementing in Jersey the arrangements for the Channel Islands set out in the Treaties, all rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under those arrangements, and all such remedies and procedures from time to*

² Written Question to the Chief Minister by Senator S.C. Ferguson on 10th September 2013

time provided for by or under those arrangements, as in accordance therewith are without further enactment to be given legal effect or used in the Channel Islands shall, in Jersey, be recognized and available in law, and be enforced, allowed and followed accordingly.”

The 1973 Law therefore explicitly provides for the binding nature of Protocol 3. We shall return to the 1973 Law later in this report when we consider the amendments which the draft Law seeks to make to it.

The 1996 Law

- 4.6 In 1996, the States Assembly adopted the *European Communities Legislation (Implementation) (Jersey) Law 1996* which sets out mechanisms by which EU legislation can be implemented in, or extended to, Jersey. It shall be referred to in this report as the 1996 Law. The draft Law seeks to repeal and replace it.
- 4.7 We shall explore the provisions of the 1996 Law in more depth later in this report. Essentially, however, under Article 2(1) of the 1996 Law, the States may by Regulations give effect to any legal provision emanating from the EU, whether or not that provision is directly binding on the Island under Protocol 3. This allows the States Assembly to implement measures when there is a direct need to do so or to extend them when it is otherwise considered beneficial for the Island to do so.
- 4.8 Under Article 2(4) of the 1996 Law, the Minister for External Relations is able by Order to give effect to legal provisions if, in the Minister’s opinion, immediate or early enactment would be necessary or expedient and in the public interest to do so and where the provisions relate to Article 12 of the Treaty on European Union. Article 12 of that Treaty relates to sanctions measures. This Order-making power was introduced in 1999 and was initially placed in the hands of the then Policy and Resources Committee. With the implementation of Ministerial Government, the power transferred to the Chief Minister and subsequently in 2013, when the Assembly agreed to establish a Minister for External Relations, to that Minister. The justification in 1999 for introducing such Order-making powers was that it would *“avoid difficulties in implementing European Union sanctions legislation where the European regulations giving effect to the sanctions do not apply automatically to the Island because they do not fall within the scope of Protocol 3 of the Treaty of Accession of the United Kingdom to the European Communities.”* The Policy and Resources Committee of the day believed it would be in the Island’s best interests that *“the Insular Authorities should be in a position to give effect to European Union sanctions legislation in the same way as in*

*the United Kingdom, and without delay.*³ Adoption of the amendment allowed that to happen.

KEY FINDING

4.9 The Minister for External Relations currently has the authority to make Orders that give effect to EU sanctions measures, delegated authority which dates back to 1999.

4.10 The 1996 Law therefore establishes mechanisms by which EU legislation may be implemented in, or extended to, Jersey. A number of Regulations and Orders have been made under the 1996 Law and are available to read on www.jerseylaw.je. As of 1st April 2014, it was apparent that 15 sets of Regulations and 20 Orders had been made (and were in force). Of the latter, two Orders had been made under powers provided in Regulations rather than directly under the 1996 Law. These figures do not include the large number of Regulations and Orders which have been made since the 1996 Law was adopted but which have been amended or revoked at various times. In that regard, approximately 60 sets of Regulations and 160 Orders have been made since the Law was adopted.

Implementing EU Legislation

4.11 In endeavouring to understand how EU legislation can be implemented in, or extended to, Jersey, we found the following distinctions, provided by the Chief Minister's Department, to be useful:

- a) EU legislation which is directly applicable under Protocol 3 and which is introduced (or given further effect) by a Jersey enactment can be said to be 'implemented in Jersey';
- b) EU legislation which is not directly applicable to Jersey but which is voluntarily given effect in the Island by a Jersey enactment can be said to be 'extended to Jersey'; and
- c) Where there is the authority to make Regulations or Orders under another existing Jersey Law or by a new Law (i.e. not under the 1996 Law), legislation may be 'introduced in Jersey' which is equivalent to EU measures.

4.12 Under the provisions of the 1973 Law, therefore, where any enactment of the EU is directly applicable as a consequence of Protocol 3, the Island is only obliged to implement administrative or enforcement arrangements, for example to specify penalties for any offences under the EU legislation, which the States Assembly would enact through the passing of Regulations under the 1996 Law.

³ *Draft European Communities Legislation (Implementation) (Amendment) (Jersey) Law 199-(P.163/1999)*

- 4.13 The 1996 Law also expressly allows for the States Assembly, through Regulations, to adopt EU legislation which is not directly binding on Jersey under Protocol 3 and the 1973 Law and to extend it to Jersey. The Island can therefore choose to extend EU legislation which is not directly applicable under Protocol 3 if it is felt beneficial to do so. As the Minister advised us, “occasionally we do give effect to European rules which do not fall within Protocol 3 because the decision has been made that it is in the Island’s best interests to do that.”⁴ We were informed that this would require the Assembly’s approval, however, through the adoption of Regulations under the 1996 Law. There may sometimes be doubts as to whether a piece of EU legislation is directly binding under Protocol 3, in which circumstances advice is sought from the Law Officers’ Department on the question of applicability.⁵ The Minister’s own Order-making powers under the 1996 Law essentially relate to the voluntary extension of EU legislation as they relate to sanctions measures which are not binding under Protocol 3.
- 4.14 No Minister has the sole authority to implement or extend EU legislation in the Island of his or her own accord under the 1996 Law – aside from the Minister for External Relations and then only within the context described. However, the written response from September 2013 to which we have already referred provided a list of enactments which allowed for the voluntary introduction of Jersey legislation broadly equivalent to EU legislation in the Island but which were seemingly made without reference to the 1996 Law and by other Ministers aside from the Minister for External Relations. For example, the *Food Safety (Labelling) (Jersey) Order 2005* made provision in Jersey broadly equivalent to certain EU requirements and was introduced voluntarily to give the same protection to the public in Jersey as is provided in other countries. That Order was made (by the Health and Social Services Committee of the day) under Articles 9(1), 26(1)(i) and 58 of the *Food Safety (Jersey) Law 1966* and not with reference to the 1996 Law. This raises the question of whether EU legislation can be given effect in the Island under the aegis of other Laws and not simply the 1996 Law as it appears from the example we have just cited that this is indeed the case.
- 4.15 Our understanding is that EU legislation can indeed be given effect in the Island by Ministerial Order under the aegis of other Laws and not solely by the Minister for External Relations under the aegis of the 1996 Law. This position is not the one from which we began our review and, indeed, we wonder if it is a position which is clearly understood. The 1996 Law allows for the implementation or extension of EU legislation (whether it is binding or not) by States Regulations and for the implementation of sanctions measures by Order of the Minister for External Relations. However, the 1996 Law does not limit the authority by which other Ministers may make Orders under other Laws. The 1996 Law does not therefore

⁴ Minister for External Relations, Transcript of Public Hearing, 11th March 2014, Page 2

⁵ Director of International Affairs, Transcript of Public Hearing, 11th March 2014, Page 9

provide the only context in which EU legislation may be given effect in Jersey. It effectively provides a framework by which effect can be given to EU legislation which would not fit neatly within the framework of other existing Jersey legislation. There was in the past a need for a mechanism by which EU law could be introduced to the Island in such cases and the 1996 Law addressed that need.

4.16 If the authority is provided in other primary legislation for Ministers to make Orders, then such Orders may be used to give effect to EU legislation, regardless of whether it falls within Protocol 3 or not. It is therefore not correct to assume that EU legislation may only be implemented or extended under the aegis of the 1996 Law. This position would not be affected if the draft Law were adopted and the 1996 Law was repealed because adoption of the draft Law would not affect the Order-making powers given to Ministers in other Laws.

4.17 This matter therefore lies outside the scope of the 1996 Law (and the draft Law which seeks to replace it) and it also therefore lay outside of the issues we set out explicitly to explore in our review. However, we believe it to be a significant matter and worthy of noting. We acknowledge that Ministers cannot make Orders unless given the authority to do so under a piece of primary legislation – which primary legislation requires the approval of the States Assembly. A Minister's Order-making power is always therefore effectively delegated authority from the States Assembly. We are not therefore suggesting that Ministers may have done, or may be inclined to do, something for which they do not have the legal authority. However, we would highlight that the Assembly needs to understand the ramifications and unintended consequences of adopting a Law in which the Assembly gives authority to a particular Minister to make Orders; those ramifications include the fact that such Order-making powers could be used to adopt and introduce (and thereby give effect to) EU legislation – something which might not have been an explicit intention of the Assembly in agreeing those Order-making powers in the first place.

KEY FINDING

4.18 It is not solely the 1996 Law which provides the legal authority for Ministers to give effect to EU legislation. Such legislation may also be given effect by Ministerial Orders under the authority of other Laws. This position would not be affected were the 1996 Law to be repealed and replaced by the draft Law. When any Law is adopted in which Order-making powers are given to a Minister, there is therefore a possibility that such powers could be used to give effect to EU legislation.

4.19 We asked the Minister how, from a practical perspective, it became evident that an item of EU legislation either required implementation in the Island or, if there were no obligation, that it would be beneficial if it were extended to the Island. We were informed of the role of the

Channel Islands Brussels Office in this process in that the Office identifies EU legislation that may be of relevance to Jersey and informs the External Relations and Constitutional Affairs Section of the Chief Minister's Department accordingly; it is not difficult to search and identify EU legislation as all such legislation is published in the Official Journal of the European Union.⁶ Legislation for implementation or extension might also become apparent through the Island's relationship with the UK. During our review, the Minister advised us that, for instance, the UK had had an interest in whether the Island would enact sanctions measures in respect of certain individuals and bodies in the Ukraine. Ultimately, as we have stated, a determination on whether EU legislation is applicable and requires implementation would be made on the basis of advice from the Law Officers' Department; a decision on whether EU legislation would be of benefit to Jersey and (although not directly binding) should be extended to the Island would initially be made by the lead policy Department within the area in question.

KEY FINDING

4.20 Jersey is obliged to implement EU legislation which is directly applicable and binding on the Island under Protocol 3. A choice can be made to extend EU legislation voluntarily which is not binding but where it is considered beneficial to do so.

Sanctions Measures

4.21 The authority of the Minister for External Relations to give effect to EU legislation under the aegis of the 1996 Law relates only to sanctions measures. Indeed, of the 20 Ministerial Orders currently in force we described above as implementing EU legislation, 18 relate to sanctions measures and it is therefore the area where the Island sees EU legislation extended most frequently by Order. The remaining two non-sanctions Orders relate to financial services and animal health and were made by other Ministers responsible for these matters under their powers provided in Regulations. Sanctions are taken against regimes or organisations which are believed to be violating international law. We were told that there were three areas in which sanctions measures generally applied: financial restrictions, such as a restriction on the provision of financial services or the freezing of money and other assets; trade in weapons and other prohibited goods; and restrictions on movement, such as visa bans.⁷ One of the main reasons for the proposal of the draft Law is to improve the mechanisms by which Jersey gives effect to sanctions measures.

⁶ International Relations Officer, Transcript of Public Hearing, 11th March 2014, Page 4
⁷ International Relations Officer, Transcript, Page 17

4.22 The rationale underlying the implementation of sanctions measures in Jersey is multifaceted. They are not a requirement under Protocol 3 (and are not therefore legally binding in accordance with the 1973 Law). However, the Minister for External Relations advised us that there could indeed be a legal obligation as many EU sanctions measures implemented by Jersey are themselves implementation by the EU of sanctions measures agreed by the United Nations (UN) Security Council. Such resolutions of the Security Council are binding upon UN Member States. Jersey may not be an independent nation but is committed to comply with UN Resolutions by extension of the UK ratification of the UN Charter. The UN Charter therefore applies to Jersey as it does to the UK and there is, as a result, a legal requirement to implement UN Security Council sanctions measures. In this regard, the Minister explained to us that “*in terms of sanctions which have their genesis in a resolution of the United Nations then obviously we are obliged to comply with that. Every nation on earth has to comply with resolutions of the Security Council, there is no getting away from that.*”⁸

KEY FINDING

4.23 **The draft Law has been proposed as a means of improving the mechanisms by which Jersey gives effect to sanctions measures.**

4.24 **Jersey is obliged to implement sanctions measures agreed in resolutions of the UN Security Council.**

4.25 We understand that in the past such sanctions measures have been extended to the Island by UK Order-in-Council. For example, the *Al-Qa’ida and Taliban (United Nations Measures) (Channel Islands) Order 2002* extended to the Island measures adopted in resolutions of the UN Security Council in 1999, 2000 and 2002. The use of this mechanism essentially arises from the Island requesting that the Privy Council makes an Order which applies to Jersey. The power to make such Orders in Council arises under the *United Nations Act 1946*, and does not include provision for the application of EU restrictive measures. We also understand, however, that Orders in Council are used ever-more infrequently for the implementation of sanctions measures in the Island, in part because it is administratively more time-consuming than the mechanisms described in the 1996 Law. Law-drafting for UK Orders in Council, for instance, would be undertaken in the UK whilst States Regulations and Ministerial Orders are drafted in Jersey. The shift away from the use of UK Orders in Council does not result from an explicit policy decision, we were advised, but is in accordance with a view that Jersey should introduce enactments under its own legislative autonomy, and it has meant that the 1996 Law has become the preferred and primary basis on which sanctions measures are extended to Jersey.

⁸ Minister for External Relations, Transcript, Page 11

4.26 Jersey could in theory choose to enact and implement UN Security Council Resolutions of its own accord, for example through the adoption of a Law. However, this is not done because it would itself be administratively burdensome; EU sanctions measures implementing UN Security Council Resolutions provide sufficient detail to be extended to Jersey with relative ease and speed (albeit with any modifications that might be required) and that is the option therefore taken most readily.

KEY FINDING

4.27 Sanctions measures are now implemented in Jersey more often by the extension of EU restrictive measures to the Island than by the use of a UK Order in Council.

4.28 The commitment to implement sanctions measures is reflected in the agreed policy of the Council of Ministers in respect of external relations. In the Common Policy on External Relations, the Council of Ministers undertook to “*implement UN sanctions and EU restrictive measures in support of international objectives to address activities or policies that threaten the international rule of law, human rights, respect for democratic principles or international peace and security, or to prevent and suppress the financing of terrorists and terrorist acts.*”⁹ The policy also covers instances where the EU takes action of its own accord (i.e. not on the basis of an identifiable and binding UN Security Council Resolution) and where there might not therefore be a legal obligation on Jersey to take similar measures. This is the case in respect of recent measures taken against bodies and individuals in the Ukraine. We understand that in this case there was no corresponding UN Security Council Resolution for the restrictive measures which the EU had taken, but the Minister (in accordance with the Common Policy) decided to implement those EU restrictive measures by Order.

4.29 We believe it would be useful for there to be clarity as to whether sanctions measures implemented in the Island through Ministerial Order have their genesis in a UN Security Council Resolution or whether they stem solely from an EU restrictive measure. This would assist Members and the public in understanding whether the Minister had taken a decision on the basis of a legal obligation (in the case of UN Security Council Resolutions) or on the basis of current policy (in respect of EU restrictive measures that do not themselves have their genesis in a Security Council Resolution). Having looked at Ministerial Decisions on www.gov.je that relate to the promulgation of sanctions Orders, not all such Decisions confirm whether or not the Order has its origins in a resolution of the UN Security Council; some do indicate that they stem from a UN Security Council Resolution but in other instances, the case is not stated one way or the other. Such information would, we believe,

⁹ *External Relations: Common Policy (R.140/2012), Page 4*

be useful, for example for future Corporate Services Scrutiny Panels in determining whether a given Ministerial Order should be reviewed.

KEY FINDING

4.30 There needs to be clarity as to whether or not sanctions Orders adopted in Jersey have their origin in a resolution of the UN Security Council.

RECOMMENDATION

4.31 When signing future Ministerial Decisions for the implementation of sanctions measures, the Minister for External Relations should confirm whether or not the measures have their origins in a resolution of the UN Security Council and, if so, provide the reference for that resolution.

4.32 We would highlight that the Common Policy on External Relations is agreed by the Council of Ministers alone in pursuance of Article 18 of the *States of Jersey Law 2005* and not by the States Assembly. This is a matter we covered in our previous report, *Minister for External Relations* (SR9/2013), from which the Minister for External Relations undertook to consider “*how best to provide an opportunity for the Assembly to consider the external relations policy of the Council of Ministers*” and to have done this within one year of his appointment (he was appointed on 24th September 2013). During the current review, the Minister undertook to consider any suggestions as to how other States Members, outside of the Council of Ministers, could be involved in the development of the Common Policy (although he stressed that, in his opinion, approval of the Common Policy should remain within the purview of the Council of Ministers).¹⁰

KEY FINDING

4.33 The Common Policy on External Relations of the Council of Ministers includes provision for the extension and implementation of UN sanctions measures and EU restrictive measures to Jersey.

4.34 Notwithstanding the legal and explicit policy basis for the implementation of sanctions measures in the Island, we were advised that it was also in the Island’s reputational interests to do so. In this regard, the Minister advised us that “*occasionally one might find that in relation to a particular regime HM Treasury in the United Kingdom would have an interest in knowing whether Jersey had implemented a particular sanctions regime.*”¹¹ Failure to enact sanctions measures would therefore reportedly reflect negatively on the Island.

¹⁰ Minister for External Relations, Transcript, Page 20
¹¹ Ibid, Page 5

The Corresponding Situation in Other Jurisdictions

- 4.35 Jersey is not alone in having mechanisms to deal with the implementation and extension of EU legislation. During our review, we considered the corresponding legislative framework in the UK, Guernsey and the Isle of Man.
- 4.36 In Guernsey, there exist two items of legislation. The *European Communities (Bailiwick of Guernsey) Law 1973* essentially makes the same provisions as Jersey's 1973 Law, in that it gives automatic effect in the island to European instruments that are, by virtue of Protocol 3, of direct application. Meanwhile, the *European Communities (Implementation) (Bailiwick of Guernsey) Law 1994* reads similarly to Jersey's 1996 Law. Under Article 1 of Guernsey's Law, the States of Deliberation "*may by Ordinance make such provision as they may consider necessary or expedient for the purpose of the implementation of any Community provision.*" This is similar to Article 2(1) of Jersey's 1996 Law (Ordinances are effectively the Guernsey equivalent of Regulations).
- 4.37 Whilst Ordinances generally require the approval of the States of Deliberation, under the *Reform (Guernsey) Law 1948*, the Legislation Select Committee may make Ordinances which would otherwise require States approval "*where in the case of any draft Ordinance [...], the Committee is of opinion that the immediate or early enactment thereof is necessary or expedient in the public interest [...].*" This provision is similar to what appears in Jersey's 1996 Law and the powers given therein to the Minister for External Relations (although the Legislation Select Committee's powers appear to be more wide-ranging in scope). It is apparent that a number of Ordinances have been passed by the Legislation Select Committee in this way (including sanctions measures which in Jersey have been introduced by Ministerial Order). Any Ordinances made by the Legislation Select Committee under these delegated powers are laid before the States at the next sitting.
- 4.38 In the Isle of Man, there appears to be only one relevant piece of legislation, which serves the function of both the 1973 and 1996 Jersey Laws: the *European Communities (Isle of Man) Act 1973*. Again, it provides for the binding applicability of Protocol 3 on the island. Under Section 2A of the Manx Act, the island's Council of Ministers "*may by order apply to the Island as part of the law of the Island [...] any [EU] instrument to which this section applies.*" However, no such order may be made unless a draft has been laid before Tynwald and approved by that body. This would appear to mirror the Regulations-making power given to the States Assembly under Jersey's 1996 Law. Section 2B applies to the implementation of EU obligations and states that the "*Council of Ministers may by regulations make such provision as appears to it to be necessary for the purpose of implementing any EU obligation of the Island, or enabling any such obligation to be implemented [...].*" This

power can seemingly be exercised without prior approval required by Tynwald (although they need to be laid before Tynwald) and is therefore similar to provisions that exist in Jersey and Guernsey legislation for delegated authority to a given body or individual.

4.39 As the UK is a Member State of the EU, all EU enactments have legal effect there (except in certain specific areas in which the UK has invoked an opt-out). However, in order to implement EU legislation it may be necessary to enact national measures, for example to introduce administrative arrangements or enforcement measures. In the UK, the *European Communities Act 1972* applies. Under Article 2(2) of the Act, “*subject to Schedule 2 [...] any designated Minister or department may by order, rules regulations or scheme, make provision (a) for the purpose of implementing any EU obligation of the United Kingdom, [...] or (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time [...].*” Such subordinate legislation needs to be laid before Parliament, however, and Parliament has the right to annul such legislation.

4.40 Both the other two Crown Dependencies can therefore be seen to have similar legislative frameworks to Jersey for the implementation and extension of EU legislation, whereby some decisions must be taken by ‘parliament’ as a whole but where some decisions may be delegated to a Minister, Committee, Council of Ministers or Department. The Minister advised us that we are in fact behind the other Crown Dependencies in our legislative provisions, a matter we shall return to later in this report.¹²

KEY FINDING

4.41 Guernsey and the Isle of Man have similar legislative frameworks to Jersey for the implementation and extension of EU legislation. Both the other Crown Dependencies have provision whereby decisions can be delegated from their respective parliaments to another body.

¹² Minister for External Relations, Transcript, Page 24

5. THE PROVISIONS OF THE DRAFT LAW – REPEALING THE 1996 LAW

5.1 The draft Law seeks to repeal and replace the 1996 Law. As covered in the previous chapter, the 1996 Law sets out mechanisms by which EU legislation may be implemented in, or extended to, Jersey. It is perhaps the replacement of the 1996 Law which led to most concerns being expressed by Members during the initial debate on the draft Law, as it is that replacement which raises the question of the respective powers of the States Assembly and the Minister for External Relations in giving effect to EU legislation. As we mentioned in the previous chapter, we understand that authority exists outside of the 1996 Law for Ministers to implement or extend EU legislation by Ministerial Order. Adoption or rejection of the draft Law would not affect that position either way; in this chapter we will therefore focus on what the draft Law would mean for the powers that are addressed explicitly within the 1996 Law: the States Assembly’s Regulations-making powers in respect of EU legislation and the Order-making powers of the Minister for External Relations.

The Rationale for Replacing the 1996 Law

5.2 The primary motivation for repealing and replacing the 1996 Law, as we understand it, is to enhance the mechanisms by which sanctions measures may be extended to Jersey. Indeed, the first stated aim in the law-drafting instructions for the draft Law (which we have seen) was “to continue to facilitate the implementation of UNSC [United Nations Security Council] resolutions by means of giving effect in Jersey to EU restrictive measures.”¹³ The Minister informed us that the Island had in fact been congratulated in recent times for its work in respect of sanctions measures:

*“There was a letter which came from the Vice President of the European Commission, Baroness Ashton, who wrote to my opposite number in Guernsey and to me, thanking us both for our interest in the EU’s role as a facilitator with regard to bilateral asset recovery actions and saying: ‘I would also like to thank you for your comments on the implementation of UN and EU sanctions. The full implementation of measures is a key to their success. My services have been in touch with your representatives here in Brussels and we are glad to be able to continue this successful cooperation.’”*¹⁴

¹³ *International Sanctions – Drafting Instructions*, Chief Minister’s Department, 20th March 2012
¹⁴ Minister for External Relations, Transcript, Page 12

5.3 This raised the question of why there was a need to amend the mechanisms by which sanctions measures could be enacted, given that the Island had been congratulated in this way. We were advised that, notwithstanding those congratulations, the existing mechanisms had also been subject to more negative comment in recent years. In 2009, the regulation of Jersey's financial services was reviewed by the International Monetary Fund (IMF). We were informed that "*Jersey was rated in that particular area [of sanctions] as largely compliant, in other words not fully compliant. The reason was a couple of points, one was there was a need to review the effectiveness, implementation of sanctions Orders in general. But also some specific questions about the scope of application of sanctions measures to include various aspects of the finance industry. So there were specific recommendations by the IMF review and the purpose of this legislation is to remedy some of those issues.*"¹⁵ The draft Law has therefore been proposed to address those inefficiencies within the current system.

KEY FINDING

5.4 The draft Law has in part been proposed in order that recommendations arising from the visit of the International Monetary Fund in 2009 and identified inefficiencies within the sanctions-making process can be addressed.

The Minister's Order-making Powers

5.5 At present, under the auspices of the 1996 Law the Minister for External Relations may implement EU legislation by Order where:

"(a) in the opinion of the Minister, immediate or early enactment of a Community provision is necessary or expedient in the public interest; and

*(b) that Community provision is contained in or arises under Article 12 of the Treaty on European Union signed at Maastricht on 7th February 1992 (which relates to the common foreign and security policy)."*¹⁶

5.6 Article 2(1) of the draft Law sets out the scope of the Minister's Order-making powers as they would be if the 1996 Law were replaced. Under this provision, the Minister would by Order be able to:

"make such provision as appears to him or her to be necessary or expedient for the purposes of –

¹⁵ International Relations Officer, Transcript, Page 15

¹⁶ *European Communities Legislation (Implementation) (Jersey) Law 1996, Article 2(4)*

- (a) *giving further effect to any EU provision that is directly applicable in or binding upon Jersey;*
- (b) *giving effect, either wholly or partly, to any other EU provision adopted under any one or more of –*
 - (i) *Chapter 2 of Title V of the Treaty on European Union,*
 - (ii) *Article 75 of the Treaty on the Functioning of the European Union, and*
 - (iii) *Article 215 of that Treaty;*
- (c) *dealing with matters arising out of or related to any EU provision falling within subparagraph (a) or (b)."*

5.7 It can be seen that, under Article 2(1)(a), the draft Law would therefore give the Minister a power he does not currently have under the 1996 Law: the power to give further effect to any EU provision that is directly applicable to Jersey (i.e. under Protocol 3). We received confirmation that this would indeed be a new provision. The Minister explained to us that *"Article 2 of the draft law says that the Minister is entitled to make an Order, if it seems to him necessary or expedient, either for giving effect or giving further effect to an E.U. provision that is directly applicable in or binding upon Jersey. So if something applies to us under Protocol 3, but there are aspects of that rule or measure that the European Union has taken which are not covered in the European rule - for example, penalties, if you fail to comply with a particular European rule - then it is usual to make an Order which says anybody who fails to comply will be guilty of an offence and liable to a fine of £2,000 or whatever it may be."*¹⁷

KEY FINDING

5.8 The draft Law, if adopted, would give the Minister for External Relations new, limited Order-making powers by which the Minister could give further effect to any EU provision that is directly applicable to Jersey.

5.9 Article 2(1)(b) of the draft Law relates to the implementation of sanctions measures and therefore refers to powers which the Minister already has under the 1996 Law. The context has changed, however. Under the 1996 Law, the Minister was empowered to make Orders contained in or arising from Article 12 of the Treaty on European Union. Under the draft Law, the Minister's Order-making powers would be within the context of Chapter 2 of Title V of the Treaty on European Union, and Articles 75 and 215 of the Treaty on the Functioning of the European Union. These provisions all relate to sanctions measures arising from the Common Foreign and Security Policy of the EU. EU Treaties have been updated since the

¹⁷ Minister for External Relations, Transcript, Page 8

1996 Law was passed (and since the Order-making power was introduced in 1999). The draft Law therefore seeks to reflect that in amending the context in which the Minister's Order-making powers may be exercised. As we were advised, "*the provisions in the Maastricht Treaty [to which the 1996 Law refers] have now been overtaken by new provisions in the Treaty on European Union and the Treaty on the Functioning of the European Union.*"¹⁸ The Minister confirmed that this provision was intended "*to give effect to sanctions which is probably the most important aspect of the Order-making power of the Minister for External Relations, and used to be of the Chief Minister.*"¹⁹

KEY FINDING

5.10 The draft Law, if adopted, would maintain Order-making powers which the Minister for External Relations already has to implement provisions which relate to the EU's Common Foreign and Security Policy and which typically involve the introduction of sanctions measures.

5.11 The draft Law also seeks to introduce provisions which would allow ambulatory references to be made in Orders. This has been proposed in Article 2(4)(iii) with the statement that references to an EU provision could be taken "*to be read as a reference to that EU provision as amended, substituted, extended or applied from time to time.*" Provision to this effect is already included within the corresponding Manx legislation.²⁰ The allowance of ambulatory references was the second stated aim of the relevant law-drafting instructions that the draft Law should "*permit the future update of existing EU restrictive measures as given effect in Jersey by ambulatory references.*"²¹ However, the inclusion of ambulatory references is not automatic and would be explicitly invoked in relation to specific provisions within the subordinate legislation concerned (for example, a list of designated persons in an annex to a sanctions Order).

5.12 In respect of the new Article 2(4)(iii), during the initial debate on the draft Law, the Minister described ambulatory references as meaning "*that if the European Union modifies a list of that kind [where identified individuals whose financial transactions are subject to control] the modification will immediately come into force in Jersey and a Jersey bank would be obliged to take note of such a change at exactly the same time as a bank in the United Kingdom or in France.*"²²

5.13 In that regard, we were also advised:

¹⁸ External Relations and Constitutional Affairs Section, Written Submission, 7th March 2014

¹⁹ Minister for External Relations, Transcript, Page 8

²⁰ Article 2C, *European Communities (Isle of Man) Act 1973*

²¹ *International Sanctions – Drafting Instructions*

²² Official Report of the States Assembly, 4th February 2014

“The concern there is that very often simply the volume of Orders required, and we have said already that a typical year, a quarter of all the Orders being made are to do with sanctions, so largely most of those are very minor changes, amendments to lists of designated individuals or entities. Small changes, but because of the way Jersey legislation works at present, we have to make a new Order on every case. To make that Order normally takes 3 or 4 days, a week maybe. But the idea of ambulatory provisions means that the Minister can refer in the legislation to an Order with the schedule as amended from time to time, for example. So that means when there are names changed in an annex to a new regulation, that will have an immediate effect in Jersey law and that means there is no gap between the E.U. regulation being made and the Jersey Order coming into force. The main concern there is partly because we want to be seen to be compliant with international standards and having an effective, well-regulated finance industry. But in particular, if there are designated persons who had assets in Jersey that would be within the scope of that legislation to be frozen then those assets would be frozen immediately and there would be no chance of the money being moved out of Jersey to an unregulated jurisdiction.”²³

- 5.14 Part of the rationale underlying the proposed changes is therefore that the Island faces an administrative burden to implement all necessary sanctions measures in a timely fashion and that the introduction of ambulatory references would ease that burden and ensure the immediate effectiveness of certain changes.
- 5.15 To take an example, we looked at the *Community Provisions (Restrictive Measures – Syria) (Jersey) Order 2012*. Originally made on 27th January 2012 and coming into force the following day, the Order is still in force but has been amended 12 times since its initial implementation. Each amendment required a Ministerial Decision and the allocation of law-drafting resources. However, 9 of those amendments were made simply to ensure that the Order reflected amendments made to the relevant piece of EU legislation. If the provision for ambulatory references that the draft Law seeks to establish under Article 2(4)(iii) had been in force, there would have been a need for only 3 amending Ministerial Orders to have been made, rather than 12.
- 5.16 The effect of introducing ambulatory references would be that fewer individual Orders would be made. This increased efficiency would address the recommendations of the IMF in 2009. We were informed, however, that the introduction of an ambulatory reference would be optional and not automatic.²⁴ Furthermore, ambulatory references could not be used to

²³ International Relations Officer, Transcript, Page 14
²⁴ Ibid

introduce measures in respect of a new regime – they would only allow for automatic modification of an existing list which had already been established.

KEY FINDING

5.17 The introduction of ambulatory references under the draft Law would lead to the enactment of fewer Ministerial Orders in respect of sanctions measures than are currently required. This would lessen the administrative burden on the Chief Minister’s Department and Law Draftsman’s Office. The use of ambulatory references would not be automatic.

5.18 The draft Law would allow interpretation of EU provisions relating to the imposition of an obligation or prohibition on financial services to mean the definition of ‘financial services’ contained in the *Proceeds of Crime (Jersey) Law 1999*. This would be effected by Article 3 of the draft Law. We asked why it had been included and were advised to the following effect:

“An objective of the Law is to clarify the extent of the sanctions provisions in Jersey law to include all types of financial services and related activities which are regulated in Jersey. This is particularly important since Jersey provides a range of financial services and products which are not recognised in some other jurisdictions and it should be certain that these are included within the scope of Jersey sanctions.”²⁵

5.19 This was a matter which had been raised during the IMF visit of 2009 with one of the IMF’s recommendations being that *“the legal framework [in Jersey] implementing the UN Resolutions should be amended to expressly extend the definition of ‘funds’ subject to freezing to cover assets ‘jointly’ or ‘indirectly’ owned or controlled by the relevant persons.”²⁶*

KEY FINDING

5.20 Article 3 of the draft Law is intended to address one of the recommendations made in 2009 by the IMF that Jersey’s legal framework should be amended to expressly include all types of financial services and related activities which are regulated in Jersey.

5.21 The draft Law would also establish provision for general provisions Orders under Article 4. In that regard, it was explained to us during our review that *“the purpose of a ‘general provisions’ Order is to introduce measures which are common to several other Orders. For example, the existing sanctions Orders mostly contain identical provisions relating to the powers of Customs and Immigration officers to enforce trade embargoes, or powers for the*

²⁵ External Relations and Constitutional Affairs Section, Written Submission

²⁶ Jersey’s Action Plan in response to IMF’s Recommendations, 16th November 2010, Page 2

Minister to require information, or provisions on how information may be disclosed to third parties. It is often more accessible and easier to understand the legislation if such ‘standard’ provisions are contained in a single ‘general provisions’ Order which applies, for example, to all sanctions measures.” It would not be possible for general provisions Orders to “make any provision which could not be made under the Orders to which they apply.”²⁷

The States Assembly’s Regulations-making Powers

5.22 The 1996 Law sets out the States Assembly’s powers in respect of implementing EU legislation, stating that the Assembly can:

“make such provision as appears to them to be necessary or expedient for the purposes of –

- (a) giving effect, either wholly or partly, to any Community provision;*
- (b) dealing with matters arising out of or related to any such provision.”²⁸*

Under the 1996 Law, such Regulations can be adapted or modified to reflect Jersey’s circumstances.

5.23 The draft Law, meanwhile, would see the Assembly’s Regulations-making powers defined in the following terms. The Assembly would be able to:

“make such provision as appears to them to be necessary or expedient for the purposes of –

- (a) giving effect, either wholly or partly, to any EU provision, whether or not one in respect of which the Minister may make an Order under paragraph (1);*
- (b) dealing with matters arising out of or related to any such provision.”²⁹*

As can be seen from the previous paragraph, the wording in the draft Law is effectively identical to the wording in the current 1996 Law. The draft Law would allow for modifications and adaptations to be incorporated within any Regulations made, thereby maintaining the provisions of the 1996 Law in that regard.

KEY FINDING

5.24 The States Assembly’s Regulations-making powers in relation to the implementation and extension of EU legislation would not be materially affected by adoption of the draft Law.

²⁷ External Relations and Constitutional Affairs Section, Written Submission
²⁸ *European Communities Legislation (Implementation) (Jersey) Law 1996, Article 2(1)*
²⁹ P.164/2013, Page 14

5.25 Given the concerns expressed by Members on 4th February 2014, we asked why the Order-making powers ascribed to the Minister in the draft Law could not in fact be given to the States Assembly as Regulations-making powers. We were informed as follows:

“The reason why, in practice, they are dealt with by the Minister is...I suppose there are two. I mean the first is that there is an urgency to bring the sanctions regime into force and if we decided to deal with a particular sanctions regime by Regulations that would mean that the Regulations would have to be lodged for 6 weeks, debated and that delay would be counterproductive. The second reason is the sheer scale of the task. I think I mentioned earlier on the number of sanctions Orders that are made and that would mean, in effect, that at each sitting of the States there would be at least one and possibly two sanctions Regulations to be debated and that is not practical.”³⁰

5.26 We therefore asked whether consideration had been given to amending Standing Orders and reducing the lodging period for sanctions measures. Using the recent Ministerial Orders taken in respect of the Ukraine as an example, however, we were advised that *“if you use the Ukrainian example, that had to be brought in within 24 hours and so we would have drafted it, we would only be in the first week of that lodging now. There would be another week and then you would have to sit and so there would be 2 to 3 weeks minimum before that Order was in place rather than it being in place within 24 hours, which is what it needed to be.”³¹*

The Impact of Repealing the 1996 Law

5.27 Adoption of P.164/2013 would see the repeal of the 1996 Law but any Regulations and Orders passed under the 1996 Law and still in force would remain in force under Article 6 of the draft Law.

5.28 The Minister was unable to determine precisely what impact adoption of the draft Law would have on both his workload and that of his officers. The report accompanying the draft Law stated that there were no resource implications of adopting the draft Law. During our review, the Minister clarified that no “adverse” implications were anticipated. It was apparent that there might be positive benefits, particularly due to the provision for ambulatory references which would reduce the administrative burden of having to continually update sanctions measures through individual Ministerial Orders.³² This can be seen from the example we explored above and from the realisation that more and more sanctions Orders have had to be made in recent years. Statistics provided to us by the Minister show that the number of

³⁰ Minister for External Relations, Transcript, Page 17

³¹ Director of International Affairs, Transcript, Page 18

³² Minister for External Relations, Transcript, Page 22

sanctions Orders has increased from 4 in 2007 and 1 in 2008 to 47 in 2011; 30 in 2012; and 25 in 2013. The introduction of ambulatory references would likely cut down the number of Orders required and thereby lessen demands upon the resources of the Law Draftsman's Office.

5.29 We also questioned the Minister on what the impact would be if the draft Law were not to be adopted by the Assembly. His response was as follows:

*"We would not be as efficient and effective as we should be. We might attract criticism from Europe and we might attract criticism from the United Kingdom and certainly if we were to contemplate requiring all sanctions and measures to be done by Regulations rather than by Order we would be subject to very severe criticism very rapidly indeed."*³³

5.30 Furthermore, we were also advised that Jersey would not, as a result, be seen to be complying with the IMF recommendation of 2009. This would be pertinent as later in 2014 Jersey would be *"assessed by the regional anti-money laundering body, Moneyval, and Moneyval will be here in Jersey in September to do a follow-up review to check whether we have implemented, sufficiently, the recommendations of the I.M.F. So I think that any such decision of the Assembly would be followed very swiftly by a Moneyval site visit and evaluation and would undoubtedly be picked up by them which could be unhelpful."*³⁴

³³ Minister for External Relations, Transcript, Page 26
³⁴ Director of International Affairs, Transcript, Page 26

6. THE PROVISIONS OF THE DRAFT LAW – AMENDING THE 1973 LAW AND OTHER ENACTMENTS

6.1 In this chapter, we will consider how the draft Law seeks to amend the 1973 Law. This would be done through the adoption of Article 7 and Schedule 1 of the draft Law. Schedule 2, meanwhile, would implement consequential changes to a number of other enactments.

Updating Definitions

6.2 The primary reason given to us for updating the 1973 Law is to ensure that the terminology and references it contains are correct and up to date. Indeed, it was the third and final stated aim within the law-drafting instructions that the draft Law would “*update the existing Law with regard to [the] establishment of the European Union in place of the European Community.*”³⁵ Since the 1973 Law was adopted, the European Union itself has come into fruition and the very name of the 1973 Law, referring as it does to ‘European Communities’ is no longer correct. Hence the draft Law seeks to update the 1973 Law and change references to ‘Community institution’, ‘Community instrument’ and ‘Community Treaty’ to ‘EU institution’, ‘EU instrument’ and ‘EU Treaty’. The name of the 1973 Law would therefore become the *European Union (Jersey) Law 1973*. Such changes appear uncontentious and have already been enacted in the legislation of other jurisdictions (e.g. the Isle of Man).

KEY FINDING

6.3 **The changes to terminology and references proposed in the draft Law are to be welcomed.**

Updating the Treaty List

6.4 It is the 1973 Law which explicitly provides in Jersey legislation for the binding nature of Protocol 3 on the Island. The draft Law does not seek to alter that provision and, in that regard, does not therefore seek to amend the current constitutional arrangements between the Island and the EU (in that only Protocol 3 will continue to be directly applicable). Article 2(1) of the 1973 Law (which provides for the binding nature of Protocol 3) would remain unaltered by adoption of the draft Law.

³⁵ *International Sanctions – Drafting Instructions*

- 6.5 We are aware that comments were made during the initial debate on the draft Law about the Island's relationship with the EU. However, that was not within the scope of our review as the constitutional position was to remain unchanged; the draft Law does not seek to alter the scope of Protocol 3 or the constitutional relationship itself. The Island's relationship with the EU is an important debate but it is not one of direct relevance to the draft Law in hand.

KEY FINDING

- 6.6 Adoption of the draft Law would not in itself amend the Island's constitutional relationship with the EU under Protocol 3.**

- 6.7 Under Article 2(1) of the 1973 Law, "*the arrangements set out for the Channel Islands in the Treaties*" have legal effect in Jersey (which as we have described means only Protocol 3). This raises the question of what those 'Treaties' are. The 1973 Law provides the answer with a list of treaties to be used as the definition for 'Treaties'. Article 1(4) of the 1973 Law allows the States to amend this list by Regulations in order to ensure that the list reflects the corresponding list which appears in the relevant UK Act (i.e. the *European Communities Act 1972*). This has occurred on a number of occasions to reflect the development of the European Communities and then more recently (with the change of terminology) the EU. For instance, each time a Member State accedes to the EU, the list of Treaties needs to be updated to incorporate the relevant accession treaty. The draft Law seeks to update the list by adding four new treaties, including the accession treaty of Croatia. Looking at other jurisdictions, these treaties are being added to relevant lists elsewhere; for example, it was proposed in 2013 that the new treaties be added to the corresponding list in the Manx legislation.³⁶
- 6.8 Significantly, a new provision is made in respect of the list of Treaties in that the 1973 Law, if amended, would explicitly exclude Treaties in so far as they relate to the EU's Common Foreign and Security Policy. This is, again, a change which has already been introduced by the Isle of Man in its own legislation. However, as we discussed in the previous chapter, the Minister's Order-making powers in respect of sanctions measures are themselves described within the context of that same Common Foreign and Security Policy. Given the potential confusion these different provisions might cause, we asked the Minister to explain how these two provisions within the draft Law would work together and were informed to the following effect:

"The provisions of the Common Foreign and Security Policy do not apply to Jersey. They are not covered by Protocol 3. They are not binding upon us and so it is right that Jersey

³⁶ Consultation on the European Union (Amendment) Bill 2013, Council of Ministers, August 2013

*should not be under any binding obligation to give effect, for example, to send troops out to Afghanistan if that is what the foreign policy of the European Union determined should happen. In terms of the sanctions regime we need to be empowered to do what the European Union has decided to do because it is our policy, as set out in the common policy, to comply with the international community in that respect.*³⁷

Article 2(1) of the draft Law allows for the Minister to choose to give effect to sanctions measures (notwithstanding the legal and policy obligations which might apply outside of the Law). In itself, that Article does not place an obligation to implement to do so or make those elements of the Common Foreign and Security Policy (to which Article 2(1) refers) binding on Jersey. This is consistent with the amendment proposed to the list of treaties in the 1973 Law in which it would be stated that the Common Foreign and Security Policy is indeed not binding.

KEY FINDING

6.9 Orders made by the Minister for External Relations to implement EU restrictive measures in Jersey would refer to the EU's Common Foreign and Security Policy. That Policy is not binding on the Island, however, and adoption of the draft Law would ensure that the Policy was explicitly excluded from the list of Treaties under which the arrangements for Jersey have legal effect, thereby recognising that it is not binding.

Amendments to Other Enactments

6.10 Schedule 2 to the draft Law would, if adopted, see a number of amendments made to various other enactments. These amendments are all proposed to reflect the changes in terminology which we have already discussed: to recognise that the European Communities have developed into the EU and that references to such matters as 'Community obligations' or 'Community finding' should be changed to read as 'EU obligations' and 'EU finding'. Again, these changes do not appear contentious.

6.11 The draft Law would amend the 1973 Law, however, to allow for the Minister for External Relations in future to be able to make the kind of amendments proposed in Schedule 2 to the draft Law. Schedule 1 would insert a new Article 1(4A) in the 1973 Law to read as follows:

"The Minister may by Order –

(a) amend any enactment (including this Law) to reflect changes in terminology or numbering arising out of –

³⁷ Minister for External Relations, Transcript, Page 22

- (i) *the Treaty of Lisbon, described in sub-paragraph (n) in the definition 'Treaties' in paragraph (1), or*
- (ii) *any other treaty becoming, at any time after the signing of the Treaty of Lisbon, one of the Treaties as defined in paragraph (1); and*

(b) *to make any provision incidental or consequential on such an amendment."*

6.12 This is a new provision and new Order-making power for the Minister. It essentially means that the kind of legislative amendments proposed in Schedule 2 to the draft Law would no longer need to be brought to the Assembly for approval; the Minister for External Relations would be able to enact them by Order. Thus if the EU were to undergo a similar change in terminology to that which saw the European Communities become the EU, the Minister would be able to make an Order to ensure that Jersey's legislation reflected that change in terminology. The Order-making power would not allow the Minister to amend the list of treaties contained in the 1973 Law, however.

KEY FINDING

6.13 Adoption of the draft Law would give the Minister for External Relations the power to make Orders that would ensure Jersey's legislation in future could be amended quickly to reflect changes in terminology. This would be a new Order-making power but is uncontroversial.

7. CHECKS AND BALANCES

7.1 In this chapter, we will consider the checks and balances that would apply were the draft Law to be adopted. There were questions during the initial debate on the draft Law on whether there would be sufficient checks and balances.

Provisions within the Draft Law

7.2 We were informed that adoption of the draft Law would in itself establish new checks and balances which do not currently exist.

7.3 In respect of the States Assembly's Regulations-making powers, Article 2(5) of the draft Law prescribes that any such Regulations implementing EU legislation cannot seek the imposition of, or increase in, taxation; cannot take effect retrospectively; and cannot amend either the Law itself or the 1973 Law. The Minister's Order-making powers would also be subject to the same conditions. In addition, under Article 2(6) the Minister would be unable to make an Order which was inconsistent with any Regulations passed by the Assembly; which sought to amend any such Regulations; and which sought the imposition of a penalty of imprisonment for more than two years for a criminal offence.

7.4 These are new provisions which do not appear in either the 1973 or 1996 Laws. Given that their introduction appears to provide a limit on the States Assembly's powers which does not currently exist in legislation, we questioned the Minister on whether the Assembly's power would indeed be more limited than at present. He advised that it would be "*unconstitutional*" in any event for the Assembly to attempt to do what would be proscribed by Article 2(5), implying that such restrictions already apply in reality and that their insertion was simply to ensure an "*avoidance of doubt*."³⁸ It would indeed be surprising if the Assembly wished to take such measures through Regulations and the new limits are therefore unlikely to have any material impact on the Assembly's current decision-making. The greater limits on the Minister's power appear reasonable and sensible.

7.5 It was subsequently explained that Articles 2(5) and 2(6) had been inserted following discussions with the Law Officers' Department and the Law Draftsman's Office which had entailed "*looking at comparable legislation in other jurisdictions and [which had] noted that the UK in their equivalent legislation has these measures and these restrictions on the powers.*" It had therefore been felt necessary "*to provide reassurance because, of course, this legislation as primary law will have to go through Privy Council and obviously they will*

³⁸ Minister for External Relations, Transcript, Page 32

look and say: ‘Well, what are the equivalent measures in the U.K. and how does the Jersey law compare?’³⁹ The provisions of Articles 2(5) and 2(6) of the draft Law do indeed mirror similar existing provisions not only within the relevant UK legislation but also that of the Isle of Man.⁴⁰

KEY FINDING

7.6 Articles 2(5) and 2(6) of the draft Law would establish reasonable limits on the power to implement and extend EU legislation, particularly in relation to the Minister’s Order-making powers.

The Order-Making Process

7.7 We also considered in respect of the Minister’s anticipated powers the Order-making process and the checks and balances which exist within it. We understand that there are in fact no procedural changes anticipated to the Order-making process as a result of the draft Law being adopted. We believe it would be useful therefore to highlight what that process currently is.

7.8 As indicated previously, relevant EU legislation is now most likely to be identified by the Channel Islands Brussels Office and communicated to the External Relations and Constitutional Affairs Section. There would then follow the discussion that one would expect between a Minister and officers before the Minister takes a decision on the appropriate course of action, such as making an Order to implement sanctions measures.

7.9 In this regard, however, we questioned what consultation, if any, the Minister undertakes before signing a Ministerial Order – for instance, with the Council of Ministers. We were advised that “*if something is clearly within either the common policy for external relations that Council has agreed, or within the framework of a piece of law which the Assembly has agreed, or sits within a policy that the Council have separately agreed, then that agreement has been done.*” There would therefore be no need for the Minister to consult the Council of Ministers in respect of sanctions measures as it is already part of the Council’s existing policy.⁴¹

7.10 Alongside any Ministerial Order, the Minister must sign a corresponding Ministerial Decision. Any such Ministerial Decision is uploaded to www.gov.je. All Ministerial Decisions relating to sanctions measures Orders may therefore be found under the relevant section on that

³⁹ International Relations Officer, Transcript, Page 32

⁴⁰ Article 1(1) of Schedule 2, *European Communities Act 1972* and Article 2B(4), *European Communities (Isle of Man) Act 1973*

⁴¹ Director of International Affairs, Transcript, Page 8

website relating to the Chief Minister (as it is the Chief Minister's Department which supports the work of the Minister for External Relations). We understand that, in normal circumstances within the legislative process, an earlier Ministerial Decision would have been required to ensure justification for the use of law-drafting resources. This is what is expected in respect of draft Laws, for instance, as well as draft Regulations and other Ministerial Orders. However, we also understand that in practice this is not the case for sanctions Orders: there is a standing commitment of law-drafting resources for the purpose of sanctions. As a consequence, the only Ministerial Decision which is required is to confirm that the policy is aligned with the Common Policy on External Relations and to make the Order itself.

- 7.11 Ministerial Orders are themselves published on www.jerseylaw.je whilst all sanctions measures are also published on the website of the Jersey Financial Services Commission (JFSC).
- 7.12 Under the provisions of the *Subordinate Legislation (Jersey) Law 1960*, all Orders must be laid before the States Assembly (unless express provision is made for the contrary). This is achieved through the listing of Ministerial Orders on States Order Papers. The draft Law seeks to remove an explicit reference in the 1996 Law that says subordinate enactments made under it are subject to the 1960 Law but that is because the reference in the 1996 Law is redundant: the *Subordinate Legislation (Jersey) Law 1960* applies to all subordinate enactments unless contrary provision is explicitly made and it will therefore apply to subordinate enactments made under the draft Law, if adopted.
- 7.13 Under the *Subordinate Legislation (Jersey) Law 1960*, any Member may subsequently lodge a proposition asking that the Assembly annuls a particular Order. The longest period before which the Assembly could annul a particular Order would (barring the calling of a special States sitting) be over the summer recess period. For example, if the Minister for External Relations were to make an Order on 24th July 2014 that came into effect on 25th July 2014, it would not appear on an Order Paper until 4th September 2014 (when the Order Paper for the sitting of 8th September 2014 is published). If a Member were immediately to lodge a proposition that the Order in question be annulled, the proposition would be subject to a four-week lodging period and, in this example, could not be debated until a sitting on 8th October 2014.⁴² Some two and a half months might therefore have elapsed before the States Assembly could of its own volition annul a Ministerial Order. We have noted that the Privileges and Procedures Committee has proposed that the lodging period for propositions

⁴² There will in fact be no sitting on that date in 2014 due to the impact of the elections, but in other circumstances a sitting would be due to take place on that date. In an election year, the longest maximum period could therefore be longer.

seeking the annulment of a Ministerial Order be reduced from four weeks to two weeks. This has been proposed in *Draft Amendment (No.23) of the Standing Orders of the States of Jersey 201-* (P.49/2014) which was lodged on 14th April 2014 and which, if adopted, would impact upon the timescales we describe above and allow for Ministerial Orders to be annulled more quickly than is presently possible.

- 7.14 Annulment of Ministerial Orders by the States Assembly does not often occur, however. Perhaps the most recent example of an attempt to annul a Ministerial Order was *Annulment of Road Traffic (St. Helier) (Amendment No.23) (Jersey) Order 2011* (P.10/2012) which was lodged by Deputy G.C.L. Baudains. It was ultimately withdrawn and not debated because the Minister for Transport and Technical Services opted to annul the Order himself, without requiring explicit direction from the Assembly.
- 7.15 Notwithstanding the above, Ministerial Orders are also subject to the provisions of the *Official Publications (Jersey) Law 1960* which states that “as soon as may be” after the making of a Ministerial Order, the Greffier of the States should arrange for a notice to appear about the Order in the Jersey Gazette (i.e. the *Jersey Evening Post*). In addition, as we have already stated Ministerial Orders are published on www.jerseylaw.je; sanctions measures are published on the website of the JFSC; and the corresponding Ministerial Decisions are made available on www.gov.je. Even though an Order made at the end of July might not therefore formally come to the Assembly’s attention on an Order Paper until weeks later, it would have been published in various formats soon after its enactment and knowledge of it would therefore be in the public domain fairly soon after its passing. It should also be noted that Orders do not require States approval to be annulled; the Minister could choose to rescind or amend an Order he or she had made (by making a new Order) if it became apparent that there was a need to do so.
- 7.16 In addition, it must be noted that scrutiny of Ministerial Orders lies within the remit of the Scrutiny Panels: under Standing Order 136(d) the Panels’ Terms of Reference include “to scrutinize subordinate enactments [i.e. Orders] which have been made by a Minister.”
- 7.17 The process outlined above for Ministerial Orders in Jersey resembles the processes which apply for subordinate legislation in the UK, Guernsey and the Isle of Man (particularly in respect of sanctions measures, which we have considered during our review). Broadly speaking, in all three other jurisdictions, legislation and procedure provides that any subordinate enactment which may be made by a Minister, Department or Committee alone should be laid before the relevant parliament and allows for that parliament to annul such a subordinate enactment.

KEY FINDING

7.18 **The Minister for External Relations does not consult the Council of Ministers before making an Order to implement EU restrictive measures as it is the policy of the Council that such measures should be implemented.**

7.19 **The Order-making process contains sufficient checks and balances: Ministerial Orders are published and notification of their enactment and publication is provided in the Jersey Gazette and on the States Assembly's Order Papers. The Assembly is ultimately able to annul Orders which have been enacted.**

8. CONCLUSION

- 8.1 We are not surprised that the debate on the draft Law led to questions about whether the Order-making powers proposed for the Minister for External Relations would be appropriate. Ever since the advent of Ministerial government, questions of which powers should appropriately be held by Ministers, and which should be retained by the States Assembly, have often been raised. Given that the Island's relationship with the EU is also often questioned, it becomes even less surprising that this draft Law raised concerns.
- 8.2 The Island's constitutional relationship with the EU lay outside the scope of our review. In any event, the draft Law does not seek to change that relationship: Jersey is already obliged to implement EU legislation which is binding on the Island under Protocol 3 and that will not change. Nor will there be a change to the position that the Island can choose to extend EU legislation voluntarily which is not binding but where it is considered beneficial to do so.
- 8.3 In terms of the authority of the Minister for External Relations, adoption of the draft Law would have less impact than might have first been feared. The Minister already has the authority to implement sanctions measures and the draft Law would not change that. It would give the Minister some new Order-making powers: to give further effect to legislation which is binding upon Jersey under the provisions of Protocol 3 and to amend legislation to ensure that it reflects the terminology currently used within the EU and the EU's institutions. These new Order-making powers do not detract from the Assembly's authority, however, and we have found that the States Assembly's Regulations-making powers in relation to the implementation and extension of EU legislation would not be materially affected by the draft Law.
- 8.4 Some of the changes proposed in the draft Law have already been enacted in Guernsey and the Isle of Man, both of which have similar legislative frameworks to Jersey. There does need to be clarity about what can be done outside of the 1996 Law (or the draft Law, if adopted) in terms of implementing and extending EU legislation. We therefore highlight again our understanding that other Ministers can be given the authority to give effect to EU legislation if they are granted Order-making powers under other Laws and that it is therefore not only within the context of the 1996 Law that EU legislation may be implemented or extended. That position will remain if the 1996 Law is replaced by the draft Law.
- 8.5 The changes enacted through the draft Law would, it is hoped, improve the Order-making process, particularly in respect of sanctions measures. The introduction of ambulatory references would reduce the administrative burden and allow the Island to take such

measures with requisite ease and speed, thereby allowing the Island to demonstrate to bodies such as the IMF that it can act accordingly and effectively.

8.6 When the States Assembly chooses to delegate authority to Ministers for the enactment of legislation, the Assembly needs to have confidence that appropriate checks and balances are in existence. In this case, the draft Law would itself establish reasonable limits on the powers of the Minister for External Relations to implement and extend EU legislation, whilst the Order-making process in general also contains a number of checks and balances that can provide the Assembly with some comfort.

8.7 Ultimately, therefore, whilst our review has raised questions about the authority that Ministers have to give effect to EU legislation, the draft Law in itself provides an appropriate replacement for the 1996 Law and update to the 1973 Law.

KEY FINDING

8.8 The Scrutiny Review has raised broader questions about the authority of Ministers to give effect to EU legislation by Order. However, in terms of what the draft law in itself seeks to deliver, the draft Law provides appropriate updates and amendments to existing legislation and there is as a result no reason why the draft Law should not be adopted.

9. APPENDIX 1: PANEL MEMBERSHIP, TERMS OF REFERENCES AND EVIDENCE CONSIDERED

Panel Membership and Terms of Reference

9.1 The Corporate Services Scrutiny Panel comprises the following Members:

Senator S.C. Ferguson, Chairman

Deputy J.G. Reed, Vice-Chairman

Connétable D.W. Mezbourian

Deputy R.J. Rondel

9.2 The following Terms of Reference were agreed for the review:

1. To consider the rationale underlying the proposal of *Draft European Union Legislation (Implementation) (Jersey) Law 201- (P.164/2013)*; and
2. To consider the Order-making powers provided to the Minister for External Relations in the draft Law, with particular regard to the following:
 - a) The scope of those powers;
 - b) The differences from the existing legal framework;
 - c) The checks and balances involved in the Order-making process; and
 - d) The interrelationship between the Order-making power of the Minister and the Regulation-making power of the States.

Evidence Gathered

9.3 The following documents were considered by the Panel during the review:

1. *Official Publications (Jersey) Law 1960*
2. *Subordinate Legislation (Jersey) Law 1960*
3. *European Communities Act 1972*
4. *European Communities (Jersey) Law 1973*
5. *European Communities (Bailiwick of Guernsey) Law 1973*
6. *European Communities (Isle of Man) Act 1973*
7. *European Communities Implementation (Guernsey) Law 1994*

8. *European Communities Legislation (Implementation) (Jersey) Law 1996*
 9. *European Communities Legislation (Implementation) (Amendment) (Jersey) Law 199-*
(P.163/1999)
 10. *International Sanctions – Drafting Instructions Part 1*, Chief Minister’s Department, 20th
March 2012
 11. *Consultation on the European Union (Amendment) Bill 2013*, Isle of Man Government,
August 2013
 12. Written Question to the Chief Minister by Senator S.C. Ferguson regarding the
implementation of European Union legislation, 10th September 2013
 13. *Draft European Union Legislation (Implementation) (Jersey) Law 201-* (P.164/2013)
 14. Extract from the Official Report of the States Assembly, 4th February 2014
- 9.4 On 7th March 2014, the Panel received a written response to written questions it had put to
the External Relations and Constitutional Affairs Section.
- 9.5 The Panel received a briefing on the draft Law on 6th March 2014 from officers of the Chief
Minister’s Department. In addition, the Panel held the following Public Hearing:
- 11th March 2014 Minister for External Relations, accompanied by the Director of
International Affairs and the International Relations Officer
- 9.6 The transcript of the public hearing and the written response from the External Relations and
Constitutional Affairs Section are available on www.scrutiny.gov.je.