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JERSEY'S CHANGING CONSTITUTIONAL RELATIONSHIP WITH EUROPE

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Introduction

1 Jersey, with Guernsey, is the closest part of the British Isles to Continental Europe. The celebration of 800 years of independent legal tradition underlines the close and continuing links between Jersey law and both the common and civil law traditions, respectively of England and Europe. Jersey law thrives, perhaps more than any other legal system in Europe, on a comparative approach, drawing *inter alia* on the Roman, Norman, French, English, Scots, South African and Commonwealth legal systems.[1] Although the English common law and lawyers (as well as their Scottish counterparts) have made a remarkable contribution to the law of European integration over the last 31 years since UK membership of the European Community, it is interesting to speculate on the effect which Channel Islands law and lawyers might have had on European law – and vice versa – if Jersey (and Guernsey) had joined the EC with the UK in 1973.[2]

2 In practice, the strong desire for political autonomy combined with a measure of antipathy towards the integrationist tendencies in continental Europe have tended to

[1] See Southwell *Citation from other legal systems*, (2004) 8 JL Review 66 and Nicolle *The Origin and Development of Channel Islands law*.

[2] The widely-acknowledged influence of UK judges and advocates-general (as well as members of the English and Scottish Bars) in the European Courts is in sharp contrast to the perceived political contribution of the UK to European integration more generally.

isolate Jersey from the emerging EU legal order. In this respect, the "constitutional" link with the EU provided by Protocol 3 to the UK Act of Accession, has acted (as indeed was intended) as a barrier to the extensive incorporation of European law into Insular law. The main purpose of this paper is to take stock of Jersey's current legal relationship with the European Union against the background of developments on both sides over the last three decades. Protocol 3 is naturally the key element in this analysis.

3 At this crucial point, not only in Jersey's history, but also in the process of integration in Europe and constitutional change in the UK, I have however taken the opportunity to describe in some detail:

(a) The scope of Jersey's current legal relationship with the EU under Protocol 3 and the technical adaptations made in the recent inter-governmental conference (IGC);

(b) The way in which Jersey's relationship with Europe has evolved in practice over the last 31 years since UK accession to the European Communities;

(c) The impact on this relationship of the legal and political changes now taking place in Europe, in the UK and in Jersey itself;

(d) The main areas of European law and policy (the *acquis communautaire*) which – it seems to me – are of critical concern to Jersey both now and in the future, whether directly under the Protocol or (more probably) indirectly outside the formal legal relationship;

(e) The way other comparable and sometimes competing jurisdictions are addressing their own relationship with the EU;

(f) Possible lessons to be learned, in particular as a result of the recent negotiations on the EU's "tax package", for Jersey's external relations, including the constitutional relationship with the UK.

4 This paper is based not only on my sixteen years experience as a European civil servant in the Commission (1973-1989), but also on fifteen years service as Jersey's Brussels adviser on European law and policy (1989-2004).

5 A number of general observations may be appropriate at the outset. It is particularly apt, in my view, to conduct a review of Jersey's legal relations with Europe since 1973 in the context of a conference which deals with 800 years of Channel Islands law. The longer and wider perspective highlights both continuity and change, not only in Jersey itself but also in Europe and in the UK where Jersey retains a proud connection to the Crown. However, the increasingly rapid pace of change (particularly economic and technological but also political) makes it vital constantly to review old assumptions in order to check their

relevance in today's world. Such "reality checks" are, it is submitted, vital not only in small and vulnerable jurisdictions such as Jersey, but also in the UK and in the EU itself.[3]

6 It is of course significant that constitutional review, with the possibility (even probability) of change, is currently underway not only in Jersey, but also in the UK itself and in the EU, with a Treaty establishing a Constitution for Europe subject to referenda and ultimate ratification in the 25 Member States. The starting point for this paper must therefore be to note briefly the changes which are currently in train in all these jurisdictions. It will then be possible, against this evolving background, to take stock of Jersey's relationship today with the European Community under Protocol 3 and then to examine how this might evolve in the future.

The continuous process of European integration – widening and deepening towards a Constitutional Europe

7 The modern Europe, epitomised by political, economic and legal integration through the European Union, has its origins in centuries of increasingly devastating international conflicts from which the Channel Islands were not immune. The last 60 years of European integration flow directly from the ashes of the Second World War, in which the Channel Islands – uniquely in the UK – suffered German occupation for five years. Future historians may wonder that the Channel Islands – which still today carry the memories and even the physical manifestations of military occupation – voluntarily chose to distance themselves from a political process designed to banish such "internecine" conflict from Europe. It may be that the choice was made (and is still made today) against the background of a profound misconception of the political, economic, cultural and legal realities of European integration – a misconception which is still to a certain extent encouraged and exacerbated by public opinion on "Europe" (including the mass media) in the United Kingdom.

8 In this respect it is vital that Jersey's constitutional and international future be decided on the basis of an objective factual analysis including a comparative study of other jurisdictions in a comparable situation. Above all, due account must be taken of trends (in the UK and Europe) towards devolution and decentralisation, as well as integration.[4]

9 After the Second World War, European politicians agreed that peace and prosperity should be approached through economic cooperation. Opinion differed as to the legal and political form for such cooperation: six countries opted for the closer form of integration in

[3] As is discussed in detail below, most other comparable jurisdictions are also reviewing their own relations with the EU against the background of the extraordinary developments of the last 10 years, in particular the increasing tendency of the EU to seek the extraterritorial application of its laws and policies (the acquis communautaire). The recent experience of the EU's European neighbours, including Jersey, with the "tax package" was fundamental in this respect.

[4] The reinforcement of the subsidiarity concept and the delimitation of competences in the European Constitution provide concrete evidence of a desire at the highest political level in all Member States to ensure a proper balance between action taken at the European, regional, national and local levels. This is not (as is sometimes portrayed in the UK media) uniquely a British matter; the need for local control over issues best decided locally is equally strong, if not more so, in countries which are strongly committed to European integration such as Belgium, Germany and Spain.

a customs union comprising the ECSC, EEC and Euratom, whilst seven elected to form the European Free Trade Association (EFTA). Experience has demonstrated the attraction of the former model, which now claims 25 Member States, with over 100 more worldwide in some form of preferential relationship with the EU based in large measure on the *acquis communautaire*. Five enlargement negotiations and five inter-governmental conferences have seen the customs union transformed into the European Union, with a Constitution awaiting ratification by the Member States. A significant number of States wait in the wings for Union membership, some of which (*e.g.* Turkey) could transform the current "personality" of the Union both internally and in the world.[5]

10 Meanwhile, the looser form of integration represented by the free-trade model (in which members preserve their external autonomy) has almost disappeared in Europe, except as a transitional measure towards EU membership. Thus, Switzerland is the only State left as a member of EFTA;[6] only Norway, Iceland and Liechtenstein remain as parties to the European Economic Area (EEA) Agreement. The Europe Agreements, concluded by the EU with all former Warsaw Pact countries as a preparation for EU membership contained free trade obligations set in a comprehensive framework for the adoption of the *acquis communautaire* in its totality.

11 The unique supranational character of the Union is reflected by law which is directly applicable in national legal orders, superior to conflicting rules of national law and which provides a basis for state liability in favour of European citizens. Crucially, the Union is endowed with legal personality, both internally and externally, and with common institutions which are independent of the Member States. This is the hallmark of supra-nationality. Perhaps the most important of these institutions is the European Court of Justice (ECJ) which has not only developed the fundamental principles of "constitutional" law which uniquely distinguish the EU from other international organisations, but which has – despite the formal limitations on its jurisdiction in Article 220 EC – developed a teleological approach in the interpretation of the founding Treaties, in sharp contrast to other international courts, such as the International Court of Justice (ICJ), in pursuit of economic integration.[7]

12 In stark contrast, EFTA has, to all intents and purposes, ceased to exist.[8] Today, all other European States and non-State jurisdictions define their international relations increasingly by reference to the European Union and its laws and policies. Despite

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[5] States which may reasonably expect to become EU Members within the next 10-15 years include Romania, Bulgaria, Turkey, Croatia, Bosnia-Herzegovina, Macedonia, Serbia and Montenegro, Kosovo and, possibly, Iceland and Norway. The possibility that the Swiss people (as well as their government) might one day vote to join the Union also cannot be excluded.

[6] The EFTA Agreement of course continues to bind Switzerland to its former EFTA partners, although in the case of former EFTA States now members of the EU, account must be taken of the more than 100 bilateral agreements concluded by Switzerland with the EU.

[7] Article 220 EC provides that the ECJ "shall ensure that in the interpretation and application of this Treaty the law is observed." It has frequently been argued that, in interpreting and applying the law the ECJ has also significantly developed European law. There are no better examples of this tendency than the three fundamental principles mentioned above (direct effect, supremacy and state liability) which were established by the ECJ in *Van Gend en Loos*, Case 26/62, 1963; *Costa v ENEL*, Case C-6/64 and *Factortame*, Case C-213/89 [1990] ECR I-2433 and Case C-221/89 [1991] ECR I-3905.

[8] Only Switzerland of the original EFTA Member States remains bound, in its relations with the EU, to Norway and Iceland, by the EFTA Agreement.

Protocol 3, Jersey is probably no exception. For better or for worse, the EU has become both a legal model as well as an economic magnet for the European continent as a whole. The magnetism of the European economy (the biggest single market in the world) and the legal model afforded by the *acquis communautaire* impacts also on countries as diverse as Russia, South Africa, Mexico, Mercosur and the members of the Cotonou ACP Agreement through their Treaty relations with the EU. It is no surprise therefore that a jurisdiction such as Jersey, on the immediate periphery of the EU, finds itself caught up in this process.

13 A common theme in the debate on European integration (including in Jersey) is the extent to which power is centralised in federal or supranational institutions at the expense of the Member States. Whilst it is true that any Treaty obligations limit sovereignty (especially where supranational institutions are created by such Treaties), the assertion of an inexorable trend towards centralisation in the EU is exaggerated. It ignores an equally strong tendency – seen across Europe including the United Kingdom – towards regionalism, decentralisation and a fierce defence of local culture, language and political responsibility.[9] Thus, the post-War history of integration in Europe is certainly dominated by economic and political integration under the EC and EU Treaties.[10] On the other hand, particularly since the explicit recognition in the Maastricht Treaty (1992) of the concept of subsidiarity – the origin of which lay in the political criticisms of excessive centralisation within the EC – this trend has at least partially been reversed.

14 The conference for which this paper was prepared looked back on 800 years of Channel Islands law. Now, just after the installation of a new Commission on 1 November 2004, is an appropriate moment to "take the temperature" of European integration immediately after the fifth EU enlargement. As this paper was being prepared for publication, the presentation of the new Commission to the Parliament for its approval was withdrawn by President Barroso. This reflects continuing political instability in the EU (particularly on fundamental moral or even religious issues), including at the inter-institutional level, with the Parliament continuing to assert increased power and control over the Commission.

15 It is tempting to look back on the decade from 1985 until 1995 which saw the creation of the Single Market and the laying of the legal foundations for the single currency as the "golden years" of European integration. It is popular, particularly but not exclusively in the UK, to play down the achievements of the last Commission under its President Romano Prodi. A closer examination reveals however that the last 5 years have been (in

[9] This is reflected, both legally and politically, in the principle of subsidiarity enshrined in article 5 EC. It is nonetheless important to recall that, in contrast to the situation under public international law where treaties are interpreted so as to impose least restriction on national sovereignty, the EC/EU Treaties are founded on the integrationist premise of creating an "ever-closer union among the peoples of Europe". (Preamble, EU Treaty).

[10] In this paper, an attempt has been made to use the terms Community and Union in their legally correct sense. Thus, the EC is one of these "pillars" established at the Maastricht inter-governmental conference (IGC), whilst the EU is the over-arching institution embracing all these pillars. Under Protocol 3, Jersey is legally linked only to the EC (not the EU) and the Crown Dependencies are only legally affected by measures taken within the EC. Politically and practically however, Jersey is also affected by measures taken by the Union under the second and (especially) the third "pillars" of the EU Treaty.

a sense, against all the odds) extraordinarily productive. It is submitted that the European legal developments in the last five years (particularly in areas such as financial services) are of crucial importance for Jersey and merit serious consideration in the context of the debate on Jersey's constitutional future.

16 The changeover to the single currency was achieved, at least for twelve Member States, smoothly and on time. Despite widespread scepticism, an unprecedented expansion of the EU was achieved on time and in good order.[11] A Constitutional Treaty has been negotiated and concluded. Internally, the Commission (and to a lesser extent the other institutions) has carried out radical reforms of its administrative structure and practices.

17 Against this backdrop, the Prodi Commission set for itself in February 2002 major strategic objectives: to promote new forms of European governance; to bring political stability to the re-united European Continent and boost Europe's voice in the world; to develop a new economic and social agenda; and to ensure a better quality of life for all. Despite the high-flown language setting out these objectives, a credible case can be made for their substantial achievement against the background of a particularly difficult global political and economic environment.

18 Above all, when taking stock of Jersey's relationship with Europe over the last 30 years, it is important to note that the "European agenda" (and the pace at which it is being implemented) has completely changed compared with 1972. This alone appears to justify a fundamental re-evaluation of Jersey's relationship with this process.

19 These cross currents in the tides of European integration make any analysis of the power-structure of today's European Union a complex matter. As indicated above, much has changed in the last 30 years even if Protocol 3 has – at least in the popular view – remained "frozen in aspic". The role and influence of large Member States amongst each other and with smaller Member States, the influence on and interaction with the institutions (the Commission, the European Council, the Council of Ministers, European Parliament and European Courts) of the Member States, the inter-relationship of the institutions[12], the influence of external factors both on the EU institutions and on the Member States, and, finally, the influence of sub-State institutions, such as the regions, are all elements which require constant re-assessment.

20 Against this complex background, there is only one certainty: in the modern world, "pure" independence is a myth even for large sovereign States. There are merely different structures for sharing power (or "sovereignty") with differing degrees in the extent to which power is shared between States themselves and between States and international

[11] My own view is that the political success of enlargement and the pace at which it was achieved has masked many potential legal problems, particularly related to the accurate and complete implementation in the new Member States of EU secondary law.
[12] The continuing friction between the Commission and the Parliament is particularly important in this respect as is shown by the withdrawal of the first Barroso Commission from submission to the European Parliament, causing a politically and legally delicate hiatus in the EU's activities.

institutions. In my view, Jersey's international future must be decided against this kaleidoscopic background of change, rather than a stereotype of an irreversible trend towards ever closer integration leading to the creation of some mythical super-State along the lines of the United States of America.

Constitutional change and devolution in the UK

21 The evolution and shifting patterns of European integration have been matched by those in the United Kingdom. Although never a unitary State (since the Union with Scotland in 1706), the UK has – virtually since EU membership in 1973 – been preoccupied with a "constitutional" identity crisis. Elements of this phenomenon include the debate on the need for a written constitution, the separation of powers, the need for a Supreme Court, friction between the executive and judiciary (epitomised by the growth of judicial review) the extent of influence of "foreign" law such as the European Convention on Human Rights, EU law and public international law (especially as a result of the Iraq war), relations with the Commonwealth and the constitutional "structure" of the country following devolution, including the external dimension.

22 The Crown Dependencies and other UK overseas territories (notably in the Caribbean) have not been unaffected by this tide of constitutional change. Despite the formal constitutional responsibility of the UK for the defence and international relations of the Crown Dependencies, recent events (perhaps in particular the *de facto* elimination of national frontiers and the "relativisation" of statehood and sovereignty) have demonstrated the need for the self-governing Crown Dependencies to acquire a measure of external autonomy comparable to that which they possess internally. It is not at all clear that the UK has the political will actively to defend the interests of the Crown Dependencies internationally even when these interests do not conflict with those of the UK. It is not obvious that the difficulties faced by the Crown Dependencies, particularly in their external relations, are fully understood in London.[13] It should therefore allow these jurisdictions the necessary international personality to represent and defend their own interests, both bilaterally and with organisations such as the EU, OECD and even the UN.[14] Such external autonomy is perfectly compatible with a continuing link with the Crown, as well as with the defence of the Islands through the UK armed forces and NATO. Today however, the separation between internal and external economic affairs has virtually disappeared, driven by technological developments such as e-commerce. Legal and political responsibilities and structures should reflect this reality not only for the Crown Dependencies but probably also other jurisdictions with substantial internal autonomy.

The winds of change in the Crown Dependencies

[13] See, in this respect, the speech by the Secretary of State for Constitutional Affairs and Lord Chancellor, Lord Falconer of Thoroton to the States of Jersey on 10 May 2004. The speech is available at the DCA website http://www.dca.gov.UK/speeches/2004/lc100504.htm.

[14] These are clear precedents for the UK allowing its territories a considerable measure of freedom to defend their (sometimes conflicting) interests in international bodies. The case of Hong Kong in the GATT (later the WTO) is a case in point.

23 In 1967, when discussions began in the Channel Islands on possible UK membership of the EC, two considerations were uppermost in the minds of Jersey and Guernsey politicians. First, there was the need to preserve the Islands' traditional independence and, secondly, the need to ensure continued free access to European markets for Insular products, notably in the agricultural field. The economic and social changes in the Island over the last 35 years have transformed the situation, at least so far as the economic interests of the Islands are concerned.[15] Today, both Jersey's and Guernsey's GDP rely predominantly on financial services supported by tourism and (only to a limited extent) exports of agricultural and horticultural products. The consequent growth in the Islands' economies and level of prosperity has been accompanied by the internationalisation of their economies and of their economic interests. In recent years, this has been given added impetus by the arrival of electronic commerce and the "'information society", which diminishes the importance of international frontiers and increases the role of trade in services as opposed to goods.[16] Thus, the information society offers opportunities for economic growth to small jurisdictions, provided that the international legal structures exist (and that the small jurisdictions participate in them) to guarantee market access for the goods and services produced and marketed electronically.

24 The growth of trade in invisibles, in particular financial and related services, has offered opportunities for growth which are not dependent on the size of the jurisdiction in question. At the same time, particularly since the Thatcher/Reagan era, international economic relations have – in general terms – been dominated by deregulation, the removal of frontiers, a reduction of protectionism and increased competition not only between enterprises but between States and other "non-State" jurisdictions such as Jersey. This process has been accompanied by a rise in international crime and new demands being made on legislators, judges, law enforcement agencies such as police, tax authorities, customs, as well as sectoral regulators and supervisors, especially in the fiscal and financial services fields. The consequences of this process of "global deregulation" for the United States' economy (including the role of "off shore" jurisdictions such as Jersey) were a central theme of the recent US Presidential election campaign.

25 More broadly, despite the increasing importance of international organisations such as the United Nations and its specialised agencies (including for the purposes of this paper the WTO), the EU and the United States have emerged as two competing "poles" from a regulatory standpoint. The economic and political power of the European Union have made it both a model (in regulatory terms) and a magnet in an economic sense, in

[15] These developments and the current status and importance of Jersey's finance industry are well described in the Edwards Report (November, 1998).
[16] The EU's Lisbon strategy aims to create a competitive job-creating knowledge-based economy characterised by growth, social cohesion and respect for the environment.

part accounting for the increase in membership from 6 to 25 Member States over the past 30 years.[17]

26 European developments in the last five years on issues such as tax and international crime have highlighted, as never before, the fragility of Jersey's status under UK constitutional law and, in terms of EU law, under Protocol 3. This paper and those presented by William Bailhache and Jeffrey Jowell at this conference underline the topicality of this issue. Jersey's system of government has been subject to searching review and modifications as a result of the Clothier and Edwards reports,[18] as well as by the International Monetary Fund (IMF).[19] Although Jersey's system of government and governance (especially in the economic field) has generally been commended by these investigations, they have highlighted the fact that, almost irrespective of its formal legal status, Jersey – as a leading international financial centre – is unavoidably and inextricably affected by international disciplines irrespective of Jersey's own will on the matter and, to a certain extent, irrespective of the material scope of Protocol 3 or the constitutional relationship with the UK.

Jersey's relations with the UK and the other Crown Dependencies

27 Formally (and at the risk of over-simplification) the constitutional relationship between Jersey and the UK is not based on any formal constitutional document and has developed mainly by convention over 800 years. Jersey enjoys virtually complete autonomy in its internal governance, whilst the UK is responsible for Jersey's international relations and defence. As Professor Jowell has made clear in his presentation at the Conference, any overriding powers possessed by the UK over Jersey's affairs fall within the residual Royal prerogative, including defence, foreign affairs and the maintenance of "good government." This latter concept now has an extremely restricted meaning and certainly does not permit intervention in Jersey's affairs merely to protect the policy interests of the UK.

28 Under public international law, the UK has responsibility for Jersey's international relations. However, it is settled constitutional practice that the UK will consult Jersey before binding Jersey to obligations in international law and will normally respect Jersey's wishes (implying obligatory prior consultation) and specify the territorial application of its international agreements. Neither the UK Crown nor Parliament require Jersey to conform to international "soft" law, such as the EU Code of Conduct on business taxation or the OECD measures in this area, especially when the matters in question (taxation) fall within

[17] Neutral States such as Sweden, Finland and Austria (not to mention Ireland) would not have joined the Union were it not for the "pulling power" of the Union's institutions and their power in economic decision-making. These States, far from subscribing to a centralised view of European integration, could not accept a role of "second-class citizens" outside the Union, particularly as regards Single Market legislation. They preferred to have "a seat at the table" rather than being relegated to a form of dependency as a "second class European citizen".

[18] The Clothier Report was commissioned in March 1999 to review all aspects of the machinery of government in Jersey, excluding however the constitutional relationships between the Bailiwick and the UK and the EC. The Report was published in December 2000. The Edwards report (published on 19 November 1998) reviewed financial regulation in the Crown Dependencies, including cooperation with overseas regulators, as well as financial crime and registered companies. It is discussed in some detail later in this paper.

[19] www.imf.org"<www.imf.org>

Jersey's settled area of autonomy. The same is true, in my view, in areas of EU law (such as direct or indirect taxation) which clearly fall outside the Protocol. It is an interesting and unresolved question to what extent the UK possesses the power (notwithstanding Jersey's autonomy in virtually all areas of domestic policy) to take steps to ensure that Jersey respects its EU obligations under the Protocol,[20] for example in areas such as agricultural state aids or the free movement of goods.

29 One of the conclusions of this paper is that, in the interests of Jersey's continued political independence and stability – as well as its economic prosperity – it would now be appropriate for the UK to grant increased responsibility for international relations to Jersey, in those (mainly economic) areas where Jersey exercises internal autonomy. The present system whereby the UK issues "letters of entrustment" on a case-by-case basis appears to be inadequate. It lacks the continuity and legal certainty which are needed to provide Jersey's international partners (whether States or international organisation) with the guarantees that they need in dealing with Jersey's authorities. Thus, in my opinion, the lack of clarity regarding Jersey's legal status under the UK Constitution (though not under Protocol 3) was – at least initially – a cause of misunderstanding in the Council of Ministers, which the UK appears to have done little to correct during negotiations on the implementation of the tax on savings Directive (TOSD).

30 It may be that practice over recent years has led to a constitutional convention[21] to the effect that Jersey now enjoys sufficient international personality at least to engage in direct relations with the EU institutions and Member States for example on tax and related matters such as financial services (*e.g*. for market access purposes) and international cooperation in matters involving economic crime (*e.g*. money-laundering). Whether such responsibility as has been ceded to Jersey, embraces formal treaty-making power (as opposed to less formal agreements, arrangements or commitments within the scope of its internal autonomous powers) is more doubtful. Necessarily, in the absence of a written constitution and a Supreme or Constitutional Court, all these matters are subjective and somewhat speculative. This is why it is essential that Jersey be clearly endowed by the UK with the essential degree of external authority in order properly to defend and enhance its current level of economic prosperity and that this be done in a way which is capable of being clearly recognised by Jersey's international partners around the world.

31 In contrast with Gibraltar and other overseas territories for which the Foreign and Commonwealth Office (FCO) is responsible, UK ministerial responsibility for the Crown Dependencies was transferred in 2001 from the Home Office to the Department of Constitutional Affairs (DCA),[22] under the ministerial authority of the Secretary of State for Constitutional Affairs and Lord Chancellor. Despite the laudable efforts of DCA officials to

[20] As argued elsewhere in this paper, like other comparable parts of the EC Treaties, the Protocol is in effect part of UK constitutional law.
[21] There appear to be no precise criteria under the UK Constitution to determine when practice has crystalised into a convention. It should however be noted that, in his speech to the States on 10 May 2004, Lord Falconer expressly recognised that "the TOSD bilateral agreement signed by Jersey would enable Jersey to deal bilaterally with other Member States…"
[22] Statutory Instrument 2001 No. 3500.

strengthen working relations with all the Crown Dependencies, Jersey's international relations in recent years (for example on the sensitive issues at stake with the EU and the OECD) have not been helped by the complex chain of responsibility which currently exists on major policy issues within the UK Administration.

32 In his speech to the States on 10 May 2004, Lord Falconer accurately summarised the current situation, but – in my view – under-stated the difficulties arising in practice, not only when Jersey's interests diverge from those of the UK, but also as far as the external representation of Jersey's interests are concerned more generally. He said in that speech -

> "The key issue to be addressed to get the balance right between my Department facilitating, supporting and encouraging bilateral links between Jersey and Whitehall Departments whilst ensuring we, that is the Department of Constitutional Affairs, are properly involved and participating in those matters where we can add value. The role for me and my team is to promote and support the interests of Jersey whilst not compromising the position of the UK Government[23]… There will undoubtedly be times when Jersey's interests do not fit neatly with UK policies. On these occasions, we must ensure that we have viable speedy channels of communications in place – and mechanisms to manage those situations in a mature, constructive and sensible way."[24]

33 Formal communications between Jersey and London must pass – in Jersey – through the Lieutenant Governor and the Bailiff on their way to the relevant administrative department. In London, the DCA acts as a conduit for channelling issues affecting Jersey or the other Crown Dependencies to the relevant Ministries and for coordinating the position of the UK authorities. Where international relations are concerned, the FCO is involved and, in the case of formal communications with the EU institutions, the UK Permanent Representative to the EU in Brussels (UKRep) plays an important role.[25]

34 Two main criticisms may be made of this system. First, it tends to diminish the importance given in London to Insular matters. There are no votes for a British government in its policies towards the Crown Dependencies! Secondly, the procedures are lengthy and slow, in both directions. Even when issues arise requiring international action which are not (or which ought not to be) controversial as between Jersey and the UK, these will not usually command priority attention in London, compared with the UK's "domestic" priorities. Recent cases have occurred where, in discussions in Brussels with the Commission on specific issues involving the vital economic interests of the Island, considerable concerted efforts were required by Jersey representatives in order that the EU institutions first understood and then acted on the Insular concerns. Direct action, as

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[23] This is of course precisely the extent of the problem which confronts Jersey and the other Crown Dependencies in their external relations and which is a central theme of this paper.

[24] See fn. 13

[25] These are of course the formal channels of communications. Although these are still respected, the advent of electronic communications has of course transformed (and made more rapid and informal) communications between and within public administrations all over the world. This is certainly true in the case of Jersey and even more so in the case of the UK administration.

of right, by Jersey with the Commission would at least have ensured that earlier and more direct attention was brought to bear on the subject, even if positive results cannot always be guaranteed. Of course, when UK and Insular interests clash (as in the case of the TOSD and the Code of Conduct), it is crystal clear that equity (and common-sense) requires that Jersey be allowed to conduct its own international relations.[26] It is illogical (and arguably unconstitutional) for the UK to accept, on the one hand, Insular autonomy in domestic policy and then to seek to impair or reduce this independence by imposing restrictions on Jersey's ability to protect or enhance this autonomy internationally. With respect, it is not sufficient for UK Ministers to say, as Lord Falconer recently did to the States of Jersey, that "when Jersey's interests do not fit neatly with UK policy" there must be "mechanisms in place to manage those situations in a mature, constructive and sensible way".

35 The tensions inherent in the constitutional relationship between Jersey and the UK have surfaced comparatively recently. They have little if anything directly to do with Protocol 3. They relate rather to Jersey's success as a global player in the field of financial services and to the Island's increased visibility and involvement in international commerce and finance. The Island's designation as a "tax haven" or "offshore financial centre" may also be relevant in this context. The difficulties which are posed for Jersey and the other Crown Dependencies in international relations as a result of the formal division of responsibility for internal and external affairs, are not unique either to the Crown Dependencies or to the UK. The devolution of sovereignty (or at least legal responsibility) to Scotland, Wales and Northern Ireland in a number of areas of domestic policy may well pose similar problems, particularly in the EU context.[27] Amongst EU Member States, Germany (especially, as regards the broad constitutional autonomy of its Länder), Spain and Belgium have comparable problems of representing "sub-State" entities' interests at international or EU level. Pragmatic means have been found at EU level by these (and other) Member States to ensure adequate and fair representation for constituent regions, notwithstanding the fact that – in formal terms – international responsibility for the actions of the constituent States resides ultimately with the sovereign power.

36 The case of Jersey and other Crown Dependencies is of course different from that of Länder or provinces such as Bavaria, Flanders or Catalonia, which are fully integrated – together with their Member State – in the EU. However, the minimal substantive context of Protocol 3, which for nearly 30 years ensured that the representation of Jersey's interests in the EU was largely a theoretical issue, now means that if it were accorded

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[26] The notion that dependent jurisdictions with fully devolved internal responsibilities may adopt policies which do not coincide (or even clash) with those of the sovereign power is not unusual. The case of Hong Kong, when it was a UK colony is instructive. Hong Kong and UK interests in the international trade in textiles were completely opposed. This did not affect the fact that, under public international law, the UK was formally responsible for actions of the Hong Kong authorities.

[27] The fact that devolution in the case of Scotland, Wales and Northern Ireland has been regulated by Statute (specifying, *inter alia*, matters which are "reserved" to the UK authorities) should at least provide greater legal certainty for these regions than for the Crown Dependencies. These are however comparatively early days and it remains to be seen how the external dimension of devolution will work in practice. See further, Michael Keating, *Devolution and Public Policy in the UK: Divergence or Convergence (2001*).

external autonomy by the UK, Jersey would act essentially as a "third country" similar to Andorra or Liechtenstein rather than as a full participant in the EU.

37 In one respect at least, such a situation would facilitate matters for the UK. A comparison with the case of Gibraltar is instructive. The application of most internal market law to Gibraltar has sometimes created difficulties for the UK, as well as Gibraltar, when the Commission has launched state aids or infringement proceedings against the UK as the Member State responsible for Gibraltar's interests in the EU. Like the Crown Dependencies, Gibraltar is constitutionally autonomous in most areas of internal economic policy. The UK therefore has limited means under UK constitutional law to compel Gibraltar to take legislative or administrative action to comply with EU law. The fact that – in contrast to Gibraltar – Jersey's obligations under EU law are confined essentially to trade in goods means that conferring greater external authority on Jersey to conduct its own relations with the EU, the OECD and third countries (such as the United States) would not bring with it the complications involved as a result of the special status – essentially inside the EU's Single Market – of Gibraltar. Or course, formally, one concern of the UK must be that, under public international rules on State liability, the UK is ultimately responsible for any breaches of international law (including failure to respect engagements entered into) by its Dependencies. This is clearly an issue which must be discussed between Jersey and the UK, as one aspect of the Island gaining greater responsibility in its international relations.

38 One other issue which needs to be addressed in the context of Jersey's relations with the EU, is Jersey's relations with Guernsey and the Isle of Man. Although all three jurisdictions have the status of Crown Dependencies under UK constitutional law and the terms of Protocol 3 are identical for all three jurisdictions, the constituent elements of each "bilateral" relationship with the UK is different. The Isle of Man for example has a "common purse" arrangement with the UK, requiring the application of VAT by the Manx authorities and based on a customs arrangement with the UK.[28] All three Islands are, however, within the "common travel area" with the UK.

39 The terms of Protocol 3 are of course identical for all three Crown Dependencies and, at least until recently, they conducted their relations on EC affairs quite independently.[29] The recent discussions with the EU authorities on the TOSD (and with the UK authorities on the adaptation of Protocol 3) have however required extensive coordination between the three jurisdictions as well as joint discussions in Brussels and London. Thus, although each Island will sign separate agreements with each Member State, from a policy standpoint all three Islands were clearly in a similar position, thereby

[28] In my view, the fact that the Manx authorities apply a system of VAT under the terms of an agreement with the UK does not mean that the Isle of Man is bound by EU rules on VAT. Such tax provisions are clearly outside the scope of Protocol 3. Manx autonomy over indirect tax matters remains untouched by Protocol 3 and is limited only by its bilateral arrangement with the UK.
[29] The economic interests of the three Islands are however quite different and, even in their relations with the UK authorities, each Island operates independently of the others.

making it possible to negotiate jointly the same arrangement for all three Islands with all 25 Member States.[30]

40 The question arises whether any lessons can be drawn from these recent experiences for the future. In my view, a distinction has to be drawn between the conduct of everyday relations with the European Union and its Member States on the one hand, and possible situations which might arise in the future where the Union requests certain action to be taken under or outside the Protocol by all three jurisdictions. It is also open to question whether politically the Protocol could be terminated or radically revised on behalf of one or two of the three Crown Dependencies or whether all three territories would, in practice, have to be involved. Legally, there is no reason why the UK could not seek to terminate or indeed to amend the Protocol for Jersey alone. Article 48 TEU currently requires any amendment of the Treaties to be done by inter-governmental conference (IGC). However there is no reason – legally at least –why this could not be done in an appropriately "light" manner if the political will existed on all sides, with effects limited to Jersey.[31] On the other hand, the amendment would require ratification by all Member States in accordance with their constitutional requirements. Even this would not be an insuperable barrier provided the other Member States perceived the matter to be of minor importance. However, for the United Kingdom authorities to undertake such a move could clearly only occur after the most careful consideration at the highest level and as a result of the clearest possible expression of will by the Island or Islands requesting the move. Such a development would obviously involve the closest possible consultation between all three Islands, the UK authorities and the EU institutions and Member States.

41 At a more mundane level, in the course of recent months, an increasing number of issues have arisen as a result of EU legislative initiatives which, although falling outside the scope of the Protocol, affect the Islands' common interests. In certain cases, it may be that the three jurisdictions wish to adopt a common position on such measures and make representations together to the EU authorities, either directly or through the United Kingdom. In other cases, the economic interests of the Islands may differ (or they may not share the same legal approach) and separate approaches may be adopted. In any event, as the EU's regulation of its Single Market progresses (for example in areas such as financial services and economic crime) it may well be that all three Islands will feel the need for more consistent coordination on their policies toward the EU, both amongst themselves and (as is already happening) with the UK authorities in London, through the DCA. Given their constitutional and economic differences however, it is difficult to envisage a situation where the three jurisdictions negotiate jointly with the EU (with or without the presence of the UK), for example on issues of market access for their services providers or other industries based on mutual recognition.

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[30] See Council document 7408/04 (FISC 58) of 16.3.2004 which contains the texts of the agreements for the UK and Dutch dependent and associated territories.

[31] The status of Greenland was, for example, changed in 1984, when Greenland became an overseas territory subject to Part IV of the EC Treaty. The Treaty of withdrawal (of March 13, 1984), or "*Greenland Treaty"* (OJ L 29 of 1.2.1985), came into force on February 1, 1985.

The symbolic importance of Protocol 3

42 The terms of Protocol 3 reflect the political preoccupations in the Channel Islands and the Isle of Man in the early 1970s. Despite the far-reaching changes in Jersey's economy and demography over the last 30 years, it is clear that the fundamental political preoccupations remain broadly unchanged today. These are, firstly, a deep-rooted desire to preserve the Island's traditions, based on the 800 years autonomy which this Conference rightly celebrates and, secondly, a need to develop market access for Insular goods and services on a global basis[32] in order to preserve Jersey's economic prosperity and independence into the future.

43 In 1973, Protocol 3 achieved these goals to a remarkable extent. Whether this is so in 2004 is less clear. Certainly, the Protocol has ensured that the Crown Dependencies have remained – almost completely – untouched by the broad swathe of laws and policies developed within the European Communities and Union. The political and practical implications of this are considered below. In any event, the Protocol itself is worth examining in some detail and this is done in the next section of this paper.[33] First however, it is important to recall the legal context in which the Protocol is set.

44 Protocol 3, which established the status of the Channel Islands and the Isle of Man in Community law, is a unique legal text. It has no parallels in over 50 years of European integration. The circumstances under which it was drafted 32 years ago are difficult to establish. However, the records of debate at the time in the States (both in Jersey and Guernsey) make it clear that when the Islands were consulted as to the nature of the links (if any) which they wished to establish with the European Communities, they took the view that it would be sufficient to preserve free trade in their manufacturing and (mainly) agricultural goods. For this reason, the Protocol establishes a minimal "umbilical cord" linking the Crown Dependencies to the European Community. Jersey, Guernsey and the Isle of Man are, by virtue of Protocol 3, part of the customs territory of the Community and part of the Single Market for the purposes – broadly speaking – of the free movement of goods.[34]

45 For the sake of clarity it is worth underlining that Protocol 3 (which in any event must be interpreted restrictively as a result of Article 299(6)(c)) only provides a link for the Crown Dependencies to the European Community (EC) and not to the European Union (EU). The latter concept was introduced in the Treaty on European Union at the Maastricht inter-governmental conference (IGC) in 1992 and created the "three-pillar structure" for the Union covering the European Community, provisions for a common foreign and security policy (CFSP) and provisions for police and judicial cooperation in

[32] It is important to keep in mind, in the debate on Jersey's relationship with the UK and the EU, that the Island's economic aspirations are global, especially in the field of financial services.

[33] As Commission Vice President Lord Cockfield remarked on more than one occasion to Member States' Ministers in the Council, it is rare that people (especially politicians) actually read the original texts of treaties, directives, regulations etc. To do so can be both revealing and rewarding for politicians and citizens as well as lawyers!

[34] A short and legally authoritative description of the material scope of the Protocol is set out in Advocate General La Pergola's Opinion in *Rui Roque* [1998] ECR I-4607 at paras. 8-11.

criminal matters. The legal link provided by Protocol 3 is with the first "pillar" only. As is discussed below, the Treaty establishing a Constitution for Europe will in future formally link the Crown Dependencies with the Union, although the substantive commitments will remain unchanged. Thus, Jersey's legal obligations under European Union law will remain those formally covered by European Community law, despite the disappearance of the "Community" under the Constitution.

46 The Courts in the Isle of Man have recently noted that Regulation 706/73 suffers from "poor drafting and a resultant lack of clarity".[35] Likewise, the Protocol gives the appearance of having been drafted in haste and without excessive concern for conceptual and linguistic consistency with the Treaties as a whole. As is discussed below, this is in marked contrast to the Treaty relationships established more recently between jurisdictions such as Andorra and San Marino with the EU. In addition, in the last 31 years, only three cases have been referred from Insular courts to the European Court under Article 234 EC for the interpretation of the Protocol. Two concerned Article 4 and the "non-discrimination" provision (see below). One pending case – a reference from the Royal Court in Jersey – deals with the application of EC competition law in the agricultural sector. This case appears to be the first dealing with the substantive provisions of Article 1 of the Protocol.

47 The Protocol settling the status of the Channel Islands and the Isle of Man under Community law is one of 30 Protocols attached to the Act of Accession to the European Communities of Denmark, Ireland, Norway and the United Kingdom.[36] The legal basis of the Protocol is Article 299 EC (formerly Article 227 EC). This Article defines the territorial scope of the Treaty and measures adopted under the Treaty. Article 299(1) provides that the Treaty is to apply to the Member States. The succeeding paragraphs make special provision for the application (or non-application) of the Treaties to particular countries and territories which are related to the Member States. In broad terms, paragraphs 2 to 5 define the conditions under which the Treaty is to apply to various territories and countries. Paragraph 6, which applies to the Crown Dependencies, is based on the opposite premise, namely that the Treaty is not to apply at all (in the case of the Faroe Islands or the Sovereign Base Areas of the UK in Cyprus) or is only to apply to the Channels Islands and the Isle of Man to the extent necessary to secure the implementation of the arrangements set out in Protocol 3. This fundamental provision (which is sometimes overlooked) is of great importance in ensuring that the Crown Dependencies are covered by EC/EU law only to the narrowest extent possible. No teleological or extensive interpretation of the Protocol should be possible – either by the Commission or the ECJ - taking into account the restrictive language of Article 299(6)(c). This is in contrast, for example, to the French overseas departments, the Azores, Madeira, the Canary Islands

[35] Manx Ices Limited v. Department of Local Government and others [2001] 3 MLR 64 at para. 65.
[36] OJ Special Edition (C 73) of 27 March 1972. Following a rejection of the terms of membership in a referendum in 1972, Norway did not join the EC and is now a party to the European Economic Area (EEA) Agreement. Other Protocols attached to the Act of Accession deal with issues such as the status of the Faroe Islands and Greenland and various sectoral issues.

and the Åland Islands. It is also in contrast to the arrangements for Gibraltar and for the overseas countries and territories listed in Annex 2 to the EC Treaty (the OCTs).

48 In order to fully appreciate the extent to which Protocol 3 has kept Jersey outside the mainstream of European law and policy, the case of Gibraltar is particularly interesting, given the relative similarity between the geographical size and economic interests of that territory compared with the Crown Dependencies. Article 299(4) EC provides that "the provisions of this Treaty shall apply to the European territories for whose external relations a Member State is responsible." As the Court of First Instance (CFI) made clear in the action brought by the Government of Gibraltar against the Commission in 2001,[37] by virtue of Article 28 of the UK Act of Accession acts of the EC institutions relating to agriculture, as well as acts on the harmonisation of laws concerning turnover taxes (i.e. VAT) shall not apply to Gibraltar unless the Council provides otherwise. In essence, this means that Gibraltar is covered by EU/EC single market legislation, including financial services and direct taxation.

49 The difference in treatment which Gibraltar has received as a result of this status is striking and is in contrast to the situation of the Crown Dependencies as a result of the application of Protocol 3. Thus Gibraltar has been subject to state aids investigations by the Commission in respect of its direct tax legislation, in addition to having its tax legislation subject to scrutiny by the Primarolo Committee (as has Jersey) under the Code of Conduct on Business Taxation.[38] Furthermore, the United Kingdom, which represents Gibraltar's interests in the EU[39], has been subject to infringement procedures brought by the Commission under Article 226 EC for the alleged failure by Gibraltar to implement various Single Market measures, for example in the field of financial services and telecommunications. On the positive side, Gibraltar is a full participant in the Single Market at least in legal terms. It is not yet evident that Gibraltar has been able, in practical terms, to capitalise on these advantages, for example by marketing its financial or other services in Spain and other Member States. Nonetheless, the legal status of Gibraltar presents an interesting comparison with that of the Crown Dependencies.

50 Particularly in recent years – and in parallel with the increased profile of the Crown Dependencies in EU affairs – "Protocol 3" has acquired almost iconic status, at least in the Islands themselves. It is perhaps time to question whether this is deserved. The Protocol has not protected Jersey from the imposition of foreign (EU) tax laws. It has not guaranteed access to EU financial or other services markets.[40] It has not had any measurable effect on Jersey's constitutional relations with the UK.[41] However, with the

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[37] Joined cases T-195/01 and T-207/01, *Government of Gibraltar v Commission*.

[38] The Committee established to implement the code of Conduct was chaired initially by the UK Paymaster General, Dawn Primarolo and was called the Primarolo Committee.

[39] Note however that, in its state aids litigation before the CFI, Gibraltar's *locus standi* to represent its own interests was supported by the UK (which did not however intervene in the case) was approved by the CFI.

[40] At the time of writing, Jersey has not been made a party to the WTO Agreements of 1994 as a result of UK ratification on behalf of Jersey. Thus, Jersey has no legal basis upon which to seek access to third-country markets for its financial services products outside (or conceivably inside) the EU.

[41] Like other comparable Treaty provisions, Protocol 3 is an integral part of UK constitutional law. To the extent that this is possible under Community law on the direct effect of Treaty provisions, the Protocol could be invoked in the courts, for example

exception of the EU "tax dossier", the minimal material scope of the Protocol has kept Jersey out of the mainstream of European law and policy as it has been developed in the Community and Union institutions. This is of course certainly in accordance with Jersey's political wishes – both in 1972 and today – although a more detailed "cost-benefit" analysis is essential before deciding whether the longer-term economic interests of Jersey are best-served by such legal, political and economic isolation.

The ambiguous provisions of Protocol 3

51 It is often said that the Crown Dependencies are covered by EU law on the customs union and on the free movement of goods.[42] As two rulings of the ECJ make clear however, the Islands' freedom to discriminate between EU nationals (although not between Jerseymen and EU nationals) is limited by article 4 of the Protocol.[43] Certain disciplines also exist in the field of competition and state aids for agricultural products. Notwithstanding the enactment of a Council Regulation in 1973 to define the scope of the Protocol's application to trade in primary and processed agricultural products, this area remains unclear both as regards the extent to which EU competition law and procedural state aids rules apply to Jersey. It does at least seem clear that the substantive rules for agricultural and fisheries state aids do not apply to the Crown Dependencies. And in the field of competition policy, it is possible that a case currently pending before the ECJ on reference from the Royal Court of Jersey (dealing with the competition law aspects of producers' organisations for potatoes) may clarify the application of competition law under the Protocol in the field of agriculture.

52 The precise language of the Protocol does not reflect (even approximately) the terms of corresponding provisions in the Treaty such as articles 23-24 on the free movement of goods, articles 25-27 on the customs union and articles 28-31 on the prohibition of quantitative restrictions. Until or unless the provisions of article 1 of the Protocol are subjected to judicial scrutiny, it is impossible to define their precise scope. Nonetheless, in my view, it is unwarranted to assume that all Community law on customs and the free movement of goods (especially the secondary *acquis*) apply to Jersey and the other Crown Dependencies by virtue of article 1(1) of the Protocol. Likewise, as far as article 1(2) is concerned – as is discussed in detail below – there is no doubt that Community law on competition and state aids in the agricultural sector are only partially applicable to the Islands.

53 Article 1 provides that Community rules on customs matters and quantitative restrictions shall apply to the Crown Dependencies under the same conditions as they apply to the United Kingdom. In particular as far as manufactured goods are concerned,

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in cases involving the extent to which EC law is (or could be made) applicable in Jersey. It would have been interesting if such a situation had arisen as a result of the recent attempts by the UK to impose tax reforms in Jersey under the TOSD and the Code of Conduct on business taxation. At the very least, as a result of the Protocol, it could be argued that Jersey had a legitimate expectation under EC law not to have EC tax rules extended to it without its consent.

[42] In the *Rui Roque* case, the Court itself, summarizing the legal status of Jersey under the Protocol, said in terms that Jersey was bound by the rules of the free movement of goods, without being more specific on the issue.

[43] For a detailed discussion on the ECJ's interpretation of the article in two cases, see below.

customs duties and charges having equivalent effect between these territories and the Community were to be progressively reduced according to the timetable set out in articles 32 and 36 of the UK Act of Accession. At the same time, the common external tariff was to be progressively applied in accordance with the same timetable.

54 There is no authoritative judicial interpretation of the scope of article 1 of the Protocol. It is therefore not entirely clear which Treaty provisions (including those with direct effect such as articles 28 and 30 EC) are applicable to Jersey by virtue of the Protocol. It is even less clear how much of the EC *acquis* on the customs union and the free movement of goods is applicable. In the absence of disputes giving rise to litigation either in the Jersey or European Courts (or before the Commission), these issues are theoretical. However, in addition to doubts concerning the material scope of the secondary law and ECJ case law applicable to Jersey, it is also important to note that certain procedural rules may well apply to Jersey and the other Crown Dependencies under article 1 of the Protocol, including rules on customs cooperation and for the notification of new technical regulations under Directive 98/34 as amended.[44] In the field of state aids for agriculture and fisheries it is likely that at least some of the procedural provisions of Regulation 659/1999 apply to the Crown Dependencies.[45]

55 As far as the free movement of goods is concerned, the material scope of EU secondary law in this area is potentially very wide indeed.[46] In addition to the voluminous case law of the European Courts based on *Cassis de Dijon*[47], secondary legislation adopted under the Single Market framework now embraces "vertical sectors" such as food law, pharmaceuticals, telecommunications, as well as "horizontal" issues such as mutual recognition and government procurement (of goods, but not services). A further guide to the potential scope of the concept of the free movement of goods (whether or not this is co-extensive with the scope of article 1 of the Protocol) is given in the original Commission White paper on completing the internal market (1985), in particular the sections dealing with the removal of physical and technical barriers to the free movement of goods.[48] It is indicative of the generally benign approach of the EU (especially the Commission) to the application and enforcement of the Protocol, that virtually no attention appears to have been paid (in the Commission, in the UK or indeed in the Channel Islands) to the extent to which the secondary and judicial *acquis* has been implemented in the Crown Dependencies in application of Protocol 3.

Particular problems in the field of agriculture, in particular in state aids

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[44] It is important also to note, *en passant*, that the word "goods" in EC law embraces electricity, as well as other energy products. This may well have a certain importance in the future to the extent that the Channel Islands become connected to grids in the EU. On the scope and importance of Directive 98/34 in avoiding the creation of new technical barriers to trade in the Single Market, see Oliver, Free movement of goods in the European Community (2003) at pp. 482-501.

[45] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty. OJ L 083, 27/03/1999 P. 0001 – 0009.

[46] See P. Oliver, The *free movement of goods in the European Community* (2003), for a comprehensive view of the current EU law on the free movement of goods.

[47] *Rewe-Zentrale AG v Bundesmonopolverwalthung für Brannstwein*, Case 120/78 [1979] ECR 649.

[48] COM (85) 310 final. See also *The Internal Market – 10 years without frontiers*, available on DG MARKT's website at http://europa.eu.int/comm/internal_market/10years/workingdoc_en.htm.

56 Article 1(2) of the Protocol makes more extensive provision for the implementation of EC rules by and in the Islands, than is the case with manufactured goods or services. Article 1(2) provides -

> "In respect of agricultural products and products processed therefrom, which are the subject of a special trade regime, the levies and other import measures laid down in Community rules and applicable by the United Kingdom shall be applied to third countries.
>
> Such provisions of Community rules, in particular those of the Act of Accession, as are necessary to allow free movement and observance of normal conditions of competition and trade in these products shall also be applicable."

57 Article 1(2) then empowers the Council to determine the conditions on which these sub-paragraphs are to be applied. This was done in Council Regulation 706/73, as amended[49]. Considerable difficulties exist in interpreting the scope of these provisions as a result of the massive development in EU agricultural law – as well as in competition law and state aids - since 1973. One key problem is to distinguish the trade and competition rules which apply to these products in the case of the Islands from the rules of the Common Agricultural Policy (CAP), in particular the Common Market Organisation (CMO) Regulations. These Regulations now cover all agricultural and fisheries sectors except potatoes, bananas and agricultural alcohol. It is clear that these Regulations do not apply as such to the Islands and, certainly, the Islands are outside the scope of the CAP, in the sense that they do not benefit from EU financial support measures. Nonetheless, it is an open question (and one which has not been judicially considered) as to the scope of article 1(2) in the field of state aids and competition policy.

58 Historically, within the EU, state aids for agriculture and fisheries have been subject to different legal disciplines from those applicable to industrial products. Whereas, in the field of industrial goods, the prohibition on state aids (and accompanying derogations) in article 87 have been applied from the outset, the situation in agriculture is entirely different. Under articles 32-38 EC, Community rules on competition (including state aids) were only to apply to production of and trade in agricultural products to the extent determined by the Council "within the framework of article 37(2) and (3) and in accordance with the procedure laid down therein, account being taken of the objectives set out in article 33".

59 In essence, the understanding upon which these provisions were based was that Member States should accept Community disciplines on state aids only to the extent that Community financing and other measures of structural support replaced existing national measures. This has now happened, virtually across the board so that – in theory at least – Community state aids disciplines now apply to agriculture, fisheries and industrial goods

[49] Council Regulation (EEC) 1174/86 of 21.4.1686, OJ L 107 of 24.4.1986.

more or less in equal measure. From 1962 onwards in the Community and since 1 January 1973 in the case of the Crown Dependencies, Members States' obligations on state aids were limited to notifying the Commission of individual measures and schemes. For the Commission, the requirement under article 88(1) to monitor existing aid schemes and, if necessary to propose appropriate measures, also applied. This limited application of EC state aids law was extended to the Crown Dependencies in Regulation 706/73 and remains valid today.

60 The importance of agriculture and fisheries is not identical for Jersey, Guernsey and the Isle of Man. As a result of its size and geography, these areas are of greater economic and political importance for the Isle of Man. Nonetheless, the Protocol and the relevant *acquis* applying under it should in theory be the same for all three Islands. In practice, agricultural support measures appear to have been used more frequently by the Isle of Man than the other Dependencies. In recent years, to judge from publications in the Official Journal, the Commission, while formally recognising the limited application of the state aids disciplines in agriculture and fisheries to the Crown Dependencies, has nonetheless conducted rigorous assessments of the notified measures under rules of Community law which do not formally apply to the Crown Dependencies. The Commission has occasionally found that proposed measures would be incompatible with relevant rules of Community law. This appears to have occurred most frequently in the case of the Isle of Man. Since the Commission recognises that the sanctions which are available against Members States are not applicable under the Protocol and Regulation 706/73, the Commission can do no more than to recommend that the measures not be implemented or that they be amended.

61 Article 2 (second sub-paragraph) of Regulation 706/73 does provide that the Commission may propose to the Council that articles 87-89 are to apply in their entirety to the Crown Dependencies. No such proposal has yet been made. It is a matter of speculation as to the conditions which would provoke such a proposal from the Commission. Even if the Commission appears to find fault increasingly with measures notified, there seems to be no political will – at present at least – to extend the application of state aids disciplines in the absence of serious distortion of trade with Member States and/or complaints from the latter.

62 From a strictly legal point of view the Commission should not in any event review proposed Insular state aids measures by reference to rules and criteria which, by common accord, are not applicable to the Crown Dependencies. In this context, the use by the Commission of the CMOs and other horizontal or vertical Regulations in order to assess state aids in the Crown Dependencies is inequitable as well as unlawful in at least two respects. First, the rules do not apply to the Islands, but in addition, neither do the Islands benefit from the financial and structural support mechanisms available to Member States and economic operators in the EU. For 31 years since Protocol 3 was concluded, the Islands have – in contrast to EU Members States – been self-sufficient in agriculture and

fisheries. It is therefore unjust and arguably illegal that their own self-financed support measures should be measured against criteria tailored to Members States in a totally different economic and legal situation.

63 This point can be made more generally. So far in its assessments made under article 1(2) of the Protocol and Regulation 706/73, the Commission appears to have made no concession whatsoever to the unique legal and economic situation of the Crown Dependencies. In agriculture and fisheries, exclusion from Community support under the CAP and CFP is of fundamental importance in assessing the permissible scope of state intervention in the Islands' exposed and vulnerable micro-economies. In law, even article 87(1) itself - which defines the concept of "aid" – is not applicable under the Protocol. The Commission would undoubtedly argue that aid notifications cannot be reviewed in a vacuum. Nonetheless, given the total self-sufficiency of the Islands in this area (and the restrictive provisions of article 299(6)(c)), it is submitted that the relevant Community *acquis*, including article 87(1), must be applied with equity and flexibility by and to the Crown Dependencies. In particular, taking into account the fact that Regulation 706/73 clearly provides that only "aid related to trade" is to be caught by the notification requirement, it is clear that structural measures, income support or aids in fields such as environmental protection, rural development, training of young farmers, early retirement schemes or quality improvement measures, are not caught by the notification requirement. To interpret the Protocol and Regulation 706/73 otherwise would subject insular agriculture and fisheries policies to EU disciplines (in particular those under the CAP and CFP) to an extent beyond that envisaged by the Protocol's authors in 1972.

64 The agricultural state aids issue also sheds light on the way Protocol 3 operates, as between the Insular authorities, the UK and the Commission. In the first place, as indicated above, there appears to be a strong case for the Islands to apply Regulation 706/73 with prudence. The fact that neither article 87(1) (defining "state aid") nor the CMOs apply to the Crown Dependencies – and that the Commission lacks any enforcement power – means that careful consideration needs to be given before measures are notified by the Commission. Many modern "aid" measures in the agricultural or rural areas have environmental, social or other purposes. It seems that such measures are not caught by Regulation 706/73 since they are unrelated to trade. Likewise, when the Crown Dependencies take measures analogous to those provided for at EU level in the CMOs (most of which are "structural" and have no direct effect on trade), these also should not require notification. In any event, to the extent that public support measures for agriculture and fisheries taken by the Crown Dependencies do not affect trade or competition with the EU, the scope of article 2 of Regulation 706/73 (and thus of the Protocol) is more theoretical than real.

65 Finally, the issue of agricultural and fisheries aids may be used to highlight another "grey zone" in the Protocol. Perhaps more than any other area except competition policy, EC state aids law has been developed, from a short Treaty article (article 87(1) EC), by

administrative practice of the Commission and judicial review by the European courts.[50] Even fundamental concepts such as the Commission's power to order States to recover illegally-granted aids with interest from the date of grant, was created and proposed by the Commission and endorsed by the ECJ. In 1999, the Council adopted Regulation 659/1999 which broadly codifies procedural rules on state aids. Some of these provisions deal with those parts of the Treaty (notably article 88(1) and the first sentence of article 88(3)) which are applicable to the Crown Dependencies. There is therefore no doubt that some of the provisions of Regulation 659/1999 apply to the Crown Dependencies, although in the absence of judicial practice it is not possible to define which provisions with complete precision.

Protocol provisions other than those on trade

66 Article 2 of the Protocol provides that the rights of Channel Islanders and Manxmen in the United Kingdom are not to be affected by the Act of Accession. Equally however, such persons are not to benefit from Community provisions on the free movement of persons and services. Although this limitation was clearly acceptable to the Islands in 1972 and may well be today, the fact that the Islands' economies are now dominated by service industries (particularly in financial sectors) as compared with the agricultural production which dominated the Islands' economies in 1972 highlights the fact that, in terms of access to EU markets for services, the Crown Dependencies are in the same situation as third countries. Thus, even in fields such as electronic commerce, Jersey and the other Crown Dependencies are in the position of third countries, with no legal rights of access to EU markets.

67 For reasons which are obscure today, it was also thought appropriate in 1972 to ensure that, to the extent that persons or undertakings within the meaning of article 196 of the EURATOM Treaty should be covered by the provisions of that Treaty when they are established in the Islands. This is provided in article 3 of the Protocol.

68 Of more practical concern is the non-discrimination provision set out in article 4. This provides that -

> "The authorities of these territories shall apply the same treatment to all natural and legal persons of the Community."

69 This short but fundamental provision has twice been interpreted by the European Court of Justice (ECJ) on references from the Deputy High Bailiff's Court in the Isle of Man and from the Royal Court of Jersey. Somewhat ironically, the two cases giving rise to the interpretation of article 4 by the ECJ were in areas of Community law falling outside the scope of Protocol 3 as set out in articles 1-3 and 5-6. They concerned, respectively, employment and criminal justice. These cases were seen at the time as being potentially

[50] The "Yellow Bible" published by the Commission (DG Competition) and which contains all the secondary legislation and "soft law" on state aids, runs to about 1000 pages.

of great importance in deciding to what extent Jersey and the other Crown Dependencies are affected (actually or potentially) by Community law obligations. The cases are discussed in more detail below. However, in essence, the European Court held that, to the extent that the Community enacts legislation in particular fields, then the Islands may not discriminate between Community nationals in their own legislative or administrative actions in these fields. This did not mean (as was once feared) that the Islands would have some kind of indirect obligation to apply Community rules in areas falling outside the Protocol and where, clearly, it had never been intended that such rules should apply. There is nonetheless an obligation, when introducing legislation in areas subject to EU law, not to discriminate between the nationals (including UK citizens).

70 Naturally, as the material scope of the secondary law has expanded and "occupied the field", then the scope of article 4 – in imposing a non-discrimination obligation on the Crown Dependencies - has also expanded. It is doubtful whether, in practice, this is of great practical concern however, since the introduction of Insular legislation discriminating between EU nationals must be unusual. Historically of course, the situation may be different. As was discovered in *Rui Roque*, Jersey legislation allowed the deportation of foreigners except British subjects, who could only be "bound over" to leave, but not ultimately denied the right to stay in or return to the Island. It may be that the special status of UK nationals in Jersey law could give rise to similar "discrimination" in other fields, although as was decided in *Rui Roque*, this would not necessarily imply an infringement of article 4 of the Protocol.

71 Another fundamental provision of the Protocol (although one which has so far escaped judicial interpretation) is article 5. This is sometimes called a "safeguard clause", although it is not a safeguard clause in the sense in which this term is used in Community or international trade policy. It may well be that the clause has been seen and even applied in this sense and this may be understandable given the fact that the "dominant" article of the Protocol is article 1 which deals with trade.[51] However, the language of article 5 is far more general and provides that -

> "If, during the application of the arrangements defined in this Protocol, difficulties appear on either side in relations between the Community and these territories, the Commission shall without delay propose to the Council such safeguard measures as it believes necessary, specifying their terms and conditions of application. The Council shall act by a qualified majority within one month."

72 As indicated above, the scope of this article has never been tested either in the Insular or European Courts. There has been one decision of the Council applying the provision in respect of meat products in the Isle of Man.[52] One isolated decision is of

[51] It is instructive however that, in the one decision taken by the Council on the implementation of this provision, trade criteria were specifically not applied. The article therefore is capable of a far more flexible interpretation than either the UK or the EU have contended.
[52] Council Decision of 23.10.2000 extending Decision 82/530/EC, OJ L 278/25 of 31.10.2000.

course insufficient to establish with any certainty how such a general provision could or should be applied in the future. It is clear however that the definition of "difficulties" appearing on either side is not confined to trade or even economic difficulties and that the discretion of the Community institutions in deciding on measures, is very wide. The Commission in particular is entitled to propose "…. such safeguard measures as it believes necessary, specifying their terms and conditions of application". An interesting question is the extent to which the Islands remain free, in their relations with the EU, to take action outside the Protocol to deal with situations (including those in fields covered by the Protocol such as trade) where either the Commission or the Council is unable or unwilling to act.

73 In my submission, in areas falling clearly outside the Protocol, Jersey remains free (subject to the provisions of article 4) to take such measures as it deems necessary - for example in areas such as immigration, social security, education, health or employment – to protect its own domestic interests. Even in areas which are broadly covered by the Protocol but where the exact scope of the relevant provisions is unclear (such as agricultural production and trade), it ought still to be possible for the Islands to take such measures as are indispensable for example to preserve a minimum viable production of essential commodities or to protect public health, particularly where other parties involved (the UK or the EU institutions) are unable or unwilling to act.

The scope of Jersey's obligations under EU law and the impact of the case law of the European Courts

74 The limited scope of Protocol 3 has, for more than 30 years, virtually excluded the Crown Dependencies from the activities of all the institutions and from the vast bulk of EU law and policy. In total, the Council has enacted measures on two occasions (Regulation 706/73 and the safeguard measure for Manx imports of meat), there have been one or two Parliamentary questions on the scope of the Protocol, the Commission has occasionally been involved in the application of the state aids and safeguards provisions of the Protocol and the Court has been seized on three occasions by references from Insular courts. To judge from this track record, the political aim of the Islands in 1972 to remain outside the mainstream of European law and policy has been achieved. As will be discussed later however, the real issue today is not the extent to which the Protocol applies to the Islands, but rather the fact that the Islands have been affected (and significantly affected) by EU and other international policies, irrespective of the limited scope of the Protocol. At the same time, the Protocol does not now provide the legal guarantee of market access for Jersey's "products", which was the intention in 1972.

75 Although it has now become commonplace to say that the Crown Dependencies are bound only by the terms of Protocol 3 and thus essentially or even exclusively by EC rules on the free movement of goods as well as those on competition in agricultural products, this is arguably not strictly correct. Just as article 299(1) which provides that "This Treaty shall apply to the [Member States]", does not exclude the application of *acquis* other than

the primary rules of EC law, so the provisions of article 299(6)(c) do not exclude the application of the *acquis* which is based on or derived from the provisions of the Protocol to the Crown Dependencies. Thus, the general and fundamental principles of EC law (including the principles of direct effect, supremacy and state liability) apply to the Islands.[53] Likewise, the secondary *acquis* (regulations, directives, decisions and other "soft law" instruments such as communications, guidelines, recommendations etc.) also applies to the Islands to the extent that these are based on the provisions of the Protocol. At the same time, the relevant case law of the European Courts in areas covered by the Protocol also applies in and to the Islands.

76 The limited material scope of the Protocol has undoubtedly reduced the opportunities for Insular Courts to consider issues of Community law, thereby minimising opportunities for references to the ECJ under article 234 EC. Equally, the Islands' micro-economies are unlikely to cause or threaten distortion of trade and competition in the Member States, thus reducing the risk of complaints to the Commission and the possible initiation of infringement proceedings under article 226 EC. The situation would be entirely different if the Protocol had covered the freedom of establishment, the freedom to provide services, consumer protection[54] or the protection of the environment. The fact that all three Crown Dependencies are centres of international business, with frequent litigation arising in areas such as financial services, company law, trusts and economic crime, would have implied frequent recourse to EC law and, probably, frequent reference to the ECJ under article 234 EC. In this context, the contrasting situation of Gibraltar (as indicated above) is instructive. Although there have been no references from the Gibraltar courts to the ECJ, Gibraltar's obligation to implement and enforce virtually all internal market measures has given rise to difficulty and controversy, notably as a result of infringement procedures being opened by the Commission against the United Kingdom authorities (representing Gibraltar) on the basis of article 226 EC. This has not only created problems for the Gibraltar Government, but has also been a source of added friction between the Gibraltar Government and the United Kingdom. The Commission has also refused to deal directly with the Gibraltar administration, despite the latter's constitutional autonomy (under the Gibraltar Act) for most internal market issues, including direct taxation.[55]

77 In the case of the Crown Dependencies, the precise scope of the applicable *acquis* has never been defined either by the Commission, by the UK authorities, or by the Islands themselves. The fact that the Protocol itself is badly drafted and does not reflect precisely either the concepts or the language of the Treaties is a further source of uncertainty. This

[53] Other principles developed by the European Courts such as proportionality, legitimate expectations and legal certainty also apply to the Islands, as presumably do general principles of law common to the constitutional traditions of all Member States in the field of human rights. This is an issue of particular interest in the context of the Constitutional Treaty. Part 2 of the Constitution, incorporating the Charter of Fundamental Rights, will not apply to the Crown Dependencies under the (revised) Protocol, although many of the principles in the Charter may apply as general principles of law.

[54] The fact that consumer protection, at least through the protection of human health, is one of the purposes of article 30 EC could be interpreted to mean that extensive areas of EC secondary law in this field apply to and in the Crown Dependencies insofar as they constitute lawful measures restricting the free movement of goods under article 30 EC.

[55] Although it is not the purpose of this paper to discuss the situation of Gibraltar, it may be pointed out nonetheless that the formal responsibility of the UK for its territories' international relations ought not to result in a diminution of the dependencies' capacity to defend their own legislation or administrative measures in international *fora*, including the EU. Unfortunately, this is currently often the case, not only for Gibraltar but also for the Crown Dependencies.

situation does not appear to have created serious practical difficulties over the last 30 years. This may well be because the Insular authorities, in enacting new legislation in particular fields (whether or not these are covered by the Protocol) have looked (amongst other sources) to relevant provisions of EU law for guidance and will be required to do so increasingly in future in order to ensure that regulatory and supervisory standards in the Islands are up to the minimum set in the EU as a basis for market access and the free movement of goods, persons, services and capital.

78 This is of course a different matter from the possible direct effect of directives and regulations, as well as case law, in Jersey law. There are two issues here. First, as indicated at the start of the paper, frequent use is made in the Royal Courts (both in Jersey and in Guernsey) of the comparative law technique. Such an approach appears to exclude reference to EU law however, including the increasing number of directives and other instruments which harmonise rules of European private law. Secondly and perhaps more importantly, it is clear that there is a significant number of EC instruments which are binding on the Crown Dependencies and which, strictly speaking, should be transposed into Insular law and applied in the Courts. Some of these directives, applicable to Jersey by virtue of Protocol 3, may also contain provisions which, according to the criteria set by the ECJ, are directly effective in Insular law.[56] Voluminous EU legislation has for example been enacted on the free movement of goods in areas such as food law, the abolition of technical barriers (especially Directive 98/34), public procurement of goods, and sectoral measures in areas such as pharmaceuticals, automobiles and other products.[57]

79 As already discussed, it is impossible to know with any precision which EC secondary legislation is applicable under the Protocol. The scope for differing views is wide, especially given the imprecise way in which the Protocol reflects the Treaty itself. Undoubtedly, if asked, the Commission would probably tend to take an expansive (or teleological) view of the matter (especially in the field of mutual recognition directives designed to promote the free movement of goods). The approach which might be taken by the European Courts – especially taking into account the restrictive nature of article 299(6)(c) – is more difficult to predict.

80 In addition to the imprecise terms of the Protocol itself, the identification of EC or EU measures which apply in the Islands as a matter of law is made more difficult by the fact that many measures, particularly in the internal market field, now embrace a number of policy areas and thus are either based on a number of Treaty provisions or on article 95, a sort of "omnibus" legal basis for Single Market legislation. Practice is not wholly consistent in this area. Political differences arise between the EU institutions, often as a result of the

[56] In this context, relevant ECJ case law on the direct effect of Directives in EU law would be applicable in Jersey. See *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, Joined Cases C-6/90 and 9/90 [1991] ECR I-5357, and related case law: see Angela Ward, *Judicial review and the rights of private parties in EC law*, Oxford University Press, 2000.

[57] In view of the exponential proliferation of non-tariff barriers to trade (particularly in the field of standards or consumer protection measures), the mandatory prior notification and standstill requirements of Directive 98/34 as amended are of crucial importance to the free movement of goods in the Single Market. This Directive has been called the single most important measure (at least of a procedural kind) in EU law. It is arguable that its mechanisms apply to Jersey and the other Crown Dependencies, although this appears never to have been enforced.

application of qualified majority voting (QMV) or unanimity in the Council, or whether a measure would be subject to the co-decision or consultation procedure with the Parliament. The fact that article 95 was adopted (as article 100a) in the Single European Act in 1986 as a legal basis for most Single Market measures also operates to hide whether a measure is "purely" concerned with the free movement of goods or whether other policy areas are also involved.[58] Article 95 itself (in paragraphs 3, 4 and 5) refers to proposals "concerning health, safety, environmental protection and consumer protection" for which separate Treaty provisions apply and which are clearly not applicable (at least *per se*) to the Crown Dependencies as a result of the Protocol.

81 The difficulties involved in this area are perfectly exemplified by the recent litigation concerning the tobacco advertising and tobacco product Directives. Anxious to secure the adoption of the advertising Directive by qualified majority voting (QMV), the Commission proposed and a majority of the Council accepted article 95 as a valid legal basis for this measure. The ECJ annulled the Directive holding that its provisions did not in effect remove obstacles to the free circulation of print media containing tobacco advertising and therefore was not a measure designed primarily to promote the free movement of goods in the Single Market.[59] Other Treaty articles may not be used to circumvent the express exclusion of harmonisation laid down in article 152(4)(c) in the field of public health. The ECJ's rulings in the tobacco cases have certainly not made it any easier to determine which EU secondary legislation applies – by virtue of Protocol 3 – to Jersey, even if *prima facie* the measure in question appears to cover the free movement of goods.

82 As indicated above however, for the moment at least, this problem tends (in contrast to the situation with Gibraltar for example) to be more theoretical than real. Whether or not Jersey or the other Crown Dependencies implement and enforce particular EC measures has not in practice had a significant economic or political impact on Member States or their nationals. There have been few if any complaints made to the Commission on whether or not the Crown Dependencies are acting in accordance with their Community law obligations. Politically, in EU terms, all three Crown Dependencies have maintained a low profile. If this situation has changed in recent years as a result of the growth of financial services industries and the rise – internationally – of issues such as tax and international economic crime including money laundering – this has not brought allegations that the Islands are acting inconsistently with the Protocol, for example by not implementing a specific measures of EU secondary legislation. There has been, at the level of the Member States and the EU institutions, no doubt that the Protocol does not apply to these areas. On the other hand, as is described below, this has not prevented the EU (and indeed the OECD) from seeking to secure the extra-territorial extension of certain

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[58] See Peter Oliver, *The free movement of goods in the European Community* (2003): *"…* Article 95 has been held to empower the Community institutions to adopt legislation designed to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws provided that the emergence of such obstacles is likely. Prior to the momentous ruling in [*the "tobacco advertising" case*] the Court had consistently upheld article 95 as the appropriate legal basis for legislation…."

[59] See *Germany v Parliament and Council* (the "Tobacco Advertising" judgment), Case C-376/98 [2000] ECR I-8419 and *The Queen v Secretary of State for Health ex parte British American Tobacco (Investments) Ltd. and Imperial Tobacco Ltd.* (the "Tobacco Products" judgment) Case C-491/01 [2002] ECR I-1453.

measures (notably in the field of direct tax) to the Islands, but not as a matter of legal obligation.

Article 4 of the Protocol and the case law of the ECJ

83 A particular difficulty has arisen on at least two occasions with regard to the scope of article 4, resulting in references to the ECJ. This fairly simple provision requires the Insular authorities to apply the same treatment to all natural and legal persons of the Community. The rulings of the ECJ in these matters merit particular attention in this paper if only to underline their limited implications for Insular policy as regards the extent to which EC law must be taken into account in Jersey's legislative, executive and judicial decision-making.

84 *Barr and Montrose*[60] was a case referred to the ECJ in 1989 by the Deputy High Bailiff's Court in the Isle of Man. It concerned the right of a British national to take up employment in the Island. The Advocate General and the Court itself agreed that article 4 "manifestly applies in relation to the nationals of all the Member States including the United Kingdom". In this case, the Manx legislation at issue was alleged to affect nationals of other Member States differently from UK nationals. It was conceded that if there was no discrimination between any Member States and their nationals then there would have been no breach of article 4.

85 *Barr and Montrose* is somewhat limited in interest as an authority however, because both the Advocate General and the Court found that there was no discrimination against Barr himself (as a UK national) and therefore no need to consider whether the prohibition on discrimination in article 4 was limited to the material scope of the Protocol or whether it extended to EC law as a whole. As a preliminary point in its ruling, the Court made it clear that article 234 did not allow the ECJ to hold that a particular piece of national legislation was contrary to Community law, but only to advise the referring national court on the correct interpretation of Community law. The Court held that the fact that the Isle of Man required all Community nationals wishing to take up employment on the Island to hold a work permit (when Manxmen were not so required) did not constitute a breach of article 4, even though the Manx legislation provided for certain exceptions in the case of certain types of employment leading to differences of treatment between nationals of different Member States. At the same time, article 2 of the Protocol did not require the Isle of Man to treat Community nationals in the same way as Manxmen were treated in the UK.

86 Crucially however, the Court did confirm that "article 4 of the Protocol cannot be interpreted in such a way as to be used as an indirect means of applying on the territory of the Isle of Man provisions of Community law which are not applicable there by virtue of [article 299(6)(c] of the UK Act of Accession and Protocol 3, such as the rules on the free movement of workers". The Court then went on to state that, contrary to the view taken by the UK, the principle of equal treatment in article 4 is not limited exclusively to the matters

[60] *Department of Health and Social Security v Christopher Stewart Barr and Montrose Holdings Ltd.,* Case C-355/89 [1991] ECR I-3479.

governed by the Community rules referred to in article 1 of the Protocol. Article 4 is an "independent provision" so far as its scope is concerned and precludes any discrimination between natural and legal persons from the Member States in relation to situations which, in territories where the Treaty is fully applicable, are governed by Community law. In the *Barr and Montrose* case, since the right to take up employment was covered by Community law, article 4 applied to that right "even though Community nationals cannot thereby obtain on the Isle of Man the benefit of the rules on the free movement of workers". One important point to underline here is that, contrary to a common misunderstanding, there is no prohibition under article 4 from the Islands enacting legislation which, whilst not discriminating between nationals of Member States, does in effect discriminate between Islanders (i.e. Manxmen or Channel Islanders) and Community nationals.

87 *Rui Alberto Roque Pereira v His Excellency the Lieutenant Governor of Jersey*[61] was referred to the ECJ in 1996 by the Royal Court of Jersey. Just as *Barr and Montrose* had involved an area of law (employment and social security) falling outside the Protocol, so *Rui Roque* involved an area even more remote from the Protocol, the right to deport persons convicted of a criminal offence. Under Jersey law, British citizens (unlike citizens of other EU countries) could not be deported from Jersey. Article 48(3) EC (now article 39(3)) allowed Member States to adopt with regard to nationals of other Member States, on grounds of public policy, measures which they could not apply to their own nationals, inasmuch as they had no jurisdiction to expel them from the national territory or deny them access thereto. The Court noted that, since Channel Islanders were British nationals, the distinction between them and other citizens of the UK could not be likened to the difference in nationality between the nationals of two Member States.

88 It was agreed that EC rules on the free movement of workers (including article 48) did not apply by virtue of the Protocol. Thus, article 4 could not be interpreted as limiting the reasons for which a national of a Member State other than the UK could be deported from Jersey on grounds of public policy, public security or public health under article 48(3) and the related Directive. However, the Court went on to hold that article 4 did prohibit the making of a deportation order by Jersey against a national of a Member State other than the UK, by reason of conduct which –when attributed to UK nationals – did not give rise on the part of the Jersey authorities to "repressive measures or other genuine and effective measures intended to combat such conduct." Thus, the Court said, "even if difference of treatment between citizens of the UK and nationals of other Member States is allowed, the rule on equal treatment laid down by article 4 prohibits the Jersey authorities from basing the exercise of their powers on factors which would have the effect of applying an arbitrary distinction to the detriment of nationals of other Member States."

89 In the course of its judgment in this case, the ECJ reviewed its ruling in *Barr and Montrose* and confirmed that article 4 was not to be interpreted as an indirect means of

[61] Case C-171/96 [1998] ECR I-4607.

applying in the Islands Community rules which were not covered by the Protocol. However, the Court did confirm that article 4 precluded discrimination between natural and legal persons from the Member States in relation to situations which, in territories where the Treaty is fully applicable, are governed by Community law. Thus, insofar as *Rui Roque's* situation fell under the rules on the free movement of workers, the rule in article 4 applied to him, even if Community nationals could not use EC rules on the free movement of workers to gain employment in Jersey. The Court went on however to examine article 48(3) in the particular circumstances of the case (where Channel Islanders being British citizens could not be likened to citizens of other Member States) and held that the deportation from Jersey was not in breach of article 4.

90 In answer to a further question from the Royal Court as to whether it was restricted, in considering a deportation order, to the grounds set out in article 48(3), the Court confirmed that this was not the case, since neither article 48(3) nor the related Directive were applicable in Jersey by virtue of the Protocol. However, the Court held that "the fact remains that the rule on equal treatment in article 4 prohibits the Jersey authorities, even if difference of treatment between citizens of the UK and other Member States is allowed, from basing the exercise of their powers on factors which would have the effect of applying an arbitrary distinction to the detriment of nationals of other Member States."

91 Even if, in these two rather isolated rulings, the Court has given some substance to article 4 by making Community law the point of reference for applying the non-discrimination principle, the rulings give considerable comfort to the Islands in at least two respects. First, the ECJ has unequivocally confirmed that article 4 is not an indirect or "backdoor" means of extending the material scope of the Protocol. Secondly, there is no suggestion that the Islands may not enact legislation or apply measures which distinguish between Islanders on the one hand and EU nationals (including UK nationals) on the other.

The revision of the Protocol in the 2004 inter-governmental conference (IGC)

92 As an integral part of the Treaties establishing the European Community and Union, the Protocol has been reviewed in the IGC together with all the Accession Treaties and related instruments in the context of eliminating measures which have become obsolete or redundant.

93 Unlike many instruments attached to or part of earlier Accession Treaties (such as transitional provisions which have since served their purpose and lapsed), Protocol 3 remains – broadly speaking – legally and practically valid today. Assuming that the Constitutional Treaty is ratified, the terms of the Protocol will remain virtually unchanged, although set in the context of a different Protocol to the new Treaty.[62] In particular, the word "Community" would be replaced by "Union" systematically throughout the text. In

[62] It remains to be seen whether the "iconic" status of Protocol 3 is affected – at least in the eyes of the Crown Dependencies – by its new position in the Constitutional Treaty as "Protocol 8".

addition, words which clearly have become redundant or obsolete would be eliminated. These would include the reference in article 1(1) to the progressive reduction of customs duties between the Islands and the Community as originally constituted, as well as the progressive application of the Common Customs Tariff (CCT). As far as legislative procedures under articles 1(2) and 5 (respectively, implementing legislation for the agricultural trade and safeguards provisions) are concerned, the present provisions would be replaced by a requirement that the Council shall adopt the appropriate European regulations or decisions. There would be no material change here however, as the Council would still act by qualified majority vote.

94 The Treaty establishing a Constitution for Europe (hereinafter "the Constitution") repeals all previous accession Treaties, including all the instruments which were attached to – and an integral part of – such Treaties, including "Protocol 3". These accession Treaties are replaced by two Protocols, which become an integral part of the Constitution. First, there is a Protocol dealing with the first four accessions (United Kingdom, Denmark, Ireland, Greece, Spain, Portugal, Austria, Sweden and Finland), whilst a separate Protocol covers the fifth accession which took place on 1 May 2004 (Hungary, Poland, the Czech and Slovak Republics, Lithuania, Latvia, Estonia, Slovenia, Malta and Cyprus). The present Protocol 3 to the UK Act of Accession will, in all important legal respects, be preserved intact in the eighth Protocol attached to the Constitution.

95 The provisions concerning the Crown Dependencies in the new Protocol were carefully and consensually negotiated by the UK authorities, in the fullest consultation with the representatives of the three Crown Dependencies (acting in close cooperation), with the EU representatives, essentially the Legal Services of the Commission and the Council, acting under the authority of the IGC.[63]

96 The language in the Constitution itself, as well as in the new Protocol, is designed to reinforce the continuity without change of the legal rights and obligations in the present Treaty and Protocol 3. The Preamble to the new Protocol notes that "certain provisions [in the earlier Accession Treaties] remain relevant and …Article IV- 437 of the Constitution provides that such provisions must be set out or referred to in a Protocol, so that they remain in force and that their legal effects are preserved." The Preamble also notes that the provisions in question have undergone "technical adjustments" to bring them into line with the text of the Constitution "without altering their legal effect". The section of the new Protocol dealing specifically with the Channel Islands and the Isle of Man is preceded by "common provisions". None of these provisions carries any special importance for the Crown Dependencies. The provisions on the Channel Islands and the Isle of Man are set out in section 3 of Title 2 of the Protocol. As indicated above, the only changes which have been made to the existing Protocol are that the word "Union" has systematically been substituted for "Community", the transitional provisions relating to the phasing in of the

[63] In his speech to the States of Jersey on 10 May 2004, Lord Falconer rightly paid tribute to the "excellent example" of Jersey and the UK working together to modernise the language of the Protocol. See fn. 13.

common internal and external trade arrangements in article 1 of the Protocol have been deleted as redundant and decisions for safeguard measures in article 12 (former article 5) are to be made by the Council, on a proposal from the Commission, by "appropriate European regulations."

97 Article IV-447 of the Constitution provides that it is to enter into force on 1 November 2006, provided that all the instruments of ratification have been deposited. Failing this, the Treaty is to enter into force on the first day of the second month following the deposit of the instrument of ratification of the last signatory to take this step. Many of the 25 Member States have decided that their ratification of the Constitution is to be preceded by a referendum.

98 The negotiating aims of the Crown Dependencies in the IGC, in essence to preserve intact the material scope of the legal obligations entered into by the United Kingdom on their behalf in 1972, have undoubtedly been met. However, ever since the creation of the European Coal and Steel Community in 1951, the process of European integration has moved forward within the legal framework of the Treaties. This was of course precisely the intention of the "founding fathers", to create an ever-closer union of the peoples of Europe. The instruments for achieving this were not "classic" Treaties creating obligations for the Member States under public international law, but Treaties creating independent and "supranational" institutions, empowered to make new law and develop existing law. Over the first 50 years of European integration under the EC Treaties, the role of the ECJ has been of crucial importance, especially in pursuing the economic integration which was central to the European project as a whole.

99 It is significant that three fundamental principles of European law (the direct effect of European law in national legal orders, the supremacy of European over incompatible national law and state liability towards citizens for breach of European law) were elaborated by the European Courts without there being any explicit reference to these principles in the founding Treaties. These fundamental principles, as well as others such as proportionality, legal certainty and legitimate expectations, apply to the Crown Dependencies although there is no mention of these in the Protocol itself. Similarly, (as discussed elsewhere in this paper), the extensive secondary legislation enacted by the institutions (and related judgments of the European courts) in fields covered by the Protocol (notably customs, the free movement of goods and competition (including state aids) in agriculture), also apply to the Islands and must be enforced by the legislative, executive and judicial authorities in the Islands.[64] EC and EU law is therefore "living law", in constant evolution. Put simply, the body of European law to which the Islands are subject today, is very different from that which existed on 1 January 1973, even if the terms of the Protocol remain unchanged. It may be expected that this process will

[64] As is extensively discussed above, it is difficult to determine precisely which provisions of "horizontal" EU measures (such as Regulation 659/1999 on state aids) apply to the Crown Dependencies by virtue of the ambiguous provisions of the Protocol, *e.g.* on the procedural requirements for agricultural state aids.

continue in future, if or when the new Constitutional Treaty is ratified, implemented and interpreted by the European and national courts.

100 The fact that this evolution is barely perceptible in the legal systems of the Crown Dependencies reflects the limited material scope of the Protocol itself, the absence of litigation in the Insular courts giving rise to issues of Community law, the policy of non-engagement consistently followed by the Insular authorities for the last 30 years and the absence of any intervention by the United Kingdom, Community or Union authorities to insist on more extensive implementation and application of Community or Union law in the Islands. Nonetheless, it is clear that legal, economic and political changes in the Union do have an impact on the Islands, notwithstanding the formal provisions of the Protocol. Some recent developments in this respect are discussed in detail below. More generally however, at least three landmarks can be identified in the evolution of European integration, all of which have had an important impact on Jersey's relations with the European Union. These are the Single Market programme launched in 1985, with the abolition of frontiers achieved on schedule by 1 January 1993, the Maastricht Treaty creating the European Union of 1992 with its three pillar structure and laying the basis for the achievement of economic and monetary union on 1 January 1999 (with the practical introduction of the euro on 1 January 2002) and, finally, the unanimous adoption by the European Council of the Constitution on 18 June 2004.

101 The Constitution, when it enters into force, is likely to have a similar impact on Jersey's relations with the EU which is difficult to quantify in advance. The fact that the negotiation of the Constitution occurred in parallel with (and partly to deal with) the accession of 10 new Member States only complicates this analysis. In simple terms, the Crown Dependencies will be legally linked to a different political "locomotive" from 1 November 2006 onwards. The Constitution itself, despite being essentially a consolidation and simplification of existing law, contains substantial developments both of substantive and procedural law. It may be that these have been minimised by the institutions and the Member States in order to enhance the prospects of domestic approval of the Constitution. Nonetheless, the creation of a single legal personality for the European Union (thereby removing the confusion – both internally and internationally – of the parallel existence of the Community and the Union) is a major and positive development. Similarly – and arguably of over-riding importance - is the incorporation into the Constitution of the Charter of Fundamental Rights of the Union. In procedural terms, the Constitution continues the process started in the Single European Act (1986) and developed in the Maastricht (1992), Amsterdam (1997) and Nice (1999) Treaties of extending the role of the European Parliament in EU law-making through the co-decision procedure and rationalising the opaque and complex comitology procedures. The number of areas of law or policy-making subject to QMV has also been consistently expanded. New impetus has been given to "third pillar" measures in the field of justice and home affairs. Finally, the creation of the new "institutions" of European Council President (article I–22) and the Union Minister for Foreign Affairs (article I-28) will undoubtedly reinforce continuity of

action at the highest political level of the Union, as well as raising the profile and "personality" of the Union externally.

102 In my view however, as so often in European law, it is the less visible changes which may in time have the greatest practical impact, particularly as a result of interpretation by the European Courts. One example is the elevation of the four "freedoms" which underpin the Single Market (the free movement of goods, persons, services and capital) – together with the principle of non-discrimination – to fundamental freedoms in article I-4. Equally, article I-6 incorporates the judge-made principle of primacy of the law adopted by the institutions of the Union over the law of the Member States.

103 Article I-44 provides for enhanced cooperation. Although provisions to this effect in earlier Treaties have rarely if ever been used, it is conceivable that in a Union of 25 Member States, greater pressures could arise from certain Member States to go "further and faster" than others in certain areas. This could lead in time to a Union of "concentric circles", variable geometry or, possibly more accurately, a multi-speed Europe. It is important in this context to note that, although the underlying conditions for the use of enhanced cooperation have not been changed in the Constitution, the procedures by which enhanced cooperation are to be triggered have been made more flexible. Article I-44 provides that the procedure may be initiated provided as few as one-third of the Member States participate.[65]

104 Given the difficulty which the Commission has experienced in achieving even minimal progress in direct tax measures (the "tax package" itself took seven years to complete) and the new enthusiasm in certain key Member States in this area, taxation may well be a candidate for the early application of "enhanced cooperation." It is conceivable that this could occur within the eurozone for example. One observation as far as the external aspects of such a move however would be that, to the extent that within the EU legal developments occur at different speeds, it is less likely that law and policies which are not common to all 25 Member Sates will be imposed on third countries and territories.

105 As far as the Crown Dependencies are concerned, the political, economic and legal impacts of these developments are difficult to predict, especially since the ratification of the Constitution is still uncertain and, in any event, two years away. Despite the formal protections obtained through a Protocol which should ensure that European "federal" law will remain marginal in Jersey's political and legal order, it is unlikely that – in practice – the Crown Dependencies will be unaffected by the historic changes enacted in the Constitution and the European political will which they represent.

Developments in practice under the Protocol between 1973 and 2004

[65] Articles III-416 to 423 further specify how enhanced cooperation is to be operated in fields of Union competence, with the exception of areas of exclusive competence and the common foreign and security policy (CFSP). Note however that authorisation to proceed with enhanced cooperation is to be granted by a European decision of the Council acting unanimously (article III-419(2)).

106 From 1973 till the end of the 1980s, European integration proceeded in fits and starts until the launch of the Single Market programme in 1985. After an initial success with the completion of the customs union two years ahead of schedule in 1968, the 1970s and early 1980s were dominated internally by the accession of the UK, Denmark and Ireland, a referendum on possible UK withdrawal from the Community in 1975, and the accession of the former dictatorships in Greece, Spain and Portugal. Externally, with the Community's exclusive external competence well-established, the pre-occupation was with securing EC markets in the face of competition in textiles, steel, automobiles and electronics, notably from Japan.[66] Against this background, the arrangements agreed in 1972 for the Crown Dependencies appear to have functioned broadly as intended.

107 With the apparent success of the Single Market in the late 1980s, inspired by the first Delors Commission and spearheaded by Delors himself supported principally (ironically in view of persistent Euro-scepticism in the UK) by Lord Cockfield and Competition Commissioner Peter Sutherland, the Jersey authorities – under the Policy and Resources Committee – sought more regular, timely and detailed information on developments in the EC than was available either publicly or through the UK authorities. In particular, Jersey was anxious to obtain an early warning of measures being developed in Brussels which might impact, directly or (more usually) indirectly on Jersey's economy, in order to be able to react appropriately. The reporting system which was set up was complemented by occasional informal visits by politicians and officials to the Commission's services in Brussels. These focused essentially on the departments responsible for the internal market (especially financial services) and, at a later stage, for justice and home affairs (including money laundering) and the investigation of fraud (initially UCLAF and later OLAF).[67]

108 From 1989 onwards, the Jersey authorities' interest in developments in Europe was surprisingly wide and certainly not constrained by the formal terms of Protocol 3. Even at this comparatively early stage in the process of implementing Single Market legislation, there was an awareness in Jersey that regulatory developments in Europe could impact, directly or indirectly, on the Island. It is interesting that, even at this stage, most of the European issues identified by Jersey as of interest fall outside the formal scope of Protocol 3. These included money laundering, the impact of GATT Uruguay Round negotiations and international trade in services, EU law and policy on tourism, environmental legislation (including the protection of natural resources and waste disposal), the free movement of persons under the Schengen arrangement, the participation of Jersey financial institutions in EU funding activities, the potential impact of EMU on the UK-Jersey monetary union, the evolution of EU rules on payments systems, travellers' allowances, employment, health and safety legislation, and consumer protection legislation – to mention only a few.

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[66] For further details of the EU's political and economic priorities at this time, see Alastair Sutton, *Relations between the European Community and Japan in 1982 and 1983*, Oxford Yearbook of European Law, 1983.

[67] *Organe pour la lutte anti-fraude* (OLAF) – an internal but autonomous Commission service set up to investigate, in cooperation with national authorities, fraud affecting the Community budget.

109 Despite the wide-ranging scope of issues of concern to Jersey at this formative and dynamic period in EU integration, in the years leading up to the adoption of the "tax package" in 1996, Jersey's main interest was in monitoring progress being made in the EC institutions towards the completion of the Single Market. In particular, the Jersey authorities (especially the Policy and Resources Committee and the Law Officers) were concerned to know in advance whether measures were likely to be adopted at EC level which could affect Jersey's access to EU markets for financial markets or, conceivably, have an adverse effect.

110 It is probably fair to say that the Jersey administration was conscious, even at this stage, that standards being set in the EU were likely to provide international benchmarks (for example in environmental and health policy, as well as financial services) and therefore should be taken into consideration in Jersey's own law and policy. As far as financial services are concerned, it is important to keep in mind that the regulatory framework for financial services was only at an embryonic stage at that time. Many important measures (notably for insurance and investment services) had still to be adopted by the Council.

111 More broadly, however, in the early 1990s Member States' attention was focused on three major new developments, which cumulatively had a radical effect in changing the legal political and institutional framework for European integration and setting a new economic agenda, notably for the achievement of EMU. Jersey, like all other non-Member jurisdictions, was unavoidably affected by these developments "on its doorstep". These developments were:

(a) the collapse of the Berlin Wall and of the Warsaw Pact in 1989, leading to applications from former Warsaw Pact countries for membership of the EU and NATO (a process which was to culminate in the fifth EU enlargement on 1 May 2004);

(b) the total abolition of internal frontiers, with the removal of technical, physical and fiscal barriers and the complete free movement of goods, persons, services and capital provided for in the Single European Act in 1986 and achieved on time on 31 December 1992; and

(c) the ratification of the Maastricht Treaty, with its new three pillar structure, which entered into force on 1 January 1993.

112 The establishment of the European Union through the Maastricht Treaty underlined for Jersey and other States or jurisdictions outside the EU, the growing importance of EU law and policy not only for Members but also for non-Members. In the economic and financial field, this was under-scored by the creation of a Treaty framework – with substantive and institutional provisions as well as a binding timetable – for the achievement of economic and monetary union (EMU) by 1 January 1999. Although (as

usual) scepticism was expressed in the United Kingdom as to the eventual success of this project, it was clear that the creation of a single currency accompanied by closer economic convergence could have serious implications not only for jurisdictions on the periphery of the EU, but also at the global level.[68]

113 Between 1990 and 1997 when the EU's activities in the fiscal field increased sharply, Jersey's "pro-active" interest in developments in European integration were matched by those of Guernsey and the Isle of Man. During this time, the ongoing process of market integration under the Single Market programme was affected by accession negotiations with Austria, Finland, Norway and Sweden. Once again, the Norwegian people voted against EU membership, but the three other former EFTA countries became Members of the EU on 1 January 1996. The virtual demise of EFTA and of the European Economic Area Agreement reinforced the economic and political power of the EU. In particular, the intensification of legislation and administrative decision making for the Single Market was accompanied by the sharp increase in the number of European States which were directly affected by the EU's *acquis communautaire*.

114 In the mid 1990's, the EU was focused not only on the completion of a genuine Single Market within the broader framework of EMU, but also on enlargement and constitutional reform. Developments under the "third pillar" on police powers and judicial cooperation gained momentum at this time, assisted by modifications in the Amsterdam and Nice Treaties. These Treaties in 1997 and 1999 respectively, made mainly incremental changes to the structural and institutional changes made in 1992 by the Maastricht Treaty. In particular, the Amsterdam and Nice Treaties further extended qualified majority voting (QMV) as well as the scope of the European Parliament's powers under the "co-decision" legislative procedure (Article 251 EC). Notwithstanding the apparently slow progress being made both on economic integration and enlargement, it was nonetheless clear to Jersey and the other Crown Dependencies that the Union's decision-making was a force to be reckoned with, irrespective of the formal provisions of Protocol 3 and in fields going well beyond the Single Market.

115 Against this background, Jersey officials and politicians maintained contact, through their professional advisors in Brussels, virtually on a daily basis with developments in all fields of interest or concern to the Bailiwick. Informal visits were also made both by officials and politicians to "take the temperature" more directly. Undoubtedly, these visits helped to establish a positive impression in the minds of European officials, notably as regards the regulatory, supervisory and enforcement standards applied in the Islands. These contacts certainly served the Islands well in organisations such as the OECD (and FATF), occasionally assisting in dealing with uninformed criticism from different quarters. A more pro-active approach was only adopted when the threat to Jersey's economy emerged in the shape of the EU's tax package (see below).

[68] The Treaty basis for EMU comprising substantive economic and monetary disciplines, institutions such as the European Central Bank and the three-stage timetable, was established in articles 98-124 of the EC Treaty.

The acquis communautaire as a model for non-members' law and policy – its impact on Jersey

116 One of the themes of this paper is the fact that, despite the limited legal scope of the Protocol, Jersey has been increasingly affected in practice by the growing body of EC and even EU law, notably but not exclusively in the internal market area. Largely as a result of having to prepare for the unprecedented fifth enlargement, the Commission was forced to take stock of the complete corpus of existing rules of Community and Union law. As is explained below, these rules comprise - but are not limited to – the voluminous secondary legislation (Directives, Regulations etc.).[69] In addition to insisting on the complete adoption of the *acquis* by the new Member States, with minimal derogations or transitional periods, the Commission increasingly makes use of the *acquis* in external relations. This is possible because of the political and economic power of the EU. Frequently, the *acquis* is extended to third countries on a consensual basis. Agreements with more than 100 countries have contributed to this process. The new "neighbourhood policy" intends to take this further (see below). Recently, in the fiscal field, the EU has attempted to impose its internal rules and disciplines on third parties, irrespective of their consent. Jersey has been caught up in this process, much against its will, and for this reason some further explanation of the notion of the *acquis communautaire* may be useful, as well as the way it has been used by the Commission in negotiations with third countries.

117 The fact that many EC terms of art (such as "*acquis communautaire*") continue to be expressed in French reflects the historic dominance of France and the French language in the development of the EU. With the accession of 10 new Member States from Central and Southern Europe this is now diminishing, with the English language playing a greater primary role than ever in the everyday life of the EU.[70] Nonetheless, it is remarkable that there is no easy English translation for terms such as "*acquis communautaire*". In its broadest sense, this term embraces all formal sources of EU law (the Treaties, secondary legislation and rulings of the European and national courts), but also fundamental and general principles of law, "soft law" (recommendations, opinions, guidelines, communications, action plans etc.) and – perhaps most important of all –the decisions of the more than 1000 regulatory, advisory, consultation and management committees which manage the Union's business on a daily basis.[71]

118 The *acquis communautaire* notion has been widely used in the recent accession negotiations with the 10 new Member States from Central and Southern Europe. It was of

[69] This is often referred to in the press as comprising some 80,000 pages of legal texts. I do not know whether this is accurate; it is however certainly misleading, since by far the more important *acquis* is that which is unwritten, such as the fundamental principles of EU law, as well as the case law of the European Courts.

[70] Note however that all legislation, Court judgments and other official documents will still need to be translated into all 20 official languages. The crisis in the EU's language services (both translation and interpretation) exacerbated by the latest dramatic enlargement has largely gone unnoticed outside the institutions. There is however a very real issue as to whether certain texts can be produced in all official languages in areas where short legally-binding deadlines now apply (e.g., mergers, state aids, anti-dumping and competition policy).

[71] The new Lamfalussy committee procedure in financial services is an example of how crucial legal and policy decisions are taken by Committees largely removed from the public (and even Parliament's) eye. It is likely that, in the enlarged Union, with formal decision-making becoming ever-slower, such delegated law – and decision-making will increase. It is of course already important in highly-technical areas such as VAT and customs. The indirect impact of this "new approach" to rule-making in the EU on Jersey is discussed below.

course always the case that new Member States had to accept and apply Community law in force at the time of membership. However, particularly in the case of Greece (1981), Spain and Portugal (1986), the application of the relevant Community law was "diluted" by wide-ranging derogations. In the fifth enlargement, the EU made it clear from the outset that derogations in the form of "transitional measures" would only be allowed in exceptional circumstances. Thus, the new Member States were required to accept the *acquis* applicable in the EU on 1 May 2004 in its totality.[72]

119 Apart from the enlargement context, the EU has used the *acquis* as a benchmark in many of its bilateral agreements. As indicated below, a great deal of *acquis* is automatically applicable to Iceland, Norway and Liechtenstein[73] as a result of the EEA Agreement. In essence, the EEA provides for the automatic application of EC law on the "four freedoms", together with key "flanking policies" such as competition, state aids, social policy, consumer protection, environment, statistics and company law. Separate institutional mechanisms are provided for the enforcement of EEA rules as regards Norway, Iceland and Liechtenstein, through the EFTA Surveillance Authority and the EFTA Court. Disputes between the EC and one or more of the EFTA States are subject to a dispute settlement mechanism through a Joint Committee.

120 As a non-Member State with economic interests closely tied to the EU, Switzerland has negotiated the extension of large areas of the *acquis* through more than 100 bilateral agreements. Historically, a key agreement as far as the free movement of industrial goods is concerned was the EFTA Agreement itself, although this Agreement has now largely been overtaken by the EU and the EEA Agreements. Following the rejection of Swiss participation in the EEA Agreement by the Swiss people, Switzerland has attempted to minimise the negative consequences of this by negotiating separate agreements in areas such as the free movement of persons, trade in agricultural products, public procurement, conformity assessments, transport and participation in EU research and development programmes. More recently, agreements have either been concluded or are being negotiated in areas such as the liberalisation of services, participation in the Schengen system, "third pillar" issues such as economic crime and police cooperation and environmental protection. Although Switzerland's primary purposes in this process has been to secure market access in the EU comparable to its principal competitors (as well as a degree of influence in EU decision-making in these areas),[74] Switzerland has also had to make concessions to EU interests, perhaps most notably in the field of personal taxation.

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[72] This included new measures which were adopted between the time of signature of the Accession Treaty and 1 May 2004. Note that considerable doubts existed on the administrative and judicial capacity of most of the new Member States to enforce the *acquis*.

[73] As a jurisdiction which is in competition with Jersey in financial services, a comparison between Liechtenstein's status as an EEA State, largely inside the Single Market but outside for tax and agriculture is especially instructive.

[74] Note that, even for EEA Member States, their participation in the EU legislative process is less than perfect. Article 99 of the EEA Agreement establishes a cooperation process based on the provision of information and consultation in good faith. This does not of course guarantee that the EFTA countries' wishes will be taken into account in the final version of the EU legislation. More importantly, article 6 EEA provides that in the interpretation of the EEA Agreement (insofar as the provisions are identical to the EC Treaty), the rulings of the ECJ are binding.

121 More generally however, the fact that the EU is – with the United States – the largest market in the world for goods and services, means that third countries have little choice other than to adopt their internal law and regulations to those of the EU. For many countries, this dependence on the EU *acquis* has led to applications for EU membership. Taking the European Continent as a whole, there is now a small and diminishing number of jurisdictions which are not either EU Members, applicant States or States with Treaty links which provide for total or partial application of the EU *acquis*.

122 The economic power of the Union and the need to be represented in its decision-making, was the main motivation for former EFTA countries to join and for Switzerland to engage in such an extensive programme of bilateral negotiations. Even if a primary consideration for the Central European former Warsaw Pact countries was security (principally from Russia) – as evidenced by their rush to join NATO – the need for economic growth in a large de-regulated market was also of crucial importance. In this context, it is important to underline the fact that – as applicant States – the Central European countries, as well as Cyprus and Malta, were all required to accept a binding obligation to implement the EU *acquis* in its totality. Despite being admitted, with observer status, to Council meetings during the accession process (after the conclusion of negotiations and the signature of the Treaty of Accession), the influence which even large countries such as Poland could bring to bear on the EU decision-making process before membership, is negligible. Of course, for all these countries, the ultimate goal (now successfully achieved) was to gain the right to appoint their own Commissioners, vote in the Council and send MEPs to Brussels and Strasbourg, with a concrete reflection of their sovereignty and an influence on EU law and policy.

123 The purpose of this analysis is not to suggest that Jersey should immediately seek to join the EU, either independently or under the aegis of the UK. The fact is however (as is shown by the reviews of recent practice of other micro-jurisdictions below) that all European jurisdictions on the periphery of the EU without exception – whether formally sovereign or not – now define their international personality, to a greater or lesser extent, by reference to the EU and its *acquis*. It would be strange if this were not the case for Jersey. The additional complication in the case of Jersey, compared for example with notionally sovereign States such as Andorra, Liechtenstein or San Marino, is the need to address the constitutional relationship with the UK at the same time as reviewing the adequacy of Protocol 3 as a "constitutional" framework for relations with the EU.

The "tax package" and the effect on Jersey's relationship with the EU

124 In the mid-1990s, following the agreement for a legal framework for EMU in the Maastricht Treaty (articles 98-124 EC), the Commission took a major initiative in the field of direct taxation. In launching a "package" of measures in the field of direct taxation, comprising a draft Directive on the taxation of interest on savings, a Directive for the avoidance of double taxation in interest and royalties and a "code of conduct" for harmful business taxation. The inclusion of an external dimension for the first two of these

measures had profound effects on Jersey and the other Crown Dependencies, which were to constitute a landmark (and perhaps a catalyst for change) unlike anything which had gone before.

125 Although the Commission had identified direct taxation as an area which needed to be addressed in order to complete the Single Market (and multinational enterprises had long complained about the extent to which double taxation remained a serious obstacle to doing business in Europe), Member State opposition had delayed progress in the Council. The unanimity requirement for Council voting on tax legislation was only one of the factors involved. Member States' desire to protect their fiscal sovereignty at a time of economic difficulty was an over-riding reason for this. For these reasons, in contrast with the situation in indirect taxation (VAT and excises), no progress has been made towards the harmonisation or even coordination of corporate tax rates and structures.

126 Although, from Jersey's perspective, the measures included in the "tax package" were of vital concern, they represented only a "second best" option for the EU, particularly for the Commission. The Commission's aim in 1996 was (and remains today) to achieve closer coordination (if not harmonisation) of Member States corporate tax rates and structures. Despite the production of a succession of policy papers by the Commission and a series of rulings by the European Courts applying fundamental principles of EC law to national tax systems, further progress in these core areas seems as remote today as ever. In order to present a consensus amongst the Member States, the Commission proposed legally binding measures to deal with the taxation of savings interest and for the avoidance of double taxation on interest and royalties. In contrast – and because of the political sensitivities involved – the Commission proposed a non-binding Code of Conduct to eliminate harmful business taxation.

127 From the outset it was clear that, to make the proposed TOSD and the Code work in practice (and to make the "package" acceptable to all Member States in the Council), an external or extra-territorial dimension was imperative. Thus, the Commission – for the first time in the field of taxation – obtained a "mandate" from the Council to negotiate agreements with certain third countries and territories in order to ensure that the principles of the TOSD were respected in these jurisdictions.[75] Article 17 of the TOSD provided that Member States were to apply the Directive from 1 January 2005 (since extended by the Council to 1 July, 2005) on condition that the United States, Switzerland, Liechtenstein, San Marino, Monaco and Andorra applied, on the same date, equivalent measures to those contained in the Directive. For the Channel Islands, the Isle of Man and the dependent or associated territories in the Caribbean, a stricter obligation was envisaged, namely to apply the same measures as those in force in the Community.

[75] Classically, the Commission is the Community negotiator in matters falling within the common commercial policy under article 133. On issues of "mixed competence" (*e.g.* financial services), the Commission may also negotiate on behalf of the Member States for example in WTO "Rounds" of trade negotiations. To be "mandated" in the field of direct taxation was unprecedented.

128 As far as the external dimension of the Code was concerned, this was of more limited scope than the TOSD. Thus, Member States' commitment was limited to "promoting" the adoption of Code principles in third countries. This limited engagement must be seen of course against the background of the fact that, since 1998, the OECD had launched a similar (and geographically more far-reaching) exercise for the removal of harmful business taxation (see below).

129 It is not the purpose of this paper to discuss the negotiating history of the tax package in detail. However, the importance of this process and these measures for Jersey and the other Crown Dependencies should not be underestimated. They mark, in my view at least, a turning point in Jersey's relations with the EU and perhaps also with the UK so far as its representation of Jersey's interests in international relations are concerned. Some of the key factors in this process therefore need to be noted.

130 For the Commission, the TOSD was important more as a step towards greater fiscal cooperation between national tax authorities in an enlarged EU, than to secure the return of fiscal revenue to individuals' countries of residence, important as this was for certain Member States such as Germany, France and Belgium. Given the unavoidable external dimension of this measure (and to a lesser extent of the Code of Conduct), the Commission were pleased to have been entrusted by the Council with responsibility for the relevant negotiations. Negotiations with Switzerland, Liechtenstein, Andorra, Monaco and San Marino were difficult as envisaged. Those with the United States were more of a formality.[76] As far as other jurisdictions were concerned, at the outset at least, the Commission anticipated that the United Kingdom (and the Netherlands as far as Aruba and the Dutch Antilles were concerned) would take responsibility, "in accordance with its constitutional arrangements," for ensuring that "the same measures" as those in the Directive were applied in the Crown Dependencies.

131 It appears that the precise constitutional relationship between the UK and its Crown Dependencies was not made sufficiently clear by the UK either to the Commission, to the Council Presidency (and Secretariat) or to the Member States. Undoubtedly, many Member States at least assumed that the UK's responsibility for the Crown Dependencies' external relations and defence was matched by comparable responsibility for the Islands' internal affairs, and that, at least as a last resort, the UK could impose tax legislation on Jersey and the other Crown Dependencies. This is of course not the case. Under UK constitutional law, Jersey and other Crown Dependencies enjoy virtually unlimited

[76] In its report presented to the Council on 28 November 2002, the Commission took the view that the U.S. is an active proponent of information exchange and the analysis of the current information exchange possibilities between the Member States and the U.S. show that current tax treaty provisions provide a solid basis for the development of the existing wide ranging information exchanges. Moreover, the Commission emphasised that the U.S. is in the process of extending the coverage of its domestic reporting requirements to provide a more complete basis for information exchange with those of its tax treaty partners that are prepared to reciprocate. At the ECOFIN Council of 21 January 2003, the Council stated that it considers that the conditions are "effectively satisfied in the case of the United States of America…". Austria, Belgium and Luxembourg are expected to move to automatic exchange of information if and when the Council agrees by unanimity that the United States of America are committed to exchange of information upon request as defined in the OECD agreement for the purposes of the Directive and the other five named third countries also move to exchange of information upon request. No indications have been made that this is envisaged for the foreseeable future.

autonomy in managing their internal affairs. Even in international relations, the Islands have – in recent years – acted independently, for example in bilateral and multilateral discussions on taxation and on related issues such as money laundering. Initially therefore, attempts by the Commission (and by the UK) to persuade the Crown Dependencies to adopt the same measures as those in the Directive, were firmly resisted. There were several reasons for this.

132 As background, it is important to keep in mind that, in the Council of Ministers, the UK assumed a particular responsibility for the successful conclusion of the TOSD or was at least anxious not to be seen as responsible for its failure. Following the Commission's initial proposal which would have allowed the "coexistence" of exchange of information with a withholding tax, the UK insisted on automatic exchange of information. The Feira European Council of 19-20 June 2000 essentially endorsed the UK approach and shifted the emphasis towards a directive based on exchange of information. Opposition by Austria, Belgium and Luxembourg resulted in agreement at Feira on a seven-year transitional period before the introduction of automatic exchange of information for these Member States. This, of course, provided a model which was immediately adopted by all the third countries, as well as the majority of the dependent or associated territories, including Jersey.

133 Having assumed primary responsibility for the success of the Directive, the UK exerted considerable pressure on the Crown Dependencies to cooperate with the EU, to negotiate agreements in effect giving (irrespective of Protocol 3) extraterritorial effect to the TOSD and subsequently to pass internal legislation to this end. Whatever the political correctness of this approach, the line taken by the UK authorities ignored UK constitutional law, including the clear provisions of Protocol 3. The fact that the Crown Dependencies acted "voluntarily" in cooperating with the UK and the EU does not alter the fact that the approach adopted by the UK violated at least the principles of legal certainty and legitimate expectations based, *inter alia*, on the fact that Protocol 3 forms an integral part of UK constitutional law and is, one of the rare examples of written law in the constitutional relationship between Jersey and the UK.[77] Whether a written constitution would have afforded greater protection to the Islands must be doubtful, although the possibility of judicial review by a Constitutional Court (as for example in Germany) may well have provided a firmer basis upon which Jersey and the other Islands could have resisted pressure from the UK authorities, notably the Treasury.

134 Following extensive discussions between the three Crown Dependencies themselves and with the UK (notably the Treasury, the Inland Revenue and the Department for Constitutional Affairs), it was decided that – in contrast to the situation with Switzerland and the other third countries – agreements would be made between each

[77] It is remarkable (to this writer at least) that greater prominence has not been given to the role of EU law (particularly Protocol 3) in the relationship between the Crown Dependencies and the UK. This is probably partially explained by the absence of "constitutional" or EU-related litigation involving the Crown Dependencies either in the Jersey or the UK Courts. Lord Falconer, when acknowledging the leading role played by Jersey in the drafting of the Model Agreement, effectively glosses over the fact that Jersey's "cooperation" was only secured by fairly overt "power politics" on the part of the UK authorities.

Crown Dependency and each of the 25 Member States. The reasons why a different approach was chosen by the EU for the UK's dependent territories and the third countries are not entirely clear, although it may well be that the UK itself did not wish to see precedent-setting agreements negotiated between its dependent territories and the EC as such. In the event, the solution which was reached was broadly analogous to the situation which would have existed if a single agreement had been negotiated between each dependent territory and the EC. Thus, following extensive concertation, mainly amongst themselves but also with the UK, the Crown Dependencies settled on the text of a "model agreement". This was then "negotiated" by the representatives of all three Islands acting in concert with the Commission and the Irish Government in its role as Council Presidency.

135 In contrast to the protracted and often controversial negotiations with third countries, the EU's negotiations with the Crown Dependencies were marked by a high level of efficiency and professionalism on the latter's part. Thus, although there were difficulties to be ironed out on a number of technical issues, the core provisions on the retention tax, including the modalities for its collection and payment, were negotiated without excessive controversy or difficulty.[78]

136 More problems were caused by the "procedural" provisions of the Model Agreement, including the conditions for suspension, termination and dispute settlement. Throughout the process, the Crown Dependencies (for whom Jersey assumed the role of lead negotiator) were conscious of the overriding need to ensure a "level playing field" not only as regards other third countries and dependent territories, but also between the Member States themselves. The Crown Dependencies also wished to make it clear that, by virtue of Protocol 3, they were outside the fiscal territory of the EU. There was no question therefore of the Crown Dependencies adopting the Directive as such. Finally, unlike the third countries involved, the Crown Dependencies did not seek "counter-concessions" from the EU in exchange for their cooperation in the extraterritorial application of the principles contained in the TOSD.

137 It is of course premature to evaluate the long-term effects of this turning point in relations between the Crown Dependencies and the EU. Undoubtedly, those on the Commission and Council Presidency side who participated in this exercise cannot but have been impressed by the professionalism of those representing the Crown Dependencies. Of course, in this instance, the interests of all three Crown Dependencies were identical and enabled the Islands to work together, seamlessly, as a team. As is discussed elsewhere in this paper, this model would be difficult if not impossible to replicate when the interests of the three jurisdictions differ. However, given the success (in adverse circumstances) of this exercise – together with that involving the technical adjustments to Protocol 3 in the negotiation of the Constitutional Treaty discussed above –

[78] Lord Falconer, in his speech to the States on 10 May 2004, noted that "the signing of these Agreements will be an historic event for Jersey, enabling you to deal bilaterally with other EU Member States within a framework that generates confidence from both sides". See fn. 13.

it is clear that in terms of capacity to conduct international relations, the Crown Dependencies are at least at the level of comparable sovereign States. This is an element which should be taken into account not only in the Crown Dependencies themselves but also in London, in any future discussions on the international "personality" of the Crown Dependencies.[79]

138 Although it is not possible in this paper to give a full analysis of the proposed Model Agreements, the following outline may be helpful. Two points need to be made at the outset. First, the texts of the Model Agreements were prepared by the Crown Dependencies and subsequently changed very little on the EU side. Secondly, although the Crown Dependencies were careful to proceed in discussions with the EU authorities taking into account progress in the EU's negotiations with other third countries such as Switzerland, the efficiency with which the negotiating process was handled was recognised by the EU (particularly the Commission and Council Presidency) and undoubtedly enhanced the standing of the Crown Dependencies with the EU Member States.

139 The preamble to the Agreements contains useful confirmation that Jersey is not within the EU fiscal territory and that Protocol 3 thus excludes fiscal policy. It is noted that Jersey will apply a "retention tax" with effect from the date of entry into force of the Directive (1 July 2005) provided that the Member States and other third parties have implemented the Directive and the other Agreements made in relation to it. Jersey also confirms that it is to apply automatic exchange of information in the same terms as provided for in Chapter II of the Directive from the end of the transitional period as defined in article 10(2) of the Directive. The Agreements usefully provide that Jersey's legislation on collective investments is deemed to be equivalent in its effect to EC legislation referred to in articles 2 and 6 of the Directive. Finally, the Agreement provides that Jersey will transfer 75 percent of the revenue of the retention tax to the competent authority of the Member State concerned, in respect of interest payments made by a paying agent established in a contracting party to an individual resident in the other contracting party.

140 The Agreements, both with Member States which apply exchange of information and with Member States applying withholding tax, are reciprocal in form. Thus, they provide that Member States are to provide the Jersey authorities either with information concerning beneficial owners resident in Jersey but receiving payments from a paying agent in a Member State or the levying of a retention tax on interest payments made to residents of an EU Member State with an account in Jersey. The definitions provided in the Agreements (of "beneficial owner", "paying agent" and "interest payment") are broadly the same as those provided in the Directive itself. A retention tax revenue sharing arrangement is made such that Jersey is to retain 25 percent of the retention tax deducted

[79] Note that in its Strategic Plan 2005-2010, the Jersey authorities specifically identify the development of Jersey's international personality as a priority.

under the agreement and 75 percent of the revenue is to be transferred to the other contracting party.

141 Perhaps the most controversial aspect of these negotiations (leaving aside the principle of the Agreement itself) was the issue of dispute settlement. The background to this issue was the fact that, being outside the EU for fiscal purposes, Jersey would not have the possibility of recourse to the European Courts for the settlement of disputes arising under the Agreements. Similarly, unlike third countries such as Switzerland and Liechtenstein (or even Andorra or San Marino), Jersey had no other framework for dispute settlement either with the EU or its Member States.

142 The Agreements contain a "best endeavours" clause to resolve difficulties or doubts regarding the implementation or interpretation of the Agreement by mutual agreement. In addition (and as a further safeguard for the Crown Dependencies), either party may terminate the Agreement by giving notice of termination in writing. In such a case, the Agreement shall cease to have an effect 12 months after the serving of notice. Finally (and crucially in view of the absolute need for a level playing field), it is made clear that the Agreement is only to apply on condition that all other parties (the Member States of the EU, the United States, Switzerland and Andorra, Liechtenstein, Monaco and San Marino and all the relevant dependent and associated territories of the Member States of the EC) adopt and implement measures which conform with or are equivalent to those contained in the Directive or in the Agreements and provide for the same dates of implementation. Six months before the date of entry into force of the Directive (now 1 July 2005) the contracting parties are to decide, by common accord, whether this condition of "simultaneous application" has been met. Equally, subject to the mutual agreement procedure, the application of the Agreement or parts of the Agreements may be suspended by either party if the Directive ceases to be applicable either temporarily or permanently under EC law, or in the event that a Member State suspends the application of its implementing legislation. Similarly, and also subject to the mutual agreement procedure, either contracting party may suspend the application of the agreement if one of the third countries or territories subsequently ceases to apply the measures.

143 It has already been necessary for the EU to postpone the date of implementation of the Directive until 1 July 2005. Currently, although most of the "old" EU Member States have notified their implementing legislation to the Commission, very few of the "new" Member States have done so. At the beginning of 2004, the Commission sent infringement letters for failure to transpose the Directive to Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg and the UK. Until now, out of the old Member States, only Greece, Italy and Luxembourg have not transposed the provisions of the Directive into national legislation. A majority of the ten new Member States have not adopted national legislation necessary to apply the Directive and a few have not even published draft legislation, even though the deadline for adoption was 1 May 2004.

144 The implementation process regarding the third countries has been proceeding smoothly since a package of bilateral agreements, including the TOSD agreement with Switzerland, were initialled in June 2004. Even if the situation improved in the course of 2004, it is clear that the extension agreed by the Council for the entry into force of the Directive on 1 July 2005 was indispensable and even this may be optimistic. Full implementation could also be further delayed as a result of the ratification process in Switzerland, and perhaps Andorra, San Marino and Liechtenstein, which provides for the possibility of a referendum. Even though Andorra has given guarantees that it would be ready to implement the agreement as early as April 2005 and potential delays due to the constitutional arrangements in Switzerland have already been taken into account when changing the date of application to 1 July 2005, EU institutions will obviously closely monitor the implementation process in third countries.

145 Perhaps more fundamentally, there appears to be a measure of scepticism, particularly in third countries such as Switzerland, as to whether the TOSD process will lead to substantial fiscal revenue being "repatriated" to EU Member States. The feeling appears to exist amongst legal and fiscal experts in third countries that the lack of clarity or uncertainty regarding the definition of terms such as "paying agent" and "beneficial owner" means that scope exists for those wishing to do so, to escape from the coverage of the agreements. If this is correct, it may be questioned whether the 7 or 8 years work within the EU and with the selected third countries and territories will have been worthwhile.

146 By general agreement, the TOSD and its related Agreements are marginal in the sense that top priority in the EU itself still needs to be given to providing a common tax base for corporate tax[80], even if any coordination of rates is unnecessary. Finally, despite the Commission's insistence on the need to extend the coverage of the TOSD to other financial centres (for example in Asia) and its commitment to do so in the Memorandum of Understanding (MoU), of the Agreements with third countries, it is unclear that countries such as Singapore would have the necessary political will or incentive to enter into negotiations with the EU on this matter. If this is the case, then EU Member States, third countries and other jurisdictions such as Jersey which have so far reached agreement with the EU will have no guarantee that there will not be a "flight of capital" from their jurisdictions to others in the world, where no agreement on information exchange or retention tax with the EU exists. Despite the uncertain and controversial background to the TOSD and its related international agreements, the impact of this exercise on Jersey and the other Crown Dependencies has been profound. More than any other development in the last 30 years, the virtual imposition of these measures on Jersey by

[80] With hindsight and taking into account the seven years which have been spent to obtain the limited results in both the TOSD and the Code, it must be difficult for the Commission to be other than pessimistic regarding future corporate tax initiatives, especially in a Union of 25 Member States, where the unanimity rule applies to Council voting on tax matters. It is for this reason that, in my view, new tax initiatives may well take place within the framework of "enhanced cooperation" and by using "soft law" measures such as the Code. See further the Commission papers *Tax policy in the EU – priorities for the years ahead*, COM(2001) 260 final of 23.5.2001; *An Internal Market without company tax obstacles – achievements, ongoing initiatives and remaining challenges*, COM(2003) 726 final of 24.11.2003.

the UK, acting as "agent" of the EU, has rightly provoked fundamental reflection on Jersey's constitutional relationship both with the UK and with the EU.

The Code of Conduct on Business Taxation – a more serious challenge to Jersey?

147 Although the taxation of interest payments to EU residents may have a certain impact on the extent to which such funds would be located in Jersey, the pressure which was brought to bear on Jersey by the UK acting on behalf of the EU, to amend its company tax legislation is arguably of greater concern. Part of the "package" of tax measures agreed by the ECOFIN Council on 1 December 1997 was a Resolution on a Code of Conduct for Business Taxation. Section M of this Code ["geographical extension"] stated clearly that the Code would apply to the dependent and associated territories of Member States and that it should also be "promoted" to third countries. It is important to remember that this initiative by the EU was taken at virtually the same time as a similar initiative in the OECD on harmful tax competition. Both the EU and OECD actions were based on the understanding that, although taxation was a legitimate instrument of national economic policy in order to promote competitiveness, certain tax measures were "harmful" and should be eliminated. The EU Code, which was legally non-binding, established a procedure of "peer review" whereby national tax measures which were potentially harmful would be tabled, reviewed and, to the extent that they were found to be "harmful," gradually eliminated and replaced by non-harmful measures. As far as the UK was concerned, measures in all three Crown Dependencies were identified.[81]

148 Section M of the Code provided in part that "Member States with dependent or associated territories . . . undertake, within the framework of their constitutional arrangements, to ensure that these principles are applied in those territories." The Jersey Exempt Company legislation was identified by the Group as potentially harmful and became one of 66 measures on the final list of harmful measures which were subject to the "standstill" and "rollback" provisions of the Code[82]. After considerable reflection and consultation, Jersey proposed new company tax legislation which was subsequently submitted to the Group by the United Kingdom and approved as being consistent with the Code.

149 As in the case of the TOSD, Jersey found that its company tax legislation has had to be changed as a result of:

(a) action initiated by the EU outside the framework of Protocol 3;

(b) political pressure from the United Kingdom outside the framework of established constitutional arrangements and arguably in contradiction with the phrase in the

[81] Full details of the measures are to be found in the Primarolo Report: *The Code of Conduct on Business Taxation / Primarolo Group*, ECOFIN Council of 29.11.1999.
[82] The four Jersey measures identified by the Code were the Tax Exempt Companies, the International Treasury operations, International Business Companies and Captive Insurance Companies.

Code of Conduct which provides that Member States should act "within the framework of the constitutional arrangements";

(c) pressure exercised in such a way as to endanger the legal and economic basis for Jersey's hard-won economic prosperity and political stability.

150 As Jersey and other territories affected by the EU and OECD measures have made clear, the attempts by the EU and OECD to apply their tax law and policy (even when it is legally non-binding) extra-territorially is not only in doubtful conformity with public international law but also threatens the economic viability of States and territories which often have no other means of economic survival. This is particularly true of developing countries in the Caribbean, but applies to micro-jurisdictions such as Jersey, Guernsey and the Isle of Man, for whom attracting financial services and other corporate business to establish a base in the Islands is crucial to their future prosperity.

151 A common and disturbing theme which runs through the extra-territorial extension of EU tax policy (and that of the OECD) is the absence of any legal basis for such action. Unlike areas such as trade, health, civil aviation, maritime policy and telecommunications, there is no universal (or even regional) agreement on tax, either as regards rates, structures or even the details and modalities of international cooperation. No legal definition of "tax haven" exists. Economic and non-binding definitions such as those in the OECD's 1998 Report and in the EU's Code of Conduct (para. B, 1-5) cannot lawfully be applied to non-Members.[83] In the case of Jersey, the situation is even worse. A change in Jersey's corporate tax law and policy was forced on the Island not only contrary to the provisions of Protocol 3, but also contrary to the spirit if not the letter of UK constitutional law. It is only of limited consolation in this context that Jersey and the other dependencies at least did not suffer the "double jeopardy" endured by Gibraltar, and certain Member States (such as Belgium) whose company tax legislation was not only subject to the standstill and rollback provisions of the Code of Conduct, but was also attacked by the Commission under EU state aid law.

152 For the sake of completeness, some mention should be made of the OECD tax initiative. Unlike the EU Code of Conduct which addressed rates of taxation (or at least differences in rates of taxation), the OECD initiative (based on the OECD's 1998 Report Harmful Tax Competition: An Emerging Global Issue) addressed the issue of effective exchange of information and transparency. Although the OECD initiative, like that in the EU, was an attack on allegedly harmful tax practices, including "tax havens", the OECD did not use the device of "standstill" and "rollback" to address specific measures.[84] Nonetheless, the attempt by a limited number of developed countries within the OECD to impose tax policies (including exchange of information and cooperation) on non-members was not only arguably in breach of public international law, but also deeply resented by

[83] Note that the Code defines "harmful" tax practices rather than "tax havens".
[84] The OECD exercise lost considerable momentum (and credibility) following the lack of support from the Bush administration in the US.

some of the developing countries and territories on whom OECD policy was imposed. From a more positive standpoint, the OECD initiative provided Jersey with an opportunity to enhance its reputation as a well-regulated financial jurisdiction. In addition, from a constitutional perspective, Jersey conducted its negotiations with the OECD Secretariat independently of the UK authorities. In this way, Jersey cemented its "standing" in the OECD, where the Island already represented its own interests in the Financial Action Task Force (FATF) and in the Offshore Group of Banking Supervisors.

153 On 22 February 2002, Jersey provided the OECD with a letter of commitment ensuring that the Island was not included on the OECD list of uncooperative tax havens. In its letter of commitment, Jersey undertook to maintain legal mechanisms allowing information to be provided to tax authorities on specific request for the investigation and prosecution of criminal tax matters on a reciprocal basis. Such information is to be provided even if the conduct being investigated would not constitute a crime under Jersey law. Jersey also undertook to provide to tax authorities upon specific request and in accordance with tax information exchange agreements (TIEAs) to be negotiated with individual countries, information that may be relevant to civil tax matters. Jersey undertook to negotiate TIEAs on condition of full reciprocity, including adequate protection against the unauthorized disclosure of information by the receiving jurisdiction and taking into account privacy obligations arising under relevant human rights law.

154 As far as transparency is concerned, Jersey undertook to ensure the availability of information on beneficial ownership of companies and other legal entities established in Jersey and to ensure that the Jersey authorities have access to bank information relevant to tax matters of both resident and non-resident business enterprises, individuals and other entities, including trusts. Jersey would also require accounts to be kept by companies and other entities in Jersey, in accordance with accepted international standards.

155 As background to Jersey's commitment to the OECD, the Island Authorities underlined a number of points which had also been made with Commission officials in Brussels. These were that Jersey already has existing legislation providing for exchange of information on criminal tax matters and under Jersey's legislation in respect to the investigation of fraud, all crimes, money laundering and international cooperation, Jersey could already provide information to some other jurisdictions which could be regarded as an exchange of information in respect to civil tax matters. More generally, and politically, Jersey took the opportunity of its commitment to the OECD to underline the need for an inclusive process in setting internationally accepted standards, in view of the need to attract global support for these standards. In this respect, the OECD Committee on Fiscal Affairs could only be successful if its work were carried out on a global basis and through a global partnership. The principle of a level playing field was indispensable in the fiscal field. As far as Jersey was concerned, the need for a level playing field also meant that OECD Members which failed to adopt equivalent commitments or to satisfy the standards

of the 1998 Report would be subject (like non-members of the OECD) to a "common framework of defensive measures." Finally, the Jersey authorities emphasized that fair tax competition in all areas of business activity was a benefit to the world economy and was not to be discouraged.

The impact on Jersey of EU activities in justice and home affairs

156 Over the last seven years, it is understandable that Jersey's attention has increasingly been focused on the potential negative consequences of the "tax package" adopted in 1996 and the opportunities offered by the integrated EU financial services markets. However, during this time, and in a way which is related to developments in EU tax policy, the "third pillar" of the Maastricht Treaty has provided a basis for increased inter-governmental cooperation in the field of justice and home affairs.[85] Although dissatisfaction has been expressed with progress in a number of areas under the third pillar, there is no doubt that there exists today a level of cooperation between national law-enforcement agencies (and judiciaries) which was unimaginable ten years ago. Given its prominence in the world of international finance, it was inconceivable that Jersey would be unaffected by these developments or indeed, given its excellent reputation in the field, that it would avoid appropriate action to relate to these European developments outside the scope of Protocol 3.

157 As with almost all new areas of EC or EU policy (the Single Market and EMU were two previous examples), the prospects for successful cooperation between Member States in this area were regarded with some scepticism, notably in the United Kingdom. Increased cooperation between police and other law enforcement authorities had become essential as a result of the total abolition of internal frontiers under article 14 EC. In short, the free movement of goods, services, persons and capital was accompanied by greater freedom for criminals and criminal activities. Article 29 TEU provided that an important Union objective should be to "provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia." This Treaty objective was to be achieved by preventing and combating crime, organized or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug and arms trafficking, corruption and fraud, through closer cooperation between police forces, customs and judicial authorities in the Member States.

158 It soon became clear that in this, as in other areas of EU policy, measures could not be confined to EU Member States alone. In particular, a close nexus was perceived between the creation of a single financial services market and the total abolition on free movement of capital (accompanied and enhanced by the increasing use of electronic

[85] Title VI of the Treaty on European Union (TEU) laid down provisions on "police and judicial cooperation in criminal matters". Substantial amendments were introduced in this area, particularly by the Amsterdam Treaty which came into force on 1 May 1999.

commerce), the possibilities for fiscal evasion both at the personal and corporate levels (thus necessitating increased cooperation between national fiscal authorities) and international criminal activities such as money laundering. It was therefore not surprising that EU action in all these areas tended to progress simultaneously if not in a coordinated manner. From an early stage therefore, as a jurisdiction conscious of the need to preserve the highest possible standards of regulation and supervision, Jersey took an active interest in developments at EU level in the field of justice and home affairs, in particular in the field of money laundering.

159 Jersey's monitoring activities in this and other areas were facilitated by the fact that, following the example set in the 1985 White Paper for the completion of the internal market, the Community increasingly adopted legislative programmes accompanied by politically-binding time tables in other fields of activity. The Financial Services Action Plan (FSAP) is an example which is discussed below. Likewise, in police and judicial cooperation, legislative time tables, action plans and "scoreboards" providing transparency for Member States'[86] progress in implementing legislation adopted by the Council, facilitated monitoring by Jersey and other non-member jurisdictions. At the same time, even if in strictly legal terms the powers of the Commission were limited in this area of inter-governmental law and policy, in practice the role and influence of the Commission has increased steadily over the last decade. Thus, the Commission's Directorate General for Justice and Home Affairs is now one of the largest services in the Commission and takes responsibility not only for proposing legislative initiatives in this area but also for monitoring and enforcing respect by Member States for measures already adopted.

160 Jersey and the other Crown Dependencies have been particularly keen not only to monitor the adoption of EU law and policy in this area, but also to ensure that the EU and other international authorities recognize that Jersey's own legislation in the field of economic crime (as well as the Islands' track record in international cooperation) was of the highest order. In general, this has been achieved. Jersey has been a participant, in its own right, in the Financial Action Task Force (FATF) established under the OECD. At the same time, Jersey officials and the Law Officers have ensured that the Commission are kept informed of Jersey legislation in this area, through meetings not only with the Director General for Justice and Home Affairs but also with the Commission's anti-fraud service (OLAF), which takes action in cooperation with national police forces against fraud on the Community budget.[87] These meetings have been welcomed by the Commission, which has responded favourably not only to the extent to which Jersey's own legislation (for example, on money laundering) broadly reflects that in force in the EU, but also on the

[86] See Commission documents SEC (2004) 401 and 680 which contain an impressive list and summary of the main measures adopted in this field under the Tampere programme, in fields such as asylum and immigration, visa policy, judicial cooperation in civil and criminal matters, mutual recognition of judgments, and the fight against drugs, terrorism and other forms of international crime.

[87] Given the extensive legislation adopted by the EU in the field of money-laundering, the fact that Jersey has enacted comparable legislation in parallel to that in the EU has been particularly well-received by the EU authorities.

efficiency of the cooperation provided by the Jersey authorities (notably the Law Officers) in their dealings with Member States or Union authorities.[88]

161 There was of course no way in which Jersey (or indeed the United Kingdom itself) could have known in 1972 that the economic goals of the European Community would, as a result of unforeseen events, need to be complemented in areas such as security, defence and criminal law. Although there is no doubt (at least in my mind) that the total abolition of internal frontiers on 31 December 1992 emphasised the need to strengthen the external borders of the EU, the main impetus which led to the second and third "pillars" of the EU being included in the Maastricht Treaty in 1992 were the collapse of the Berlin Wall and increased instability on the EU's Eastern frontier, combined with the total abolition of internal frontiers in the EU and the opportunities which this offered to organized crime.

162 In addition and perhaps more importantly, it was realised that to attempt to limit the competence of the Community to purely "economic" issues and to public rather than private law, was not only realistic but possibly counter-productive. Thus, since 1992, the divisions between the three "pillars" (particularly between the first and third pillars) has become increasingly irrelevant so that, in the Constitutional Treaty now awaiting ratification, the pillar structure has been abolished altogether. In addition, the EC has increasingly addressed the need to harmonise or at least coordinate areas of national private as well as criminal law. The need for increased judicial cooperation, including the mutual recognition and enforcement of judgements as well as cooperation between law enforcement authorities, has also been recognised.

163 In a way which was unforeseen a mere decade ago, justice and home affairs has become one of the most dynamic policy domains in the EU. Particular impetus was given by the procedural changes enacted in the Treaties of Amsterdam and Nice, which came into force in May 1999 and May 2003 respectively. In the Amsterdam Treaty, policies grouped under the heading of JHA were re-labelled freedom, security and justice, together with judicial cooperation in penal matters. Immediately after the entry into force of the Treaty of Amsterdam on 1 May 1999, the EU adopted an ambitious work program at the Tampere European Council of 15-16 October 1999, at the same time outlining a timetable (the "Tampere scoreboard") which set objectives as well as deadlines and gave structure to the agenda in this area.[89]

164 It is beyond the scope of this paper to discuss in detail progress which has been made in various areas of justice and home affairs. Two observations may however safely be made. First, the intensity of regulatory action in the Council was entirely unforeseen 10 years ago. Secondly, almost all the measures taken have an external as well as an

[88] Lord Falconer has recognised Jersey's efforts to develop measures to counter the threat posed by money laundering and other financial crime (speech to the States on 10 May 2004). See fn 13.
[89] See further *Progress and obstacles in the area of justice and home affairs in an enlarging Europe*, CEPS working document no. 194 by Joanna Apap and Sergio Carrera (June 2003).

internal impact, which Jersey (like other jurisdictions on the periphery of the EU) cannot afford to ignore. EU regulatory activity has been most intense in areas such as immigration, asylum and judicial cooperation in criminal matters. Given the intrinsic sensitivity, in terms of national politics, in all these areas, it is not surprising that progress has been difficult and characterised by continuing frictions and strains amongst the Member States. Some of the causes of these frictions which have been identified are the weakness of political resolve by the Member States themselves, the diversity amongst national legal systems (particularly after EU enlargement in 2004) and police practices, differences in European policies on immigration and asylum, corruption amongst certain national authorities, a lack of consistency owing to the practice of the rotating EU presidency and the unsatisfactory or unclear character of the EU pillar structure.

165 Despite the difficulties and setbacks involved in this relatively new area of EU policy, it is clear that, as jurisdictions with high standards of regulation, supervision and law enforcement, Jersey and the other Crown Dependencies cannot stand aside from these developments, whatever the formal provisions of Protocol 3. Jersey has in fact much to gain - with the EU as with the OECD – from being perceived as a "cooperating jurisdiction" and one which applies high standards in matters falling under the criminal law. Thus, not only has Jersey felt it appropriate to monitor carefully developments in this new area of EU activities, but the Islands' authorities have in certain cases developed contacts with certain of the institutions which have been set up to facilitate cooperation at European level.[90] Given the close relationship between financial services as Jersey's core economic activity and issues such as money laundering and other forms of economic crime together with the need for wide ranging administrative and judicial cooperation at European level in these areas, it may be wondered whether the current scope of Protocol 3 is not more of a handicap than a benefit to Jersey in developing a form of cooperation with other jurisdictions in Europe (including the EU institutions).

166 In this respect it is important to stress that Jersey's deep-rooted desire to preserve its culture and heritage through independence is not unique in modern Europe. Indeed, there is in my view a close relationship between the trend towards subsidiarity and decentralisation on the one hand and regional autonomy on the other. Sovereign States such as Andorra and Liechtenstein are equally jealous of their unique history and independence. This, it is submitted, is entirely distinct from the extent to which international cooperation is appropriate. For Jersey to underpin its economic prosperity, international cooperation is indispensable. For this, a clearer and more extensive international personality is overdue.

Financial services and access to EU markets for Jersey companies

[90] Eurojust, a European Union body established in 2002 to enhance the effectiveness of the competent authorities within Member States when they are dealing with the investigation and prosecution of serious cross-border and organised crime, and Europol, which was set up to improve police cooperation between the Member States to combat terrorism, illicit traffic in drugs and other serious forms of international crime.

167 The growth of Jersey as an international financial centre occurred largely in parallel to the creation of a legal framework for a single financial services market in the EC.[91] As in the GATT (later the WTO), the liberalisation of services markets lagged behind the liberalisation of trade in goods. However, in the space of one decade (between 1988 and 1998) the EC had completed the framework providing for the establishment and the cross-border provision of services in the banking, insurance and securities sectors. Throughout this time, Jersey's financial products could be marketed in EC Member States only as a result of bilateral agreements with the financial authorities in those Member States. This is still the case today. By virtue of Protocol 3 Jersey is, as far as financial and other services are concerned, outside the Single Market and, in practice, in the position of a third country. This is of course in contrast to Liechtenstein which benefits from freedom of services under the EEA Agreement and to Switzerland which has negotiated market access, at least in certain financial sectors, on a bilateral, case-by-case basis. Other countries (such as Andorra and San Marino) have used the recent TOSD negotiations at least to provide a springboard for future market access negotiations.

168 The success of Jersey's financial industry over the last 30 years and the fact that it is likely to provide the basis for the Islands' future economic prosperity raises the question of the adequacy of Jersey's constitutional links both with the UK and with the EU (as well as other international organisations) in perhaps its most acute form. Protocol 3 is largely if not completely irrelevant to the way in which the Jersey authorities regulate and supervise the financial services industry and to the way in which that industry markets its products in the EU. It is an important question whether the absence of an international legal framework for this important industry (not only in Jersey but in the other Crown Dependencies) is positive, negative or neutral from the standpoint of the protection and development of Jersey's financial services industry. In a fast changing world, it is clear that all jurisdictions for which financial services are a key economic sector are being forced to address this question at the same time as Jersey, without yet having found a perfect solution. Some, such as Cyprus and Malta (together with other small jurisdictions which have aspirations in financial services such as Slovenia and Estonia) have opted for and obtained EU membership. Others – as indicated above – such as, Andorra, Monaco, San Marino, Iceland and jurisdictions beyond Europe such as those in the Caribbean, the Far East and other parts of the world, are still searching for an appropriate solution. Full membership (or at least adherence to) the WTO GATS, would be an important start for Jersey and all comparable jurisdictions. Whilst not automatically guaranteeing full market access for all financial products, the application of the national treatment and most-favoured nation (MFN) standards in the GATS, as well as the forum which the WTO provides for ongoing market opening negotiations, are an essential legal platform for all

[91] Although the basic framework for the financial services market was set by the establishment and services Directives on banks, insurance and investment services in the late 1980s and early 1990s, these fundamental rules have been modernised and complemented by the Financial Services Action Plan (FSAP) agreed in 1998 and due for completion in 2005. The adoption by the Council of the Lamfalussy Committee's recommendations has now fundamentally changed the regulatory (though not the supervisory) approach to financial services in the EU. Attention has now shifted to EU financial regulation and supervision after 2005, as evidenced by the creation of a taskforce under the Centre for European Policy Studies (CEPS) in Brussels on this subject.

jurisdictions for which financial services are a key component of their economies. Again, as so often throughout this paper, the conclusion of suitable arrangements or modalities for international negotiations by Jersey itself, with the UK authorities, is both indispensable and increasingly urgent.

169 The issues involved are complex, both legally and institutionally. Even if, for Jersey, access to international markets is a priority, financial services are now inextricably linked with other issues such as taxation, economic crime and "corporate governance" in the broadest sense. In the latest report by the European Commission on the Financial Services Action Plan (FSAP)[92], the Commission makes it clear that the emphasis has now shifted from completing the legislative framework for the cross border provision of services (including the consolidation of existing directives in banking and insurance) and turning to addressing lessons learned from market failures such as Parmalat. Thus, the current legislative priorities for the EU cover areas such as audit and accountancy, money laundering, more rigorous capital requirements (the CAD III proposal), follow-up to the action plan on company law and corporate governance and strengthening company law provisions on cross border transfers of corporate seats.

170 As the Commission states in its 10th Report on the FSAP -

> "Although the European Commission tried to keep additional measures in the area of financial services limited in amount, developments and/or incidents required adaptability and flexible political responses. This was true, for instance in the areas of company law and corporate governance, where the accounting scandals in the United States and Europe required a tailored European response. Furthermore, it became clear already at an early stage of the FSAP that an integrated market could not be achieved by regulation only: parallel work was set in hand to develop more streamlined regulatory and supervisory structure."

171 As a jurisdiction which seeks to attract companies to locate or do business in Jersey, it is clearly in the Island's political and economic interests to keep abreast of – and indeed to cooperate with – these new European initiatives, so that there can be no question that Jersey has equivalent regulatory and supervisory standards in the field of company law (including audit and accountancy).

172 As far as the modernisation of regulatory and supervisory structures is concerned, in July 2000, the ECOFIN Council established a Group of Wise Men, chaired by Baron Alexandre Lamfalussy, to investigate and propose options. In February 2001, the final Lamfalussy report recommended reform of the European regulatory structure in the securities area, calling for a four-level approach in the lawmaking process. This approach comprises -

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[92] Financial Services: *Turning the Corner – Preparing the challenge of the next phase of European capital market integration*, Brussels 2 June 2004 (10th Report).

(a) "Level 1" framework legislation adopted by the co-decision procedure under article 251 EC concentrating on the core legal principles;

(b) Level 2 implementing measures to fill in the details of Level 1 legislation, to be adopted by the Commission in cooperation with a committee of Member States'experts;

(c) greater day-to-day cooperation by national supervisors and regulators to ensure consistent implementation and enforcement, again by the Commission in consultation with national experts; and

(d) more effective enforcement of Community law.

173 Following the success of the "Lamfalussy approach" in the securities area, the Council has recently decided to extend this approach to banking and insurance. A new institutional framework has therefore been established, covering the whole financial services field, for the regulation of the industry at European level.[93]

174 In clear terms, the Lamfalussy approach means a radical change in the regulation of a key area of the Single Market, which in my view at least, has been relatively unnoticed. This approach (which substantially speeds up EU law making) could eventually be adopted in other areas of EU regulation and is noteworthy for this reason alone. Under this approach the "normal EU lawmaking process" (the co-decision procedure involving the Council and the Parliament under Article 251 EC) is restricted to framework or "over-arching" measures, whereas detailed implementing and enforcement measures would revert to the Commission, admittedly acting in cooperation with (and on the advice) of national experts in sectoral committees. Thus, "Level 2" committees would comprise the European Securities Committee (ESC), the European Banking Committee (EBC) and the European Insurance and Occupational Pensions Committee (EIOPC). All these committees would be chaired by the Commission and located in Brussels. Three new "Level 3" committees have been created as follows: the Committee of European Securities Regulators (CESR), the Committee of European Banking Supervisors (CEBS) and the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS). The Securities Committee would be located in Paris, the Banking Committee in London and the Insurance and Occupational Pensions Committee in Frankfurt.[94]

175 In my view, the adoption of the Lamfalussy approach across-the-board in financial services is of considerable significance for jurisdictions such as Jersey. The new approach reflects an intensification and a quickening in the pace of EU financial services regulation. This has been prompted, *inter alia*, by technological changes and the need for the EU to provide a regulatory and supervisory framework for financial services which

[93] Note that supervision (as opposed to the regulation) of the financial services industry is still very much a matter of national as opposed to EU competence.
[94] The function of the Level 3 committees is to issue non-binding guidelines in their respective sectors.

enhances Europe's competitiveness compared with the United States and other jurisdictions. Arguably (although this is of course denied by the Commission) the new approach is less transparent than its predecessor. This is a particular problem for the European Parliament which continues to fight for an equal role in EU legislation with the Council. Non-membership of the new committees will be an added disadvantage. Given the scope and ongoing nature of these reforms (see below), it will be vital for "off-shore" financial centres such as Jersey to establish the best possible working relationships with the new EU structure. One key constitutional issue here is whether this is done directly (formally or informally) or through the UK authorities. This question of course goes to the heart of the issues discussed in this paper, namely that Jersey must enjoy comparable international personality to its internal autonomy, particularly in areas crucial to Jersey's economic future, such as financial services.

176 As far as the post FSAP era is concerned (*i.e*., from 1 January 2005 onwards) it is clear that reforms will be ongoing, although perhaps at a more measured pace. The Commission recently received reports from four groups of market practitioners aimed at assessing the strengths and weaknesses of the European legislative framework in the banking, insurance, securities and asset management sectors. The new Commission under President Barrosso, which took office on 1 November 2004, will have to evaluate the conclusions to be drawn from these reports and decide what action to take. It is already clear that the Commission will not rush headlong into announcing new legislative initiatives beyond those already announced. As the Commission itself has said[95] "the present legislative programme on strengthening solvency requirements for insurance companies, reinsurance, clearing and settlement, the legal framework for payments, corporate governance and the reform of company law is already a demanding and continuing regulatory priority in the post FSAP period. Nevertheless, where necessary, targeted legislative action in response to specific market failures or regulatory gaps may be an appropriate response and should not be ruled out".

177 In addition, Member States meeting in the Financial Services Committee (FSC) have also prepared a report on financial integration in the EU, which was sent to the June 2004 ECOFIN Council. Finally, the Commission has been attempting to evaluate whether the current legislative framework, (as well as the regulatory and supervisory provisions under it) has actually improved cross border commercial opportunities from the four financial institutions and investors. The Commission's first annual Financial Integration Monitoring (FIM) report has been published alongside the four expert group reports mentioned above. According to the Commission, there is evidence of increased integration of financial markets, as well as favourable developments in terms of competition, market structure, efficiency and the intensity of cross border risk transmission channels. It is unclear however to what extent the new regulatory and supervisory framework for financial services have contributed to this, compared with factors such as the introduction of the euro, cyclical factors or technology. More broadly, it is clear that, in the future, the

[95] Page 13 of the FSAP Report of 2 June 2004.

Commission will work increasingly closely with the private sector in order to develop "evidence-based policy-making and prioritization". Any future regulation at European level must be "effective and proportionate, respecting the subsidiarity principle". It must avoid distorting legitimate competition between market players and be attentive to European competitiveness in a global market place. According to the Commission, this should not only apply to directives and regulations, but also to implementing measures and supervisory standards agreed upon within the Lamfalussy framework. The Commission is committed to "impact assessments" in order to prevent inappropriate regulation.

178 For jurisdictions such as Jersey, the broadening, deepening and intensification of regulation within the EU presents a challenge on at least three levels. First, financial operators in Jersey need to take account of a rapidly changing regulatory and supervisory environment in their biggest and closest market. Secondly, the Jersey authorities (including regulators and supervisors) need to keep abreast of this rapidly changing legal environment in order to ensure that Jersey's own law and practice is equivalent in all respects. Finally, Jersey's economic operators and authorities alike must cope with the fact that, for legal and political reasons, they are formally excluded from the decision-making process in the EU, which will nonetheless have an important influence on the Jersey industry in the years to come.

179 There is a danger that the pace and intensity of regulatory and supervisory change in European financial services may be under-estimated by economic operators and jurisdictions which are not close to the process. As recently as 2000, there was little interest in the United States administration in establishing cooperation with the EU (as opposed to individual Member States) on financial services. This situation has now completely changed with the Treasury, Securities and Exchange Commission (SEC) and the Federal Reserve (as well as the State Department) actively participating in and pressing for regular consultations with their counterparts in the EU. The need for Jersey to do likewise can scarcely be less.

The impact of international action against "tax havens" and off-shore financial centres

180 Jersey's unsought status as a "tax haven" or as an "off-shore centre" is as politically unwanted as it is legally unfounded. These unsolicited labels have been applied to sovereign and non-sovereign jurisdictions across the world, including – occasionally – to EU Member States such as Luxembourg, Cyprus and Malta. Even if the terms "tax haven" and "off-shore centre" have no automatic legal definition or consequences, jurisdictions to which these appellations are attached have undoubtedly suffered adverse consequences at the hands of, for example, the OECD, the EU and the United States (both at Federal and State level).

181 The fact that such labels are attached to jurisdictions such as Jersey without any clear legal basis makes it difficult to identify a strategy to avoid the negative consequences

of such appellations.[96] Recent developments in the United States, both at Federal and State level, have shown that Jersey and other "off-shore" jurisdictions may be cited or "black-listed" in legislation which aims at limiting United States' use of "off-shore" jurisdictions for investment or trade purposes. It appears that the primary "targets" of such legislation are jurisdiction in the same time-zone as the United States (*e.g.*, in the Caribbean).

182 It is therefore important for Jersey to ensure that its status (vis-à-vis the UK and the EU) is better known, especially in the United States, as well as its regulatory and supervisory system and trade-record in international cooperation. Improving international knowledge of Jersey's "personality" is one aspect of the increased challenge (as Liechtenstein and other micro-States have for example found) in dealing with an enhanced international personality.

183 Given that the label "tax haven" has no precise legal definition in public international law, it is vital that Jersey's partners in the world (including the United States and the EU) are fully and consistently briefed – in a way which can be referred to and relied on – on Jersey's legislation and law enforcement activities, in relevant areas such as tax, financial services and economic crime.

184 It may well be, even when such steps are taken in a more systematic way to improve international understanding, that difficulties remain, for example as regards the rates of corporate tax applied in Jersey in order to attract foreign business or investment. However, at the very least, a more intensive and direct international dialogue with key partners would address the current level of ignorance and misunderstanding, which clearly exists.

General recognition of the excellence of Jersey's regulatory and supervisory structure

185 Although Jersey has been grouped together with other jurisdictions and categorised as a "tax haven" (as discussed above), the general excellence of Jersey's regulatory and supervisory systems in the field of financial services is now better recognised. This has come about as a result, *inter alia*, of Jersey's own efforts to give proper publicity to its regulatory and supervisory structures and practices, for example in the OECD (including the FATF and the off-shore group of banking supervisors) and through full cooperation in exercises such as that conducted by Andrew Edwards on the instructions of the UK authorities in 1998 and, more recently, by the IMF.[97] Jersey's non-sovereign status has not helped in establishing a separate identity from that of the UK. Of course, it may be argued that sovereign small states such as Liechtenstein, Andorra, San Marino or Monaco

[96] In the context of its work on harmful tax practices, the OECD set out in 1998 four criteria to determine whether a jurisdiction is a tax haven. These are: zero or nominal taxation; lack of transparency; laws or practices preventing the effective exchange of information for tax purposes, with other jurisdictions and the absence of a requirement that economic activity be substantial. Considerable and unresolved debate exists on the public international law consequences of action taken (including extraterritoriality) by, for example, OECD countries, against jurisdictions which are "labelled" as "tax havens".

[97] *Assessment of the Supervision and Regulation of the Financial Sector* Volumes I and II (November, 2003). See fn. 19.

have not necessarily fared better than Jersey in securing international recognition and approval or in escaping "black-listing", for example in the United States. It may be that in certain quarters, for example, in the United States, Jersey's close (but undefined) constitutional relationship with the UK is an impediment to the Island's being able to secure adequate recognition in its own right as an independent jurisdiction in the international financial services world. The confusion within the EU in the context of recent discussions and negotiations on the TOSD are a further example of this phenomenon, which is discussed in more detail below.

186 There could scarcely be any higher recommendation for Jersey (and indeed Guernsey and the Isle of Man) than the Edwards Report of 1998.[98] Edwards found that Jersey and the other Crown Dependencies are "clearly in the top division of off-shore financial centres, with legal frameworks, judicial and prosecution systems, regulation, policing and cooperation with other jurisdictions which mostly work well." Edwards estimated that the Islands' finance centres (taken together), in terms of assets and liabilities of Island institutions and trusts "probably now amount to some 300 to 350 billion pounds". The Edwards' Report expressly does not deal with criticisms of the Islands' tax regimes and the appropriateness or otherwise of labels such as "tax haven". On the other hand, Edwards expressly rejects any criticisms based on secrecy, poor regulation and poor cooperation as being "quite wide of the mark". Edwards concludes, as to the Islands' reputation, that "the Islands are in the top division of off-shore centres". He adds that "many of the professional people I consulted commended their standard of regulation, the absence of corruption, and their cooperation with other jurisdictions, especially in the pursuit of drug trafficking".

187 Criticisms mentioned by Edwards dealt more with company law and practice and with law enforcement, particularly in the area of tax evasion and other forms of financial crime. It is not possible within the confines of this paper to examine Edwards' conclusions in more depth. However, to the extent that criticisms are made in the Edwards Report of Jersey's law and practice, these deal with points of detail rather than major issues of principle and probably could be made with respect to any Member State of the European Union. Indeed, on the occasions when Jersey's law officers have presented Jersey's regulatory and supervisory system (both as regards financial services and economic crime) to the EU authorities in Brussels, the comment has often been made that Jersey's situation is equivalent (and even superior) to that of many Member States. This must certainly be the case to an even greater extent following the EU's enlargement on 1 May 2004, with the accession of Central European countries, still shaking off the administrative legacy of earlier years.[99]

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[98] Lord Falconer said on 10 May 2004 that *"the role which Jersey has played in Europe and beyond on financial matters shows just how successful Jersey has been learning a positive and well-deserved reputation for financial regulation."* See fn. 13.

[99] A consistent criticism by the Commission of the candidate states was their administrative and judicial weakness or inadequacies. Whether all these have been corrected is open to doubt.

188 Edwards, understandably, does not discuss whether the "constitutional" relationship between Jersey and the UK and with the EU is advantageous or otherwise to the Island's economic prosperity. Edwards does mention the importance of the financial flows between Jersey and the UK. He might also have mentioned the fact that many of the regulators and supervisors both in Jersey and the other Crown Dependencies have, at one time or another, gained professional experience in the UK. This tends not only to ensure a consistently high quality of regulation and supervision, but also (presumably) continuing good relations between regulators and supervisors in Jersey and their counterparts in London.

189 Despite the re-assurance which public commendations such as those in the Edwards and IMF reports may bring, it must be remembered that – unfortunately – these do not always have a major impact on policy-makers with a specific agenda in jurisdictions such as the US or the EU. There is therefore, at least in my view, no alternative to consistent constructive engagement with key partners worldwide, including the EU. On the other hand, it is worth considering whether Protocol 3 (rather than being merely "benign" or neutral) may in fact "send the wrong message" about the image or personality which Jersey wishes to create for itself in the 21st century.

Jersey's unclear status under the WTO Agreements

190 Finally, as far as international market access for Jersey services industries are concerned, it is important briefly to note Jersey's status, not only as regards the EU, but also the World Trade Organisation (WTO). Although Jersey was, as a result of specific ratification by the UK, a party to the GATT (1947), the UK has yet to extend ratification of the Uruguay Round Agreements to the Channel Islands. The delay is apparently due to the fact that neither Jersey nor Guernsey has yet upgraded their intellectual property legislation in order to conform to the trade-related intellectual property (TRIPs) Agreement.[100] In any event, it is crucial for the Islands to become a party to the WTO Agreement on services (GATS) if they are to have a solid legal basis from which to negotiate (whether through the UK or in the form of independence agreed with the UK) market access for financial or other services on a global basis.

191 The view is apparently taken that, as far as free trade in goods is concerned, the Crown Dependencies are bound by relevant GATT disciplines by virtue of Protocol 3 and the EC's membership of the WTO. It is not clear whether the same legal nexus would mean that the Islands were also bound by the TRIPs and TRIMs agreements (although this appears to be assumed by the UK), since these are specifically trade-related. In my view, the better approach is that these WTO Agreements (together with the GATS) would only be binding on the Crown Dependencies, if the UK ratified these Agreements specifically on behalf of each Island. In any event, it is interesting to note that the Crown Dependencies are represented in GATT (as opposed to WTO) matters by the

[100] The Isle of Man is apparently a party to the Uruguay Round package (by virtue of UK ratification) already.

Commission, even if – in more than 31 years – no representative of the Crown Dependencies has ever attended a meeting of the article 133 Committee, either in Brussels or Geneva, when trade in goods is being discussed.

192 A further difficult question (but crucial in view of the limited nature of Protocol 3) which arises here is whether Jersey's adherence to the GATS would provide a legal basis for negotiating with the EU (either as such or with individual Member States) for market access for financial services products.[101] From a strictly legal standpoint, my view is that this would be possible. Of course, the defence of Jersey's interests in the WTO (as well as the EU and OECD) also raises the question of the role of the UK. Taking the case of Hong Kong as one recent precedent in this field, it seems that when the UK ratifies the GATS on behalf of Jersey, it is, in law, acting in a different capacity from that when it ratifies the GATS on its own behalf or on behalf of another of its dependent territories. This issue however is one which would need to be addressed with others when the new external status of Jersey was being considered. The economic (and political) importance of the matter should not however be under-estimated, since in the absence of a legal basis for negotiations with the EU and other international partners, Jersey's financial industry is in a state of legal uncertainty.

The changing strategies of the EU's European neighbours – adopting the acquis in exchange for market access?

193 It is fair to say that, as the Community has evolved into an economic and monetary entity (but above all a "Union of law") and as its membership has grown, the consequences of exclusion have also grown. Exclusion can have particularly serious consequences for smaller States or non-sovereign jurisdictions which lack the political leverage to negotiate with the EU (usually through the Commission) on a basis of equality. The only European nation capable of negotiating with the EU in this way is Switzerland. Switzerland is in fact the EU's second largest trading partner after the United States. Taking trade in goods and services into account, there is also a rough balance in bilateral trade. Switzerland has of course applied to join the EU and only the opposition of certain sections of the population (principally the German-speaking cantons) has prevented this. And, as indicated above, Switzerland has made every effort to secure access to the EU's market by the conclusion of over 100 bilateral agreements.

194 This is a two-way street. Since Switzerland is so frequently a *demandeur* for bilateral negotiations with the EU, it is difficult for the Swiss to resist EU requests for "cooperation" in areas such as fiscal, customs or police cooperation. The recent hard-fought negotiations for an agreement implementing the Taxation of Savings Directive is an example of this. Nonetheless, even if – in the end – Switzerland was compelled to accept

[101] Note that in its Opinion of 15 November 1994 in case 1/94, [1994] ECR I-5276 on the extent to which the EC possessed the exclusive competence to conclude the GATS, TRIPS and TRIMS Agreements at the end of the Uruguay Round, the ECJ held that the EC did not possess such competence. The impact of regulatory developments in the EU over the last 10 years on this legal situation is not clear, although clearly the extent to which the regulatory "field has been occupied" by EC legislation has expanded considerably.

the TOSD agreement, with a transitional period leading to the full exchange of information, Switzerland was able to use the "leverage" of these negotiations to secure concessions from the EU in its own interests. Given the scepticism as to the likely results (in terms of recovery of fiscal revenue) of the Swiss agreement, it may be that Switzerland has made a clear net gain from the TOSD exercise.

195 The same cannot be said of all parties involved in this process. Andorra, Monaco, San Marino and Liechtenstein all sought "counter-concessions" from the EU in the TOSD process. Jersey, the other Crown Dependencies and the UK's Caribbean territories did not even seriously contemplate making "counter-concessions" part of their negotiating strategy in the TOSD discussions. Even for the other third countries involved however, the results obtained were not on the whole of great economic significance. However, the manner in which the EU conducted negotiations with the micro-States on its periphery (including the dependent and associated territories) has certainly caused all of them to undertake a fundamental re-appraisal of their relations with the EU. The same must surely be the case for Jersey.

The case of San Marino

196 Independently of the TOSD, San Marino, like all the micro-States on the periphery of the EU, has found it appropriate to take steps – principally for economic reasons – to develop closer relations with the EU. San Marino has concluded an agreement with the EU on cooperation and customs union.[102] The aim of this recent agreement is to strengthen cooperation with the EU "in respect of all matters of common interest". The conclusion of a customs union agreement is of course far-reaching, particularly as regards external relations. Although it is not often considered in this conceptual way, Jersey is of course in a customs union relationship with the EU, at least as far as trade in goods is concerned.[103] San Marino's agreement goes further however. Its provisions on the free movement of goods aspects of the customs union (including rules or origin, for example) are far more precise than those applicable in the case of Jersey, at least on paper. Article 8 of the Agreement provides explicitly for example that San Marino authorises the Community to carry out customs clearance formalities for products imported from third countries. A Cooperation Committee is established to administer the customs union and to provide a forum for the discussion of problems (including the resolution of disputes) arising under the Agreement more generally.[104]

197 The scope of the cooperation provisions is particularly interesting. Cooperation is to be as broadly-based as possible, "for the mutual benefit of the parties, taking into account

[102] OJ L 84/43 of 28.3.2002.
[103] Thus, in law and in fact, the EU represents Jersey's interests in the WTO, insofar as trade in goods is concerned (*i.e.* involving the application of the GATT and other related agreements such as those on technical barriers to trade (TBTs), sanitary and phytosanitary products (SPS)). Whether this is the case – as the UK appears to believe – for matters covered by the WTO TRIPS and TRIMS agreements is controversial. I am not convinced that these agreements apply to the Crown Dependencies in the absence of specific or separate ratification by the UK.
[104] The absence of any dispute-settlement mechanism in the model agreements on the TOSD was a sticking point for the Crown Dependencies until a late stage in their negotiations, notably because it was a symbol of equality in the bilateral relationship being created.

their respective powers." The underlying philosophy of this Agreement is of course diametrically opposed to that of Jersey under Protocol 3. San Marino seeks an ever-closer engagement with the EU, short of membership. More specifically, the EU and San Marino identify "priority areas" for cooperation, including the growth and diversification of industrial and services sectors (especially for the benefit of small and medium enterprises), environmental protection and improvement, tourism, communications, information and cultural matters. The scope of cooperation may be enlarged by mutual consent.

198 These provisions on cooperation clearly distinguish San Marino's relationship with the EU from that of Jersey. San Marino views "constructive engagement" with the EU to be in its interest and not to pose an unacceptable threat to its sovereignty or independence. In this respect, it is important to point out that the structure and scope of San Marino's agreement with the EU is both more modern and better tailored to this micro-State's interests in the twenty-first century.[105]

199 The fact that San Marino is (at least in terms of public international law) a sovereign State is probably not insignificant, although there is no obvious reason why Jersey could not obtain a similar framework for its relations with the EU if such were to be the Island's political choice.

200 The Treaty relationship between San Marino and the EU has been complemented by a monetary Agreement of 2001.[106] This Agreement formally entitles San Marino to use the euro as its official currency in accordance with EC Regulations 1103/97 and 974/98. Article 1 provides that San Marino is to grant legal tender status to euro bank notes and coins as from 1 January 2002. San Marino also undertakes to make Community rules on euro bank notes and coins applicable in San Marino and to align itself to the Italian Republic's timetable for the production of euro bank notes and coins. Further articles of the Agreement specify additional conditions applicable to San Marino on the management of the euro, in close cooperation with the Italian authorities. Article 8 provides that San Marino is to cooperate closely with the EC with regard to measures against counterfeiting euro bank notes and coins and to suppress and punish any counterfeiting of such coins and notes that may take place in its territory. Article 9 provides that the financial institutions located in San Marino may have access to payment systems within the euro area under appropriate terms and conditions determined by the Banca di Italia with the agreement of the European Central Bank (ECB).

201 It is clear from the dates of the agreements concluded by San Marino with the EU that the "restructuring" of the Republic's relationship with the EU is of recent vintage. It is

[105] Note that, in sharp contrast to the situation with Jersey under Protocol 3, articles 20-22 of the San Marino's customs union Agreement lays down social provisions, applicable to EU and San Marino nationals, respectively, on non-discrimination, insurance and social security.
[106] OJ C 209/1 of 27.7.2001.

also clear that this is an ongoing process, particularly as a result of recent discussions on direct taxation under the TOSD.

202 San Marino's arrangements with the EU provide food for thought, it is submitted, at a number of levels. First, the legal drafting of the customs and cooperation Agreement, as well as the currency agreement, is of a different nature and quality from the language of Protocol 3. The Agreements are balanced and reciprocal, in that they contain rights and obligations on both sides. At least at the legal level, formal sovereign equality is respected. Whatever may be the realities imposed by power politics (and San Marino's position under the TOSD was in substance no different from that of Jersey), San Marino's formal or legal sovereignty is fully respected in the recent agreements concluded with the EU.

203 Finally, in a Memorandum of Understanding attached to the draft TOSD agreement, San Marino has sought the EU's agreement to eliminate or reduce, on a bilateral basis, Member State taxation of San Marino's financial products, a commitment by the EU to consider the progressive improvement of market access for financial products of both parties on a reciprocal basis, a commitment by the EU to simplify procedures under the customs union and cooperation agreement and to allow access for San Marino's citizens to research, study and higher education programs organised by the EU.

The case of Andorra

204 Similar considerations apply to the case of Andorra. Like San Marino, Andorra has a customs union Agreement with the EEC, dating from 1990[107]. Agricultural products are excluded from the coverage of this agreement. Nonetheless, in contrast with the provisions in Protocol 3, the legal details of the customs union are set out in terms which are legally clearer and more consistent both with internal EU law, as well as comparable provisions in other bilateral agreements. Separate provisions apply to products (mainly agricultural) not covered by the customs union. As is the case with San Marino, the Agreement is to be administered by a Joint Committee, which is empowered to formulate recommendations or to take decisions in the cases provided for in the Agreement. Article 18 of the Agreement provides for a binding dispute settlement procedure, including the designation of an arbitration panel.

205 As in the case of San Marino, Andorra's customs union Agreement with the EU has been complemented in 2004 by a Council Decision (not yet a bilateral agreement) regarding an Agreement on monetary relations with Andorra. In essence, the Council decision sets out the main provisions of an Agreement with Andorra for which negotiations will be initiated when the bilateral TOSD Agreement has been initialled by both parties and when Andorra has agreed to conclude the Agreement. Article 8 of the Council Decision provides that if the TOSD Agreement has not been concluded by Andorra before the

[107] OJ L 374 page 14 of 31.12.1990.

agreed date, then the negotiations on the monetary Agreement would be suspended until such conclusion has taken place.

206 The envisaged Agreement (similar to that with San Marino) regarding euro bank notes and coins, the legal status of the euro in Andorra and access to euro area payment systems is based on the close economic relations which exist between Andorra and the Community. It is envisaged that the EU would accept that Andorra uses the euro as its official currency and would grant legal tender status to euro bank notes and coins issued by the European system of central banks and the Member States which have adopted the euro. For its part, Andorra is required to ensure that Community law on euro bank notes and coins are applicable in Andorra. In addition, it is envisaged that Andorra would implement – as a matter of legal obligation – "all relevant measures forming part of the Community framework for banking and financial regulations, including the prevention of money laundering, the prevention of fraud and counterfeiting of non-cash means of payments and statistical reporting requirements." The application of such measures is intended to contribute to establishing comparable and equitable conditions between financial institutions in the euro area and those located in Andorra.[108]

207 From a procedural and institutional point of view, it is interesting that the Decision provides that the Commission could be empowered to conduct negotiations with Andorra and that Andorra's neighbouring countries (Spain and France) should be fully associated with such negotiations. In addition, it is provided that the European Central Bank should be fully associated with such negotiations within its field of competence. Finally, the preamble to the Decision makes it clear that the negotiation and conclusion of a monetary Agreement (as well as other "separate agreements") is entirely conditional on progress by Andorra in implementing the TOSD Agreement.

208 Within the context of the TOSD negotiations with the EU, Andorra also sought concessions in other areas. Andorra was particularly insistent that the EU should commit to initiating negotiations for equivalent measures with other third countries. Thus, during the transitional period provided for in the Directive, the EU would enter into discussions with other important financial centres with a view to promoting the adoption by those jurisdictions of measures equivalent to those to be applied by the Community. There is of course, at the very least, some doubt as to whether other third countries, for example in Asia, will accept such negotiations.

209 Andorra has also linked the signature of the TOSD Agreement to the signature of a cooperation Agreement with the EC, expanding the scope of its relations to include sectors for future cooperation such as environment, communications, information and culture, education, social questions, health, transfer energy, regional policy and trans-European communications. The draft Memorandum of Understanding attached to the TOSD Agreement also contains a commitment from Andorra to introduce the crime of tax

[108] These provisions – like those with San Marino – are of course of particular interest to Jersey should the UK ever participate in the euro zone.

fraud in its territory and provides that Andorra and each EU Member State will enter into bilateral negotiations to define the administrative procedure for exchange of information in this area.

210 Finally, Andorra has asked the EU for a commitment to consult in order to define a broader framework for economic and tax cooperation. In particular, Andorra seeks measures to promote the integration of the Andorran economy into that of the EU and bilateral cooperation on tax in order to determine the conditions under which withholding tax on income derived from financial services currently levied in the Member States can be eliminated or reduced.

The case of Monaco

211 All the micro-States examined in this paper have some form of special relationship with one or more Member State. Monaco is no exception. Despite formal independence from France, the relationship between the two countries is particularly close and the constitutional situation is not always clear. Likewise, as far as relations with the EU are concerned, Monaco does not have the benefit of a "framework" Treaty relationship, even in as embryonic a form as Protocol 3. Also, as recently has been the case between the United Kingdom and the Crown Dependencies, at least as far as the tax package is concerned, the extent to which French political influence plays a part in the external relations of Monaco, seems to be significant.

212 Despite the absence of an underlying or framework Treaty relationship with the EU, it appears that - unlike the UK Crown Dependencies - Monaco has found it convenient (or perhaps politically unavoidable) to apply broad sections of the EU *acquis*. By virtue of Article 3(2)(b) of the Community Customs Code, Monaco is fully integrated into the EU's customs union. Monaco also applies EU VAT and excise duties. Somewhat strangely and in contrast to the usual legal situation in a customs union, Monaco is excluded from the external trade policy of the EU. Thus, goods produced in Monaco do not acquire EU origin and Monaco is not covered by the various trade agreements concluded by the Union. By virtue of its "special relationship" with France however, Monaco is covered by the EU's Schengen *acquis*.

213 As has been the case recently with both Andorra and San Marino, Monaco has found it convenient - apparently on a pragmatic basis - to negotiate with the EU for the extension of certain areas of the internal market acquis to Monaco. On 19 December 2003, an Agreement was published in the Official Journal[109] on the relation of certain acts to the territory of Monaco. The acts in question cover medicines for human and veterinary use, cosmetic products and medical devices. This is one of the most densely regulated areas of the Single Market and the relevant acts henceforth applicable by and in Monaco are set out in an annex to the Agreement.

[109] Agreement between the European Community and the Principality of Monaco on the application of certain Community acts on the territory of the Principality of Monaco, OJ L 332/42 of 19.12.2003.

214 It is not clear at this stage whether the conclusion of this agreement is part of a wider policy by Monaco to seek inclusion in the EU's Single Market when it suits Monaco's interests to do so. Nonetheless, Monaco's policy - like that of San Marino and Andorra - is in contrast to that of Jersey and the other Crown Dependencies, which seek to apply a restrictive approach to their current Treaty relationship with the Community and to prevent this being extended, even incidentally, to fields not envisaged in 1973 when the Protocol was concluded.

215 Monaco's Agreement with the Community is of legal and political interest in a number of respects. The material scope of the Agreement having been defined in Article 1(1), Article 1 (2) provides that "Acts adopted by the Commission ...in application of the acts referred to in paragraph 1 shall apply on the territory of Monaco without the need for a decision of the Joint Committee. When applying the rules governing such matters covered by the Agreement, such rules must be interpreted in accordance with the case-law of the Court of Justice...." In this respect of course, there is no difference between Monaco and Jersey in the sense that the Jersey courts - as well as the legislative and executive branches - are legally required to apply the *acquis* covered by the Protocol in conformity with the case law of the European Courts and the general principles of Community law.

216 Article 2(2) of the Agreement makes specific reference (as far as the application of the Agreement is concerned) to the fact that, to ensure the uniform application and interpretation of the Agreement, Monaco's authorities “may have recourse to their special administrative relationship with the French Republic”. A forum is provided by the Agreement for dispute settlement in the form of a joint committee, to which Monaco is required to report every year on the manner in which its administrative authorities and courts have applied and interpreted the provisions referred to in Article 1. Failure to settle disputes in the joint committee is to lead to the termination of the Agreement after six months.

217 In its negotiations with the EU on the TOSD, Monaco did not seek the extension of further areas of the *acquis*. Monaco did however request that it be removed from the various "blacklists" maintained by certain Member States. It also requested greater access to EU markets for its financial services industries, including special measures for companies peculiar to Monaco such as family owned companies. Monaco - like Andorra, Liechtenstein and San Marino - requested a formal commitment from the EU to enter into similar TOSD negotiations with other third countries. This may well be the only "counter-concession" likely to be accepted in a Memorandum of Understanding which will be attached to Monaco's TOSD agreement with the EU.

218 Finally, Monaco - like San Marino - has concluded a monetary agreement with the Community, by an exchange of letters in 2001, published in the Official Journal on 31 May 2002.[110] This Agreement is also of some interest for Jersey, as much for its form and the

[110] OJ L142/59 of 31.5.2002.

way it was negotiated as for its content. Initially, France appeared to assume that the monetary *acquis* could simply be applied to Monaco by a unilateral act of the French Republic. In a manner which indicates the attention paid in the Legal Services of the Commission and the Council to matters of this sort however, the Council insisted that the Agreement be negotiated within the framework of Community law. France was therefore "mandated" by the Council to negotiate the agreement with Monaco, in close consultation with the Commission, the European Central Bank and the Council Presidency. The title of the Agreement refers to an agreement between the "French Republic on behalf of the European Community" and Monaco. There is no reason why this formula could not be applied in the future should Jersey and the UK ever wish to negotiate similar arrangements with the EU.

219 Like the agreement on cosmetics, medicines and medical products referred to above, the monetary agreement makes applicable in Monaco a wide range of EU legislation not only on monetary policy in the strict sense, but also on the prudential supervision of credit institutions and the prevention of systemic risk to payment and securities settlement systems. This is of course not the inclusion of Monaco in the EU's financial services market which the Principality sought in the context of the TOSD negotiations; it is rather something of a halfway stage, as if Monaco has been required (for reasons of monetary policy) to accept the prudential and supervisory obligations without having the benefit of its financial "products" being recognised by the EU as being eligible for free circulation in the single financial services area.

220 Nonetheless, the scope of Monaco's "integration" as a result of the monetary agreement is wide. First (and in "constitutional contrast" to Jersey's relationship with the UK), the exchange of letters refers to Franco-Monegasque agreements of 1945, 1987 and 2001 on banking regulations, as well as the countries' bilateral "Neighbourhood Agreement" of 1963, as a legal backdrop to the present monetary agreement. The preamble to the agreement refers to the competence of the Community in monetary matters since the advent of the euro, thereby implicitly excluding the possibility for a single Member State such as France to act unilaterally in this area (even with a "neighbourhood" state such as Monaco). Declaration No.6 of the Treaty on European Union was also referred to as a further basis for negotiating the extension of EU monetary law to Monaco. Significantly (considering the current difficulties of the Crown Dependencies in ensuring their continued access to UK payments systems), the association of the ECB to the negotiations and to the implementation of the Agreement itself was to enable it to agree to the "conditions under which financial institutions located in [Monaco] may have access to payment systems in the euro area".

221 In return for being allowed to participate in the euro area, Monaco undertakes not to issue any banknotes, coins or "monetary surrogates" unless the conditions for such issuance have been agreed with the Community in advance. Monaco must also ensure the application and enforcement of EU law on the euro in Monaco, including the

prevention of counterfeiting. In that context Monaco is to cooperate with the Commission, the ECB and Europol. For its part, the EU agrees that Monaco's financial institutions may have access to payment systems in the euro area under conditions which have been agreed with the ECB, including respect for the minimum reserve and reporting conditions applicable in the EU. Registered companies in Monaco involved with portfolio management for third parties or for the transmission of instructions are not however to have access either to the payments systems or to be bound by the obligations on reserves and reporting. The freedoms of establishment and to provide financial services for Monegasque financial operators are also expressly excluded by the Agreement. As far as the prevention of systemic risk is concerned, Monaco also undertakes to "ensure that the law applicable in Monaco in the areas covered by this agreement will at all times be identical, or where appropriate, equivalent to the law applicable in France". Finally, the supervision of the agreement is to be ensured by a joint committee. Crucially, in view of the need to ensure a uniform interpretation of EC law, the parties “have expressed their common wish for the jurisdiction of the ECJ.... to be extended to Monaco.” This will apparently happen once the Court itself has considered the consequences of such an extension.

222 Further detailed analysis of Monaco's agreements with the EU would be superfluous in the context of this paper. Nonetheless it seems important to remark in a paper dealing with Jersey's “constitutional” relationship with the EU (and incidentally with the UK) that any change - no matter how apparently insignificant or formal - is addressed by the EU and all its institutions (including most recently the ECB in matters of monetary and financial policy) - with the utmost respect for EU and EC procedures. In particular, the capacity for one single Member State to make ad hoc or unilateral arrangements for the extension of EU law to third States or territories is limited if not non-existent. In addition, an "à la carte" approach to the acceptance of EU obligations by jurisdictions outside the EU is far from a simple matter. Quite apart from the concomitant need to accept general principles of law and the case law not only of the European courts but also the institutions (in which non-Member jurisdictions will not participate), it is clear that the acceptance of rights in one area (e.g. monetary policy) will almost always involve the acceptance of obligations in others (e.g. financial supervision). Thus, any adjustments to the Protocol which may be contemplated in the future - for example to secure Jersey's access to the Single Market for its financial products - will inevitably involve complex and protracted negotiations with the EU and all its institutions (as well of course as with the UK on the UK constitutional dimension of the exercise), and a broader degree of engagement than might at first be expected.

The case of Switzerland

223 The major expansion of the Community *acquis*, particularly in the internal market, has resulted in the re-evaluation of their relations with the EU by most, if not all, peripheral European countries. Unlike Jersey and the other Crown Dependencies, the six third countries with which the EU opened negotiations on the TOSD also used this opportunity

to strengthen their bilateral relations with the EU, in a manner commensurate with their political "leverage" in relations with the EU. Switzerland in particular sought, as a condition of concluding an Agreement on the taxation of savings income, the conclusion of agreements in areas such as the fight against fraud, the association of Switzerland to the Schengen *acquis*, the participation of Switzerland in the Dublin and Eurodac regulations, trade in processed agricultural products, Swiss participation in the European Environmental Information and Observation Network (EIONET), statistical cooperation, Swiss participation in the Media plus and Media training programmes and the avoidance of double taxation for pensioners of the Community institutions residing in Switzerland.

224 It is not clear whether the conclusion of this "package" of Agreements is of greater benefit to the Union or to Switzerland. It is however clear that the Agreements will further narrow the "regulatory" gap resulting from Switzerland's non-membership of the EU. One of the Agreements (that on processed agricultural products) opens the way for improved trade flows in products such as spirits, coffee, tea and products with a sugar content. Other Agreements have a heavy procedural content and will in effect allow Switzerland to participate in policy making and law enforcement on a comparable (though not completely equal) basis with EU Member States. This is the case for example in the Agreement on the fight against fraud, the extension of the Schengen Agreement to Switzerland and the extension of the Dublin Convention and the Eurodac system covering asylum applications and the EU electronic system for the identification of asylum seekers. Finally, it is important to note that Switzerland has committed to contribute one billion Swiss francs over the next five years to economic and social cohesion in the enlarged EU. There could be no clearer indication that the EU views its relationship with Switzerland as a two-way street: "*do ut des*".

225 It would of course be wrong to draw too close a parallel between Switzerland and Jersey, even if the economies of both jurisdictions are dependent to a similar extent on the economy of the EU. Switzerland is, after all, the EU's second largest trading partner after the United States. In addition, Switzerland has formally applied for membership of the EU. There is a fundamental difference of approach between Switzerland and Jersey, in the sense that the former actively seeks a closer economic and even political relationship with the EU, even at substantial cost, both financially and in policy terms.

226 Perhaps unsurprisingly, smaller and more vulnerable jurisdictions such as San Marino, Andorra and Monaco have traditionally maintained a certain distance from the EU and – like Jersey – have limited their relations to those falling within a customs union, supplemented pragmatically or opportunistically by areas of cooperation of particular interest to the third country concerned. As indicated above, this situation has recently begun to change. In their negotiations on the TOSD, all the micro-States concerned have sought "concessions" from the EU side. Jersey and the other Crown Dependencies made no such "counter demands". Although, the EU has generally resisted "linkage" of this kind, and has insisted that the "counter-concessions" requested by San Marino, Andorra and

Liechtenstein be set out in non-binding "Memoranda of Understanding" attached to the TOSD, nonetheless the fact that such "wish-lists" have been accepted and registered at all by the EU is seen as a political step forward by the jurisdictions in question.

227 For the moment at least, Liechtenstein, as well as Norway and Iceland (who were excluded from the TOSD package) appear content with their status under the European Economic Area (EEA) Agreement.[111] This ensures that they are inside the Single Market for virtually all measures covered by the "four freedoms"[112], as well as "flanking policies" such as environmental and consumer protection, but outside the Single Market for indirect taxation and agriculture, as well as external affairs. This formula ensures that Norway, Iceland and Lichtenstein are represented in most of the Committees dealing with EU business which applies to these countries under the EEA Agreement. Switzerland does not have such representation in EU working groups and is linked to the EU by the original EFTA Agreement (as well as over 100 supplementary bilateral agreements), which also excluded tax and agriculture.[113]

228 The imposition of personal tax measures[114] – essentially through power politics – on its neighbouring micro-States has caused the latter to reappraise their relations with the EU. Undoubtedly for some jurisdictions, the issue of whether to request EU membership will have been raised or revisited.[115] It is now increasingly clear that for small neighbouring States, relations with the EU are not a "one-way street", with EU market access being the only item on the agenda. In areas perceived to be of vital interest to the EU itself (such as cooperation in tax, customs and police matters), the EU will increasingly expect neighbouring micro-States to adopt the EU *acquis* in the particular area and to cooperate constructively with the EU, whatever the terms of the Treaty relationship between them.116 It is likely in the near future that pressure will be brought to bear on these jurisdictions to align their law in areas of the *acquis* such as money-laundering. San Marino's monetary Agreement with the EU already makes provision to this effect.

The EU neighbourhood policy – possible impact on Jersey

229 A further illustration of the extent to which the EU acquis increasingly has a pan-European application is offered by the recently-adopted EU neighbourhood policy. This purports to provide a framework by which the EU *acquis*, especially on the Single Market,

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[111] There have recently been rumours that Norway is once again considering renewing its membership application. If this happens, it is difficult to see that (fisheries interest notwithstanding) Iceland would not follow.
[112] The free movement of goods, services, persons and capital.
[113] Liechtenstein's status within the EEA may partially explain its limited list of counter-demands compared with the other micro-States.
[114] It is interesting that only the UK's Crown Dependencies were the subject of the extraterritorial extension of the EU's Code of Conduct on harmful business taxation.
[115] It is worth recalling here that article 48 EU provides that any "European State" may apply for membership. For micro-States such as Andorra, San Marino or Monaco, there would presumably be no obstacle to membership, although it is not clear what arrangement would be made on voting rights or institutional representation in an enlarged EU. In this paper it suffices to note that the "big five" Member Sates have already displayed considerable concern about the voting power of the smaller Member States in the EU. It is unlikely that any new micro-State Members would receive as generous treatment as that of Luxembourg.
[116] In this context it is interesting that the United States' authorities have recently become pre-occupied by the loss of fiscal revenue (both at Federal and State level) caused by US corporations moving business activities "off-shore" or by channelling business transactions through off-shore jurisdictions, notably those in the same time-zone as the US.

can be "exported" to countries across the European continent, as well as the Middle East and North Africa.[117] This would be on a consensual basis, although appropriate legal frameworks could be negotiated taking into account existing agreements.[118] There is no doubt that it is in the economic (and political) interests of the EU to promote these arrangements, since a legal level playing-field will facilitate market-access for EU exporters to the partner countries. The reverse is also true, although in this respect, much depends on the ability of those exporting goods or services from the partner countries to meet EU technical and safety standards, as well as to compete on quality.

230 Through this new framework for the EU's neighbouring countries[119], the EU offers "the prospect of a stake in the EU's Internal Market and further integration and liberalisation to promote the free movement of – persons, goods, services and capital (four freedoms)". The EU maintains that geographical proximity calls for enhanced interdependence and the steps to be taken will include the extension of current mechanisms in a variety of areas through measures such as:

- Extension of the Internal Market and regulatory structures;
- Preferential trading relations and market opening;
- Perspectives for lawful migration and movement of persons;
- Intensified cooperation to prevent and combat common security threats;
- Greater EU political involvement in conflict prevention and crisis management;
- Greater efforts to promote human rights, further cultural cooperation and enhance mutual understanding;
- Integration into transport, energy and telecommunications networks and the European Research Area;
- New instruments for investment promotion and protection;
- Support for integration into the global trading system;
- EU technical and grant assistance tailor-made to needs and combined with assistance from International Financial Instruments.

231 Such measures will be taken to supplement the already existing arrangements. Free Trade Agreements (FTAs) are currently in place with the Southern Mediterranean countries. As envisaged by the Barcelona process, these FTAs are expected to be extended in order to include the services sector as well as the goods sector more fully. Meanwhile, Association Agreements, encouraging the approximation of legislation to that of the EU's Internal Market, have been negotiated with a number of Mediterranean countries. The Association Agreements with Tunisia, Israel, Morocco, the Palestinian Authority and Jordan have already entered into force, while those with Egypt, Lebanon

[117] Communication from the Commission to the Council and the European Parliament: *Wider Europe – Neighbourhood – a new framework for relations with our Eastern and Southern Neighbours*, COM (2003) 194 final of 11.3.2003.
[118] Under existing Partnership and Cooperation Agreements with Russia and former CIS countries and Association Agreements with Maghreb countries, agreements already exist for partner countries to adopt the *acquis* on a voluntary basis.
119 The EU's neighbourhood policy currently covers: Russia, Ukraine, Moldova, Belarus and the Southern Mediterranean countries: Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, the Palestinian Authority, Syria and Tunisia.

and Algeria await ratification. An Association Agreement with Syria is currently under negotiation.

232 On the other hand, the Partnership and Cooperation Agreements in force with Russia, Ukraine and Moldova do not provide for either preferential treatment in trade or regulatory approximation in the area of the Internal Market.

233 Formalising and strengthening relations with the EU's bordering countries has already been reported by employers to be an important asset to the business world. The EU's "new neighbours" are countries with great potential for growth and development and in need for foreign investments to support their infrastructure, extend their industry and establish a well-functioning financial services sector. Extending the Single Market to include these countries would mean that doing business is eased, as governments apply to companies (telecoms, car manufacturers, the construction industry etc.) EU legislation regarding the setting up of new plants, merging, banking, employment rules and corporate governance standards. The benefits would be similar to the enlargement process, though not as far-reaching, because the Wider Europe initiative does not provide for membership or participation in the EU institutions and the law-making process of the Union.

234 This evolving scenario – of the gradual spread of EU law and policy, not only across the wider Europe, Middle East and North Africa, but to countries such as South Africa and many other WTO Members – is, in my view, a further factor to be given serious consideration by Jersey and other Crown Dependencies when reviewing the legal basis for their external arrangements in the future. Essentially there appear to be at least three broad options available. First, "business as usual", in other words, with external relations in general falling under the constitutional responsibility of the UK and with relations with the EU covered formally by the Protocol, but with an increasing number of issues involving contacts with the EU and its Member States being dealt with pragmatically, as in the case of the TOSD arrangements.

235 A second option would be to agree with the UK a broader scope for Jersey to conduct its own external relations, including with the EU and in the OECD, based on the Island's extensive internal autonomy and taking into account the fact that, in a number of areas of economic policy, Jersey's policy is not the same as that of the UK.

236 Finally – and as a possible extension of the second option – Jersey could seek an even more fundamental change in the structure of its external relations. This could embrace a revision of the Treaty link with the EU and a review of Jersey's relationship with organisations such as the WTO. This latter option would presumably require close consultation with Guernsey and the Isle of Man. It would also require not only discussions with the UK authorities (which would inevitably involve consideration of changes to the

current constitutional situation), but also negotiations between the UK and other member States under Article 48 TEU.[120]

The future of Protocol 3

237 In very broad terms, the analysis in this paper of developments over the last ten years in relations between Jersey and the EU can be summarised as follows. With rare exceptions, economic relations under the Protocol have been uncontroversial. Outside Protocol 3, on the other hand, developments in areas such as tax and economic crime have dominated the relationship. A number of other issues which have arisen tend to fall into a "grey zone," where either the Protocol clearly does not apply but EU law and policy has an impact on the Jersey economy or where it is unclear to what extent EU law must be taken into account in Jersey, whether by the administration, the courts or by economic operators.

238 The advent of e-commerce (including e-payments) has reduced the importance of national frontiers dramatically and has added a new dimension to the cross border supply of goods and services, as well as related issues such as the protection of intellectual property and consumer protection. Private law issues such as the conflicts of laws, judicial and administrative cooperation, and the availability of judicial remedies have also acquired a new significance in the electronic age. This new dimension to international trade has been the subject of intensive, but so far inconclusive, discussions in international organisations such as the WTO and the OECD (for example on the taxation of electronic trade in goods or services). Jersey, although a potential beneficiary of free trade in electronic goods and services, is unable to make a direct input into the ongoing discussions either because the formalities for its membership of the organization in question have not been completed (in the case of the WTO) or because appropriate arrangements have not been made by the UK (in the case of the OECD).

239 In recent years, it appears that Jersey's economic interests are increasingly affected by EU law and policy, almost always in areas outside the material scope of Protocol 3. In addition to electronic commerce (and the taxation of this trade), international capital transfers, international air and maritime transport (including the security of links with the EU), intellectual property and data protection are all areas of considerable economic importance in Jersey and where the increasingly close "interface" between the Jersey and EU economies means that a growing number of delicate legal and policy issues may well arise in the future. The extra-territorial application of EU competition law (to trade in goods and services) may also become an issue, to the extent that economic activities in Jersey have an economic effect in the EU.

240 It would be strange after the dramatic developments of the last few years in the fiscal field if Jersey (and indeed the other Crown Dependencies) did not now reflect on

[120] If the UK's request was accepted by the other Member States, then the necessary changes to the Protocol would have to be agreed unanimously and would be subject to ratification by all 25 national parliaments.

lessons to be learned and possible changes to be made. As we have seen throughout this review, the starting point remains the constitutional relationship with the UK. Fortunately, the history of the UK is rich in the diversity and flexibility of constitutional arrangements which can be made between the UK and its dependent territories. As far as Jersey's continuing relationship with the Crown is concerned, the thesis advanced in this paper is that Jersey's virtually complete internal autonomy needs to be matched with a comparable level of external independence. Only in this way can Jersey's economic prosperity and future political stability be preserved and enhanced. Complete sovereignty or independence may not yet be on the agenda; but a new form of partnership with the UK – more fitted to the political and economic realities of the twenty-first century – seems to be an urgent requirement.

241 The future of Protocol 3 is obviously related to any future constitutional arrangements to be worked out between Jersey and the UK, but is essentially a separate matter. As Jersey has stated in its Letter of Commitment to the OECD in its work on harmful tax competition, it is vital that the principles of equality, consent and the "level playing field" be followed in international economic relations, including in the tax field. The tendency for the EU to seek to extend its own law and policy (the *acquis communautaire)* extraterritorially shows no sign of abating.[121] Such an approach may well be justified when countries (such as the former Warsaw Pact members or Turkey) apply for membership of the EU. On the other hand, for jurisdictions which seek to preserve their independence, the fundamental principle of international law is that their sovereignty (to the extent that this exists under international law) should only be limited by rules of customary international law, general principles of law recognized by civilized nations or international agreements freely entered into by their consent. The recent approach by the OECD and EU in extending rules and disciplines on business taxation to non-members without their consent is in breach of these principles.

242 As far as Protocol 3 is concerned, it may be that the radical alternatives of abolishing the Protocol or, on the other hand, seeking full EU membership, can be ruled out. On the other hand, Jersey will certainly wish to examine the situation of other comparable jurisdictions (as has been done in outline in this paper), especially as regards their legal relationship with the EU, in order to see whether alternatives to Protocol 3 exist which might better guarantee the Islands' twin aims of political stability and growing economic prosperity. It is clear that other jurisdictions (both sovereign and non-sovereign) affected by the recent negotiations on the "tax package" with the EU will also be reviewing their status and relationship to the EU, with a view to possible change.

Conclusion

243 In the course of the last 15 years (not to mention the 31 years since Protocol 3 entered into force) all the major elements involved in Jersey's relationship with the Union

[121] The recent Commission paper setting out a "neighbourhood" policy for the EU vis-à-vis its European, North African and Middle East partners merely seeks to provide a more coherent framework for this process.

have changed fundamentally. These include change within Europe itself – from customs union to Single Market and economic and monetary union, from Community to Union and from a multiplicity of founding Treaties to a single Constitution. In the United Kingdom, constitutional change – marked by devolution – is still in progress. In Jersey itself, economic and demographic changes have produced a situation in which the Island is no longer a tranquil haven sheltered from the winds of change emanating from international organisations such as the EU, OECD and the UN, or important states such as the United States. The success of the financial services industry has not only generated prosperity for Jersey, it has also made the Island a serious "player" in the international financial community. In one sense, it may be said that, although Jersey has become an important member of the international financial community, it is handicapped compared with many of its competitors, by its international status (or lack of it). Thus, Luxembourg, Cyprus and Malta as full members not only of the EU but also the OECD, have the full power to "opt out" of or even to "veto" tax measures taken in those organisations. Jersey, on the other hand, despite carrying the full weight of responsibility – without external assistance – for its own economic prosperity, lacks the defences available under public international law to enable it to resist unwanted initiatives by more powerful neighbours.

244 Jersey has been the target of unsought and hostile action by the EU, by the OECD and even by individual States, such as the United States and a number of its constituent States. Jersey has found it politically impossible to avoid responding to these initiatives. It has in fact responded constructively. Lord Falconer's speech to the States of Jersey on 10 May 2004 bears eloquent testimony to Jersey's constructive cooperation, but fails to address the serious underlying constitutional issues involved.

245 In these matters, the limited material scope of Protocol 3 has afforded no legal protection for Jersey whatsoever. In one sense, the fact that Protocol 3 is so manifestly "out of kilter" with the modern Jersey economy may be a source of confusion or misunderstanding about Jersey's status and "economic personality". Perhaps even more significantly, the UK has exercised its responsibilities for Jersey's international relations not by defending the Island's laws and practices, but rather by joining with those seeking to compel change, notwithstanding the absence of internationally-binding rules or procedures.

246 These circumstances have forced Jersey (as well as other UK dependent territories) to come to terms with the relative weakness and vulnerability of its constitutional and international situation. By a mixture of political will and technical excellence and by making the most of its legal autonomy (mainly internal, but also to a limited degree external), Jersey has succeeded in

(a) preserving its status as a cooperative jurisdiction in the OECD;

(b) reaching an accommodation with both the UK and the EU as regards the "rollback" of its company tax legislation under the EU Code of Conduct;

(c) reaching agreement with the EU and its Member States[122] on the implementation of a retention tax system for the implementation of the TOSD;

(d) reaching agreement with the EU, through the UK, on the alignment of Protocol 3 with the EU Constitution.

247 In this process, Jersey has been forced to recognise the vulnerability of its international and constitutional position. Despite a recent strengthening of the action taken, inter-ministerially, in London by the Department of Constitutional Affairs (DCA) in defence of Jersey's interests, it may safely be said that, at least in relations within the EU and the OECD, defending the interests of the Crown Dependencies (especially when these conflict with those of the UK) is not a UK priority. This was certainly true in the recent tax negotiations in the EU and the OECD, but it is also the case (whether for Jersey, Guernsey or the Isle of Man) on issues such as the application of the agricultural state aids or safeguards provisions of the Protocol. Recent experience in ensuring that Jersey does not suffer economic harm as a result of the adoption of the UK or EU Single Market measures (*e.g.* as regards payments systems for banks) offers some hope for optimism. But, in general terms, Jersey's experience of the last few years tends to emphasize the need for far greater international autonomy or "personality"[123] so that it can defend and enhance its hard-won political stability and economic prosperity, without having to go "cap in hand" to London and to rely – in effect – on one of the less-powerful departments of State to wring "concessions" from the Treasury, Inland Revenue, DEFRA or the Foreign Office.

248 It is no consolation to recognise that many of Jersey's competitors endowed with formal sovereignty (Liechtenstein, Andorra, Monaco and San Marino) have arguably fared not much better in the face of the political pressure brought to bear by the EU and its Member States (including the UK) and the OECD. Competitors such as Cyprus and Malta which have now joined the EU will now of course benefit from all the institutional rights accorded to Member States (*e.g.* the right to "veto" unwanted tax initiatives).

249 As far as Jersey is concerned, once it had been recognised that a compromise had to be made with the EU (for example on the TOSD), Jersey's performance in drafting a "Model Agreement" in concertation with Guernsey and the Isle of Man, in negotiating this with the Commission and Council Presidency, in finalising the agreements bilaterally with all 25 Member States and then ensuring domestic implementation, was unsurpassed, including by EU Member States.[124]

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[122] Formally, of course, the TOSD Agreements are with the 25 Member States individually. The terms of the Agreements were however settled by direct discussions with the Commission and the Irish Presidency of the Council.

[123] In this context, it may be questioned whether the term "letter of entrustment" is appropriate in the modern age. Under public international law, it would suffice for the UK to make it known, both bilaterally and multilaterally that, whilst retaining its links with the Crown, Jersey enjoys international autonomy commensurate with its internal independence, for the sake of clarity and transparency, this transfer of external powers could well be set out in a statute.

[124] At the time of writing, a large number of the EU's Member States have failed to transpose the TOSD into national law, as required by the Directive, by the end of 2004.

250 The clear lesson to draw from this experience is that Jersey has the political will, technical competence and resources to conduct international relations in areas where its interests are affected. It is not clear that the constitutional relationship with the UK significantly strengthens Jersey's international negotiating position. And in fields such as tax, where the UK has opposing interests, the UK link is entirely unhelpful. Precedents exist for UK dependent territories or colonies to act as international persons in their own right. Hong Kong was, for many years, a case in point, negotiating with the EC (including the UK) in fields such as textiles, where Hong Kong and UK and EU interests were diametrically opposed.

251 A word of caution is appropriate at this point. It is clear that even formal sovereignty would not be a panacea, a passport to instant international recognition and acceptance or even a means of avoiding challenges to Jersey's internal laws and practices. As indicated above, it is likely that as EU membership continues to grow and the *acquis* continues to expand and consolidate, the extent to which the EU will expect jurisdictions on its periphery and which wish to do business with the Union, to adopt the *acquis* (with or without relevant Treaty relations) will also increase. This will be so particularly in areas deemed by the EU to be politically sensitive and/or economically harmful, such as tax, financial services, economic crime and "internal affairs" (anti-terrorism, visa, asylum, immigration policy, etc.).

252 Jersey (and indeed the other Crown Dependencies) must prepare itself to meet these challenges. Like all independent and self-sustaining jurisdictions of its size, Jersey will have to make the best use of scarce resources. In my view, to focus exclusively on the existing legal link with the EC (although that has been the central theme of this paper) would be a mistake. The Protocol has, after all, only recently been reconsidered and renewed, virtually unchanged, in the IGC leading to the Constitutional Treaty.[125] This is not the case for the constitutional relationship with the UK, where the grant of external autonomy in areas falling within Jersey's internal competence, is now a matter of urgency. Priority does however need to be given to improving international knowledge and recognition of Jersey's political and legal status. Jersey's first-class track record of international cooperation also deserves to be better known. This is essential in order to provide greater legal certainty for Jersey's economic relations with its partners around the world, including perhaps first and foremost the EU and the United States.

253 Jersey's financial industries have been successful in publicising their products and services across the globe. Comparable efforts must be made by Jersey politicians and officials particularly in the EU, but also in the United States and other key jurisdictions.[126] It is disappointing that, despite a succession of informal but constructive meetings with EU (mainly Commission) officials in areas such as financial services, justice and home

[125] There is of course no reason why the longer-term future of the Protocol could not be considered immediately, since it would in any event take some years before the processes leading to its changes could be completed.

[126] This is the same challenge faced by literally hundreds of sub-State entities which have had to come to terms with the important role played by the EU in their political and economic lives. This explains why over 200 local authorities, regions and other entities have opened offices in Brussels.

affairs and international economic crime, Jersey is too frequently identified as a "tax haven" or a jurisdiction which lacks – to a certain extent at least – full international legitimacy. There is a contradiction here which needs to be addressed perhaps by considering formalising or giving greater publicity to, meetings with the EU institutions and the almost uniformly positive results emerging from these meetings. This is normal practice not only in the case of diplomatic contacts by States and international organisations, but even by private sector entities wishing to put on record (to avoid misunderstandings and for future reference) points made, understandings reached or even disagreements.

254 In my submission, now that negotiations have been successfully resolved both with the EU and the OECD on personal and business taxation, sustained efforts need to be made – at a level previously not attempted – to secure international recognition of Jersey's status as a self-governing jurisdiction with the highest regulatory and supervisory standards, not only in tax and financial services, but also in law enforcement and international cooperation more generally. Such recognition, once achieved, needs to be formalised in a way which can later be relied upon. Achieving a minimum degree of international legal personality, whilst retaining a clear link with the Crown, is a sine qua non in this respect. The problem until now in informal contacts with the EU has precisely been that the contacts were informal and therefore subject to no official records. Such recognition as has been received (for example as regards the excellence of Jersey's anti-money laundering legislation) is quickly dissipated, since it is not recorded127 and quickly overtaken by other events in the minds of busy EU officials.

255 The label "tax haven" (or, even more vaguely, "off-shore" jurisdiction) and the consequent inclusion on national "black lists" or other forms of unwarranted discrimination, is more intractable. The very use of the term "off-shore" somehow connotes (or is seen increasingly, by the EU and US authorities to connote) a jurisdiction which escapes appropriate or normal regulatory and supervisory control and thereby creates unfair advantages for investors or traders, including non-residents.

256 The perjorative use of terms such as "tax haven" is particularly difficult to combat, given the technical complexity (and indeed lack) of agreed ground rules in, international tax law and policy. However, to the extent that such terms imply a failure to respect minimum standards in areas such as international economic crime and international cooperation in customs, tax and police matters, then the evidence and the means clearly exist to rebut such assertions.

257 As far as tax policy is concerned, it is clear that, both inside the EU and internationally, the limits of national fiscal sovereignty and the appropriate scope of

[127] At least in the case of sovereign jurisdictions such as Andorra (or even, in the past, with non-sovereign jurisdictions such as Hong Kong and Macau) formal records are kept of regular Ministerial, diplomatic or official-level meetings. *Notes verbales* are exchanged, as well as agreements (even on minor matters) being recorded by exchanges of letters, memoranda or other instruments recognised by international law.

international rules and disciplines have yet to be defined. EU and OECD policy documents assert simultaneously that tax (rates and structures) is a legitimate instrument of national economic policy in promoting the competitiveness of economies and enterprises, whilst at the same time stating that "harmful tax competition" is to be condemned.[128]

258 As the current debate in the US election campaign demonstrates, the perceived loss of fiscal revenue (both at Federal and State level) is a crucial political issue in the United States, particularly in a nation with a massive budget deficit. The debate on tax rates and structures, as well as the extent to which international corporations should be permitted to structure or channel their operations (including invoicing and tax accounting) through multiple jurisdictions, including those classed as "off-shore", will continue for the foreseeable future. The absence of a truly global and inclusive forum for international tax discussions is a significant handicap to progress in this area.

259 In these circumstances, Jersey has a choice between continuing with its present level of international engagement, or of increasing it. Even small jurisdictions do not lack intellectual capital. Jersey has the opportunity to develop its international cooperation in international tax policy (and indeed in international economic relations generally), including the building of alliances with other jurisdictions which share Jersey's concerns. The EU institutions and the increasing number of Member States (many of which now may share Jersey's views of the use of tax policy as an instrument of international competitiveness) should not be excluded from a more pro-active approach in this field by Jersey and the other Crown Dependencies. Constructive engagement with the UK will inevitably be a vital element in any strategy which Jersey may adopt for its future international relations. In this respect, the Protocol which currently links Jersey to the EC (and in the future to the EU) is only one element in Jersey's increasingly complex and challenging international relations.

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[128] In the EU, failing sufficient agreement between Member States on the elimination of "harmful" tax measures, the Commission has – since 2000 – adopted a more rigorous and extensive approach to it state aids policy, applying article 87(1) to national fiscal measures previously considered not to constitute "aid". At the same time, the Commission has failed to distinguish between tax measures affecting the competitive position of enterprises under article 87(1) and fiscal measures of a more general nature affecting competition between national economies, under articles 96-97 EC. EU fiscal state aids policy does not of course apply to the Crown Dependencies.

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