

STATES OF JERSEY



DRAFT FINANCIAL SERVICES COMMISSION (AMENDMENT NO. 8) (JERSEY) LAW 202- (P.104/2021): COMMENTS

**Presented to the States on 13th January 2022
by the Economic and International Affairs Scrutiny Panel**

STATES GREFFE

COMMENTS

Introduction

The Panel has been aware for some time of the pending visit in 2023 by MoneyVal to assess Jersey and to ensure that, as one of the world's leading international finance centres, Jersey is committed to following the standards on Anti-Money Laundering (AML) and Countering the Financing of Terrorism (CFT) set by the Financial Action Task Force (FATF). Jersey was last assessed by MoneyVal in 2015.

The FATF has developed and revised 40 Recommendations which ensure a co-ordinated global response to prevent organised crime, corruption, and terrorism and more than 200 countries and jurisdictions, including Jersey, are committed to implementing the Recommendations. These Amendments, should they be adopted, would meet Recommendation number 35 of the 40

Government has recently completed a consultation process where it invited industry stakeholders to provide feedback on the proposed Amendments. The Panel has been informed that the Amendments contained within P.104/2021, reflect the feedback and discussions held with industry.

The Proposed Amendments

If adopted, the Amendments would enable the JFSC to ensure that the existing civil penalties regime is extended to Designated non-financial Businesses and Professionals (DNFBPs) and to senior management, so that the categories of person that will be within scope will be not just “principal persons” (as extended) but also directors and senior management of financial institutions/DNFBPs. The Amendments would also make the existing processes more efficient, and bring the Island’s regulatory regime in line with the FATF. In summary, the Amendments propose to ensure:

- there is a range of effective, proportionate, and dissuasive criminal, civil or administrative penalties available to deal with natural or legal persons which fail to comply with anti-money-laundering and countering the financing of terrorism (“AML/CFT”) requirements;
- that these penalties are applicable to financial institutions and Designated Non-Financial Businesses and Professions (“DNFBPs”); and
- that these penalties are applicable to directors as well as senior management of financial institutions and DNFBPs.

Background

The Panel has raised a number of questions around the proposed Amendments and has asked for clarity and background on these, which it has since received. These are discussed in more detail below but cover:-

- The right to a fair trial for individuals
- The likelihood of individuals being prosecuted (as opposed to companies and/or boards)
- Civil vs Criminal Contravention of Law
- The decision to prosecute

- Limitation on the lookback window to be removed for entities but a limit of six years introduced for individuals

The Right to a Fair Trial for Individuals

The Panel was informed that where a company or individual are of the opinion that they have not been treated fairly as part of a JFSC enforcement action or its outcome, they can appeal to the Royal Court. This route to appeal already exists in the Financial Services Commission (Jersey) 1998 Law and would not be altered by this proposition.

The Likelihood of Individuals being Prosecuted (as Opposed to Companies and/or Boards)

From a starting point, the company or board would be held responsible until the evidence pointed otherwise. The JFSC have confirmed in response to the consultation that when they are considering a civil penalty, their policy is to look first at the corporate level, then at directors of the board and then at other officers of the company unless the specifics of the case merit a different approach. The decision to prosecute against an individual or a company would be based on existing policies and procedures using the existing public interest test, the contravention in question and the evidence available and would be examined on the merits of each individual case.

With regards to the civil financial penalties levied by the JFSC, this would also be dependent on the merits of the individual case, the contravention and the evidence.

Civil vs Criminal Contravention of Law

The JFSC must provide evidence of a contravention on the balance of probabilities for a civil prosecution whereas, for a criminal prosecution, the Attorney General (AG) would have to provide evidence beyond reasonable doubt of the contravention of the law. This is already the case for civil penalties levied by the JFSC and prosecutions by the AG and these amendments would thus not introduce any change in this respect.

The Decision to Prosecute

The Panel was informed of a Tripartite Group which consists of the Law Officers Department (LOD), the States of Jersey Police (SoJP) and the JFSC. With regards to financial crimes or contraventions, the Tripartite Group would look at the specific merits of each case and then arrive at a consensus through which route a case should be pursued. If a case needed to be pursued through the criminal route, the ultimate decision to prosecute rests with the AG. Non-financial crimes are not looked at by the Tripartite Group and rest exclusively with the LOD.

The ultimate decision whether to prosecute is, and will remain at the sole discretion of the AG. These Amendments do not change this and the AG will still have to consider if it is in the public interest to bring a prosecution.

Limitation on the lookback window to be removed for entities but a limit of six years introduced for individuals

This amendment, should it be adopted, would enable the limitation on the lookback window to be removed for entities but a limit of six years is introduced for individuals. During the consultation with the JFSC, Government was advised that the three year lookback limitation could potentially impede investigations and enforcement actions by the JFSC. Most other comparable jurisdictions do not exhibit a limitation on the lookback window, but Government considered it disproportionate to remove the limitation for natural persons completely. In order to enable effective investigations and enforcement actions, Government considered it an appropriate compromise to extend the existing window by three years but, in order to allow for closure of the matter for individuals, to limit the window to six years. This is similar to the position in the UK.

Conclusion

The Panel is fully supportive of the work the Minister and his team are undertaking to ensure the Island is compliant and adopting to the necessary changes in combatting money laundering and countering financial terrorism. It continues to receive regular briefings from the Minister and is grateful to have been kept informed of any upcoming changes affecting Financial Services issues and the steps Jersey proposes to take in order to comply with these changes. The Panel believe it is important to highlight that many of the changes made should these Amendments be adopted do not fundamentally alter the right of the Attorney General to bring a criminal prosecution where there is sufficient evidence and it is in the public interest.

In the report accompanying the proposition, it is stated that:

“The combination of the Law Amendment and the Order Amendment will increase the overall effectiveness, proportionality, and dissuasiveness of the existing civil financial penalties regime. Furthermore, implementing both amendments will help to align the existing regime with international standards, especially FATF Recommendation 35, and best practices whilst providing for fairer and more equitable enforcement action outcomes. Both amendments have been subject to extensive consultations with the Commission and with representatives from the finance industry including Jersey Finance. The Minister is content that the proposed amendments strike a pragmatic and sustainable balance between industry needs and the jurisdiction’s requirement to meet international AML/CFT standards in order to maintain Jersey’s reputation and ultimately, its prosperity.”

The Panel notes that the proposed amendment has been subject to extensive consultation with both the JFSC and representatives of the industry and accepts the Minister’s conclusion that they strike a pragmatic and sustainable balance between industry needs and the island’s requirements to meet international AML/CFT standards to maintain Jersey’s reputation.