

OFFSHORE FINANCE

How Safe Is the Constitutional Safety Net?

by St. John Bates

Explanatory Introduction:

The following paper was presented 18 September 2001 to a business and professional audience in Jersey as the first of a series seminars organised by Network CPD Ltd, a Jersey company which provides continuing professional development for directors and senior personnel on the Island.

Jersey, like Guernsey and the Isle of Man, where St. John Bates lives, are UK Crown dependencies. In recent years, there has been an increasing interest in the nature of the constitutional status of these Crown dependencies and, in particular, the extent of their autonomy. As each of the dependencies is an off-shore finance centre, this has a particular interest to the business community as financial transactions, the source of the funds which are transacted, and the relevant tax implications, become increasingly subject to formal and informal international regulation. This has become an active concern of, among others, the United Nations, the Organisation for Economic Co-operation and Development and the European Union. These trends were also reflected in the "Review of Financial Regulations in the Crown Dependencies" commissioned in 1998 by the UK Secretary of State for Home Affairs and conducted by a former UK Treasury civil servant, Andrew Edwards, who reported in the same year [Cm 4109-1].

In addition, Jersey -- and indeed Guernsey -- is presently considering internal constitutional reform. The proposals would introduce a ministerial cabinet system of government in place of the present system in which executive functions are effectively the responsibility of a series of parliamentary committees. The Isle of Man introduced such a system in 1986-87 and the other Crown dependencies are interested in the Manx consequences, to date, of that constitutional change.

Synopsis:

The paper examines, for a business and professional audience, the constitutional relationship of the UK Crown dependencies (Isle of Man, Jersey and Guernsey) with the Crown and the UK Government; and their consequential relationship with the European Union and international organisations, such as the Organisation for Economic Co-operation and Development.

The paper also considers current proposals for domestic constitutional change in Jersey and Guernsey in the light of the effects of similar changes made in the Isle of Man in 1986-87. An important element of the proposed changes would be replacing the present arrangements, in which executive functions are effectively the responsibility of parliamentary committees, by ministerial cabinet government.

OFFSHORE FINANCE: HOW SAFE IS THE CONSTITUTIONAL SAFETY NET?

I. Introduction

In June, the Financial Services Commission in Jersey issued the first fourteen registration certificates for trust company business to businesses with relatively simple structures and with which the Commission was already satisfied from previous dealings with them; in the course of the next year or so the Commission will consider licences from applicants less well known to them. In the autumn the Financial Supervision Commission in the Isle of Man will issue over 100 corporate service provider licences to applicant companies which have been fully vetted; trust service providers will be licensed under separate statutory powers.

This extended licensing regime in the Crown dependencies has certainly been stimulated -- and possibly prompted -- by the recommendations of the Edwards Review. In other spheres there have been initiatives from OECD and a variety of other international bodies of equal and lesser formality but with distinctly overlapping membership, and also policy and legislative initiatives within the EU.

It seems like only yesterday that we were talking of the advantages of doing in business in the Crown dependencies which were familiar with, and sympathetic to, the needs of a sector which has always worked in a complex, competitive and shifting international environment. And of how it was a particular comfort to know that these were jurisdictions where -- despite its occasional downsides -- the decision-makers were accessible and where there was a high degree of executive and legislative autonomy.

The familiarity and sympathy are still there. With the globalisation of financial markets, regulation will be a constant and important element in all reputable jurisdictions. Yet, as some-one who has to take a strategic view, it would be surprising if -- while overseeing the practical implications of licensing -- you did not undertake some longer-term evaluation of the autonomy of the Crown dependencies and its strategic implications for you. I would like to-day - as a lawyer, businessman and a former public servant -- to offer you some insights into the constitutional structures and developments which may inform that evaluation.

You might reasonably ask why businessmen -- who always view the law with a wary eye -- should concern themselves with how these matters are utilised and developed.

I will try to explain why.

The emphasis to be placed on legal parameters is a strategic decision. That emphasis is likely to be complementary to constructive dialogue and certainly not a substitute for dialogue.

Nevertheless, the legal context in which states and international bodies act, and engage with the dependencies, raises considerations which are quite distinct from the, commonly less precise and less manageable, political parameters of these matters. Where a question of the legal competence of action, or proposed action, is raised by a dependency, it can be raised by the dependency in its own right. It can be raised as a

technical question independent of political and economic considerations. The weight to which it is entitled is, or should be, a product of the strength of the supporting argument and can only properly be met by counter legal, as opposed to political or economic, argument from others. Finally, in many cases, it falls to be determined by an independent legal tribunal; and if there is no provision for such a determination, this in itself may be a further legal issue that can properly be raised.

This is often in contrast to political and economic issues. Even where there are strong supporting arguments, political and economic issues which are raised may be resisted by others with more political and economic power and influence. That is the importance of legal parameters -- the "constitutional safety net".

My observations on these legal parameters fall into three inter-related parts:

1. the constitutional relationship of the Crown dependencies and the Crown;
2. the relationship of the dependencies to OECD and the EU; and
3. the implications for these relationships in the proposals for domestic constitutional change in Jersey, in the light of the Manx experience.

II. The Crown Dependencies and the Crown

1. Introduction

There are essentially three aspects to the constitutional relationship between the dependencies and the Crown.

There is the *executive government relationship*, which in pathological terms raises the question of when and on what basis the Crown (in the effective form of the UK Government) can act in an executive capacity in the dependencies.

There is the *legislative relationship*, which raises the question of when and on what basis the Crown (again in the effective form of the UK Government) can legislate for the dependencies, independent of their consent to the legislation.

Finally, there is the *judicial relationship*. In the case of each of the dependencies, the final court of appeal in respect of questions of the domestic law of the dependency and relevant domestic law of the United Kingdom is the Judicial Committee of the Privy Council.

My comments will be devoted to the executive and the legislative relationships, although obviously the judicial relationship can have a significant bearing on both of them.

2. The Executive Relationship

There is no specific statutory regulation of the relationship: either in enactments of the UK or in the dependencies. This is in contrast with domestic constitutional arrangements in the UK, where for example one can turn to legislation to determine the competence of the Scottish Executive, the Scottish Parliament and the National Assembly for Wales, and the competence of the Westminster and Whitehall in respect to Scotland and Wales.

However, the UK-dependency relationship is not totally devoid of a domestic and international legislative dimension. To the extent that Protocol 3 of the Act of Accession annexed to the 1972 UK Treaty of Accession applies, in terms of Community law neither the UK nor the dependency authorities can act in violation of EU law. Neither can these authorities act in violation of the European Convention on Human Rights, again to the extent that the Convention applies to them.

In the absence of competent statutory authority, the power of the UK to take executive action in respect of the dependencies rests on prerogative power. Prerogative power is essentially power existing in the Crown which is recognised by the courts. It is distinct from statutory power (derived from legislation) or common law power (established over the years by the courts). In addition to their specific application to the dependencies, prerogative powers include such diverse matters as entering into treaties, issuing passports and declaring war -- and granting assent to legislation, to which I will return.

In respect of the dependencies the Crown exercises prerogative power on the advice of the Privy Council, in practice Ministers of the UK Government who are Privy Councillors. This advice is now the particular responsibility of the Lord Chancellor (and the Lord Chancellor's Department).

However, prerogative power is not synonymous with unlimited discretion; it is regulated in a number of ways:

(i)

Prerogative power may be affected by legislation. Legislation may abolish or restrict prerogative power, either expressly or by necessary implication. Where legislation does not abolish prerogative power but creates a parallel statutory scheme, in general terms the Executive must proceed by use of its statutory rather than its prerogative powers. The Executive cannot exercise the prerogative in a way which would derogate from the due discharge of a statutory duty. So prerogatives of the Crown in respect of the dependencies may be limited by legislation, enacted at Westminster or by the legislature of the dependency (although such legislation would require the assent of the Crown).

(ii)

In principle, the courts will not recognise the existence of new prerogative powers. As Lord Diplock famously observed in a judgment in 1964: "it is 350 years and a civil war too late for the Queen's courts to broaden the prerogative". This is not to say that while not being prepared to create a new prerogative the courts may not apply an old prerogative to new circumstances. The courts appear less ready to consider that an ancient prerogative has

become so unsuited to modern conditions that it can no longer be relied on by the Crown.

(iii)

UK courts will now review the exercise of many prerogative powers. In the 1980s and 1990s they moved away from a previously held position that they would determine the existence and extent of a prerogative power, but would not review or regulate the manner in which it was exercised. Admittedly there are dicta which would suggest that this capacity to review the exercise of prerogative power may not extend to all prerogative powers but, on the other hand, there are also judgments which demonstrate a judicial capacity to extend such review beyond what was perhaps initially anticipated.

(iv)

The exercise of prerogative power may be constrained by constitutional convention.

(a) *Introduction*

This is a much-emphasised aspect of the relationship of the dependencies and the United Kingdom, However, before looking at the specific application to that relationship a little background about constitutional conventions may be helpful.

There is some theoretical dispute about whether conventions are *descriptive statements* of constitutional practice or *prescriptive statements* of what should happen. In 1963 when, in a procedure without precedent, the 14th Earl of Home was chosen to follow Harold Macmillan as Prime Minister and renounced his title so that he could enter the House of Commons as Sir Alec Douglas-Home, one distinguished professor of public law suggested that the pages in public law text books headed 'conventions' should be deleted and that "the constitution is what happens" and "if it works, it is constitutional". This was a view shared by the Home Office six years later. In 1969, the Home Office observed in its considered comments on an Isle of Man memorandum containing proposals for changes in its constitutional relationship with the United Kingdom, that "if a sound, just and lasting constitutional relationship is to be created it must reflect the practical aspects of the relationship; it is not for the constitutional relationship to dictate the actual relationship but rather the reverse". This may have some disturbing echoes in the alleged recent statement of a junior minister in the Lord Chancellor's Department.

There are other theoretical views. For instance, the Supreme Court of Canada observed in 1982 that the main purpose of conventions is to ensure that the legal framework of the constitution is operated in accordance with prevailing constitutional values. I would suggest that, over time, an emphasis on prevailing constitutional values may prove to be a useful one for the dependencies.

Turning from theory to their operation, constitutional conventions may have the advantage of assisting seamless constitutional development (so, for

example, the rôle of the Sovereign in the conduct of government in the UK has almost disappeared since the 18th century largely by the operation of convention, and on the same basis the UK Prime Minister has acquired a wide range of powers). Conventions also have drawbacks. They may lack precision; they may not be authoritatively stated in writing, or even formulated in writing at all. It is not always clear to whom they apply. They rarely lead to action in the courts and legal sanctions are not normally available if they are broken.

(b) Constitutional Convention and the Crown Dependencies

Some of these drawbacks are evident in the constitutional convention which constrains the exercise of prerogative power to take executive action in the dependencies.

This convention is that the Crown is responsible for the "defence, external relations and ultimately the good government" of the dependencies. It has changed over the years, but is now commonly founded on observations in the Report of the Royal Commission on the Constitution which was published in 1973.

However, there are three areas which tend to lead to uncertainty over the operation of the convention.

(i) One of the imponderables about relying on the convention is to whom does it apply. Does it represent some loose bi-lateral agreement between successive UK administrations and the dependencies, or is it merely an understanding which regulates the relationships between institutions of the state in the UK? Does it mean that there is an understanding that the United Kingdom Government will not involve itself in the internal affairs of a Crown dependency unless "good government" requires it, or does it mean, for example, that UK Government Ministers will not hold themselves responsible to the UK Parliament for the internal day-to-day affairs of the dependencies and will not accept liability in UK courts for such matters. This is of course a spectrum, but presented harshly are the dependencies a *party* to the convention or merely the *subject* of it?

(ii) There are uncertainties which may be created by questions of interpretation. The Crown is said to have responsibility "ultimately for the good government" of the dependencies. One can envisage this encompassing unlikely situations, such as the extensive breakdown of law and order or economic collapse. However, beyond that, the maintenance of what sort of "good government" would entitle the Crown to exercise a prerogative power to intervene in the domestic affairs of a dependency?

The concept of "good government" is essentially subjective; but is it the subjective view of the government of the day in the United Kingdom advising the Crown, the government of the day in the dependency, or a joint view of those two governments which determines the scope of the concept? Is it one linked to standards which are external to the two jurisdictions? Does it encompass the enforcement in the dependencies of standards and practices

which are attracting international support but which may not have any recognised juridical basis and rely on international political or economic coercion?

Another particularly pertinent illustration of uncertainty arising from a question of interpretation is what is encompassed by the "external relations" of the dependencies. Does consultation on, and the negotiation and adoption of, Community legislation affecting the dependencies invariably and exclusively constitute "external relations"? At the moment, the practice is that it does. Why should this be when any resulting legislation has, either directly or at one remove, domestic legal effect and, more often than not, bears on matters which are purely internal in terms of the convention? I believe that this is an issue which HM Attorney General for Jersey has also suggested recently deserved further consideration.

More generally, as the dependencies become more closely integrated with the international community, to what extent does being responsible for the external relations of dependencies encompass the UK Government (on behalf of the Crown) determining the external relations policy of the dependencies as opposed to presenting an external relations policy determined by the dependencies, or one determined in consultation with the UK Government? This becomes more germane as it is not impossible to see aspects of the policy and economy of the United Kingdom being in more direct competition with those of the dependencies than would have been envisaged even quite recently. There was some, rather formal and anglo-centric, reflection of this in the Royal Commission Report. However, there are other dimensions to this. For instance, the convenience of the UK, and indeed the dependencies, has frequently led to the position of the dependencies being presented externally as a common one. This practice may become less feasible as the economies of the dependencies become more sophisticated and somewhat more diverse.

(iii) There are also the uncertainties which may be created by the discretionary application of the convention by the United Kingdom to new circumstances. This is perhaps a manifestation of a rather unilateral interpretation of the convention, although the consequential implications have not proved to date to be necessarily inimical to the constitutional development of the dependencies.

Let me give briefly three examples.

- In June 1997, in recognition of its particular concern with the basking shark, the Isle of Man Government was represented on the UK delegation to CITES, an international conference. This was considered by some to be a constitutional development.
- The April 1998 Belfast Agreement (commonly called the Good Friday Agreement), provided for the establishment of a British-Irish Council. At present, it comprises representatives of the British and Irish Governments, the devolved governments in Northern Ireland, Scotland and Wales, and also representatives of the governments of the Isle of Man and the Channel Islands. The purpose of the Council is to

promote the harmonious and mutually beneficial development of the totality of relationships among the peoples of all these islands. In addition, it will be open to the governments represented on the Council to enter into bi-lateral or multi-lateral arrangements with each other. These arrangements do not require the prior approval of the Council as a whole and would operate independently of it.

So, in our present context, the UK Government has entered into an agreement which appears to give a degree of external relations competence to the dependencies, including a competence to enter into bi-lateral and multi-lateral arrangements with another independent state (Ireland), without the prior approval of the British-Irish Council, or presumably the UK Government. Interestingly, as far as I am aware none of the dependencies was consulted in advance of the United Kingdom entering into the Good Friday Agreement, although no doubt in this case it can be attributed to the political exigencies of the situation.

- My third example is the OECD initiative on harmful tax competition. It is my understanding that in responding to the OECD initiative the Home Office first merely transmitted the OECD communications to the dependencies to the extent that the initiative affected them, including the requests for responses to be made to OECD. Obviously in this case there could be conflicts of interest, both political and institutional, for the United Kingdom, but the initial action of the Home Office does represent an interesting approach to the constitutional responsibility of the Crown for the external relations of the dependencies.

3. The Legislative Relationship

In certain circumstances it would be possible for the UK Government (on behalf of the Crown) to legislate under prerogative power, but this would be subject to the constraints already described. Here I turn rather to the capacity of the UK Parliament to legislate for the dependencies; again, of course we are almost invariably talking of legislation introduced by the UK Government. I will not rehearse the detail of the legal arguments surrounding this, partly because they are extensive but also because some of them are particular to each of the Crown dependencies, as a consequence of their rather different constitutional histories. I will, however, make three general observations and then comment a little on some practical issues.

My first general observation is that I do not believe it is correct to presume that the capacity of the UK Parliament to legislate for the dependencies is co-terminus with the prerogative power of the Crown, as exercised by the UK Government, to take executive action in respect of the dependencies.

Secondly, the capacity of UK Parliament to legislate for the dependencies is largely based on the notion of the legislative supremacy of the UK Parliament which is an English common law doctrine developed by the courts. It is a doctrine which has an uncertain application to the dependencies. Of course, the UK Parliament has extended

its legislation expressly or by necessary implication (which is a slippery concept) to, and legislated directly for, the dependencies over many centuries. However, the legal basis on which it has done so is unclear and, and, in the view of some, may -- on occasion -- have been no more than the acquiescence of the dependency.

Thirdly, like the exercise of prerogative power, primary legislation of the UK Parliament is more subject to judicial review than it once was. UK primary legislation applying to a dependency which was in conflict with the EU legal obligations of the UK would be struck down by the courts. UK primary legislation applying to a dependency which was in conflict with other treaty obligations of the UK would be restrictively interpreted by UK courts. UK primary legislation applying to a dependency which was in conflict with UK obligations under the European Convention on Human Rights would be likely to be restrictively interpreted by UK courts, might be the subject of a declaration of incompatibility by UK courts, and would face the possibility of being determined as a breach of the Convention by the European Court of Human Rights. UK delegated legislation, such as regulations and orders, applying to a dependency would be subject to more extensive judicial review.

I turn to a couple of practical matters.

The UK Government normally consults the dependencies before seeking to legislate for them, or extending UK legislation to them. As you may know, during consideration of the Human Rights Bill in the House of Lords there was an amendment tabled which sought to extend the UK Bill to the Isle of Man and the Channel Islands. A junior Home Office Minister at the time – Lord Williams of Mostyn – responded for the Government as follows:

"the Crown is ultimately – and I stress the word ultimately – responsible for the good government of the Islands. We have full power in principle to legislate for the Islands, but it is a fact that it would be contrary to constitutional conventions to which all governments of whatever political complexion have adhered, for the power to be used *in the ordinary course of events* without the agreement of the Island governments"*(emphasis added)*.

With great respect to Lord Williams, I would not agree with all his propositions, but here we have another constitutional convention -- this time with respect to legislative competence. Clearly this is one that it is difficult to characterise as other than a British constitutional convention which falls to be interpreted and applied by British institutions without reference to the dependencies. It is no less opaque for that. What would be an extraordinary course of events, as a result of which the UK Government would seek to legislate for the dependencies without their agreement?

Perhaps we can find some clues by looking at another practicality of the legislative process and the manner in which the UK sometimes advise the Crown.

Although the details of the legislative process differ somewhat from one dependency to another, in each dependency the UK Government, in advising the Crown, effectively determines whether assent is given to the legislation. Manx experience suggests that there may be merit in seeking an authoritative limitation on the present (apparently unlimited) discretion exercised by the UK Government in tendering

advice on this matter. This could even be the acceptance of a convention that the UK Government would not advise against assent unless the legislation was in conflict with the responsibilities of the Crown in respect of the defence, external relations or -- conceivably but more controversially -- the good government of the dependency.

Let me give you two Manx illustrations, although examples may be found in the other Crown dependencies.

The Sexual Offences Act 1992 decriminalised homosexual acts between consenting adults in private. You will recollect that this was a matter for some political controversy and the Home Office intimated both in public and private that any express attempt to maintain the previous position in the legislation would result in advice that Royal Assent should be refused on the grounds that the provision would be in breach of the obligations of the United Kingdom under the European Convention of Human Rights, which is extended to the Isle of Man. Happily, the matter did not have to be tested but, if in the circumstances outlined, the advice had been that Royal Assent should be refused this would -- on my propositions -- have been constitutionally correct.

The contrasting example is the Territorial Sea (Consequential Provisions) Act 1991 which provided the legislative framework in the Isle of Man for the agreement between the United Kingdom Government and the Isle of Man Government on the extension of the territorial waters of the Island. An Isle of Man department had competence to make bye-laws in respect of the then existing Manx territorial waters. The UK Government was concerned about the exercise of this power in the extended territorial waters because Northern Ireland fishermen fished in those waters and were worried about the effect of bye-laws made in the Isle of Man on their rights to do so. The result of the negotiations between the Isle of Man Government and the UK Government, and reflected in the legislation, was that the Isle of Man department could make the bye-laws for the extended territorial waters but only with the concurrence of the UK Secretary of State. It was stated in Tynwald that part of this negotiation was that the Royal Assent would be unlikely to be advised if the concurrence requirement were dropped from the Bill. The constitutional propriety of using proposed advice on Royal Assent as an element of negotiation in this way may be considered to be debatable. It would be a situation where judicial review of the exercise of the prerogative of Royal Assent on the grounds that it was an abuse of a prerogative power might now be contemplated.

As a general principle, it is difficult to see why the constitutional responsibility of the Crown in respect of a dependency should be exercised with a view to securing economic or political benefit for the United Kingdom except where this is coincidental with the interests of the dependency. Despite the accidents of history (which obviously have applied to other jurisdictions where the Crown has exercised such powers), to put it in more formal terms, it does not seem constitutionally appropriate for the Crown exercising its responsibility in respect of a dependency to exercise that responsibility as if it were solely doing so as the Crown in right of the United Kingdom.

4. An Interim Assessment

All these issues give particular point to the question which I posed earlier: is the application of the convention a matter for determination by the Crown on the advice of the UK Government, or is it a matter for agreement -- or at least extensive consultation -- with the dependencies? The convention, of course, only regulates executive action taken by the UK Government on behalf of the Crown, usually under prerogative power; that prerogative power is itself regulated and subject to the potential of judicial review. Nevertheless it is the convention that will affect the day-to-day relationships of the UK Government and the dependencies. Long-term, it is not constitutionally desirable to allow the convention to be solely a matter of the discretion of the UK Government. This might be said to be distressingly similar to the manner in which the Lord Chancellor determined questions of equity in seventeenth century England. This was described thus at the time by John Seldon:

"Equity is a roguish thing, for law we have a measure, knowing what to trust to. Equity is according to the conscience of him that is Chancellor. And as it is larger or narrower so is equity. It is all one as if they should make the standard for the measure we call a foot to be the Chancellor's foot; what an uncertain measure this would be: one Chancellor has a long foot, another a short foot, a third an indifferent foot; it is the same thing in the Chancellor's conscience".

One way to limit the discretion is for the governments of the dependencies to be alert to variations and extensions of constitutional convention, and to make a public response when they are considered to be inappropriate. Even if the convention is presently perceived as one for British institutions and merely applied to the dependencies, such responses by the governments of the dependencies may eventually lead to the convention being additionally characterised as effectively a bi-lateral agreement between the UK Government and the dependencies.

III. The Dependencies, OECD and the EU

I am using OECD and the EU as examples of a more general phenomenon. In respect to these bodies and others, this is a matter which was the subject of an initial mapping exercise by the Tynwald Standing Committee on Economic Initiatives second report for 2000/2001, *The Legal Context of Contemporary Economic Initiatives*, in February -- although that report has, in some respects, been overtaken by events.

A range of international bodies are taking decisions and conducting inquiries which may affect the present economy, and the future economic development, of the dependencies. As well as OECD and the EU they include the UN and the International Monetary Fund, together with some of its various associated bodies such as the Financial Action Task Force (FATF), the Group of Seven (G7) and the Group of Eight (G8).

Many of these bodies act within legal parameters as well as political parameters, but the legal parameters vary substantially in nature and substance. The UN and OECD have a competence determined by the treaties establishing each organisation, and

these treaties may be interpreted by reference to subsequent practice. The competence of the EU is also circumscribed by treaty, and it has the additional capacity, within the terms of the Community treaties, to legislate. By way of contrast, the G7 appears to have been established by the Heads of State or Government of the seven largest industrial countries in the IMF agreeing to meet regularly; the G8 was created by an invitation from the G7 to the Russian Federation to meet with them; FATF was established by the G7 Summit in 1989 as an inter-government body which has neither a rigidly defined constitution nor an unlimited life as it conducts a review of its mission every five years. Not only are there substantial variations in the legal context in which these bodies operate, but their legal relationship with the dependencies is similarly varied and, in some cases, obscure. For the dependencies this may require a strategic approach similar to that which I have suggested may be required in their relationship with the United Kingdom.

Three initiatives of OECD and the EU may illustrate the point.

(i) The OECD Harmful Tax Competition Initiative

The legal basis of OECD is the OECD Convention 1960, although in fact until 1990 there was uncertainty over the application of the Convention to the dependencies. It is to this source that one must first turn to determine the scope of the international law *competence* of OECD to conduct the harmful tax competition initiative.

Without burdening you with -- even by the standards of multi-lateral treaties of the time -- the rather windy drafting style of the Convention, it is difficult to identify any specific competence in the general aims of the Organisation in Articles 1 & 2 of the Convention.

There are further legal considerations, with both an international and an analogous domestic law dimension, in the *manner in which an initiative* such as the OECD Harmful Tax Competition Initiative *is conducted*. As we all know the process has lacked to a remarkable degree both transparency and equity -- not to mention intellectual rigour. I made reference to this a couple of years ago in an editorial in the *Statute Law Review*, and this found a political echo in a speech by the Chief Minister of the Isle of Man to an OECD Conference in Paris last February.

The international law context extends beyond the determination of the competence of OECD to conduct the harmful tax competition initiative and the manner in which it is conducted. It also bears on the *sanctions proposed* where a jurisdiction fails to comply with action or standards determined as part of the initiative. Were any such sanctions to be applied, they would be applied by the Member States of the OECD rather than by the OECD itself. However, international law does not permit a state an unfettered discretion in applying sanctions, including economic sanctions, to other states or non-sovereign jurisdictions.

(ii) EU Code of Conduct for Business Taxation

The Code of Conduct for Business Taxation was annexed to the Council of Ministers' conclusions at the ECOFIN Council meeting held on 1st December 1997; these conclusions and the annex were published in the *Official Journal of the European Communities*. This development had its genesis in an EU Commission document, "Towards Tax Co-ordination in the European Union".

Neither the ECOFIN conclusions nor the Code of Conduct have any Community or other legal basis. The Code of Conduct, once adopted, will be a political agreement and not legally binding. This is also the view of the UK Treasury as expressed in its explanatory memorandum to the UK Parliament on the Code.

Paragraph (M) of the Code adopts a formula which may well be used elsewhere in the future. This would impose an obligation on Member States with dependent or associated territories, or which have special responsibilities or taxation prerogatives in respect of other territories. They are required to:

"commit themselves, *within the framework of their constitutional arrangements*, to ensure that these [Code] principles are applied in those territories. In this connection, those Member States will take stock of the situation in the form of reports to the group referred to in paragraph H, which will assess them under the review procedure described above" (*emphasis added*).

Despite the comfort which some have drawn from it, this relies on a concept which is neither that clear nor that constant.

A further legal issue is the Community law implications were the Code to be adopted and applied. As I have said, the Code is a political agreement rather than a text that is binding on Member States in Community law. However, it is a document which, if adopted, would record a political agreement between the Member States to take, and report on, action. With respect to the dependencies, one Member State, the United Kingdom, would commit itself "within the framework of [the] constitutional arrangements", to ensure that principles within the Code were applied in the dependencies. However, by virtue of Protocol 3 of the Act of Accession annexed to the UK Treaty of Accession 1972, taxation is not an element of Community legal obligations which extend to the dependencies. Even were the view ever taken by the United Kingdom that the constitutional relationship between the dependencies and the United Kingdom admitted UK intervention in the scope and nature of taxation in the dependencies, there would be a significant legal issue to address as to whether an agreement such as this - even one which is not legally binding -- to act in a manner which was contrary to Community treaty obligations was lawful and enforceable in Community law. Furthermore, as entering into the agreement would be an exercise of prerogative power by the United Kingdom Government, it would be possible for the dependencies to seek judicial review of the exercise of that power.

(iii) EU Draft Directive on Savings

The original draft directive on savings was submitted by the Commission in 1998. It contained an annex which incorporated a decision of the Council of Ministers, which flowed from the conclusion of the 1st December 1997 ECOFIN meeting. Article 2 of the annex adopted essentially the same formula as that used in the proposed Code of

Conduct for Business Taxation. It raised not only the issues that I have outlined but other legal issues as well.

First, the annex to the draft directive had an uncertain legal basis; while it incorporated a decision of the Council of Ministers, the annex itself did not appear to be incorporated within the draft directive.

Secondly, unlike the draft Code of Conduct on Business Taxation, the draft directive, if adopted, would have been legally binding. Negotiating, and agreeing to the adoption, of the draft directive by the United Kingdom Government would have been an exercise of the prerogative. To the extent that the United Kingdom were to have sought, or failed to exercise its competence to resist, the adoption of provisions of the directive which, if implemented, would have been in conflict with Protocol 3 of the Act of Accession annexed to the UK Treaty of Accession 1972, would potentially have been subject to judicial review.

Finally, were the draft directive to have been adopted (and the annex treated as a legally binding part of the text), the *implementation* of the directive with respect to the dependencies would have been challengeable in Community law as being in conflict with Community treaty provisions, namely Protocol 3.

However, as I am sure you are aware, the draft directive was withdrawn by the Commission and replaced by an alternative draft directive in July 2001. The revised directive does not have an annex in the terms of the previous directive. However, a press release carried the Presidency Conclusions of the Fiera European Council meeting in June 2000 and this contains in Annex IV a report of ECOFIN to the Council on the "Tax Package". This has the following passage:

"In order to preserve the competitiveness of European financial markets, as soon as agreement has been reached by the Council on the substantial content of the Directive and before its adoption, the Presidency and the Commission shall enter into discussions immediately with the US and key third countries (Switzerland, Liechtenstein, Monaco, Andorra, San Marino) to promote the adoption of equivalent measures in those countries; *at the same time the Member States concerned commit themselves to promote the adoption of the same measures in all relevant dependent or associated territories (the Channel Islands, Isle of Man, and the dependent or associated territories in the Caribbean)*. The Council shall be informed regularly on the progress of such discussions. Once sufficient reassurances with regard to the application of the same measures in dependent or associated territories and of equivalent measures in the named countries have been obtained, and on the basis of a report, the Council will decide on the adoption and implementation of the Directive no later than 31 December 2002, and do so by unanimity" (*emphasis added*).

Whatever Community law status could have been accorded to the annex to the previous version of the directive, all we have now is an account of an inter-state agreement in a press release. However, it may be noted that there is no reference to the constitutional relationship of the Crown dependencies to the United Kingdom in this commitment. This seems a profoundly unsatisfactory way to proceed, but it does not remove the Community and domestic legal parameters within which the United Kingdom must act.

IV. The Implications of Proposals For Domestic Constitutional Change in Jersey

In the mid-1980s, the Isle of Man made domestic constitutional changes which were similar to those presently proposed in Jersey. However, the Jersey proposals differ in important and, particularly in the present context, beneficial ways.

As I understand them, the more germane features of the Policy and Resources Committee proposals announced last month are:

- ministerial government would replace government by committee of the States
- the States would appoint a Chief Minister from amongst its members
- the Chief Minister would nominate up to 10 ministers from amongst the States members and these nominations would require the approval of the States
- the Chief Minister and the ministers would constitute the Council of Ministers and the executive functions of government would be vested in the Council
- each government department would be the responsibility of a minister, who might appoint no more than two further States members as, in effect, junior ministers
- the number of States members involved in executive government would be less than those who are not
- the States would, in addition to other committees, establish a small number of committees which would scrutinise legislation, examine government performance and contribute towards the development of policy. The members of these committees would be States members not involved in government.

In comparison to the constitutional changes in the Isle of Man over the last fifteen years, the most striking differences in the Jersey proposals relate to the attempt to maintain a central role for the parliament. In this, Jersey has, I believe learned from the Manx experience.

First, the nominations of both the Chief Ministers and departmental ministers will be subject to the approval of the States. This was initially the position in the Isle of Man after the introduction of ministerial government, but now the Chief Minister nominates ministers without the requirement of the approval of Tynwald. Admittedly, Tynwald has resolved that the procedure should be somewhat modified, but this awaits implementing legislation.

Secondly, the Jersey proposals carefully maintain a substantial cadre of States members to undertake parliamentary scrutiny, with – it must be assumed – sufficient resources to do so. In contrast, other than the presiding officers, all elected members of Tynwald are usually appointed to executive government posts.

There are some glosses that I should add.

First, there is a tendency of drift towards the convenience of executive government in these matters. So, as I have said, the Isle of Man moved away from parliamentary approval of ministerial appointments. Similarly, it has also developed a convention of the collective responsibility of the Government to Tynwald, but this differs

substantially from the Westminster model. For instance, where a Minister on appointment to the Council has a strongly held and publicly declared position on a particular subject that is in conflict with government policy, the Minister can maintain that position publicly - although in passive rather than in active mode. Also, where a constituency interest conflicts with a decision of the Council of Ministers, the Minister may publicly favour the interests of the constituency rather than government policy -- but must first make this position clear to the Council.

There are reasons for these developments other than the understandable reluctance of any government to subject itself to enhanced parliamentary scrutiny. In a parliament such as Tynwald with twenty-four directly elected and eight indirectly members, most of whom are elected as independents, there is in practice a limited number at any one time who are appointable to the nine ministerial posts. Placing additional constitutional and political hurdles in the way of the appointment process exacerbates the difficulties.

There is also the question of the extent to which a small community can effectively provide the resources to develop government policy and also to maintain credible parliamentary scrutiny of that policy. Here the important factors include the demands on the time of parliamentarians, the relatively few people such a community who will have the requisite specialist knowledge, as well as the more obviously economic implications.

There is an ebb and flow in these matters. The Isle of Man maintained its Public Account Committee when it established ministerial government in the mid-1980s, but it did not create the range of parliamentary scrutiny committees envisaged for Jersey. Yet since then Tynwald has established a Standing Committee on Constitutional Matters (to scrutinise government policy and action on matters of significant constitutional importance) and a Standing Committee on Economic Initiatives (to scrutinise external economic initiatives which may affect the Isle of Man). It remains to be seen whether these committees, which have been somewhat quiescent recently, will be maintained after the general election in November.

There is a broad political importance in such institutional developments. Most people here would accept that the private sector demand of the public sector what it seeks to achieve for itself - effective decision-making. In public sector terms, the inclusive development of government policy coupled with objective systematic parliamentary scrutiny is what makes effective decision-making. There is obviously a price to be paid for addressing that equation.

This type of institutional development also has a more immediate practical importance for the matters we are discussing. In its dealings both with the United Kingdom and further afield, there may be strategic advantages for the government of a Crown dependency in having a parliament that is a distinct and independent institution and which performs a significant and effective role in scrutinising both the policy and administration of the government and also its proposed legislation. This, of course, provides a valuable democratic discipline in that the government is required to explain and justify itself publicly. Where the government can satisfy a parliamentary committee and the committee reports accordingly, the government may also quite legitimately use the report externally to argue that its view has been independently

supported. This is a strategy which has been frequently employed by the UK Government in its dealings with the European Union, in particular by reference to the reports of the House of Lords Select Committee on the European Union.

Again, where pressure is placed on the Government to enact legislation arising from such off-Island initiatives, it may be helpful to remind others that enacting such legislation, and the terms of that legislation, are not entirely in the hands of the government but are matters for an obviously independent legislature -- particularly so where the legislature consists largely of members without party allegiance.

V. Conclusion

I have tried to sketch some of the complexities and practicalities of the constitutional relationship between the Crown dependencies and both the United Kingdom and some of the entities in the wider world which are seeking to influence our future, and the implications of internal constitutional change for these matters. I believe that these legal parameters are of general importance and of importance to you. It is also an importance, you may have noticed, which has been recognised recently by Gibraltar in raising an action against the European Commission; although, of course the Chief Minister of Gibraltar is a lawyer.