Jersey has no chance of opposing a UK imposed register ...

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The Jersey Evening Post, ever the faithful mouthpiece for the Jersey establishment, yesterday noted both the planned amendment to U.K. legislation that will impose new transparency requirements on the Island and my blog comments on the issue. Their lead comment was:

JERSEY is facing a constitutional crisis, as it looks increasingly likely that the UK will try to impose laws on the Island which threaten the future of the finance industry.

They added:

Chief Minister Ian Gorst has said that Jersey would resist any such interference in Island affairs.

And noted that:

Senator Gorst said, however, that the UK legislating for Jersey was 'unconstitutional' and a public register of beneficial ownership could not be forced on the Island without Jersey's consent.

Whilst adding:

Senator Gorst said that he opposed the move, as Jersey already had sufficient arrangements in place for sharing information with the UK about individuals who owned companies here.

And then saying:

'It would also be unconstitutional and impossible for the UK to impose such a measure on our island without our consent,' he said.

'We are not represented in the UK Parliament, and it is an agreed constitutional position that the UK does not legislate for Jersey. We would expect this convention to be observed and would resist the registration of any Order in Council issued in breach of

our constitutional arrangements.'

Senator Gorst is, of course, wrong. Let me quote from this (although other sources are available, all of which support the view I will be promoting):

This says:

UK legislation does not normally extend to the Crown Dependencies. In instances where it does extend, it may do so either by virtue of the Act itself or by Order in Council made with the their agreement under an enabling provision contained in the Act which provides for it to be extended to the Crown Dependencies . For an Act to extend otherwise than by an Order in Council is now very unusual. Departments must consult the Crow Dependencies at the earliest opportunity in the event that extension is under consideration.

It adds:

An enabling provision for an Order in Council, known as a 'permissive extent clause' in a Bill could take the following form: "Her Majesty may by Order in Council provide for any of the provisions of this Act to extend, with or without modifications, to any of the Channel Islands or the Isle of Man".

In other words, it is not normal for UK legislation to extend to the Crown Dependencies, but it is common enough for them to a normal provision for it to do so.

So can this be done without consent? The same note says:

The Crown is ultimately responsible for their good government, the UK for their defence and international relations of each Island — this was explained by Lord Bach in a parliamentary answer given on 3 May 2000 in these terms: "The Crown is ultimately responsible for the good government of the Crown Dependencies. This means that, in the circumstances of a grave breakdown or failure in the administration of justice or civil order, the residual prerogative power of the Crown could be used to intervene in the internal affairs of the Channel Islands and the Isle of Man".

So there is not a shadow of a doubt that the UK can intervene if it wishes, albeit it has constrained when it might. But the note also says:

There has always been a close relationship between the Crown Dependencies and the United Kingdom. The constitutional relationship between the Islands and the UK is the outcome of historical processes, and accepted practice. The most recent statement of the relationship between the UK and the Islands is found in Part XI of Volume 1 of the Report of the Royal Commission on the Constitution, published in 1973 and known as the Kilbrandon Report. It acknowledged that there were areas of uncertainty in the

existing relationship and that the relationship was complex. It did not try to draw up a fully authoritative statement.

In other words, there is no definitive answer as to when the power may be exercised, but there are most certainly some clues:

The UK Government is responsible for defence and international representation of the Crown Dependencies. In certain circumstances, the Crown Dependencies may be authorised to conclude their own international agreements by a process of entrustment. For example, all of the Crown Dependencies have autonomy in domestic matters including taxation and, having made commitments to the OECD on the exchange of tax information, they have consequently negotiated tax information exchange agreements (TIEAs) with an increasing number of other states. In order to facilitate the completion of TIEAs, which by virtue of their autonomy in tax matters they considered it inappropriate for the UK Government to sign on their behalf, the UK entrusted the Crown Dependencies to conclude the Agreements within the terms of Letters of Entrustment issued to their Governments under the signature of the appropriate UK Minister.

However, being responsible for the Crown Dependencies' international representation is not limited to simply entering international agreements; it should be read to include any international or external relations whether or not they result in some internationally binding agreement.

This is where we arrive at the nub of the argument. The UK is responsible for the external affairs of the Crown Dependencies. It has, when they have done what the UK expects of them (i.e. agreed to comply with international norms of tax practice), permitted them to act in their own names. But let's be clear, this was not hard: the form of these agreements was laid down in international standards set by the Organisation for Economic Cooperation and Development. But, the responsibility goes a lot further than such minor agreements and the primary authority very clearly rests with the UK.

So the best way to answer the question as to whether or not this is an issue pertaining to international relations is to refer to the facts.

The first, and obvious, fact is that the financial services industry in the Crown Dependencies does not exist to service a local market. It is almost entirely an export trade.

Second, secrecy is a key component in this. It is widely recognised that I defined the now commonly used term 'secrecy jurisdiction' that is now frequently used to define these places when the term tax haven is not considered appropriate. I define secrecy jurisdictions as places that intentionally create regulation for the primary benefit and use of those not resident in their geographical domain with that regulation being designed to undermine the legislation or regulation of another jurisdiction and with the

secrecy jurisdictions also creating a deliberate, legally backed veil of secrecy that ensures that those from outside the jurisdiction making use of its regulation cannot be identified to be doing so. This is a description of the Crown Dependencies.

Third, it has to be decided if this is causing international concern. As I have previously noted, in December 2017 the European Union placed the Crown Dependencies on its tax haven grey list, saying:

So, there is an undoubted issue of compliance with international relations that is of concern for these Islands at present. And this impacts the UK. The threat from the EU is to sanction non-compliant locations. If the UK leaves the EU and it could change the law in these locations but does not then it too could be sanctioned by the EU because it would then be the government permitting the non-compliant behaviour. I think that this risk is real.

So does the UK have a right to intervene because Jersey is undertaking acts with international consequences that suggest that a 'grave breakdown or failure in the administration of justice' is taking place? I would say that is the case, beyond a shadow of doubt. And if evidence is needed I would refer to the EU Code of Conduct on Business Taxation from 1997 which says non-compliant behaviour can be defined like this:

Code of conduct for business taxation
tax measures covered

A. Without prejudice to the respective spheres of competence of the Member States and the Community, this code of conduct, which covers business taxation, concerns those measures which affect, or may affect, in a significant way the location of business activity in the Community.

Business activity in this respect also includes all activities carried out within a group of companies.

The tax measures covered by the code include both laws or regulations and administrative practices.

B. Within the scope specified in paragraph A, tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question are to be regarded as potentially harmful and therefore covered by this code.

Such a level of taxation may operate by virtue of the nominal tax rate, the tax base or any other relevant factor.

When assessing whether such measures are harmful, account should be taken of, *inter alia:*

1. whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents, or

2. whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base, or

3. whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages, or

4. whether the rules for profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably the rules agreed upon within the OECD, or

5. whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way.

It is pretty clear that the EU is now saying that abuse is happening as defined at stages 3, 4 and 5 of part B, at least. That is a failure of the administration of justice in that case.

Has Senator Gorst got a leg to stand on in that case? I would suggest not. He might be much more sensible to start drawing up the necessary rules.