

STATES OF JERSEY



Jersey

DRAFT FINANCIAL SERVICES COMMISSION (AMENDMENT No. 8) (JERSEY) LAW 202-

**Lodged au Greffe on 3rd December 2021
by the Minister for External Relations and Financial Services
Earliest date for debate: 18th January 2022**

STATES GREFFE



Jersey

DRAFT FINANCIAL SERVICES COMMISSION (AMENDMENT No. 8) (JERSEY) LAW 202-

European Convention on Human Rights

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000, the Minister for External Relations and Financial Services has made the following statement –

In the view of the Minister for External Relations and Financial Services, the provisions of the Draft Financial Services Commission (Amendment No. 8) (Jersey) Law 202- are compatible with the Convention Rights.

Signed: **Senator I.J. Gorst**

Minister for External Relations and Financial Services

Dated: 2nd December 2021

REPORT

Jersey is a leading and well-regulated International Finance Centre, and it is critical to maintain its reputation and therefore its prosperity, through its support for the global fight against financial crime, money laundering and the financing of terrorism.

Money laundering is the process through which criminals give the appearance of legitimacy to proceeds of crime. It is an expanding and increasingly international phenomenon, with current estimates by MONEYVAL of money laundered worldwide ranging from \$500 billion to \$1 trillion, with disastrous effects on the global economy and society. The international community and society at large, including the people of Jersey, are exposed to the negative effects of money laundering and terrorist financing with detrimental impacts on the economy, security, health, and safety.

In order to prevent these negative economic, security and social consequences as far as possible, the Government of Jersey has made several critical commitments to combat financial crime and illicit finance whilst protecting the integrity of the international financial system from misuse. These efforts are based on the standards developed by the Financial Action Task Force (“FATF”). The FATF is the global money laundering and terrorist financing watchdog. The inter-governmental body sets international standards that aim to prevent these illegal activities and the harm they cause to society.

The FATF has developed and revised 40 Recommendations (the “Recommendations”), which ensure a co-ordinated global response to prevent organised crime, corruption, and terrorism and more than 200 countries and jurisdictions, including Jersey, committed to implementing the Recommendations.

At the top of Government’s commitments is the commitment of the Chief Minister of the day to the FATF President to implement, in full, the revised Recommendations and the FATF Methodology post their development and adoption in 2012 and 2013 respectively. This makes compliance with the Recommendations a national commitment and therefore of national interest.

While certain Recommendations provide requirements regarding preventative measures, Recommendation 35 provides requirements which form part of the powers and responsibilities of competent authorities acknowledging the importance of an effective financial penalties regime which is able to deal with non-compliance.

Recommendation 35 specifically requires countries to ensure that –

- 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; and
- 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.

In order to implement an effective, proportionate, and dissuasive civil financial penalties regime available to the Jersey Financial Services Commission (the “Commission”) with respect to AML/CFT requirements, in line with Recommendation 35 and the national

commitments, the Minister for External Relations and Financial Services proposes the following legislative amendments for adoption.

Firstly, the Draft Financial Services Commission (Amendment No. 8) (Jersey) Law 202- (the “Law Amendment”) makes several amendments to the Financial Services Commission (Jersey) Law 1998 (the “FSC Law”). The FSC Law came into force on 4th June 1998 to establish the Commission. Under the FSC Law, the Commission is responsible for the supervision and development of financial services provided in or from within Jersey. Since the commencement of the FSC Law, several consequential amendments have been made to the FSC Law to ensure that the Commission can discharge its responsibilities effectively.

Under the current provisions of the FSC Law, the Commission can only impose a financial penalty for contraventions of the Codes of Practice whereas, should the Law Amendment be adopted, the Commission will also be able to impose financial penalties for significant and material contraventions of the Money Laundering (Jersey) Order 2008.

Hence, the Law Amendment looks to extend the existing civil financial penalties regime already available to the Commission, to deal with natural or legal persons which fail to comply with anti-money laundering and countering the financing of terrorism requirements and that the regime is applicable to financial institutions as well as Designated Non-Financial Businesses and Professions (casinos, real estate agents, accountants, lawyers etc.) and to their senior management, including principal and key persons.

Secondly, while the [Financial Services Commission \(Amendment No. 6\) \(Jersey\) Law 2015](#) granted the Commission the power to impose civil financial penalties, it is the Financial Services Commission (Financial Penalties) (Jersey) Order 2015 (the “FP Order”) which sets certain parameters for the imposition of a financial penalty. Therefore, the Minister intends to make the Draft Financial Services Commission (Financial Penalties) (Amendment No. 2) (Jersey) Order 202- (the “Order Amendment”), should the Law Amendment be adopted.

The Order Amendment looks to increase the overall effectiveness and dissuasiveness of the regime by way of removing the absolute penalty caps for legal entities from the FP Order. This also removes a potential disadvantage for smaller firms with regards to enforcement outcomes. Moreover, the calculation base for financial penalties moves from the contravening entity’s relevant income to its turnover, and the Order Amendment thus also introduces a definition of turnover.

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.

Financial and manpower implications

There are no financial and manpower implications for the States arising from the adoption of this draft amending Law.

Human Rights

The notes on the human rights aspects of the draft Law in the **Appendix** have been prepared by the Law Officers' Department and are included for the information of States Members. They are not, and should not be taken as, legal advice.

APPENDIX TO REPORT**Human Rights Notes on the Draft Financial Services Commission
(Amendment No. 8) (Jersey) Law 202-**

These Notes have been prepared in respect of the Draft Financial Services Commission (Amendment No. 8) (Jersey) Law 202- (the “**draft Law**”) by the Law Officers’ Department. They summarise the principal human rights issues arising from the contents of the draft Law and explain why, in the Law Officers’ opinion, the draft Law is compatible with the European Convention on Human Rights (the “**Convention**”).

These notes are included for the information of States Members. They are not, and should not be taken as, legal advice.

The draft Law, if adopted, would further amend the Financial Services Commission (Jersey) Law 1998 (the “**Principal Law**”) to provide for: (i) the extension of the civil penalties regime to “Designated non-financial Businesses and Professionals (“**DNFBPs**”)”; and (ii) the extension of the civil penalties regime to directors and senior management so that the categories of person that will be within scope (as far as consent or connivance or aiding, abetting etc is concerned) will be not just “principal persons” (as extended) but also directors and senior management of financial institutions/DNFBPs.

Article 6 ECHR – the right to fair trial

1. Bearing in mind the specific areas of amendment to the Principal Law, there will be minimal ECHR interaction, this being in relation to Article 6 of the Convention and the right to a fair trial. The potential for Article 6 infringement arises due to the higher standard of proof and greater procedural rights that must be accorded where a penalty imposed is of a criminal, rather than a civil nature. Failure to accord the appropriate rights may infringe an individual’s right to a fair trial.
2. There are three criteria established by the European Court of Human Rights in the case of [Engel and Others v the Netherlands](#) to assess the applicability of the criminal aspect of Article 6 of the Convention and whether a penalty is civil or criminal in nature. These are as follows:
 - a. Classification in domestic law;
 - b. Nature of the offence; and
 - c. Severity of the penalty that the person concerned risks incurring.
3. The first criterion is to consider the classification of the offence under domestic law. In the present case the offence and related penalty are classified as civil.
4. In evaluating the second criterion, the following factors can be taken into consideration:
 - a. Whether the legal rule in question is directed solely at a specific group or is of a generally binding character;

- b. Whether the proceedings are instituted by a public body with statutory powers of enforcement;
 - c. Whether the legal rule has a punitive or deterrent purpose;
 - d. Whether the legal rule seeks to protect the general interests of society usually protected by the criminal law;
 - e. Whether the imposition of any penalty is dependent upon a finding of guilt; and
 - f. How comparable procedures are classified in other Council of Europe member states.
5. Considering these points in turn, the penalty in the draft Law will be extended to apply to “key persons” and “any person who performs or performed a senior management function”. Such persons can be classified as specific groups. This points to the penalty being disciplinary in nature and therefore a civil penalty.
 6. However, the fact the proceedings would be brought by the Jersey Financial Services Commission (the “**JFSC**”), a public authority which has statutory powers of enforcement in relation to breaches of any enactment or code of practice to which the draft Law will apply, points to a penalty being criminal in nature.
 7. The penalty in the draft Law is intended to be a deterrent, which would lend itself to being criminal in nature. However, the draft Law does not provide for culpability specifically and a penalty may be imposed even where there is an innocent contravention. Moreover, the language of the draft Law does not denote a mandatory position, so there is still a level of discretion left to the JFSC as to whether or not it will impose a penalty. This aspect of the penalty would arguably lean towards it being deemed civil in nature.
 8. The penalty in the draft Law is comparable to those within UK legislation, which the UK government described as a disciplinary penalty. This again leans the penalty towards being civil in nature.
 9. There is also the question of whether there is any overlap with criminal offences. It is possible that conduct by a registered person could amount to both a breach of an enactment or code of practice and the commission of a criminal offence. However, the JFSC will likely only pursue the imposition of a civil financial penalty in respect of conduct that had been the subject of a failed prosecution, which again points to the penalty being civil in nature.
 10. The third of the Engel-criteria is the severity of the penalty. The draft Law will impose a financial penalty, but it is not enforceable by imprisonment. An unpaid penalty may be enforced as if it were a debt owed by a “key person” or “any person who performs or performed a senior management function” to the JFSC.
 11. The intended penalty ranges from £10,000 for what might be deemed routine or more innocent breaches to up to £400,000 for intentional or reckless breaches, thereby conforming to the suggestions made by the Joint Committee on Financial Services and Markets. This again would take the penalty away from the criminal sphere and into the civil sphere.
 12. It is worth noting that the Engel criteria were reconsidered (and effectively confirmed) in the recent ECHR case of [Milachikj v North Macedonia](#) (judgment dated 14 October 2021).
 13. There are also a number of safeguards available to the offending party as well as an appeals process. Therefore, the offending party is offered mechanisms that

ensure a fair trial and are of a similar nature as would be made available in criminal cases.

14. The penalty in the draft Law is therefore more arguably civil in nature. In view of the procedural safeguards and rights of appeal afforded to a “key person” or “any person who performs or performed a senior management function”, the draft Law is compatible with the ECHR.

EXPLANATORY NOTE

This Law amends the Financial Services Commission (Jersey) Law 1998 (the “principal Law”) to make key persons and persons who perform or performed a senior management function liable to civil penalties for breaches of certain enactments and Codes of Practice issued by the Commission.

Article 1 states that this Law amends the principal Law.

Article 2 amends Article 1 of the principal Law to update definitions of words and expressions used throughout that Law in line with the changes introduced by this Law.

Article 3 substitutes a new Article 21A of the principal Law which gives the Commission the power to impose a penalty on a registered person as well as a principal person, key person (as defined in Article 1 of the principal Law), or person who performs or performed a senior management function for breach of an enactment to which Article 21A applies or Code of Practice. A fine would not be imposed on a registered person that is a fund but a principal person, key person or person who performs or performed a senior management function in respect of that fund could be fined for a breach by that fund.

Article 4 amends Article 21B of the principal Law, which provides for the level of penalty and criteria for imposition of a penalty, to include references to a key person and a person who performs or performed a senior management function. Article 21B is also amended so that it would be applicable to contraventions of any Code of Practice as well as any other enactment to which Article 21A of the principal Law applies.

Article 5 amends Article 21C of the principal Law to provide that notification of the imposition of a penalty may be given to a registered person, principal person, key person or any person who performs or performed a senior management function. Article 21C is also amended to include a reference to the Money Laundering (Jersey) Order 2008.

Article 6 amends Article 21D of the principal Law to provide that the Commission must not issue a notice of intent under Article 21C(1) in respect of a contravention of the Money Laundering (Jersey) Order 2008 that occurred before the commencement of this Law, except that if the contravention was continuing at the time of the commencement of this Law, a notice of intent may be issued in respect of such part of the contravention as continued after the commencement.

Article 6 also amends Article 21D of the principal Law to provide that the Commission must not issue a notice of intent under Article 21C(1) to a key person or a person who performs or performed a senior management function, in respect of a contravention of a Code of Practice that occurred before the commencement of this Law, except that if the contravention was continuing at the time of the commencement of this Law, a notice of intent may be issued in respect of such part of the contravention as continued after the commencement.

Article 6 further amends Article 21D to provide that the Commission must not issue a notice of intent under Article 21C(1) to –

- (a) a supervised person within the meaning of Article 1(1) of the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008 who was not a registered person prior to the commencement of the Financial Services Commission (Amendment No. 8) (Jersey) Law 202-; or
- (b) a certificate holder within the meaning of Article 1(1) of the Collective Investment Funds (Jersey) Law 1988,

in respect of a contravention of a Code of Practice that occurred before the commencement of this Law, except that if the contravention was continuing at the time of the commencement of this Law, a notice of intent may be issued in respect of such part of the contravention as continued after the commencement.

Article 6 also amends Article 21D of the principal Law to provide that the Commission must not issue a notice of intent under Article 21C(1) to an individual more than 6 years after the contravention giving rise to the notice came to the attention of the Commission.

Article 7 amends Article 21E of the principal Law to include references to a key person or any person who performs or performed a senior management function in Article 21(4) which provides for a penalty to be enforced as a debt owed to the Commission.

Article 8 amends Article 21F of the principal Law, which deals with procedures for appeal against the imposition of a penalty, to include references to a key person or any person who performs or performed a senior management function.

Article 9 amends Article 21G of the principal Law, which deals with proceeds of penalties, to include references to a key person or any person who performs or performed a senior management function.

Article 10 gives the name by which this Law may be cited as the Financial Services Commission (Amendment No. 8) (Jersey) Law 202- and provides for it to come into force 7 days after it is registered.



Jersey

DRAFT FINANCIAL SERVICES COMMISSION (AMENDMENT No. 8) (JERSEY) LAW 202-

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Jersey

DRAFT FINANCIAL SERVICES COMMISSION (AMENDMENT No. 8) (JERSEY) LAW 202-

A LAW to amend further the [Financial Services Commission \(Jersey\) Law 1998](#).

<i>Adopted by the States</i>	<i>[date to be inserted]</i>
<i>Sanctioned by Order of Her Majesty in Council</i>	<i>[date to be inserted]</i>
<i>Registered by the Royal Court</i>	<i>[date to be inserted]</i>
<i>Coming into force</i>	<i>[date to be inserted]</i>

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

1 [Financial Services Commission \(Jersey\) Law 1998](#) amended

This Law amends the [Financial Services Commission \(Jersey\) Law 1998](#).

2 Article 1(1) (interpretation) amended

In Article 1(1) –

- (a) the following definitions are inserted in the correct alphabetical sequence –

“key person”, in relation to a registered person, means a person who –

- (a) is or was employed or otherwise engaged by a registered person as a money laundering reporting officer; or
 (b) is or was designated as such by the registered person under Article 9 of the [Money Laundering \(Jersey\) Order 2008](#);

“money laundering reporting officer” means a person appointed as reporting officer under the [Money Laundering \(Jersey\) Order 2008](#);

“senior management function”, in relation to a registered person, means a function designated as such by the Commission by notice published on the Commission’s website where –

- (a) the function requires the individual performing it to be responsible for managing one or more aspects of the registered person’s affairs; and

(b) those aspects involve, or might involve, a risk of serious consequences –

- (i) for the registered person, or
- (ii) for business or other interests in Jersey,

and in paragraph (a), managing one or more aspects of the registered person's affairs includes a reference to taking decisions, or participating in the taking of decisions, about how one or more aspects of those affairs should be carried on;"

(b) for the definition "principal person" there is substituted –

" "principal person" means –

- (a) a director, controller or manager within the meaning given by Article 1 of the [Banking Business \(Jersey\) Law 1991](#);
- (b) a chief executive or shareholder controller as defined in Article 1(1) of the [Insurance Business \(Jersey\) Law 1996](#) or any individual acting as a director of a permit holder (within the meaning given by Article 1(1) of that Law);
- (c) a principal person as defined in Article 1(1) of the [Financial Services \(Jersey\) Law 1998](#);
- (d) a principal person as defined in Article 1(1) of the [Proceeds of Crime \(Supervisory Bodies\) \(Jersey\) Law 2008](#);
- (e) a principal person as defined in Regulation 2 of the [Alternative Investment Funds \(Jersey\) Regulations 2012](#); or
- (f) a principal person as defined in Article 1(1) of the [Collective Investment Funds \(Jersey\) Law 1988](#),

and includes a person who was a principal person as defined in paragraph (a), (b), (c), (d), (e) or (f);"

(c) in the definition "registered person" after paragraph (d) there is inserted –

- "(e) a supervised person as defined in Article 1(1) of the [Proceeds of Crime \(Supervisory Bodies\) \(Jersey\) Law 2008](#);
- (f) a certificate holder as defined in Article 1(1) of the [Collective Investment Funds \(Jersey\) Law 1988](#);
- (g) a person required to be a registered person, permit holder, service provider, supervised person or certificate holder under any of the Laws referred to in paragraph (a), (b), (c), (d), (e) or (f);"

3 Article 21A (power to impose civil financial penalties) substituted

For Article 21A there is substituted –

“21A Power to impose civil financial penalties

- (1) If the Commission is satisfied that a registered person has, to a significant and material extent, contravened any enactment or Code of Practice to which this Article applies, the Commission may –
 - (a) except where that registered person is a fund, impose on that registered person a penalty to the extent permitted by the following provisions of this Law;
 - (b) if satisfied that the contravention by the registered person was –
 - (i) committed with the consent or connivance of, or was attributable to neglect on the part of a principal person, key person or any person who performs or performed a senior management function, or
 - (ii) aided, abetted, counselled or procured by a principal person, key person or any person who performs or performed a senior management function,
 impose on that principal person, key person or person who performs or performed a senior management function, a penalty to the extent permitted by this Law (despite the fact that the registered person is a fund).
- (2) This Article applies to –
 - (a) the [Money Laundering \(Jersey\) Order 2008](#); and
 - (b) the Codes of Practice issued by the Commission under –
 - (i) Article 15 of the [Collective Investment Funds \(Jersey\) Law 1988](#);
 - (ii) Article 19A of the [Banking Business \(Jersey\) Law 1991](#),
 - (iii) Article 42 of the [Insurance Business \(Jersey\) Law 1996](#),
 - (iv) Article 19 of the [Financial Services \(Jersey\) Law 1998](#),
 - (v) Article 22 of the [Proceeds of Crime \(Supervisory Bodies\) \(Jersey\) Law 2008](#),
 - (vi) Regulation 22 of the [Alternative Investment Funds \(Jersey\) Regulations 2012](#).
- (3) The Minister may by Order amend paragraph (2).”.

4 Article 21B (level of penalty and criteria for imposition) amended

In Article 21B –

- (a) for paragraphs (3) and (3A) there is substituted –
 - “(3) In considering whether to impose a penalty on a registered person, principal person, key person or any person who performs or performed a senior management function and the amount of the penalty to be imposed, the Commission must, where applicable, have regard to the following matters –
 - (a) the seriousness of the contravention;

- (b) whether or not the person knew or ought to have known of the contravention;
 - (c) whether or not the person voluntarily reported the contravention;
 - (d) whether or not the person has taken steps to rectify the contravention and to prevent its recurrence;
 - (e) the potential financial consequences to the person and to third parties (including customers and creditors of the person) of imposing the penalty;
 - (f) the principle of ensuring that a person cannot expect to profit from the contravention;
 - (g) the penalties imposed by the Commission in other cases; and
 - (h) the principles mentioned in paragraph (4) other than those set out in this paragraph.”; and
- (b) in paragraph (4) there is deleted “and paragraph (3A)(a) to (d)”.

5 Article 21C (notification of imposition of penalty) amended

In Article 21C –

- (a) for “registered person or principal person” wherever it occurs there is substituted “registered person, principal person, key person or any person who performs or performed a senior management function”;
- (b) in paragraph (1)(b)(i) after “Code of Practice” there is inserted “or the [Money Laundering \(Jersey\) Order 2008](#)”;
- (c) for sub-paragraph (2)(a) there is substituted –
“(a) details of the alleged contravention;”.

6 Article 21D (restrictions on powers of Commission in respect of notices) amended

In Article 21D –

- (a) for paragraph (2A) there is substituted
“(2A) The Commission must not issue a notice of intent under Article 21C(1) in respect of a contravention of the [Money Laundering \(Jersey\) Order 2008](#) that occurred before the commencement of the Financial Services Commission (Amendment No. 8) (Jersey) Law 202-, except that if the contravention was continuing at the time of the commencement of that Law, a notice of intent may be issued in respect of such part of the contravention as continued after the commencement.
- (2B) The Commission must not issue a notice of intent under Article 21C(1) to a key person or a person who performs or performed a senior management function in respect of a contravention of a Code of Practice that occurred before the commencement of the Financial Services Commission (Amendment No. 8) (Jersey) Law 202-, except that if the contravention was continuing at the time of the commencement of that Law, a notice

of intent may be issued in respect of such part of the contravention as continued after the commencement.

(2C) The Commission must not issue a notice of intent under Article 21C(1) to –

(a) a supervised person within the meaning of Article 1(1) of the [Proceeds of Crime \(Supervisory Bodies\) \(Jersey\) Law 2008](#) who was not a registered person prior to the commencement of the Financial Services Commission (Amendment No. 8) (Jersey) Law 202-; or

(b) a certificate holder within the meaning of Article 1(1) of the [Collective Investment Funds \(Jersey\) Law 1988](#),

in respect of a contravention of a Code of Practice that occurred before the commencement of the Financial Services Commission (Amendment No. 8) (Jersey) Law 202-, except that if the contravention was continuing at the time of the commencement of the Financial Services Commission (Amendment No. 8) (Jersey) Law 202-, a notice of intent may be issued in respect of such part of the contravention that continued after such commencement.

(2D) The Commission must not issue a notice of intent under Article 21C(1) to an individual more than 6 years after the contravention giving rise to the notice came to the attention of the Commission.”;

(b) in paragraph (4) for “(2A)” there is substituted “(2D)”.

7 Article 21E (late payment surcharge and enforcement) amended

For Article 21E(4) –

“(4) A penalty, including any surcharge imposed on a registered person, principal person, key person or any person who performs or performed a senior management function, may be enforced as if it were a debt owed by that person to the Commission.”.

8 Article 21F (appeal against imposition of penalty) amended

In Article 21F(1) for “registered person or principal person” there is substituted “registered person, principal person, key person or any person who performs or performed a senior management function”.

9 Article 21G (proceeds of penalties) amended

In Article 21G(2) for “principal person” in both places where it appears there is substituted “principal person, key person or a person who performs or performed a senior management function”.

10 Citation and commencement

This Law may be cited as the Financial Services Commission (Amendment No. 8) (Jersey) Law 202- and comes into force 7 days after it is registered.