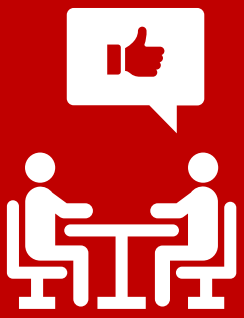

Consultation on amendments under the Proceeds of Crime (Jersey) Law 1999

Government of JERSEY

Summary

The Government of Jersey proposes the creation of a failure-to-prevent money laundering and terrorist financing offence which is to take effect by an amendment to the Proceeds of Crime (Jersey) Law 1999. It is a corporate criminal offence which captures the activity of regulated businesses. The introduction is considered necessary to enhance the overall effectiveness of the anti-money laundering (AML) and countering the financing of terrorism (CFT) enforcement in the jurisdiction.

The offence would address some issues arising from the identification doctrine and thus enable a more appropriate attribution of criminal liability with regards to corporate bodies. This would enhance the overall effectiveness and dissuasiveness of the sanctions available to the Royal Court. However, because the requirements to prevent money laundering and terrorist financing already exist for the AML-regulated sector, this increase in effectiveness can be achieved without extending existing requirements or introducing any new requirements for the sector, whereas the introduction of failure-to-prevent offences similarly to the UK would create new obligations.

Finally, considering the different stages of the money laundering process and given that Jersey is more exposed to the layering stage, the introduction of the offence is considered beneficial to enable prosecutions consistent with the country's threats and risk profile, in line with the FATF Methodology.

Date published: 28 January 2022

Closing date: 21 February 2022

Supporting documents attached:

Draft Proceeds of Crime (Amendment No. 5-6) (Jersey) Law 202-

How we will use your information

The information you provide will be processed in compliance with the Data Protection (Jersey) Law 2018 for the purposes of this consultation. For more information, please read our privacy notice at the end of this document.

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Do you give permission for your comments to be quoted?

1. No ☐
2. Yes, anonymously ☐
3. Yes, attributed ☐

Name to attribute comments to:

Organisation to attribute comments to, if applicable:

Ways to respond

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Alternatively, Jersey Finance will be collating an industry response and these responses should be sent to:

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INTRODUCTION

1. Jersey is a leading and well-regulated International Finance Centre, and the Government of Jersey is committed to combat financial crime and illicit finance whilst protecting the integrity of the international financial system from misuse.

2. The Financial Action Task Force (FATF) is the global money laundering (ML) and terrorist financing (TF) watchdog. The inter-governmental body sets international standards that aim to prevent these illegal activities and the harm they cause to society. Under Immediate Outcome 7 (IO7) of the FATF Methodology,[1] jurisdictions are required to demonstrate that money laundering offences and activities are investigated, and offenders are prosecuted and subject to effective, proportionate, and dissuasive sanctions.

3. IO7 outlines a number of core issues which need to be considered when determining whether the Outcome is achieved, and of particular relevance are Core Issues 7.2, 7.4 and 7.5 (emphasis added):

    - To what extent are the types of ML activity being investigated and prosecuted consistent with the country's threats and risk profile and national AML/CFT policies?

    - To what extent are the sanctions applied against natural or legal persons convicted of ML offences effective, proportionate, and dissuasive?

    - To what extent do countries apply other criminal justice measures in cases where a ML investigation has been pursued but where it is not possible, for justifiable reasons, to secure a ML conviction?

4. The Government of Jersey recognises a requirement to introduce new statutory measures to enhance the jurisdiction's effectiveness of AML/CFT enforcement in order to better meet the Core Issues of IO7 in addition to other relevant requirements under the FATF Methodology.[2] This view is based on the results of the 2015 Mutual Evaluation Report by MONEYVAL, the Government's own National Risk Assessment of ML in 2020 and the mock MONEYVAL assessment by independent experts in 2021.

5. Government's broader policy proposal to enhance the enforcement effectiveness, from a statutory perspective, is based on following three building-blocks:

    1. Extend the civil financial penalties regime available to the JFSC *and*

    2. Introduce a Failure-To-Prevent Money Laundering/Terrorist Financing offence (FTP ML/TF) *and*

    3. Introduce a bespoke Deferred Prosecution Agreement (DPA) regime.

[1] Documents - Financial Action Task Force (FATF) (fatf-gafi.org)
[2] See for example the 2021 consultation on civil financial penalties.

6. The combination of these three building-blocks will significantly enhance the jurisdiction's overall AML enforcement effectiveness. These statutory building-blocks are further supplemented by operational building-blocks, for example a significant increase in FIU resources in order to enhance the investigative process.

7. With regards to the extension of the civil financial penalties regime, the Draft Financial Services Commission (Amendment No. 8) (Jersey) Law 202- has been adopted unanimously by the States Assembly on 19 January 2022.[3] Government's intention with regards to DPAs is to consult on a draft law over the summer with the intention to implement the regime by autumn, if adopted by the States Assembly. Attached to this consultation is the proposed draft amendment (the "Amendment") to the Proceeds of Crime (Jersey) Law 1999 (POCL) regarding a new corporate criminal offence of failing to prevent money laundering and terrorist financing.

CORPORATE CRIME AND THE IDENTIFICATION DOCTRINE

8. It is not just with regards to the requirements under IO7 that legal persons need to be subject to effective, proportionate, and dissuasive sanctions. The ultimate rationale for corporate criminal liability is much broader and based on the social implications of law enforcement. Where corporate bodies commit crimes, it is important that they are held to account and sanctioned similar to natural persons, otherwise there are a number of negative consequences, from the incentive to commit crimes in a corporate setting to undermining the legitimacy of sanctions against natural persons. This creates a clear social impetus for corporate criminal liability.

9. However, attributing criminal liability to corporate bodies for certain offences, especially economic crimes, poses several challenges to the Crown.[4] One of the main challenges is based on the identification doctrine. Currently, a criminal act can only be attributed to a legal person where a natural person committing the offence can be said to represent the "*directing mind and will*" of the legal person. The UK Law Commission, however, considers the identification doctrine as an inappropriate and ineffective method of establishing criminal liability of corporations mainly for the following reasons:

    i. It ignores the reality of complex, modern corporate decision-making which is often the product of corporate policies and procedures rather than individual decisions, and

    ii. It discriminates against small businesses compared to large or complex businesses which can have a more diffuse and devolved decision-making processes.

[3] Propositions (gov.je)

[4] For certain non-economic crimes, for example health and safety offences, it might be easier to attribute criminal liability to corporate bodies based on strict-liability provisions.

These two reasons have a direct negative impact on the likelihood of a potential prosecution. The more complex a corporate structure, the less likely a prosecution is going to be successful. This fact then creates a positive incentive for criminal actors to create more complex corporate structures in order to avoid potential prosecutions. Furthermore, it also reduces the deterrent of a criminal prosecution and its associated "costs" which might in turn make criminal conduct more profitable from an economic perspective. Where large or complex corporate structures are better able to avoid the negative consequences of criminal conduct compared to less complex corporate structures or natural persons, it undermines the overall legitimacy of law enforcement efforts with all the associated negative consequences for society at large.[5]

10. When trying to apply the identification doctrine in practice, it is not entirely clear *who* constitutes the directing mind and will of a company. While there is consensus that the board of directors *collectively* can constitute the directing mind and will, there is no consensus whether individual directors of the board would meet that requirement. Going beyond the board of directors to managing directors, the views are even more diverse. This problem is illustrated in *Serious Fraud Office v Barclays*,[6] where the High Court deemed that neither the Chief Executive Officer nor the Group Chief Financial Officer, although both members of the board, would be considered the directing mind and will of Barclays as far as the allegations of the case were concerned and thus, it was not possible to attribute any criminal liability to Barclays. Considering the impact of this judgement on corporate criminal liability in general, Spector[7] concluded:

> "In the wake of *Barclays,* it appears to be the case that in order for a company to be prosecuted for […] offences that do not impose strict liability, the individual company agents conducting the wrongdoing must either be its "directing mind and will" for *all* purposes, or the directing mind and will for the purpose of performing the *particular function* in question. […] Prima facie, this appears to be an impossibly high bar to achieve in anything other than a very small company. […] *Barclays* therefore sets a very high bar for prosecutors to prove corporate criminal liability, requiring the dishonest agents to have no less than "entire autonomy" over a deal."

11. All the aforementioned issues arising from the identification doctrine, or directing mind and will (DMW) requirement, can be summarised as follows:

> *"*One of its prime ironies is that the DMW requirement propounds a theory of corporate liability which works best in cases where it is needed least and works least in cases where it is needed most. The directors and managers of small companies who are most likely to satisfy the DMW requirement are also likely to be directly involved in carrying out of the company's affairs and thus criminally liable in their own right; vicarious and corporate liability are largely superfluous for deterrent purposes. In large companies, on the other hand, there is far less likelihood of personal involvement by senior management in day-to-

[5] See: Brand and Price (2000), Home Office Research Study 217: The economic and social costs of crime
[6] [2018] EWHC 3055 (QB), [2020] 1 Cr App R 28.
[7] See: Spector: "SFO v Barclays: Elusive corporate criminal liability in the UK", Archbold Review, Issue 10, December 2020.

day activities. As a result, the possibility of personal criminal liability is not much of a deterrent while the DMW requirement frustrates efforts to impose corporate liability."[8]

12. Removing the identification doctrine for certain offences would enable a more appropriate attribution of criminal liability with regards to corporate bodies because it better reflects the fact that, for example, preventative measures regarding money laundering are usually not drafted, implemented and monitored by a single person or team of persons but instead managed through delegation to various boards, committees and sub-committees across the organisation or even across several entities as a part of group structures.

13. Furthermore, the removal of the identification doctrine for AML offences would come with another major benefit from a policy perspective. It enables the attribution of criminal liability across the entire spectrum of different companies, irrespective of the structure or complexity of the businesses, thus potentially increasing the prosecution perimeter by bringing more complex corporate structures into scope which acts as a deterrent against criminal actors while ultimately increasing the overall social acceptance of legal sanctions.

FAILURE-TO-PREVENT PROPOSAL

14. In order to address the attribution issues created by the identification doctrine and the corresponding liability gap, legislators created Failure-To-Prevent (FTP) offences. The UK for example introduced a failure-to-prevent bribery offence[9] in 2010 and a failure-to-prevent tax evasion offence[10] in 2017. Moreover, the Law Commission is currently consulting on reform proposals with regards to corporate criminal liability[11] and whether the effectiveness of economic crime attribution could be enhanced by the introduction of additional FTP offences, since FTP offences do not require the identification of a natural person which represents the directing mind and will of the legal person. This means FTP offences are not subject to the requirements of the identification doctrine. However, the corporate liability can only be attached to liability created by the commission of substantive offences. For example, liability for failing-to-prevent bribery can only be attributed to a corporate body if there was conduct which amounts to bribery in the first place.

15. Once the commission of a substantive offence has been established to the criminal standard of proof, it is then up to corporate body to demonstrate on the balance of probabilities, that adequate or reasonable steps have been taken to prevent the substantive offence. This idiosyncrasy makes FTP offences highly attractive in the fight against corporate economic crimes because the substantive offences are often only made possible due to a lack of effective policies and procedures within the corporate body. Considering the fact that the corporate

[8] See: Gobert: "Corporate Criminal Liability: four models of fault" (1994) 14 *Legal Studies* 393, (paraphrased).
[9] See: Bribery Act 2010 (legislation.gov.uk).
[10] See: Criminal Finances Act 2017 (legislation.gov.uk).
[11] See: Corporate Criminal Liability | Law Commission.

body has the best knowledge about its business' risks and its preventative measures, it seems most appropriate for the corporate body to demonstrate the adequateness of its preventative measures.

16. FTP offences are considered an effective and hence attractive tool in the fight against economic crime beyond the UK. Switzerland introduced in 2003 with Article 102 (2) of its criminal code a failure-to-prevent offence for certain financial crimes including money laundering.[12] On a European level, the European Union adopted its sixth Anti-Money Laundering Directive (6AMLD) in 2018.[13] The Directive introduces, inter alia, a failure-to-prevent offence for corporate bodies in Article 7 (2). The Directive requires member states to comply with the Directive by 3 December 2020 while regulated entities operating in member states were given a timeline till 3 June 2021 to be compliant with the new requirements.

17. As part of the Law Commission's consultation in the UK, it is proposed to introduce a "*failure to prevent economic crime"* offence.[14] This would capture a wide range of substantive offences from money laundering to forgery to false accounting. Whether such a broad approach with a "catch all" provision, instead of several individual FTP offences, will be effective regarding liability attribution remains to be seen.

18. Government also proposes the introduction of a new FTP offence in Jersey to address the issues posed by identification doctrine enabling a more appropriate attribution of criminal liability. A more appropriate attribution of criminal liability will also support a better alignment with the requirements of Core Issue 7.4 of IO7 with regards to legal persons. However, it is proposed to be more targeted than the UK and focus on money laundering and terrorist financing related offences only, given that these offences pose one of the most significant risks to the jurisdiction.

19. The proposed Amendment creates a failure-to-prevent money laundering and terrorist financing offence for financial services businesses (FSBs). The substantive offences covered under the Amendment are Articles 30 and 31 of POCL and Articles 15 and 16 of the Terrorism (Jersey) Law 2002 as well as conduct outside Jersey which, if occurring in Jersey, would be an offence under said articles. This means that only money laundering and terrorist financing as defined under the aforementioned articles would trigger the new offence, whereas, for example, a contravention of the Money Laundering (Jersey) Order 2008 would not. Because the substantive offences would be committed by an associated person of the FSB, the Amendment provides a definition of associated persons which lists the most relevant categories from a financial services and money laundering perspective. Additionally, the Amendment provides the corporate body with a "reasonable steps" defence tailored to its business and risk requirements.

20. Compared to the existing FTP offences of bribery and tax evasion in the UK, the introduction of an FTP ML/TF offence can be considered superior for several reasons. Firstly, the proposed

[12] See: SR 311.0 - Swiss Criminal Code of 21 December 1937 (admin.ch)
[13] See: EUR-Lex - 32018L1673 - EN - EUR-Lex (europa.eu)
[14] See: Financial Services Bill - Wednesday 13 January 2021 - Hansard - UK Parliament.

offence would only apply to the sectors which are already regulated for AML purposes. Hence, no additional requirements for other sectors would be introduced. Moreover, for the AML-regulated sectors, the requirements to prevent money laundering and terrorist financing already exist and would not be expanded. This means that, unlike the introduction of the bribery and tax evasion FTP offences, no new or additional compliance requirements, and thus costs, would be imposed on the regulated sectors through the introduction of the FTP ML/TF offence. This is also preferable with regards to competitiveness aspects for the jurisdiction. Finally, considering the different stages of the money laundering process and given that Jersey is generally more exposed to the layering stage, the introduction of the offence is considered beneficial to enable prosecutions consistent with the country's threats and risk profile, as outlined under Core Issue 7.2 of IO7.

21. Furthermore, because FTP offences provide for a defence where reasonable or adequate prevention measures are in place, they create an incentive for corporate bodies to ensure they comply with best practices and that they identify and support the removal of any areas of uncertainty in statutory and regulatory guidance, whereas at present, there is no positive incentive to do so. This represents another attractive feature from a policy perspective which looks to minimise AML vulnerabilities on a jurisdictional level.

22. On a theoretical level, overall deterrence is achieved by a combination of two factors, firstly the probability of receiving a sanction and secondly, the severity of the sanction. However, empirical studies in behavioural economics clearly demonstrate that the perceived probability of a sanction is a much more important factor than the severity of the sanction.[15] Although deterrence increases with increasing levels of severity, the relative increase in levels of deterrence, however, decreases with increasing severity, i.e. severity is subject to diminishing marginal returns. This results in the general perception that the difference in sanctions between *"$10 and $20 feels much bigger than the difference between $1300 and $1310"*.[16] Given that the perceived probability of receiving a sanction represents such an important factor in criminal decision making, compared to severity of the sanction, it can be concluded that an FTP offence contributes towards a stronger deterrence, irrespective of whether the change in probability is actual or just perceived.

CONCLUSION

23. The introduction of the proposed FTP ML/TF provisions in Jersey is considered a key building-block to enhance the enforcement effectiveness and thus the overall financial crime regime with respect to AML offences because it addresses some of the main challenges in attributing corporate criminal liability, namely the identification doctrine. Therefore, also enabling a fairer and more equitable approach to corporate misconduct by removing the discriminating factor

[15] See: Pickett (2018): Using Behavioral Economics to Advance Deterrence Research and Improve Crime Policy: Some Illustrative Experiments. Authors across behavioural studies use different terms but whether "*apprehension*", "*sanction*" or "*conviction*" is used, does not change the general findings.
[16] See: Thaler (2015): Misbehaving: The Making of Behavioral Economics.

against less complex businesses, although it needs to be noted that corporate culpability can only be attached to a legal person once the commission of a substantive offence has been established.

24. Overall, the introduction would enhance the overall dissuasiveness of the sanctions available to the Royal Court and act as an effective deterrent against contravening the existing AML provisions. This overall increase in effectiveness can be achieved without creating new or additional requirements for the AML-regulated sectors. Finally, the new offence is considered beneficial to enable prosecutions which are consistent with Jersey's threats and risk profile, in line with the FATF Methodology.

DRAFT LAW AMENDMENT SUMMARY

- Article 1 of the Proceeds of Crime (Amendment No. 5-6) (Jersey) Law 202- (the "Law") states that the proposed amendments will amend the POCL.

- Article 2 of the Law amends the POCL by inserting a new Article 35A (offence of failure to prevent money laundering) after Article 35 of the POCL. Article 35A sets out the following in relation to the offence:
  a) details of the offence that may be committed by a financial services business (B);
  b) details of a defence that may be available to B; and
  c) other interpretation provisions.

- Article 3 of the Law deletes Articles 37(5) and (6) of the POCL.

- Article 4 of the Law amends the POCL by inserting a new Article 39A (offences by body corporates and others) before Article 40 of the POCL. Paragraph 1 of Article 39A sets out definitions for the terms "relevant person" and "statutory officer". Paragraph 2 of Article 39A sets out "consent or connivance" provisions relating to "relevant persons".

- Article 5 of the Law gives the name by which the Law may be cited (being the Proceeds of Crime (Amendment No. 5-6) (Jersey) Law 202-) and provides for it to come into force [7 days after it is registered].

QUESTIONS

1. Do you agree that the introduction of an FTP ML/TF offence will enhance the overall effectiveness of AML enforcement? If not, please provide details.

2. Do you agree with the proposed scope of the offence? If not, please provide details.

3. Do you agree with the proposed definition of the reasonable steps defence? If not, please provide details.

4. Do you agree with the proposed definition of an associated person? If not, please provide details.

Jersey

DRAFT PROCEEDS OF CRIME (AMENDMENT No. 5-6) (JERSEY) LAW 202-

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Jersey

DRAFT PROCEEDS OF CRIME (AMENDMENT No. 5-6) (JERSEY) LAW 202-

A LAW to further amend the Proceeds of Crime (Jersey) Law 1999

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

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

PART 1

AMENDMENT OF THE PROCEEDS OF CRIME (JERSEY) LAW 1999

1 Interpretation of Part 2

The Proceeds of Crime (Jersey) Law 1999 is amended as described in this Part.

2 New Article 35A (offence of failure to prevent money laundering)

After Article 35 there is inserted –

"35A Failure to prevent money laundering

(1) A financial services business (B) commits an offence, and is liable to a fine, if a person is engaged in money laundering when acting in the capacity of a person associated with B.

(2) It is a defence for B to prove that when the money laundering occurred –

(a) B had prevention procedures in place; and

(b) those prevention procedures would be considered adequate by a reasonable professional engaged in B's business.

(3) A person may be engaged in money laundering –

(a) whether that money laundering commenced prior to or after the coming into force of this article;

(b) whether or not they have been convicted of an offence.

(4) A person acts in the capacity of a person associated with B if that person is –

(a) an employee of B who is acting in the capacity of an employee;

(b) an agent of B (other than an employee) who is acting in the capacity of an agent;

(c) any other person who performs services for or on behalf of B who is acting in the capacity of a person performing such services;

(d) any customer of B, or any agent of any customer of B, in relation to any service performed by or on behalf of B.

(5) In paragraph (2) "prevention procedures" means procedures designed to prevent persons acting in the capacity of a person associated with B being engaged in money laundering.

(6) For the purposes of paragraph (4)(c) the question whether or not the person is a person who performs services for or on behalf of B is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between that person and B.

(5) In paragraph (4)(d) "customer" has the same meaning as in Schedule 3.".

3 Article 37 (procedures to prevent and detect money laundering) amended

Articles 37(5) and (6) are deleted.

4 New Article 39A (offences by bodies corporate and others)

Before Article 40 there is inserted –

"39A Offences by bodies corporate and others

(1) In this article –

"relevant person" means –

(a) if the offence is committed by a limited liability partnership, a partner of the partnership;

(b) if the relevant is committed by a separate limited partnership or an incorporated limited partnership –

(i) a general partner, or

(ii) a limited partner who is participating in the management of the partnership;

(c) if the relevant offence is committed by a body corporate other than an incorporated limited partnership –

(i) a director, manager, secretary, statutory officer or other similar officer of the body corporate, and

(ii) if the affairs of the body corporate are managed by its members, a member who is acting in connection with the member's functions of management;[

(d) if the relevant offence is committed by an unincorporated association, a person concerned in the management or control of the association;] and

(e) a person purporting to act in any capacity described in sub-paragraphs (a) to [(d)] in relation to the partnership or body that commits the relevant offence;

"statutory officer" means any person who is required to be appointed by a financial services business under an order made under Article 37.

(2) If an offence under this Law or any order made under it is proved to have been committed by a financial services business with the consent or connivance of a relevant person, that relevant person is also guilty of the offence and liable in the same manner as the financial services business to the penalty provided for that offence.".

PART 2

GENERAL

5 Citation and commencement

This Law may be cited as the Proceeds of Crime (Amendment No. 5-6) (Jersey) Law 202- and comes into force [7 days after it is registered].