

Corporate Services Scrutiny Panel

Review of *Draft European Union Legislation (Implementation) (Jersey) Law 201- (P.164/2013)*

Written Questions and Answers

1. What is the rationale for repealing and replacing the *European Communities Legislation (Implementation) (Jersey) Law 1996* and amending the *European Communities (Jersey) Law 1973*?

The rationale for the legislation is to update, remedy inconsistencies and improve the effectiveness of the existing Law taking into account experience of operating the legislation over 18 years.

It is the agreed common policy of the Council of Ministers to “*Implement UN sanctions and EU restrictive measures in support of international objectives to address activities or policies that threaten the international rule of law, human rights, respect for democratic principles or international peace and security, or to prevent and suppress the financing of terrorists and terrorist acts*”.¹ A key objective of the Law is to improve the effectiveness of sanctions implementation in Jersey.

It was decided to repeal and replace the European Communities Legislation (Implementation) (Jersey) Law 1996 (“*the 1996 Law*”) because of the number of changes and new provisions required in the legislation.

2. What external influences from outside Jersey, if any, have led to the drafting of the new legislation?

The 2009 IMF review of the regulation of Jersey’s financial services industry included specific recommendation on assessing the effectiveness of implementing UNSCR sanctions and on extending the scope of sanctions measures to apply to all regulated financial services in Jersey.

The forthcoming Moneyval review, in September 2014, will examine the steps taken to action the IMF recommendations. This creates a new imperative for ensuring the more effective and speedy introduction of sanctions measures, i.e. by Ministerial Order, and for amending the application of sanctions measures.

Changes in the European Union, particularly the implications of the Lisbon Treaty and consequent terminology changes, and subsequent Treaties such as the accession of Croatia, have required amendments to update the Jersey legislation.

The capability to implement UNSCRs by giving effect to EU restrictive measures, using the existing 1996 Law, is not new. However, the shift in policy towards this approach is largely a result of the significantly increased use of sanctions as a preferred instrument in international relations.

¹ External Relations: Common Policy R.140.2012

3. How different from the current position would the Minister's Order-making powers be under the draft Law?

Article 2(1) of the draft Law has broadly the same effect as Article 2(4) of the 1996 Law and the Minister's power to make Orders would be similar to before. The provisions include:

- Removing uncertainty about whether 'early enactment' is necessary since this is a subjective test which is difficult to determine objectively in law. Instead, the Minister may make Orders for specific defined purposes, namely:
 - to give further effect to an EU provision that is binding on Jersey under Protocol 3, and
 - provisions under any one or more of Chapter 2 of Title V of the Treaty on European Union (*Specific Provisions on the Common Foreign and Security Policy*); Article 75 of the Treaty on the Functioning of the European Union (*implementation of a framework to prevent and combat terrorism and related activities*) or Article 215 (*Restrictive Measures*) of the Treaty on the Functioning of the European Union – i.e. sanctions measures.

In addition, the Minister would have the ability to include ambulatory provisions in an Order. The effect of ambulatory provisions, if these are included in any Order, would be to give effect to specific minor or administrative amendments, such as changes in the listing of designated persons or entities under sanctions Orders.

The draft Law is different from the 1996 Law because it further *limits* the Order making power, such that the Minister may not –

- imposing a penalty of imprisonment for more than 2 years for a criminal offence;
- amend Regulations made by the States or make any provision inconsistent with any such Regulations.
- under the same restrictions that apply to Regulations made by the States, impose or increase taxation, apply measures retrospectively or amend the 1973 Law.

4. Article 2 of the draft Law describes the Minister's Order-making powers in relation to certain provisions of the Treaty on European Union and the Treaty on the Functioning of the European Union. To what do those provisions relate and why have the Order-making powers been ascribed in relation to those particular provisions?

The relevant provisions in the draft Law replace the Order-making powers under Article 2(4)(b) of the 1996 Law ascribed in relation to "*Article 12 of the Treaty on European Union signed at Maastricht on 7th February 1992 (which relates to the common foreign and security policy)*". The provisions in the Maastricht Treaty have now been overtaken by new provisions in the Treaty on European Union and the Treaty on the Functioning of the European Union.

The new provisions are any one or more of:

- Chapter 2 of Title V of the Treaty on European Union (*Specific Provisions on the Common Foreign and Security Policy*);
- Article 75 of the Treaty on the Functioning of the European Union (*implementation of a framework to prevent and combat terrorism and related activities*) or
- Article 215 (*Restrictive Measures*) of the Treaty on the Functioning of the European Union – i.e. sanctions measures.

In effect, this covers the range of measures which the EU might describe as ‘restrictive measures’ or sanctions relating to the EU common foreign and security policy (such as promoting compliance with UN resolutions on nuclear proliferation or chemical weapons), combatting terrorism or terrorist funding, promoting the rule of law and democracy and protection of human rights and freedoms.

The Order making powers are ascribed to these matters because they fall within the scope of measures which ordinarily require immediate enactment to be effective.

5. What impact, if any, would adoption of the draft Law have on the Regulation-making powers of the States Assembly in respect of implementing European legislation?

The very wide powers of the States to make Regulations to give effect to any EU provisions are largely unaffected by the draft Law, except that Article 2(5) limits those powers so that the States may not by Regulations under this Law –

- impose or increase taxation,
- make retrospective legislation, or
- amend the 1973 Law.

If appropriate, the States should take such steps by means of a primary Law.

6. Why has Article 3 been included in the draft Law?

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

7. In what circumstances would the Order-making power established under Article 4 of the draft Law be used?

The purpose of a ‘general provisions’ Order is to introduce measures which are common to several other Orders. For example, the existing sanctions Orders mostly contain identical provisions relating to the powers of Customs and Immigration officers to enforce trade embargoes, or powers for the Minister to require information, or provisions on how information may be disclosed to third parties.

It is often more accessible and easier to understand the legislation if such ‘standard’ provisions are contained in a single ‘general provisions’ Order which applies, for example, to all sanctions measures.

Moreover, if these provisions are contained separately in each Order, if any overall change is required it would be necessary to amend each and every Order to be consistent. In contrast, it would be much more convenient and easier to understand if a single amendment was made to a ‘general provisions’ Order which applied to sanctions generally.

A key restriction on ‘general provisions’ Orders is that they must not make any provision which could not be made under the Orders to which they apply. In effect, ‘general provisions’ Orders are a device to simplify the legislative process and do not affect the substance of the legislation.

8. What checks and balances exist at present in the Order-making process?

The current Law constrains the Order-making power of the Minister to circumstances in which –

- (a) the subject relates to the EU common foreign and security policy, and
- (b) 'in the opinion of the Minister, immediate or early enactment is necessary or expedient in the public interest'.

The second of these requirements is a subjective test and it is difficult to determine with certainty when the need for 'immediate or early enactment' applies.

Moreover, all Orders made by a Minister must be published as a Ministerial decision and presented to the States.

Orders are subject to possible annulment by the States and, for all areas where there is a power given to the Minister to make an Order, the States may enact Regulations which will have the effect of superseding such an Order.

9. What new checks and balances, if any, is it envisaged will be introduced in relation to the Minister's Order-making powers under the new legislation?

The powers of the Minister to make Orders under the draft Law are explicitly limited to those provisions that are necessary to give further effect to an EU provision that is binding on Jersey under Protocol 3, or specifically to give effect to sanctions measures.

The Law further limits the Order making power, such that the Minister may not –

- imposing a penalty of imprisonment for more than 2 years for a criminal offence;
- amend Regulations made by the States or make any provision inconsistent with any such Regulations.
- under the same restrictions that apply to Regulations made by the States, impose or increase taxation, apply measures retrospectively or amend the 1973 Law.