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6 Deputy S.Y. Mézec of the Minister for External Relations regarding the criteria to be used in determining how E.U. legislation would be brought into domestic legislation under the Draft European Union (Repeal and Amendment) (Jersey) Law 201-: [OQ.23/2018]

What criteria will the Minister be using to determine which E.U. laws will be brought into domestic legislation directly by the Council of Ministers, and which will be brought by the full Assembly according to the proposed provisions in the Draft European Union (Repeal and Amendment) (Jersey) Law?

Senator P.M. Bailhache (The Minister for External Relations):

The European Union (Repeal and Amendment) (Jersey) Law, which perhaps I can refer to by its acronym E.U.R.A.L., does essentially 2 things as its title implies. First it repeals the European Union (Jersey) Law 1973 and the European Economic Area Law of 1995; and secondly it amends the European Union Legislation (Implementation) (Jersey) Law of 2014. The short answer to the Deputy's question is that no E.U. laws will be brought into domestic legislation by the Council of Ministers. The draft law will create a framework whereby relevant E.U. laws can be brought into effect by regulations passed by the States Assembly. Those regulations could - but this will be a matter for discussion at a later stage - empower Ministers to make orders to the extent that the States Assembly thinks fit. The only powers conferred by E.U.R.A.L. on the Minister for External Relations are powers by order to amend the definition of E.U. treaties, and secondly to make the commencement order; but in both cases only with the approval of the Council of Ministers.

4.6.1 Deputy S.Y. Mézec:

A supplementary. The reason that I ask this question is because of course there have been concerns raised in the U.K. with their repeal law and worries that it puts too much power in the hands of Government Ministers and taking power out of Parliament. I just want to be sure that will not be the case in Jersey. Would the Minister agree with me that the assumption should be that upon the U.K. leaving the European Union as much of that work as possible should be done by the Assembly entirely, and when things are reserved for Ministerial Order that should be in exceptional cases rather than the rule?

Senator P.M. Bailhache:

Yes, I would agree with the Deputy. I think that is entirely the right principle. The United Kingdom has adopted a different way of dealing with the exiting from the European Union because there is such a huge mass of legislation that applies and has built up over a period of 40 years, that the only way in which the U.K. can deal with this is to move the whole of their body of E.U. law into United Kingdom law and then to allow either Parliament or Ministers to amend those provisions as the Government thinks fit. We have adopted a different approach and the approach that we have adopted is that it will be for the States Assembly to decide to what extent European Union law, which currently applies in the Island, should be re-enacted. That re-enactment will be done by regulations and it may be that in the fullness of time it will be regarded as sensible to confer delegated powers on Ministers to do minor modifications in the context of those regulations passed by the States Assembly. But in substance I accept the statement made by the Deputy.

4.6.2 Senator P.F.C. Ozouf:

I wonder if the Minister would clarify whether or not there is a scenario in which the effect or the ability of E.U.R.A.L. could be that legislation that is not passed by the United Kingdom Parliament but

is legislation in the E.U., would mean that we would be effectively departing from the arrangements that we have that we are normally at the same point with similar arrangements to the U.K. What I am really getting at is: is this opening up the possibility of Jersey asserting - dare I use the word - a slightly more independent approach to legislation in future, almost through this E.U.R.A.L. law - which I am somewhat concerned about because I thought that the higher arrangement was with the United Kingdom and not with the European Union?

Senator P.M. Bailhache:

I think the Senator's concerns are misplaced. Jersey's relationship with the European Union is different from the United Kingdom's relationship with the European Union. The U.K. is inside the E.U.; Jersey is basically outside the E.U. What will happen in the future is an unwritten story. We know that some of the arrangements that are in place in relation to Protocol 3 and our current relationship with the European Union ought, in the interests of Jersey, to be replicated. I do not know but it is very likely that the United Kingdom will want to do something similar. But we have to look at matters from the point of view of what is in Jersey's interests. If it is in Jersey's interests for the purposes, for example, of exporting fish to France that we have certain regulations with European Union regulations then that is what we should do. But these are all matters to be considered in due course, having regard to the subject matter under consideration.

4.6.3 Senator P.F.C. Ozouf:

I fully accept what the Minister is saying but, nevertheless, the effect of this option ... the Minister said that the future Assembly would have the ability - and I accept what he is saying, that this Assembly will decide - but effectively when the Minister says the Assembly will have the option, that could be an option under somewhat of duress. Because the European Union will know that we have the ability to enact European legislation, and I am sure that he would agree that there have been some difficult discussions about Jersey in the European Union. The fact that this ability will be there to enact European legislation through this mechanism, which might be different from that which will apply to the U.K., is that not putting us in a potentially vulnerable position that we will have to do "this" in order to get "that" to get off a blacklist. Has he given consideration to that? Because effectively this is probably a departure opportunity for Jersey not to be tucked-in close under the United Kingdom, and that situation concerns me because it could be used detrimentally. We could be effectively threatened.

Senator P.M. Bailhache:

I do not think I can accept those concerns of the Senator. In essence nothing is changing because under the European Union Legislation (Implementation) Law of 2014 we have at the present time the ability by regulations to bring into force any European Union law that we think is in the interests of Jersey. We have done that and we are going to do it again in the context of - I am not sure I am using the right word - digital information, in order to ensure the free flow of electronic information between Jersey and the European Union we have to ensure that our regulatory position is consonant with that of the European Union. The Assembly will very shortly be asked to consider such legislation. But that is the current position and the E.U.R.A.L. law will simply replicate that state of affairs and give the Assembly the opportunity to do whatever is necessary in Jersey's interest.

4.6.4 Deputy G.P. Southern:

Does the Minister agree that the argument in the U.K. appears to be, as he said, between the powers of Parliament to amend particular moves, or Ministers to do that amendment? Is it the case that our mechanism will avoid that battle between Parliament and Ministers, or not? Secondly, is it not the case that this is very subjective as he used the word "minor" amendments; the fact is that if

we give powers to Ministers to change things by order which do not come before the States and therefore we are blind to by and large, we cannot do anything about, the level at which it is risky is not the level of the regulations but the level of the orders which in some cases are very all encompassing, are quite major elements. It is about the definition of what constitutes “minor”. So there are 2 issues there: do we avoid the battle between Parliament and Minister; and secondly, the real risks are surely in the judgment of ministers as to what constitutes minor. We could be letting ourselves into giving Ministers carte blanche to do what they wish.

Senator P.M. Bailhache:

In relation to the first issue, I think the Deputy is correct, and indeed the policy view taken by the Government was that we should avoid the controversy into which the United Kingdom had entered by having this conflict between what should be done by Parliament and what should be done by Ministers. That conflict has been avoided because Ministers will only be in power to do things which the States Assembly itself has authorised them to do. Now, I used the word “minor” and the Deputy is perhaps right that the meaning of that word is in the eye of the beholder. But I think that will be a matter for the Assembly in due course. I am quite sure there will be some matters which it will be sensible - let us use that word “sensible” - to delegate to Ministers so that there is no gap between the coming into force of some necessary piece of legislation, because we have to go through the whole procedure of regulations, which is much more time consuming than the making of an order. But that will be a matter for the Assembly in due course.

4.6.5 Deputy G.P. Southern:

Does the Minister not consider that on such a major issue, which will affect the way in which we run our Island and our international relations for the foreseeable future, that we must take very great care that we do not in fact sign over powers through orders to Ministers without in-depth analysis of what passing a regulation and giving such power would mean?

Senator P.M. Bailhache:

I agree that the question of delegation to Ministers would have to be carefully considered.

4.6.6 Senator P.F.C. Ozouf:

My concerns are not that of the Reform Party in relation to trying to suggest that there is some sort of Henry VIII clause arrangement here. That is not my concern. My concern is the Minister’s answer that effectively this E.U.R.A.L. legislation, as it is to be known, replaces the E.U. Implementation Law, which effectively was a fast-track... an ability for Jersey to pass E.U. legislation on to Jersey’s statute book almost as a fast-track while the United Kingdom was part of the European Union. Now, what he is effectively saying - and I wish to just press this point - is that the United Kingdom is leaving the European Union: it is leaving. The data protection issue is in this transitional period but this law is going to be in place after the U.K. has left the E.U. Therefore, this gives an ability to fast-track E.U. legislation from a club in which our sovereign power is effectively left. So the situation is different and surely we might as well have a E.U.R.A.L, U.S. or Asia legislation ...

The Deputy Bailiff:

I think you do have to focus on the question.

Senator P.F.C. Ozouf:

Yes, okay. The fact is the world has changed and we are still effectively allowing a fast-track for a club that our superior sovereign state is no longer a member of, and I find that quite a worrying situation for the pressure that could be brought upon us to comply.

[11:00]

The Deputy Bailiff:

I am still not sure I have understood the question.

Senator P.F.C. Ozouf:

The question is that legislation was brought in while the United Kingdom was part of the European Union. The U.K. is no longer going to be part of the European Union so why are we having legislation ...

The Deputy Bailiff:

So, why is the legislation necessary given the change of ...

Senator P.F.C. Ozouf:

Why do we need a permissive clause to fast-track an E.U. legislation to which our sovereign power is no longer a member of that club?

The Deputy Bailiff:

Very well, that is the question then, Senator.

Senator P.M. Bailhache:

I think the Senator is under the misapprehension that the United Kingdom, in leaving the European Union, is going to detach itself absolutely, entirely and completely from European Union rules and regulations. I am absolutely sure that that is not going to be the case. Data protection is not a transitional matter. Data protection is something that is going to go on for some considerable time because I find it very difficult to envisage a situation where Jersey data should not be able to pass freely to and from the European Union. The United Kingdom will be in exactly the same position. The United Kingdom will, I have absolutely no doubt, procure that so far as flows of data are concerned it is possible for data to flow freely between the European Union and the United Kingdom. So I do not see any difficulty in this. It will be a matter for debate perhaps when the E.U.R.A.L. law comes up for debate before the Assembly and the Senator can no doubt raise these issues again at that time. But I think his concerns are entirely misplaced.

4.6.7 Deputy S.Y. Mézec:

I am just wondering at this stage how much of the E.U.R.A.L. law is premature given that the situation with the U.K. leaving the European Union is completely unclear at this point, beyond what colour the passports are going to be. We do not know what arrangement that will be for a transitional deal, and if the European Union will want any continued relationship with the U.K.'s overseas territories and Crown Dependencies in some form, either the same as what we have now or slightly altered in that transition period; to then change again when that transition period is over. So I am just asking how much of this law deals with what needs to be set in stone right now that will not change in future, and is there going to need to be a greater deal of flexibility to cope with the fact that transitional arrangements may not be what we anticipate them being, the final deal may not be what we anticipate it being.

Senator P.M. Bailhache:

None of this law is premature. It is all absolutely necessary, as was explained when we had a debate in this Assembly on the question of whether legislation was required to repeal the 1973 European Union Law. The E.U.R.A.L. law creates a framework; it does not actually do anything, it creates a

framework and it gives powers to the States Assembly to make regulations and, to a limited extent, it gives powers to the Minister for External Relations to make orders, as I explained in answer to the Deputy at the beginning. But the law is a very important preparatory piece of legislation which will confer power on the States to move in whatever way it is required to move. The Deputy is quite right, we do not know what is going to happen, but we have to have the power to adapt our legislation and to react to the decisions taken by the United Kingdom and by the European Union. The E.U.R.A.L. law does exactly that.