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## **The constitutional legislation between the Crown Appendages / Dependencies - Bailiwicks of Guernsey, of Jersey, and the Isle of Man- and the European Union. *as at 7<sup>th</sup> July, 2015***

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The Treaty documentation contained in the Act of Accession to the European Communities of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland of 22nd January, 1972<sup>1</sup> ("Act of Accession") is fundamental to understanding the relationship between the Crown Appendages or Dependencies and the European Union, and has remained virtually unchanged since 1972. What is clear is that the Third Protocol to that Act of Accession only addressed the legal world as it was in 1972, and the degree of direct influence of Community and now Union legislation on the Island has been superficially insignificant. However, the arrangements and the Protocol do not deal with the increasingly non-constitutional, if not blatantly unconstitutional pressures being brought to bear on the Island as a result of the increasing political, and probably "outlawful" pressures being applied to it. Whilst the prior Constitutional arrangements existing with the United Kingdom were paralleled in their extension to the relationships with the European Communities in 1972 and now with the Union, the United Kingdom has repeatedly shown that it has no intention of defending the Island's constitutional position, interests, and legal position where that conflicts with its own interests in Europe. For a useful and more detailed analysis of the position in 2004, prior to the abandonment of the European Constitutional proposal, see Alistair Sutton's summary in the Jersey Law Review of February 2005<sup>2</sup>

The subsequent Treaty on the European Union of did no more than reiterate these arrangements within what is admittedly a developing area and widening background by virtue of article 355 TFEU. See OJ 2010/C 83/01, Volume 53 for the consolidated version of the TEU and the TFEU.

It is important to note that the 1972 Act of Accession also amended the Crown Dependencies relationships with the European Coal and Steel Community, and with the Euratom Community. Hence the term Communities.

<sup>1</sup> *The United Kingdom of Great Britain and Northern Ireland.*

<sup>2</sup> [http://www.jerseylaw.je/Publications/jerseylawreview/feb05/JLR0502\\_Sutton.aspx#P021](http://www.jerseylaw.je/Publications/jerseylawreview/feb05/JLR0502_Sutton.aspx#P021)

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The following excerpts are taken from the Compilation of Documents concerning the Accessions to the European Communities 1987 Volume II ISBN 92-77-19304-2 published by the Office for Official Publications of the European Communities, 1988, incorporating the later accessions of Greece and Spain, whose copyright is gratefully acknowledged.

The original version of the Third Protocol is in French, was archived, but both the English and the French versions are available on line on:

<http://eur-lex.europa.eu/en/treaties/index.htm>

The Decision constituting the acceptance of the Accession request, namely the Act of Accession of 22nd January, 1972 including the United Kingdom of 22<sup>nd</sup> January 1972 may be found at

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:1972:073:TOC>

The articles of the Act of Accession amending the Treaties are articles 25, 26 and 27. Note also in passing, that article 28 contained the slight amendment to the Treaties relating to Gibraltar's exclusion from the Common Agricultural Policy and Turnover taxes. The wording of the exclusion is by exclusion of the application of certain acts of institutions in areas in which the Treaties would otherwise apply to Gibraltar. Like the Crown Dependencies the overall application of the Treaty barring certain aspects is confirmed but by different wording. Gibraltar's constitutional position following the Treaty of Utrecht remains very different from the peculiars constituting the Crown Dependencies.

The principles undergirding the United Kingdom's negotiation of the status of the Crown Dependencies within the European Communities were outlined by Lord Rippon, the person responsible for the negotiation of the accession of the United Kingdom to the European Communities in 1972, in a speech given in Jersey in 1992.

The principles were that:

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1. the Crown Dependencies were European Territories for whose external relationships the United Kingdom was responsible and would, in principle become part of the Communities on accession, unless a specific set of arrangements regulating their position was agreed;

2. the existing constitutional relationship between the United Kingdom and the Crown peculiars known as the Dependencies, given its longevity and its prior ascendancy over most constitutional acts in Europe, was to be extended, with minor modification, to the remainder of the European Communities, being then the ECSC, the EC and Euratom. As each of these Dependencies fell within the definition of a European Territory for whose international relations the United Kingdom was ultimately responsible they would have been within the European Communities, unless specifically excluded. There is therefore no, doubt that the Islands are part of the Communities and are not outside them.

Note that the only other European Territories excluded in the Act of Accession, in other words outside the Treaties and the Communities, for which the United Kingdom was responsible were the Sovereign Base areas in Cyprus.

Gibraltar was therefore included within the Communities and the Union under article 227(4) of the EC Treaty, and has a qualified status as a territory within the European Communities, distinct from that of the Dependencies. That qualification as to application of Institutional Acts was dealt with in article 28 of the Act of Accession.

The position of Jersey, Guernsey and the Isle of Man required specific arrangements within the parameters of article 227 (4) of the EC Treaty which states that

“The provisions of this Treaty shall apply to the European territories for whose external relations a Member State is responsible”.

At the moment, the list of European States or Territories outside the European Communities comprises :

Switzerland, Liechtenstein, Monaco, Andorra and Saint Marino.

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This list does not include the Crown Dependencies. Grasping why is fundamental to an understanding of the current misinformation being circulated by politicians in Europe.

It is to be noted that in addressing the issue of the application of the Savings Directive to the Crown Dependencies their constitutional status within the European Union was recognised.

The Council had to negotiate separately through the Commission with each of Switzerland, Liechtenstein, Monaco, Andorra and Saint Marino as being outside the Union<sup>3</sup>. Had any of the Crown Dependencies fallen outside the European Union, its position in relation to the Savings Directive implementation would needs be different, and the Crown Dependencies would have been included in this mandate.

### The Act of Accession

To summarise, the position taken in the Act of Accession of 22<sup>nd</sup> January, 1972 is that:

1 Under article 227 (4) of the Treaty of Rome, it is a principle of fundamental application that all European Territories for whose international relations a Member State is responsible are part of the EC and now the EU. That principle undergirds the remaining paragraphs of that article and was unaffected by the Act of Accession<sup>4</sup>. Article 227 (4) EC reads:

*"The Provisions of this Treaty shall apply to the European Territories for whose external relations a Member State is Responsible"*

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<sup>3</sup> Council mandate to the Commission of 14th May 2013 9487/13 (OR. en) PRESSE 193:

[https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ecofin/137115.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/137115.pdf)

<sup>4</sup> How Spain and France have managed to keep Andorra out of the EU when each has ceded that responsibility to the other is quite interesting feat of intellectual gymnastics.

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Technically the Act of Accession therefore brings the Crown Dependencies into the Treaty, under Article 227 (4) EC as Gibraltar and the Sovereign base territories in Cyprus were. This fundamental principle is the reason why the Crown Dependencies have to be treated separately from other European States who are not part of the Union, whether independent, or not<sup>5</sup>.

However;

2. The Crown Appendages / Dependencies were not included the list of overseas territories in Annex IV to the Treaty as firstly they are European Territories for whose international relations the United Kingdom is responsible and that set of provisions otherwise to be instituted by article 227(3) §1 EC is also excluded by its §2. Otherwise, the Crown Dependencies would have the same limited degree of what is now described as partnership with the EU as the Caribbean OCTs for example, which are now governed by a separate Council Decision<sup>6</sup>. As they are not on the list, the Crown Dependencies are excluded from the application of Annex IV of the then EEC Treaty.

3. Whilst being therefore within the European Communities and, as pointed out by Commissioner Prodi in 2003, now the European Union, the Crown Dependencies are then specifically excluded from the *full scope of article 227 (4) EC by article 227 (5) EC which otherwise would apply the Treaty to them as being European territories for whose external relations a Member State is responsible.*

*At that point in the Treaty drafting the Crown Dependencies are therefore excluded entirely from the application of the legal effects of the EC Treaty and then of the European Union, but not of their status as being within these.*

*The application of the Treaty legal order as a fundamental legal principle under sub paragraph 227(5)(c) is then restrictively defined as an exceptional internal relationship as being limited to that defined in the Act of Accession of 22<sup>nd</sup> January, 1972; specifically its Third Protocol. It is not the Third Protocol which defines the Treaty status of the Crown Dependencies, but rather article 227. The Third Protocol merely defines the scope of application of*

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<sup>5</sup> Note that, for example, Andorra is not independent of either France or Spain, each having ceded sovereignty to the other in a last millennium legal solution to potential discord over the policing of that mountain pass. The ensuing joint "relationship" is a peculiar, such as that of the Crown Dependencies.

<sup>6</sup> COUNCIL DECISION 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the European Union ('Overseas Association Decision')

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*the principles within that legal order of the Communities and the Union. That is the only manner in which the arrangement can function at International law and constitutionally.*

*That the Crown Dependencies are part of the legal order of the Communities and the Union is evidenced by the Islands' access to the Court of Justice of the European Union, in a manner which is distinct from the relationships defined for the Annex IV OCTs in their Council Decision.*

At that point in the Accession drafting they are therefore within the European Communities as a fundamental legal principle, saving that sub paragraph 227(5)(c) then restrictively defines the application of the Treaties by reference to the provisions defined in the Act of Accession of 22nd January, 1972; specifically its Protocol N°3. The French text states the same principle, but using the reverse negative "ne s'applique que dans le mesure...". That does not compromise the fundamental principle of inclusion of article 227(4) EC. Application is a separate and subordinate issue to being within the scope of the Treaties.

Protocol n°3 is specifically included within the Act of Accession 1972 by its article 26 amending article 227 of the EEC Treaty.

No modification to these constitutional provisions can be contemplated or adopted by the United Kingdom or the European Institutions without each of the Crown Appendages / Dependencies agreement<sup>2</sup>. The clause relating to the Faroe Islands has been omitted as not in point

By way of comparison

Article 227 (4) of the Treaty states that “The provisions of this Treaty shall apply to the European territories for whose external relations a Member State is responsible”, and was not amended. That is why the following European States and Territories remain outside the European Communities and the European Union: Switzerland, (independent), Liechtenstein (independent), Monaco (independent), Andorra (a joint French and Spanish co principality), and Saint Marino (Independent).

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*No modification to these constitutional provisions can be contemplated or adopted by the United Kingdom or the European Institutions without each of the Crown Appendages / Dependencies agreement<sup>7</sup>. The clauses (a) relating to the Faroe Islands and (b) the Cyprus Sovereign base areas have been omitted as not in point.*

Those who assert that the Crown Dependencies are outside the Union, rather than accepting that they are within but have a specific status are simply wrong.

Otherwise, in the absence of a specific provision in the Third Protocol how can the Court of Justice of the European Union have jurisdiction to provide preliminary rulings to referring Island Courts in matters relating to the application of the Third Protocol and its application? The CJEU addressed this issue by referring to article 158 of the Act of Accession in *Department of Health and Social Security v Christopher Stewart Barr and Montrose Holdings Ltd. Case C-355/89*. It held that:

"....

7. *In that regard, it must be borne in mind that according to Article 227(5)(c) of the EEC Treaty, as amended by the Act of Accession, the provisions of the EEC Treaty are applicable to the Channel Islands and the Isle of Man only to the extent provided for by Protocol No 3.*

8. *Next, it must be pointed out that according to Article 1(3) of the Treaty of Accession, the provisions concerning the powers and jurisdiction of the institutions of the Communities are to apply in respect of Protocol No 3 which, according to Article 158 of the Act of Accession, forms an integral part thereof. Accordingly, the jurisdiction in preliminary ruling proceedings conferred on the Court by Article 177 of the Treaty extends to Protocol No 3.*

9. *Furthermore, it would be impossible to ensure the uniform application of Protocol No 3 in the Isle of Man if its courts and tribunals were unable to refer questions to the Court concerning the interpretation of that protocol, the interpretation and validity of the Community legislation to which that protocol refers, and the interpretation and validity of measures adopted by the Community institutions on the basis of Protocol No 3.*

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<sup>7</sup> *This comment is the generally accepted legal, academic and professional position, as relayed by Overseas Chambers.*

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10. *It follows that in order to ensure the uniform application of that protocol, the Deputy High Bailiff's Court must be regarded as a court or tribunal empowered to refer questions on those matters to the Court of Justice pursuant to Article 177 of the Treaty."*

To argue that in some manner the Crown Dependencies are excluded from the Legal Order of the Communities, and now the Union, is little sort of incongruous, when the ultimate court of appeal and reference against breaches of European Community or Union law, whether by the Institutions of the Communities and the Union or by others, as enacted by the various provision of the Act of Accession and its Third Protocol is the Court of Justice of the European Union.

This position has been followed by the Commission and the Council throughout until recently. *C.f.* Commissioner Prodi's reply of 14 January 2003 (2003/C 242 E/070) to the Written question P-3620/02 from Wolfgang Ilgenfritz (NI) to the Commission:

*"Jersey, a British Crown dependency, is part of the Union in so far as the United Kingdom is responsible for its external relations. It does, however, have a special status. Pursuant to Article 26(3) and Article 27(d) of the Act concerning the conditions of accession to the Communities of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, a new paragraph was added to Article [227] of the EC Treaty and Article 198 of the Treaty establishing the European Atomic Energy Community.*

*The paragraph reads as follows:*

*This Treaty shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972.*



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*The special arrangements laid down for the Channel Islands and the Isle of Man are set out in Protocol No 3 attached to the Act of Accession, of which, under Article 158 of the Act, they form an integral part.*

*As regards VAT, Jersey does not belong to the tax territory as defined in Article 3(2) of the Sixth VAT Directive (1). Firms in Jersey do not therefore have an individual Union VAT identification number. However, deliveries of goods from or to the Channel Islands are treated as exports and are exempt from VAT as set out in Article 33a of that Directive."*

The relevant documents follow for ease of reference:

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**Article 355 Treaty on the Functioning of the Economic Union**

Article 355

(ex Article 299(2), first subparagraph, and Article 299(3) to (6) TEC)

In addition to the provisions of Article 52 of the Treaty on European Union relating to the territorial scope of the Treaties, the following provisions shall apply:

.....

2. The special arrangements for association set out in Part Four shall apply to the overseas countries and territories listed in Annex II.

The Treaties shall not apply to those overseas countries and territories having special relations with the United Kingdom of Great Britain and Northern Ireland which are not included in the aforementioned list.

3. The provisions of the Treaties shall apply to the European territories for whose external relations a Member State is responsible.

.....

(c) the Treaties shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972.

6. The European Council may, on the initiative of the Member State concerned, adopt a decision amending the status, with regard to the Union, of a Danish, French or Netherlands country or territory referred to in paragraphs 1 and 2. The European Council shall act unanimously after consulting the Commission.

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Provisions contained in the Act of Accession of Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland of 22nd January, 1972.

**Article 25<sup>8</sup>**

The following paragraph shall be added after the first paragraph of Article 79 of the ECSC Treaty:

*'Notwithstanding the preceding paragraph:*

*.....*

*(c) This Treaty shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Council decision of 22 January 1972 concerning the accession of new Member States to the European Coal and Steel Community.'*

**Article 26**

1.<sup>9</sup> The following shall be substituted for Article 227 (1) of the EEC Treaty:

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<sup>8</sup> Text as amended by Article 14 of the Adaptation Decision.

<sup>9</sup> Paragraph (I) as amended by Article 15 (1) of the Adaptation Decision



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*'1. This Treaty shall apply to the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland.'*

2. The following subparagraph shall be added to Article 227 (3) of the EEC Treaty:

*'This Treaty shall not apply to those overseas countries and territories having special relations with the United Kingdom of Great Britain and Northern Ireland which are not included in the aforementioned list.'*

3.<sup>10</sup> The following paragraph shall be added to Article 227 of the EEC Treaty:

*'5. Notwithstanding the preceding paragraphs <sup>11</sup>:*

.....

*(c) This Treaty shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972.'*

<sup>10</sup> Paragraph (3) as amended by Article 15 (2) of the Adaptation Decision.

<sup>11</sup> Author's note: article 227 (4) of the Treaty states that "The provisions of this Treaty shall apply to the European territories for whose external relations a Member State is responsible".

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**Article 27<sup>12</sup>**

The following paragraph shall be added to Article 198 of the Euratom Treaty:

'Notwithstanding the previous paragraphs:

.....

(c) This Treaty shall not apply to those overseas countries and territories having special relations with the United Kingdom of Great Britain and Northern Ireland which are not listed in Annex IV to the Treaty establishing the European Economic Community.

(d) This Treaty shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972.'

**Article 28**

Acts of the institutions of the Community relating to the products in Annex II to the EEC Treaty and the products subject, on importation into the Community, to specific rules as a result of the implementation of the common agricultural policy, as well as the acts on the harmonization of legislation of Member States concerning turnover

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<sup>12</sup> Text as amended by Article 16 of the Adaptation Decision



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taxes, shall not apply to Gibraltar unless the Council, acting unanimously on a proposal from the Commission, provides otherwise.

**Article 158**

Annexes I to XI, Protocols N°s 1 to 30 and the Exchange of Letters on Monetary Questions, which are attached to this Act, shall form an integral part thereof.

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**Protocol No 3<sup>13</sup>**

on the Channel Islands and the Isle of Man

**Article I**

1. The Community rules on customs matters and quantitative restrictions, in particular those of the Act of Accession, shall apply to the Channel Islands and the Isle of Man under the same conditions as they apply to the United Kingdom. In particular, customs duties and charges having equivalent effect between those territories and the Community as originally constituted and between those territories and the new Member States shall be progressively reduced in accordance with the timetable laid down in Articles 32 and 36 of the Act of Accession. The Common Customs Tariff and the ECSC unified tariff shall be progressively applied in accordance with the timetable laid down in Articles 39 and 59 of the Act of Accession, and account being taken of Articles 109, 110 and 119 of that Act.

2. 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 in trade in these products shall also be applicable.

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<sup>13</sup> Set out in the Third Protocol to the Act of Accession of the United Kingdom of 22 January 1972

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The Council, acting by a qualified majority on a proposal from the Commission, shall determine the conditions under which the provisions referred to in the preceding subparagraphs shall be applicable to these territories.

**Article 2**

The rights enjoyed by Channel Islanders or Manxmen in the United Kingdom shall not be affected by the Act of Accession. However, such persons shall not benefit from Community provisions relating to the free movement of persons and services.

**Article 3**

The provisions of the Euratom Treaty applicable to persons or undertakings within the meaning of Article 196 of that Treaty shall apply to those persons or undertakings when they are established in the aforementioned territories.

**Article 4**

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

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**Article 5**

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.

**Article 6<sup>14</sup>**

In this Protocol, Channel Islander or Manxman shall mean any citizen of the United Kingdom and Colonies who holds that citizenship by virtue of the fact that he, a parent or grandparent was born, adopted, naturalized or registered in the island in question; but such a person shall not for this purpose be regarded as a Channel Islander or Manxman if he, a parent or a grandparent was born, adopted, naturalized or registered in the United Kingdom. Nor shall he be so regarded if he has at any time been ordinarily resident in the United Kingdom for five years.

The administrative arrangements necessary to identify these persons will be notified to the Commission.

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<sup>14</sup> EU EDITORIAL NOTE: See in this connection the 'Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the definition of the term "nationals",' reproduced on p. 103 of this volume.

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**Declaration<sup>15</sup>**

by the Government of the United Kingdom of Great Britain and Northern Ireland on the definition of the term 'nationals'

In view of the entry into force of the British Nationality Act 1981, the Government of the United Kingdom of Great Britain and Northern Ireland makes the following Declaration which will replace, as from 1 January 1983, that made at the time of signature of the Treaty of Accession by the United Kingdom to the European Communities:

'As to the United Kingdom of Great Britain and Northern Ireland, the terms "nationals", "nationals of Member States" or "nationals of Member States and overseas countries and territories" wherever used in the Treaty establishing the European Economic Community, the Treaty establishing the European Atomic Energy Community or the Treaty establishing the European Coal and Steel Community or in any of the Community acts deriving from those Treaties, are to be understood to refer to:

- (a) British citizens;
- (b) persons who are British subjects by virtue of Part IV of the British Nationality Act 1981 and who have the right of abode in the United Kingdom and are therefore exempt from United Kingdom immigration control;

<sup>15</sup> EU EDITORIAL NOTE: *This Declaration which appears in the OJ of the EC No C 23 of 28 January 1983 has replaced, from 1 January 1983, that which was made at the time of signature of the Treaty concerning the accession of the United Kingdom of Great Britain and Northern Ireland to the European Communities.*



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(c) British Dependent Territories citizens who acquire their citizenship from a connection with Gibraltar.'

The reference in Article 6 of the third Protocol to the Act of Accession of 22 January 1972, on the Channel Islands and the Isle of Man, to 'any citizen of the United Kingdom and Colonies' is to be understood as referring to 'any British citizen'.

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