STATES OF JERSEY

DRAFT FINANCIAL SERVICES COMMISSION (AMENDMENT No. 6) (JERSEY) LAW 201-

Lodged au Greffe on 22nd September 2014
by the Chief Minister

STATES GREFFE

DRAFT FINANCIAL SERVICES COMMISSION (AMENDMENT No. 6) (JERSEY) LAW 201-

European Convention on Human Rights

In accordance with the provisions of Article 16 of the Human Rights (Jersey) Law 2000, the Chief Minister has made the following statement –

In the view of the Chief Minister, the provisions of the Draft Financial Services Commission (Amendment No. 6) (Jersey) Law 201- are compatible with the Convention Rights.

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

Chief Minister

Dated: 19th September 2014

REPORT

Background and purpose

The Draft Law would amend the Financial Services Commission (Jersey) Law 1998 (the "**FSC Law**") to provide the Jersey Financial Services Commission (the "**Commission**") with the power to impose civil financial penalties on regulated businesses for serious contraventions of the Codes of Practice issued by the JFSC under the regulatory laws.

The Codes of Practice set enforceable regulatory requirements on regulated businesses. They mandate how a regulated business must conduct its business activities (including what measures it must take to mitigate money laundering and terrorist financing risks).

There are a number of reasons why the JFSC should be given a statutory power to impose civil financial penalties for breaches of the Codes of Practice. In particular, such a power would –

- act as a further deterrent to prevent businesses contravening the Codes of Practice;
- encourage prompt and consistent remediation of contraventions of the Codes of Practice;
- provide the Commission with more flexibility to deal with non-compliant behaviour through the use of an additional sanction that can be graduated to reflect the seriousness of the contravention and the particular circumstances of the business;
- provide some mitigation against compliant regulated businesses subsidising, through annual licence fees, the cost of regulatory action taken against those who are not; and
- bring the sanctions available to the Commission into line with similar regulators and meet the expectations of international standard-setters.

With regard to this last point, it is notable that the Commission's range of sanctions has fallen behind that of comparable regulatory bodies such as the UK's Financial Conduct Authority, the Guernsey Financial Services Commission and, locally, the Competition Regulatory Authority and the Gambling Commission – all of whom can impose civil financial penalties.

The introduction of a power to impose civil financial penalties would also respond to comments made by the International Monetary Fund ("**IMF**") in its 2008 assessment of the Island's financial regulatory standards. It noted that: "*While the [JFSC] can and does use other means to enforce compliant behaviour, the restricted availability of fines as a sanction mechanism limits possible responses to misconduct. It may be useful to have in addition a fining power to ensure that breach of [JFSC] regulations is damaging not only to a regulated firm's reputation, but also to the profitability of the activities in question*.".

In addition, the introduction of such a power would respond to an increasing international expectation that regulators should be able to impose financial penalties. For example, under Financial Action Task Force ("**FATF**") Recommendation 17 (2003 version), a jurisdiction's competent authorities are expected to have the ability to impose "financial sanctions" against those persons that fail to comply with national requirements designed to counter money laundering and terrorist financing. Where a

jurisdiction's financial services regulator does not have the power to impose financial sanctions (or has such a power but does not use it) it is likely to result in the jurisdiction's compliance with FATF Recommendation 17 being assessed as less than "compliant".

In January 2015, there will be an independent assessment – by the Council of Europe's monitoring body, MONEYVAL – of certain of the Island's standards to prevent and detect money laundering and the financing of terrorism. Whilst, if the States support this *Projet*, the Draft Law is unlikely to be in force by the time of that assessment, the Council of Ministers anticipates that being able to demonstrate substantial progress having been made towards the implementation of a civil financial penalties regime for the JFSC would be considered a positive factor when the assessors are concluding their assessment report, in due course.

Overview

The Draft Law would –

- provide the Commission with the power to impose civil financial penalties on a regulated business that has, to a significant and material extent, contravened a Code of Practice;
- provide for the Chief Minister to set the financial penalty 'tariff' by Order;
- require the Commission to have regard to certain matters (such as the seriousness of the contravention) when determining whether to impose a penalty and the level of penalty in any particular case;
- require the Commission, before imposing a financial penalty on a regulated business, to give the business due notice;
- provide a regulated business with a right of appeal to the Royal Court against the proposed imposition of a financial penalty;
- allow the Commission to issue a public statement concerning the imposition of a financial penalty;
- allow the Commission to retain the proceeds of financial penalties for the purpose of reducing annual licence fees to be paid by regulated businesses or to mitigate any required increase in such fees;
- provide for the Commission to voluntarily pay over the proceeds of any financial penalty to the States of Jersey, in circumstances where the use of such proceeds to reduce annual licence fees would result in a substantial reduction in such fees; and
- provide the Chief Minister with the power to make an Order stating the circumstances in which the proceeds of a penalty(ies) must be paid by the Commission to the States of Jersey.

The detailed provisions

Article 1(1) to 1(4) of the Draft Law

Paragraphs (1) to (4) of Article 1 would introduce into the FSC Law certain definitions that are required for the purposes of the civil financial penalty regime, and make some necessary consequential changes.

In particular, Article 1(2) would insert into the FSC Law the definition "registered person". Persons included within that definition are the regulated businesses that would be subject to the civil financial penalties regime.

Article 1(3) would amend Article 14 of the FSC Law so that the funds and resources of the JFSC are statutorily recognised as including the amount of any penalty paid to the JFSC.

Article 1(4) would amend Article 15 of the FSC Law so that, when consulting on a proposed annual licence fee to be paid by a registered person, the Commission would be required to state the extent to which any penalties received: "have reduced the level of fee that would otherwise be proposed". In other words, the Commission would need to set out the extent to which penalties paid would either enable an existing fee to be reduced or mitigate any required increase in the fee.

Article 1(5) of the Draft Law

Paragraph (5) of Article 1 is the substantive provision that would insert into the FSC Law several new Articles (21A to 21G) that would set out when and how the JFSC could impose a civil financial penalty.

Article 21A of the FSC Law – Power to impose civil financial penalties

This new Article would provide that, where the Commission is satisfied that a regulated business has to a significant and material extent contravened a Code of Practice, it may require the business to pay a financial penalty. This is considered to be the appropriate definition of a serious contravention and is identical to the draft Isle of Man legislation.

It also sets out the Codes of Practice to which the financial penalty regime would apply. These are the Codes issued under –

- Article 19A of the Banking Business (Jersey) Law 1991 (Codes of Practice for Deposit-taking Business)
- Article 42 of the Insurance Business (Jersey) Law 1996 (Codes of Practice for Insurance Business)
- Article 19 of the Financial Services (Jersey) Law 1998 (Codes of Practice for: Fund Services Business; General Insurance Mediation Business; Investment Business; Money Service Business; and Trust Company Business)
- Article 22 of the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008 (Handbook for the Prevention and Detection of Money Laundering and the Financing of Terrorism)
- Regulation 22 of the Alternative Investment Funds (Jersey) Regulations 2012 (Codes of Practice for Alternative Investment Funds and AIF Services Business).

Article 21B of the FSC Law – Level of penalty and criteria for imposition

Under paragraphs (1) and (2) of Article 21B, the Chief Minister would make an Order setting out the maximum level of financial penalty (i.e. the 'tariff') that the JFSC would be able to impose for any particular type of contravention. The Chief Minister would have the discretion to prescribe the levels by reference to a fixed amount, a percentage of a regulated business's income or such other criteria as he or she considers appropriate.

When considering whether to impose a financial penalty and the amount of the penalty, paragraph (3) of Article 21B would require the Commission to have particular regard to the following matters –

- the seriousness of the contravention of the Code of Practice;
- whether or not the regulated business knew, or ought to have known, of the contravention;

- whether or not the regulated business voluntarily reported the contravention;
- whether or not the regulated business had taken steps to rectify the contravention and to prevent its recurrence;
- the potential financial consequences to the regulated business and to third parties (including customers and creditors of the regulated business) of imposing the penalty;
- the principle of ensuring that regulated businesses cannot expect to profit from contraventions of the Codes;
- the penalties imposed in other cases; and
- the additional principles set out in the Commission's statement referred to below.

Paragraph (4) of the Article would require the Commission to publish a statement setting out –

(a) the principles (including the matters listed above) it will apply when deciding upon the imposition and amount of the penalty: these must include a (non-exhaustive) list of aggravating and mitigating factors that the Commission would take into account; and

(b) the processes it will follow when exercising the power to impose a financial penalty.

Before issuing (or subsequently revising) such a statement, the Commission would have to consult the Chief Minister, regulated businesses and such other persons as the JFSC considered appropriate (paragraphs (5) and (6) of Article 21B).

Article 21B (paragraph (7)) would also provide the Chief Minister with the power to make an Order that prescribes the principles and processes that the Commission would have to follow when exercising the power to impose a financial penalty. To the extent to which anything in a statement previously issued by the Commission was inconsistent with that Order, the requirements of the Order would prevail.

The Chief Minister would be required to consult the Commission before making any Order under Article 21B (see paragraph (8)).

Article 21C of the FSC Law – Notification of imposition of a penalty

Before imposing a financial penalty, Article 21C would require the Commission to follow a 2 stage process: the issuing and serving of a "notice of intent" and then a "final notice".

The notice of intent (see paragraphs (1) and (2) of Article 21C) would require the Commission to inform the regulated business –

- that the Commission proposes to require the regulated business to pay a financial penalty;
- of the Commission's grounds for believing: (a) that the regulated business had contravened a Code of Practice; (b) that the contravention should give rise to a penalty; (c) that the amount of the penalty should be as specified in the notice;
- details of the provision(s) of the Code(s) alleged to have been contravened;
- how the proposed penalty had been calculated by reference to the Chief Minister's Order referred to above;

- that the regulated business may make representations to the Commission regarding the imposition of the penalty or its amount within one month of the date of service of the notice.

Provided that a representation referred to above is made within the specified one month period, the Commission would be required by the statute to consider it.

If, after considering any representation, the Commission considers that it is still appropriate to impose a financial penalty as proposed in the notice of intent (or as modified in light of a representation), it would be required to issue a final notice informing the regulated business that it must pay the penalty (paragraph (3) of Article 21C).

Paragraph 4 of Article 21C would require the Commission's final notice to –

- include the same matters referred to above in relation to the notice of intent (modified as the JFSC considered appropriate in the light of the representation);
- specify the date by which payment of the penalty must be made (which must be at least 2 months after the date of service of the notice);
- specify how payment must be made;
- advise the regulated business of the surcharge that may be imposed for late payment (see below);
- explain the power of the Commission to enforce the penalty (see below); and
- advise the regulated business of its right of appeal (see below).

Article 21D of the FSC Law – Restrictions on powers of the JFSC in respect of notices

To ensure compliance with the European Convention on Human Rights, paragraph (1)(a) of Article 21D stipulates that the Commission would not be able to issue a notice of intent (i.e. propose a financial penalty) in respect of a contravention of a Code of Practice that occurred before the commencement of Article 21A [the power to impose civil financial penalties].

The exception to this would be where the contravention was on-going at the time that Article 21A comes into force (paragraph (2)(a) of Article 21D).

In addition, paragraph (1)(b) of Article 21D stipulates that the Commission would not be able to issue a notice of intent (i.e. propose a financial penalty) in respect of a contravention of a Code of Practice that came to its attention more than three years previously.

However, paragraph (2)(b) of Article 21D would allow the JFSC, in exceptional cases, to apply to the Royal Court for permission to issue a notice of intent in respect of a contravention that came to the Commission's attention more than 3 years previously. The circumstances in which an application to the Royal Court might be made include where a regulated business had deliberately employed delaying tactics, or where an investigation by the Commission into a contravention(s) had been unusually lengthy due to its size or complexity. Paragraph (4) of the Article would allow the States, by Regulations, to amend the 3 year time limit.

Paragraphs (3) and (5) of Article 21D would prohibit the Commission from issuing a public statement about the issue or service of a final notice where the period in which an appeal could be made had not expired, or where an appeal had not been determined by the Royal Court or withdrawn.

Article 21E of the FSC Law – Late payment surcharge and enforcement

Where a penalty had not been paid within the period specified in the final notice, Article 21E would provide for a surcharge to be applied at the rate of 5% of the amount unpaid for each complete month that it remains outstanding (paragraph (1) of the Article).

The figure of 5% has been chosen for consistency with the Commission's approach in relation to the late payment of annual licence fees. The figure of 5% would be able to be amended by an Order made by the Chief Minister on the recommendation of the Commission (paragraph (3) of Article 21E).

Paragraph (3) would provide the Commission with the discretion to waive or reduce the surcharge (for example, where late payment was not the fault of the regulated business).

The Article also provides that a penalty imposed by the Commission, including any surcharge, may be enforced as if it were a debt owed by the regulated business to the JFSC (paragraph (4) of Article 21E). Thus, the Commission would be able to launch civil legal proceedings to sue for the recovery of any outstanding penalty.

Article 21F of the FSC Law – Appeal against imposition of the penalty

Article 21F would provide a regulated business with the ability to appeal to the Royal Court against the imposition of a financial penalty (paragraph (1)). The appeal would have to be lodged within one month of the regulated business having been served a final notice (paragraph (2) of Article 21F).

Once an appeal had been lodged, the Commission would not be permitted to take any action to enforce the financial penalty (paragraph (3)).

In its decision, the Royal Court would be able to confirm or rescind the imposition of the financial penalty, substitute a penalty of a different amount or make such other order as it thinks fit (paragraph (4)).

Article 21G of the FSC Law – Proceeds of penalties

Paragraph (1) of Article 21G would provide that penalties paid to the Commission may be regarded as part of its income, save in certain circumstances where the Article provides otherwise, as explained below. (Note that the need for the FSC Law to be amended to treat penalties as "income" is essentially a technical change only, so that the Commission can include money received from penalties paid for budgeting purposes (see Article 14(d) of the FSC Law)).

The general principle, set out in paragraph (2) of Article 21G, is that money received by the Commission in payment of civil financial penalties would have to be treated as if it were part of the fees due from regulated businesses of the same class and used to reduce, or mitigate any required increase in, licence fees to be paid by the class of regulated business on whom the penalties were imposed.

So, for example, money received by the Commission in respect of penalties imposed on deposit-takers would be used to reduce, or mitigate any required increase in, licence fees to be paid by deposit-takers; penalties imposed on trust company businesses would be used to reduce, or mitigate any required increase in, licence fees to be paid by trust company businesses, and so on.

However, in recognition of the fact that if the Commission were to impose very substantial penalties in a particular period it could result in an anomalous situation where far more money would be received than would be necessary to achieve a reasonable reduction in licence fees, paragraph (3) of Article 21G would give the

Commission the discretion to pay 'excess' money received from penalties to the States.

In addition, paragraph (4) would provide the Chief Minister with the discretion to make an Order to prescribe circumstances when the Commission would be required to pay money received from penalties to the States. The Order could not require the Commission to pay money to the States where it had already applied the money from the penalty(ies) to reduce, or mitigate any required increase in, licence fees (paragraph (5) of Article 21G).

Before making any such Order, the Chief Minister would be required to consult the Commission and take account of the requirement under Article 15(2)(c) of the FSC Law for the JFSC to maintain a reserve in order to meet contingent liabilities, in particular those relating to the costs of investigations or litigation (paragraph (6) of Article 21G).

The Schedule to the Draft Law

The Schedule would make some minor changes to the regulatory laws that the Commission administers. These can be separated into 5 categories.

Firstly, the regulatory laws would be amended so that contraventions of a Code of Practice are consistently described as such. At the moment, expressions such as "failed to follow" or "failed to comply with" are used.

Secondly, the regulatory laws would be amended so that the failure to pay a financial penalty would constitute an additional ground for the Commission to revoke the licence of a regulated business.

Thirdly, a consequential amendment to the regulatory laws[1] would be made so that the Commission would have the discretion to issue a public statement when it serves a regulated business with a final notice to pay a financial penalty (subject to the timing restriction imposed by Article 21D(3), as described above).

Fourthly, a clarificatory amendment to the statutory provisions that enable the Commission to issue Codes of Practice would be made so that the description of the Codes more accurately reflects their regulatory purpose and status.

Fifthly, a clarificatory provision would be inserted into each of the regulatory laws stating that, "the contravention of a Code of Practice may lead the Commission to exercise its powers under this Law or any other enactment applicable to such contravention". A necessary consequential amendment would also be made to qualify the existing provision in the regulatory laws that provides that the failure to comply with a Code of Practice does not of itself render any person liable to proceedings.

Consultation

In 2012, the Commission consulted publicly on the principles of a civil financial penalties regime. The relevant Consultation Paper and the associated feedback paper are available from the Commission's website. There was wide support for the introduction of such a regime, although, as would be expected, there were some comments on aspects of how the regime would work in practice.

In June 2014, the Commission publicly issued a consultation version of the Draft Law. Responses to that consultation were reviewed jointly by the Commission and the Chief Minister's Department. All responses were considered in full and some changes were made to the draft legislation as a result of the responses received. The Commission will shortly issue its customary Feedback Paper summarising the comments received

[1] Not applicable in the case of the Collective Investment Funds (Jersey) Law 1988.

and how the draft legislation has been amended to take them into account, where appropriate.

Financial and manpower implications

There are no financial or manpower implications that would arise for the States from the adoption of the Draft 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.

Human Rights Notes on the Draft Financial Services Commission (Amendment No. 6) (Jersey) Law 201-

These Notes have been prepared in respect of the Draft Financial Services Commission (Amendment No. 6) (Jersey) Law 201- (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 ("**ECHR**").

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

The draft Law will amend the Financial Services Commission (Jersey) Law 1998 (the "**principal Law**") so as to introduce a civil financial penalty regime and to make minor amendments to related enactments. The imposition of financial penalties in the manner envisaged by the draft Law and the appeal provision in the draft Law will engage Article 6 ECHR.

Civil penalties

The draft Law provides for the imposition of a financial penalty regime (Article 1 of the draft Law inserting Articles 21A–G into the principal Law). From an ECHR perspective, whether a penalty is deemed to be 'civil' or 'criminal' in nature is significant as Article 6 ECHR requires stringent safeguards if proceedings are considered to be 'criminal' (under Article 6(2) and (3) ECHR).

In considering the classification of a penalty, the European Court of Human Rights ("**ECtHR**") has held that it is necessary to look behind the national classification and inquire whether a proceeding has exposed a person to a sanction which "*belongs in general to the 'criminal sphere'*". The assessment criteria established by the ECtHR in *Engel v Netherlands*[2] is key here. In determining whether proceedings are 'criminal' the following must be considered: (a) the domestic classification of the penalty; (b) the nature of the offence in question; and (c) the severity of the potential penalty.

Application of Engel criteria

First criterion: domestic classification

This criterion considers the domestic classification of the penalty. Where the penalty is classified as 'civil', ECtHR case law dictates that an assessment of the penalty must look behind the national classification to examine the substantive reality of the procedure in question. The proposed penalty is clearly expressed in the preamble to the draft Law as a '*civil financial penalty*'. Accordingly, an analysis is required of the substance of the related offence and proceedings.

Second criterion: nature of the offence

This criterion, which looks at the nature of the offence, requires further analysis of a number of features of the penalty. The relevant features within this criterion which point to the penalty being civil in nature are, firstly, that the penalty is addressed to a specific group, i.e. registered persons (see Article 21A), rather than the public at large. Secondly, the imposition of the penalty is not necessarily dependent on a finding of

[2] (1976) 1 EHRR 647 (paragraph 81).

culpability on the part of the registered person. The penalty can be imposed in cases where there is an innocent or routine contravention of a Code of Practice and where non-culpable factors listed in Article 21B(3) are evident. Moreover, under Article 21A(1) the imposition of the penalty is by no means mandatory ("*the Commission may impose on that person a penalty to the extent permitted by the following provisions of this Law*"). Thirdly, the proposed penalty is comparable to s.206 of the UK's Financial Services and Markets Act 2000, which was deemed a disciplinary provision from an ECHR perspective.

Third criterion: severity of the potential penalty

The third of the *Engel* criteria, the severity of the potential penalty, is often decisive. The draft Law does not propose a power to impose unlimited fines, which could in principle enable arbitrary fines to be imposed. Rather, Article 21B provides that the level of the penalty will be prescribed by Order and it is understood that the level of the penalty will be contained within a specified range, dependent on the nature of the breach. The actual level of the penalty itself will then be determined by reference to the grounds listed in Article 21B(3). To that extent, the draft Law and the Order will provide for a number of factors which will operate to temper the severity of the penalty and this contributes to the proposed penalty coming within the 'civil' sphere. Finally, failure to pay a financial penalty will be enforceable in the first instance by a late payment fee, rather than by imprisonment (which is often a clear indication of the penalty being criminal in nature).

Conclusion on the application of the Engel criteria

The application of the *Engel* criteria to the proposed penalty, as illustrated above, indicates numerous elements which point to the penalty being 'civil' in nature. Moreover, the general feel and substance of the penalty is disciplinary rather than criminal, e.g. the imposition of the penalty is not mandatory and, generally, is not intended to operate in place of criminal offences already existing in regulatory laws.

The significance of this conclusion is that the imposition of the financial penalty under the draft Law does not, as far as a strict application of Article 6 ECHR is concerned, need to be accompanied by criminal standard safeguards (under Article 6(2) and (3) ECHR). Notwithstanding that conclusion, it is relevant to note that the draft Law does in any event provide for safeguards against any abuse of the financial penalty power, which should operate to ensure that the civil financial penalty is imposed in a proportionate and compatible manner.

The relevant safeguards here are –

(i) provision enabling registered persons to make representations to the Commission regarding the imposition of a financial penalty (Article 21C(1)(c)). This provides registered persons with the opportunity to challenge a determination of the Commission at a stage when the imposition of a penalty has not become final;

(ii) when issuing both a 'notice of intent' and a 'final notice', the Commission must state the grounds for believing that the registered person has contravened a Code of Practice, etc. This assists the registered person to understand the Commission's rationale for the imposition of a penalty, in turn informing any representations made by the registered person to the Commission (Article 21C(1)(b) and Article 21C(4)(a));

(iii) Article 21F(1) provides that registered persons may appeal to the Royal Court against the imposition of a penalty on the ground that the decision to impose it was unreasonable having regard to all the circumstances of the case.

Article 21C(4)(f) provides that a final notice must also inform the recipient of this right of appeal.

Appeal

The second aspect of the draft Law that engages Article 6 ECHR is the provision for appeals to the Royal Court in Article 21F. Article 6(1) ECHR requires that those who face a determination of their '*civil rights and obligations*' must be entitled to a '*fair and public hearing… by an independent and impartial tribunal*'. The guarantees afforded by Article 6 ECHR will only be relevant to the extent that an act or a decision is determinative of a '*civil right*' or '*obligation*'.

In providing for the imposition of a financial penalty, the provisions in the draft Law may be deemed to engage '*civil rights and obligations*'. This is due to the imposition of a penalty by the Commission amounting to an administrative decision affecting the property rights of registered persons.

Article 6(1) ECHR requires that civil rights be determined by an '*independent and impartial tribunal*'. The Commission's decision-making process in respect of these matters does not afford all of the procedural guarantees required by Article 6 ECHR of an independent and impartial tribunal. However, it will be compatible with Article 6 ECHR for the Commission to make decisions that will determine a civil right if that decision is "*subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1)*" and "*has the ability to quash the impugned decision or to remit the case for a new decision by an impartial body"*. The body in question here is the Royal Court, who will hear appeals against the Commission's decisions under Article 21F on the ground that a decision of the Commission to impose a penalty was "*unreasonable having regard to all the circumstances of the case*".

This 'unreasonableness' review standard is prevalent in Jersey law, particularly in financial services legislation. That standard requires a decision to be considered as wrong to such an extent that it is categorised as being unreasonable. The 'unreasonableness' formula has been interpreted by the Royal Court and the Court of Appeal more broadly than the English courts approach to the '*Wednesbury* unreasonableness' standard involved in judicial review cases. In *Steenson v Minister of Planning and Environment*[3], it was stated that "*there would seem to be much merit in allowing as full a review of the decision as the language of the statute permits*". This points to the Royal Court applying the 'unreasonableness' formula in a wider, more expansive, manner. This conclusion is also influenced by the fact that the Royal Court should be able to develop its case law on the meaning of '*unreasonable*' to include a wider, more intensive role, in light of its interpretative obligation under Article 4 of the Human Rights Law.

Ultimately, in the case of the draft Law, the ability to appeal to the Royal Court is considered sufficient to make the process of determining civil rights and obligations under the draft Law compatible, as a whole, with Article 6(1) ECHR. The potential for flexibility in the application of the 'unreasonableness' standard would suggest that the review standard is amenable to ensure that a sufficient intensity of review, should it be required for Article 6(1) ECHR purposes, is provided makes the proposed review provision in Article 21F(1) compatible with the ECHR.

[3] [2009 JLR 427].

Explanatory Note

This Law would amend the Financial Services Commission (Jersey) Law 1998 ("the 1998 Law") so as to provide a civil financial penalty regime.

Article 1 amends the 1998 as follows. Paragraph (2) inserts some new definitions. Paragraph (3) adds the proceeds from penalties that the Commission is to keep to its resources. Paragraph (4) requires the Commission to include in a report it is required to make before publishing fees any extent to which penalties have reduced the level of fee that would otherwise have been proposed.

The main provisions concerned with the new penalty regime are inserted into the 1998 Law by paragraph (5) as Articles 21A to 21G.

Article 21A provides a power for the Commission to impose penalties for significant and material contraventions of codes of practice under the regulatory legislation set out in that Article.

Article 21B limits the penalty to the maximum that may be prescribed by Order of the Chief Minister and sets out the criteria that the Commission must have regard to in deciding whether to impose a penalty and the amount of the penalty. It has to publish a statement setting out these and other principles it will apply and there is also power for the Chief Minister to publish principles and processes for the Commission to follow.

Article 21C requires the Commission to issue and serve on the registered person a notice of intent where it is minded to impose a penalty, setting out the grounds and inviting the registered person to make representations. After considering any representations, the Commission may issue and serve on the registered person a final notice which must include a number of matters including the date by which payment must be made, how it may be made and advising as to the power to impose a surcharge, to enforce the penalty and the registered person's right of appeal.

Article 21D prevents the issuing of a notice of intent, subject to 2 limited exceptions, in respect of a contravention of a code of practice occurring before the commencement of the civil penalty regime or more than 3 years after the contravention came to the attention of the Commission. There is also a prohibition on issuing public statements except in the case of final notices and these only after the period for appealing has expired or any appeal made is concluded.

Article 21E requires the Commission to impose a surcharge of 5% of the amount unpaid for every month it remains unpaid after the date specified in the final notice. However, any time during the currency of the appeal process is disregarded and the Commission has a discretion to waive or reduce the amount of the surcharge. Penalties (including any surcharge) are enforceable as debts owed by the registered person to the Commission.

Article 21F provides for an appeal to the Royal Court against the imposition of a penalty or the amount of the penalty.

Article 21G enables the Commission to retain the penalties. The money must be treated as fees paid by registered persons of the same class as the person paying the penalty, and applied so as to reduce the level of fees that would otherwise by charged. However, if this would reduce the level of fees substantially the money or a proportion of it may be paid to the States. There is also power for the Chief Minister to prescribe the circumstances in which the money derived from penalties must be paid to the States.

Article 2 introduces the *Schedule*, which makes a series of amendments to various regulatory Laws and some Regulations consequential upon the new provisions. In addition the provisions concerned with codes of practice are revised and assimilated.

Article 3 gives the Law its short title and provides for it to come into operation one month after registration.

DRAFT FINANCIAL SERVICES COMMISSION (AMENDMENT No. 6) (JERSEY) LAW 201-

Arrangement

Article

DRAFT FINANCIAL SERVICES COMMISSION (AMENDMENT No. 6) (JERSEY) LAW 201-

A LAW to amend further the Financial Services Commission (Jersey) Law 1998 so as to introduce a civil financial penalty regime and to make minor amendments to related enactments.

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]*

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

1 Amendment of Financial Services Commission (Jersey) Law 1998

(1) The Financial Services Commission (Jersey) Law 1998[1] is amended in accordance with this Article.

(2) In Article 1 –

(a) in paragraph (1) after the definition "Minister" there shall be inserted the following definitions –

" 'penalty' means a civil financial penalty imposed by the Commission under Article 21A;

'prescribed' means prescribed by Order made by the Minister;

'registered person' means –

(a) a registered person within the meaning of the Banking Business (Jersey) Law 1991[2];

(b) a permit holder within the meaning of the Insurance Business (Jersey) Law 1996[3] other than the holder of a Category A permit (within the meaning of Article 5(2) of that Law);

(c) a registered person within the meaning of the Financial Services (Jersey) Law 1998[4], other than a person registered under that Law to conduct general insurance mediation business falling within Class R or Class S as set out in the

Schedule to the Financial Services (Financial Services Business) (Jersey) Order 2009[5];

(d) a service provider within the meaning of Regulation 2 of the Alternative Investment Funds (Jersey) Regulations 2012[6];";

(b) for sub-paragraph (2) there shall be substituted the following sub-paragraph –

"(2) The States may by Regulations amend the definition 'registered person' in paragraph (1).".

(3) in Article 14(c) there shall be deleted the word "and" and after that paragraph there shall be inserted the following paragraph –

"(ca) the amount of any penalty paid to the Commission that is not paid or to be paid to the States under Article 21G; and".

(4) After Article 15(3)(b) there shall be inserted the following sub-paragraph –

"(ba) details of the extent (if any) to which any penalties received have reduced the level of fee that would otherwise have been proposed;".

(5) After Article 21 there shall be inserted the following Articles –

"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 a Code of Practice to which this Article applies, the Commission may impose on that person a penalty to the extent permitted by the following provisions of this Law.

(2) This Article applies to the Codes of Practice issued by the Commission under –

(a) Article 19A of the Banking Business (Jersey) Law 1991[7];

(b) Article 42 of the Insurance Business (Jersey) Law 1996[8];

(c) Article 19 of the Financial Services (Jersey) Law 1998[9];

(d) Article 22 of the Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008[10]; and

(e) Regulation 22 of the Alternative Investment Funds (Jersey) Regulations 2012[11].

21B Level of penalty and criteria for imposition

(1) The penalty that the Commission may impose must not exceed the maximum level of penalties prescribed for the particular type of contravention.

(2) The Order may prescribe those levels by reference to a fixed amount, a percentage of the registered person's income or such other criteria as the Minister considers appropriate.

(3) In considering whether to impose a penalty and the amount of penalty to be imposed the Commission must have particular regard to the following matters –

(a) the seriousness of the contravention of the Code of Practice;

(b) whether or not the registered person knew, or ought to have known, of the contravention;

(c) whether or not the registered person voluntarily reported the contravention;

(d) whether or not the registered person has taken steps to rectify the contravention and to prevent its recurrence;

(e) the potential financial consequences to the registered person and to third parties (including customers and creditors of the registered person) of imposing the penalty;

(f) the principle of ensuring that registered persons cannot expect to profit from contravention of the Codes;

(g) the penalties imposed by the Commission in other cases;

(h) the principles mentioned in paragraph (4) (other than those set out in this paragraph).

(4) The Commission must publish a statement setting out –

(a) the principles (including the matters set out in paragraph (3)(a) to (g)) it will apply in determining the imposition and amount of the penalty, including within those principles what are the aggravating and mitigating factors, which must be stated not to be exhaustive; and

(b) the processes it will follow when exercising the power to impose a penalty.

(5) The Commission must review the statement from time to time and revise it when it considers it necessary to do so.

(6) Before publishing or revising the statement the Commission must consult the Minister, registered persons and such other persons as the Commission considers appropriate.

(7) The Minister may prescribe the principles and processes the Commission must follow when exercising the power to impose a financial penalty in prescribed circumstances, and such principles and processes shall override anything in the Commission's published statement that is inconsistent with them.

(8) The Minister must consult the Commission before making any Order under this Article.

21C Notification of imposition of penalty

(1) Before imposing a penalty the Commission must issue and then serve on the registered person a notice (a 'notice of intent') informing the registered person –

(a) that the Commission proposes to require the registered person to pay a penalty;

(b) of the Commission's grounds for believing –

(i) that the registered person has contravened a Code of Practice,

(ii) that the contravention should give rise to a penalty,

(iii) that the amount of penalty should be as specified in the notice; and

(c) that the registered person may make representations to the Commission regarding the imposition of the penalty or its amount within one month of the date of service.

(2) The Commission must include within its grounds under paragraph (2)(b) –

(a) details of any provision of the Code alleged to have been contravened; and

(b) how the proposed penalty has been calculated by reference to any Order made under Article 21B(1).

(3) The Commission must consider any representations made within the period specified under paragraph (1)(c) and if it considers that it is still appropriate to impose a penalty as proposed in the notice of intent, or as modified in light of any such representations, it may issue and then serve on the registered person a notice (a 'final notice') requiring the registered person to pay a penalty.

(4) The final notice must –

(a) include the matters mentioned in paragraph (1)(b) but modified as the Commission considers appropriate in the light of any representations made;

(b) specify the date by which payment of the penalty must be made, being a date not less than 2 months after the date of service of the final notice;

(c) specify how payment must be made;

(d) advise the registered person of the surcharge that may be imposed under Article 21E(1) in the event of late payment;

(e) advise the registered person of the Commission's power to enforce the penalty under Article 21E(4); and

(f) advise the registered person of the right of appeal against the imposition or amount of the penalty under Article 21F.

(5) When issuing a notice under this Article the Commission need not specify –

(a) any reason that would, in its opinion, involve disclosing confidential information the disclosure of which would be prejudicial to a third party; or

(b) the same reasons, or reasons in the same manner, when issuing notices to different registered persons about the same matter.

21D Restrictions on powers of Commission in respect of notices

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

(a) in respect of a contravention of a Code of Practice that occurred before the commencement of Article 21A; or

(b) more than 3 years after the contravention giving rise to the notice came to the attention of the Commission.

(2) However –

(a) in the case of a contravention falling within paragraph (1)(a) that was continuing at the time of the commencement of Article 21A, a notice of intent may be issued in respect of such part of the contravention that continued after such commencement;

(b) the Commission may apply to the Royal Court for an extension of time for issuing a notice of intent beyond the time limit set out in paragraph (1)(b) and the Royal Court may grant such extension if it considers the Commission has a reasonable excuse for not issuing the notice within that time limit.

(3) The Commission may not issue a public statement about the issue or service of notice under Article 21C except in the case of a final notice and then only –

(a) where the period within which an appeal against the imposition of a penalty may be lodged has expired without an appeal having been lodged; or

(b) if such an appeal has been lodged, after it is determined by the court or withdrawn.

(4) The States may by Regulations amend the time limit set out in paragraph (1)(b).

(5) In this Article 'public statement' means a statement issued under any of the enactments mentioned in Article 21A(2).

21E Late payment surcharge and enforcement

(1) If any part of a penalty imposed by the Commission remains unpaid after the date for payment specified in the final notice under Article 21C(3), the amount unpaid attracts a surcharge of 5% for each complete month that it remains unpaid.

(2) However –

(a) in computing the surcharge, the time from when any appeal is lodged under Article 21F till the appeal is determined by the court or withdrawn, must be disregarded;

(b) the Commission has a discretion to waive, or reduce the amount of, any surcharge.

(3) The Minister may by Order, on the recommendation of the Commission, vary the percentage set out in paragraph (1).

(4) A penalty, including any surcharge imposed under this Article, may be enforced as if it were a debt owed by the registered person to the Commission.

21F Appeal against imposition of penalty

(1) A registered person may appeal to the Royal Court against the imposition of a penalty or the amount of penalty imposed only on the ground that the decision of the Commission was unreasonable having regard to all the circumstances of the case.

(2) The appeal must be lodged with the Royal Court no later than a month after the date of service of the final notice under Article 21C(3).

(3) Once an appeal has been lodged the Commission must not take any action to enforce payment of the penalty until the conclusion of the appeal.

(4) On hearing the appeal the Royal Court may confirm or rescind the imposition of the penalty, substitute a penalty of a different amount or make such other interim or final order as it thinks fit.

21G Proceeds of penalties

(1) Subject to this Article the Commission may retain any sum of money it receives in respect of a penalty as part of its income.

(2) The money must be treated as if it were part of the fees due from registered persons of the same class (with reference to the various meanings of 'registered person' set out in Article 1 and the various classes of financial service business in respect of which a person may be registered as mentioned in paragraph (c) of that definition) as the registered person on whom the penalties were imposed so as to reduce the level of fees that would otherwise have been charged to those registered persons.

(3) However, if the result of the application of paragraph (2) would be to reduce substantially the level of fees that the Commission would otherwise have charged, the Commission may pay the money, or a proportion of it, to the States.

(4) An Order may prescribe the circumstances in which money received by the Commission in respect of a penalty must be paid to the States.

(5) The Order may be made –

(a) only to the extent that the Commission has not already applied the money so as to reduce the level of fees that would otherwise be charged; but

(b) irrespective of when the money was received or is due to be received by the Commission.

(6) Before making an Order under this Article the Minister must consult the Commission and take account of the requirement under Article 15(2)(c) for the Commission to maintain a reserve and its need to meet contingent liabilities, in particular those relating to the costs of investigations or litigation.".

2 Amendments to related enactments

The Schedule has effect.

3 Citation and commencement

(1) This Law may be cited as the Financial Services Commission (Amendment No. 6) (Jersey) Law 201-.

(2) This Law comes into force one month after the day on which it is registered.

SCHEDULE

(Article 2)

AMENDMENTS TO RELATED ENACTMENTS

1 Collective Investment Funds (Jersey) Law 1988

(1) The Collective Investment Funds (Jersey) Law 1988[12] is amended as follows.

(2) For Articles 7(6)(f) and 8B(7)(f) there shall be substituted in each case the following sub-paragraph –

"(f) the Commission has reason to believe that the applicant has at some time contravened a code of practice;".

(3) In Article 15 –

(a) in paragraph (1)(a) for the words "for the purpose of establishing sound principles and providing practical guidance" there shall be substituted "setting out the principles and detailed requirements that must be complied with";

(b) for paragraph (3) there shall be substituted the following paragraph –

"(3) The contravention of a code of practice –

(a) may lead the Commission to exercise its powers under this Law or any other enactment applicable to such contravention; but

(b) otherwise does not of itself render a person liable to proceedings of any kind or invalidate any transaction.".

(4) In Article 17(2)(b) for the words "failed to comply with" there shall be substituted the word "contravened".

2 Banking Business (Jersey) Law 1991

(1) The Banking Business (Jersey) Law 1991[13] is amended as follows.

(2) For Article 10(3)(f) there shall be substituted the following sub-paragraphs –

"(f) the Commission has reason to believe that person A has at some time contravened a code of practice;

(fa) person A has failed to pay any part of a penalty imposed by the Commission under Article 21A of the Financial Services Commission (Jersey) Law 1998[14] (including any surcharge imposed under Article 21E(1) of that Law);".

(3) In Article 19A –

(a) for paragraph (1)(a) there shall be substituted the following sub-paragraph –

"(a) prepare and issue a code of practice setting out the principles and detailed requirements that must be complied with in the conduct of deposit-taking business;";

(b) for paragraph (3) there shall be substituted the following paragraph –

"(3) The contravention of a code of practice –

(a) may lead the Commission to exercise its powers under this Law or any other enactment applicable to such contravention; but

(b) otherwise does not of itself render a person liable to proceedings of any kind or invalidate any transaction.".

(4) For Article 48(2)(b) there shall be substituted the following sub-paragraph –

"(b) a public statement with respect to the serving of a final notice on a registered person under Article 21C(3) of the Financial Services Commission (Jersey) Law 1998 imposing a penalty following the contravention of a code of practice by that person; or".

3 Insurance Business (Jersey) Law 1996

(1) The Insurance Business (Jersey) Law 1996[15] is amended as follows.

(2) For Article 7(4)(i) there shall be substituted the following sub-paragraphs –

"(i) the Commission has reason to believe that the applicant has at some time contravened a code of practice;

(j) the applicant has failed to pay any part of a penalty imposed by the Commission under Article 21A of the Financial Services Commission (Jersey) Law 1998[16] (including any surcharge imposed under Article 21E(1) of that Law).".

(3) In Article 11(7)(c) for the words "registered person" there shall be substituted the words "permit holder".

(4) In Article 42 –

(a) for paragraph (1)(a) there shall be substituted the following sub-paragraph –

"(a) prepare and issue a code of practice setting out the principles and detailed requirements that must be complied with in the conduct of insurance business;";

(b) for paragraph (3) there shall be substituted the following paragraph –

"(3) The contravention of a code of practice –

(a) may lead the Commission to exercise its powers under this Law or any other enactment applicable to such contravention; but

(b) otherwise does not of itself render a person liable to proceedings of any kind or invalidate any transaction.";

(c) in paragraph (4)(a) and (b) for the words "relevant provision" there shall be substituted the word "requirement".

(5) In Article 43 –

(a) after paragraph (1)(g) there shall be added the following sub-paragraph –

"(h) a code of practice.";

(b) for paragraph (2)(b) there shall be substituted the following sub-paragraph –

"(b) a public statement with respect to the serving of a final notice on a permit holder under Article 21C(3) of the Financial Services Commission (Jersey) Law 1998 imposing a penalty following the contravention of a code of practice by that permit holder; or".

4 Financial Services (Jersey) Law 1998

(1) The Financial Services (Jersey) Law 1998[17] is amended as follows.

(2) For Article 9(3)(f) there shall be substituted the following sub-paragraphs –

"(f) the Commission has reason to believe that the applicant has at some time contravened a Code of Practice;

(fa) the applicant has failed to pay any part of a penalty imposed by the Commission under Article 21A of the Financial Services Commission (Jersey) Law 1998[18] (including any surcharge imposed under Article 21E(1) of that Law);".

(3) In Article 19 –

(a) for paragraph (1)(a) there shall be substituted the following sub-paragraph –

"(a) prepare and issue a Code of Practice setting out the principles and detailed requirements that must be complied with in the conduct of financial service business;";

(b) for paragraph (3) there shall be substituted the following paragraph –

"(3) The contravention of a Code of Practice –

(a) may lead the Commission to exercise its powers under this Law or any other enactment applicable to such contravention; but

(b) otherwise does not of itself render a person liable to proceedings of any kind or invalidate any transaction.".

(4) In Article 25 –

(a) in paragraph (b) for the words "failed to comply with" there shall be substituted the word "contravened";

(b) after paragraph (b) there shall be inserted the following paragraph –

"(ba) a public statement with respect to the serving of a final notice on a registered person under Article 21C(3) of the Financial Services Commission (Jersey) Law 1998 imposing a penalty following the contravention of a Code of Practice by that person;".

5 Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008

(1) The Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008[19] is amended as follows.

(2) In Article 18(1) –

(a) in sub-paragraph (f) for the words "not complied with" there shall be substituted the word "contravened";

(b) after sub-paragraph (f) there shall be inserted the following sub-paragraph –

"(fa) if the registered person has failed to pay any part of a penalty imposed by the Commission under Article 21A of the Financial Services Commission (Jersey) Law 1998[20] (including any surcharge imposed under Article 21E(1) of that Law);".

(3) In Article 22 –

(a) for paragraph (1)(a) there shall be substituted the following sub-paragraph –

"(a) prepare and issue a Code of Practice setting out the principles and detailed requirements that must be complied with in order to meet certain requirements of this Law and anti-money laundering and counter-terrorism legislation, by persons in relation to whom that body has supervisory functions;";

(b) for paragraph (4) there shall be substituted the following paragraph –

"(4) The contravention of a Code of Practice –

(a) may lead the Commission to exercise its powers under this Law or any other enactment applicable to such contravention; but

(b) otherwise does not of itself render a person liable to proceedings of any kind or invalidate any transaction.";

(c) in paragraph (5)(a) and (b) for the words "relevant provision" there shall be substituted the word "requirement".

(4) In Article 23(1)(b) for the words "failed to comply with" there shall be substituted the words "contravened".

(5) After Article 26(b) there shall be inserted the following paragraph –

"(ba) a public statement with respect to the serving of a final notice on a person under Article 21C(3) of the Financial

Services Commission (Jersey) Law 1998 imposing a penalty following the contravention of a Code of Practice by that person;".

6 Alternative Investment Funds (Jersey) Regulations 2012

(1) The Alternative Investment Funds (Jersey) Regulations 2012[21] are amended as follows.

(2) In Regulation 9(7)(f) for the words "there has been failure on the part of the applicant to follow" there shall be substituted the words "the applicant has contravened".

(3) In Regulation 22 –

(a) in paragraph (1)(a) for the words "for the purpose of establishing sound principles and providing practical guidance" there shall be substituted "setting out the principles and detailed requirements that must be complied with";

(b) for paragraph (3) there shall be substituted the following paragraph –

"(3) The contravention of a code of practice –

(a) may lead the Commission to exercise its powers under this Law or any other enactment applicable to such contravention; but

(b) otherwise does not of itself render a person liable to proceedings of any kind or invalidate any transaction.".

(4) In Regulation 24 –

(a) after paragraph (1)(g) there shall be added the following sub-paragraph –

"(h) a code of practice.";

(b) for paragraph (2)(b) there shall be substituted the following sub-paragraph –

"(b) a public statement with respect to the serving of a final notice on a service provider under Article 21C(3) of the Financial Services Commission (Jersey) Law 1998[22] imposing a penalty following the contravention of a Code of Practice by that service provider;".

1 *chapter 13.250*
2 *chapter 13.075*
3 *chapter 13.425*
4 *chapter 13.225*
5 *chapter 13.225.04*
6 *chapter 17.245.51*
7 *chapter 13.075*
8 *chapter 13.425*
9 *chapter 13.225*
10 *chapter 08.785*
11 *chapter 17.245.51*
12 *chapter 13.100*
13 *chapter 13.075*
14 *chapter 13.250*
15 *chapter 13.425*
16 *chapter 13.250*
17 *chapter 13.225*
18 *chapter 13.250*
19 *chapter 08.785*
20 *chapter 13.250*
21 *chapter 17.245.51*
22 *chapter 13.250*