

The new failure to prevent money laundering offence: what are Jersey businesses required to do?

Insights - 26/07/2022

Following in the footsteps of the failing to prevent tax evasion offence, with effect from 24 June 2022 Jersey has introduced a new offence under Article 35A of the Proceeds of Crime (Jersey) Law 1999 (the **Law**) of failing to prevent money laundering (the **Failure to Prevent Offence**).

This is a significant development in the regulation of Jersey's financial services industry: if a business is connected to certain persons who are engaged in money laundering, the business is itself at risk of committing a criminal offence unless it can demonstrate that its AML policies and procedures (both on paper and in practice) were nonetheless fit for purpose.

It is therefore important that businesses consider the adequacy of their AML systems and controls now and on an ongoing basis. This briefing suggests a few practical tips that businesses might consider in order to help minimise the risk they fall foul of the Failure to Prevent Offence.

How does a business commit the Failure to Prevent Offence?

A business (referred to in the Law as "B") will commit the Failure to Prevent Offence if the following conditions are met:

1. there is a person who is:
 - a. an employee of "B"
 - b. agent of "B"
 - c. other person who performs services for "B" (which is to be determined by reference to all the relevant circumstances); or
 - d. customer (or their agent) of "B"(each an **Associated Party**).
2. the Associated Party is "engaged in money laundering" – defined for these purposes as "engag[ing] in conduct which constitutes money laundering, **whether or not** the person has been convicted of an offence in relation to that conduct" (emphasis added). (Businesses will be aware that 'money laundering' is a broad concept for the purposes of the Law)
3. in carrying on the activity in (2) above, the Associated Party is acting in the capacity in (1) above

However, the Failure to Prevent Offence can only be committed by persons who are carrying on "financial services businesses" for the purposes of the Law. This term is defined more fully in Schedule 2 of the Law, but broadly speaking includes (among others) JFSC licensees as well as a wide range of businesses ranging from lawyers and accountants to casinos. Persons not carrying on "financial services business" therefore fall outside of the scope of the Failure to Prevent Offence.

Are any defences available?

There is a defence in Article 35A(2) of the Law. However, the burden of proving this defence rests on the business, and it is clear that businesses face a high hurdle if they wish to benefit from it.

In order to benefit from the defence, the business must prove that it had adequately maintained **and** applied "prevention procedures" in relation to the activities of the Associated Party (**Defence**) – these procedures must be fit for purpose both on paper and as implemented. For these purposes, "prevention procedures" means procedures designed to prevent persons acting as an Associated Party being engaged in money

laundering.

Article 35A(6) of the Law provides that, in determining whether the business maintained and applied the required prevention policies, the Court may have regard to any Code of Practice or guidance issued by the JFSC that applies to the business. In the absence of such JFSC Codes or guidance, the Court may have regard to similar materials issued by supervisory bodies overseas or, failing that, any guidance issued by a body that is representative of the business or any supervised business that is carried on by the business.

Helpfully, the JFSC has issued detailed guidance in its AML Handbook on businesses' AML obligations (including the Failure to Prevent Offence). It is therefore crucial that businesses give careful consideration to the provisions of the AML Handbook and any subsequent changes to it, and that they ensure that their policies and procedures are amended without delay so as to be consistent with that guidance.

If a business identifies an absence of JFSC guidance on a particular aspect of their AML obligations and they are unclear on what is expected of them, it should give careful consideration to whether there is any non-JFSC guidance (for example, from the UK FCA) that might help them in deciding how best to proceed. While this has the potential to be a time-consuming task, if a business is at risk of prosecution it is important that it can explain why its AML prevention policies were fit for purpose.

What penalties can be imposed?

The Failure to Prevent Offence is a criminal offence, and on conviction the business can be sentenced to an unlimited fine if it is a body corporate, and to an unlimited fine and/or imprisonment for up to two years if it is an individual.

Further, if the offence is proved to have been committed by a business that is a body corporate with the consent or connivance of a "relevant person" (broadly speaking an officer such as a partner, director or general partner), then that relevant person is also guilty of the offence and liable to similar penalties.

In addition to this risk of criminal sanction, businesses should bear in mind that the JFSC is also empowered to take action against businesses that breach its Codes of Practice or otherwise fail to meet the minimum standards the JFSC expects of businesses it supervises. Potential powers that the JFSC might exercise (depending on the circumstances and whether the business is JFSC licensed) include: imposing a direction requiring the business to take or refrain from taking specified steps; an order prohibiting a person from performing roles at licensed businesses in the future; and/or a civil financial penalty.

Why has the Failure to Prevent Offence been introduced?

Put simply, the introduction of the Failure to Prevent Offence will make it easier for the authorities in Jersey to prosecute businesses and key persons for AML offences.

As the JFSC has made clear on a number of occasions, [1] "the continuing ability of Jersey's finance industry to attract legitimate customers with funds and assets that are clean and untainted by criminality depends, in large part, upon the Island's reputation as a sound, well-regulated jurisdiction". As the JFSC notes, Jersey's defences "rely heavily on the vigilance and co-operation of the finance sector". It is clear that the introduction of the Failure to Prevent Offence is intended to ensure that businesses are properly motivated to play their part.

Indeed, when consulting on this offence the Government stated that it would enhance Jersey's overall AML enforcement effectiveness. The Government also referred to the Financial Action Task Force's "Methodology – Immediate Outcome 7", which provides that 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. [2]

What can businesses do to mitigate the risk of committing this offence?

Given the severe consequences for a business (and their senior management) if it commits the Failure to Prevent Offence, all businesses should act promptly to ensure that their AML policies and procedures are up-to-date and fit for purpose.

Steps that businesses should consider taking include:

- ensuring that Compliance reviews the business's AML prevention procedures to ensure they are fit for purpose – both on paper and as implemented in practice
- reviewing the JFSC's guidance on businesses' AML obligations (including the AML Handbook), and

- ensuring their prevention procedures are consistent with it
- regularly reviewing the adequacy of the business' prevention procedures and promptly implementing any necessary enhancements
- providing refresher training to all employees as to their AML obligations, and then providing regular ongoing training
- ensuring all staff know where to find the business's AML resources
- implementing appropriate controls in relation to potential money laundering by non-employee Associates of the business (for example, the business's customers)
- ensuring that reports are submitted to the business's governing body on its AML control framework, which reports must be sufficient both in terms of the level of information they provide and their frequency
- ensuring that the Compliance function has the necessary quality and quantity of resource to perform its role
- fostering a culture within the business that understands the purpose of AML obligations and the importance of complying with them, so as to avoid a "tick box" mentality

[1] See for example Section 1 of the JFSC's AML Handbook and the outcome of its themed examination programme on the role of the MLRO in 2019, accessible at:

<https://www.jerseyfsc.org/industry/examinations/themed-examination-role-of-money-laundering-reporting-officer/>

[2] The consultation can be found at:

<https://www.gov.je/SiteCollectionDocuments/Crime%20and%20justice/C%20Consultation%20on%20amendments%20under%20>

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