



Feedback on Consultation No. 4 2021

Decision-Making Process

Feedback relating to a consultation on proposals to revise the decision-making process that we follow when taking administrative action that could result in the imposition of a regulatory sanction

Consultation feedback

This feedback reports on responses we received to Consultation No. 4 2021, that was published on 12 July 2021.

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Glossary of terms

Board	The Board of Commissioners of the JFSC constituted as set out in Article 3 of the Commission Law.
Board DMP Committee	The committee of the Board responsible for making a determination in relation to the imposition of a regulatory sanction. It will have a rotating membership of three Commissioners.
Commission Law	Financial Services Commission (Jersey) Law 1998, as amended.
consultation paper	JFSC Consultation Paper No. 4 2021.
Executive	One or more officers of the JFSC, including the Director General, acting individually or together, as appropriate, exercising responsibilities delegated to them by the Board.
Jersey Finance	Jersey Finance Limited.
JFSC	Jersey Financial Services Commission.
present DMP	The JFSC's Decision-Making Process policy statement issued 8 July 2019, as shown in Appendix B of the consultation paper.
proposed revised DMP	The JFSC's proposed revised Decision-Making Process policy statement, as shown in Appendix C of the consultation paper.
regulatory sanction	Has the same meaning as in the present DMP and the proposed revised DMP (for example: the issuing of a public statement; the imposition of a civil financial penalty; the issuing of a direction banning a person from holding certain positions in a business regulated by the JFSC, etc).
revised DMP	The finalised post-consultation version of the JFSC's Decision-Making Process as referred to in paragraphs Error! Reference source not found. and Error! Reference source not found. of this paper.
Subject	The business or individual who is the subject of any decision that may be taken in accordance with the present DMP or the revised DMP.

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1 Executive summary

1.1 Overview

- 1.1.1 On 12 July 2021, we issued a consultation, which sought views on proposals to revise the decision-making process that we follow when taking administrative action that could result in the imposition of a regulatory sanction.
- 1.1.2 The consultation reflected the output of an internal holistic review we undertook of our decision-making process. The aim of the review was to develop a revised process that would be more efficient for both us and for those businesses or individuals that become subject to it. It was equally as important, that it remained a process that adhered to the principles of fairness, in particular ensuring that the relevant business or individual would receive a full and fair hearing before the persons who would determine their case.
- 1.1.3 The purpose of this feedback is to provide comments on the responses received to the consultation.
- 1.1.4 In light of the feedback received, we will be implementing the proposed revised DMP in the form consulted on, subject to two minor clarificatory amendments (as set out in paragraphs 2.2.12 and 2.4.3).
- 1.1.5 That final version will be referred to as the revised DMP.

1.2 Feedback received

- 1.2.1 Respondents provided comments either directly to us or indirectly via Jersey Finance.
- 1.2.2 Jersey Finance provided us with comments it had received from:
 - 1.2.2.1 four trust company businesses;
 - 1.2.2.2 three banks;
 - 1.2.2.3 two investment businesses; and
 - 1.2.2.4 one law firm.
- 1.2.3 Eight other respondents provided comments to us directly. A full list of respondents is given in Appendix A.
- 1.2.4 Section 2 of this feedback presents a summary of the substantive comments received and our response.
- 1.2.5 We are grateful to respondents for taking the time to consider and comment on the proposals. Each respondent has been sent a copy of this feedback.

1.3 Next steps

- 1.3.1 We will shortly publish the revised DMP, which will be effective for Enforcement cases opened from the date of its publication.
- 1.3.2 At the same time, as indicated in the consultation, we will publish a discrete and updated policy statement on regulatory settlements.

2 Consultation feedback

2.1 Feedback received

- 2.1.1 This section summarises the substantive comments received in response to the consultation. Whilst not every comment received is individually listed, this section contains summaries of the most commonly made and pertinent comments received and, as appropriate, our response to those comments.
- 2.1.2 At the same time that we were consulting on revisions to our decision-making process, the Government of Jersey was consulting on revisions to the Commission Law. This would expand the scope of our civil financial penalties regime.¹ Some of the feedback received to our consultation included comments on certain aspects of the Government's consultation. In particular, these comments focused on the proposal to bring into the scope of the civil financial penalties regime Key Persons² and employees in a regulated business who carry out a "significant management function". Those comments (in anonymised form) were forwarded to the Government to assist it in developing its policy response.
- 2.1.3 The Government's response to those respondents' comments has been reflected in its 'Response Paper' published on 3 December 2021.³ Consequently, no reference to those comments is made in this feedback.
- 2.1.4 Our consultation asked only one question: "Do you have any issues or concerns with the proposed revised DMP?".
- 2.1.5 Three respondents indicated that they were fully supportive of the proposed revisions and had no issues or comments to raise.
- 2.1.6 The remaining respondents provided comments, or requested clarification, on various aspects of the proposed revised DMP. To facilitate the provision of coherent feedback on those comments they have been grouped into discrete topics and the remainder of this section is structured accordingly.

2.2 Replacement of the Review Committee system

Overview

- 2.2.1 The consultation proposed that the present Review Committee system (Stage Two of the present DMP) would be replaced with a less formal, and quicker, internal review process.
- 2.2.2 The consultation noted that the detail of that internal review process would be set out in internal procedures rather than in the proposed revised DMP. Presently, substantive parts of the internal process are included in the present DMP.

Respondents' comments

- 2.2.3 A number of respondents considered that the internal procedures for the new Stage 2 (Review of the case by the Executive) set out in the proposed revised DMP should be publicly available.

¹ See <https://www.gov.je/government/consultations/pages/jsfccivilpenalties.aspx>

² i.e. Compliance Officers, Money Laundering Compliance Officers and Money Laundering Reporting Officers.

³ See <https://www.gov.je/SiteCollectionDocuments/Industry%20and%20finance/ID%20Response%20JFSC%20Civil%20Penalties%20Consultation.pdf>

- 2.2.4 Some of those comments appeared to stem from a concern that the internal process at the new Stage 2 might not ensure that the Enforcement Division's case was subject to adequate independent scrutiny and challenge at Executive level before a decision is made on whether to refer a case to the Board DMP Committee for consideration under Stage 3 of the proposed revised DMP.
- 2.2.5 Some respondents raised a concern that the proposed new Stage 2 deprived a Subject of the opportunity to make adequate representations to the Executive, either on the case generally or on any draft directions/public statement etc., in advance of a decision by the Executive on whether to refer a case to the Board DMP Committee for consideration.

Our response

- 2.2.6 The consultation⁴ explained that the writing in to the present DMP of many internal processes often mistakenly leads a Subject to consider that they should make early and lengthy - but unnecessary - representations to the Executive during the decision-making process (for example, to the Review Committee) when, in practice, those representations should be reserved for making to the decision-maker – the Board (under the present DMP). In many cases, because the Subject will have engaged a lawyer to make those unnecessary early representations to the Executive, they will have incurred legal expenses at an unduly early stage.
- 2.2.7 That said, the revised DMP maintains the important step of providing the Subject with the opportunity to comment on the draft investigation report (in Stage 1) in order to clear up any misunderstandings or to correct factual inaccuracies. If it considers it helpful to its cause, the Subject can also provide additional supporting material to us at that time.
- 2.2.8 Some respondents were mistakenly of the view that for a fair process to exist it would be necessary for our internal review process at Stage 2 to be publically available. The key element for a fair process, as confirmed by the legal advice provided to us by a leading QC (see paragraph 1.2.8 of the consultation) is that the Subject will be made fully aware of the case against them and they can make representations to the decision-makers i.e. the Board DMP Committee. In that regard, at the conclusion of Stage 3 of the revised DMP the Subject will be notified of the case they have to answer and at Stage 4 the Subject will have the right to make comprehensive written and oral representations to the Board DMP Committee.
- 2.2.9 It is also important to see the proposed new Stage 2 for what it is – a triage stage where the Executive decides whether a contested case merits consideration by the decision-maker i.e. by the Board DMP Committee. Even if the Executive does refer a case to the Board DMP Committee it is not inevitable that the case will proceed further. The committee may decide that the case does not merit consideration of a regulatory sanction and instruct the Executive accordingly.
- 2.2.10 To improve efficiency the number of members of the Executive involved at the new Stage 2 will be slightly smaller than under the present Review Committee system. However, the process that will be followed will ensure that the Enforcement Division's case will be subject to scrutiny by senior members of the Executive and the Stage 2 decision as to whether a case should be referred to the Board DMP

⁴ Paragraph 4.3.1.3

Committee for consideration will be made by an officer of at least Executive Director grade who is independent of the Enforcement Division.

- 2.2.11 No draft directions/public statements etc., will be provided to the Subject at Stage 2 of the revised DMP given that the decision to do so will be the prerogative of the Board DMP Committee (at Stage 3) rather than the Executive. The Subject's opportunity to make representations about the content of those draft documents comes at Stage 4.
- 2.2.12 It became apparent from some respondents' comments that the position on the provision of draft proposed directions/public statements etc., at Stage 3 was not set out as clearly as it could have been in the text of the proposed revised DMP. To address that, paragraph 25 of the revised DMP now states that any Notice of Intent will be accompanied by a draft of the proposed directions/public statement, as appropriate (and will state the amount of any proposed civil financial penalty, if applicable.) The Notice of Intent will set out the reasons why the particular regulatory sanction is proposed. The Subject will also be made aware of the supporting material that is being relied upon by us, material which will be available for the Subject to scrutinise.

2.3 The Board DMP Committee

Overview

- 2.3.1 The consultation proposed that, instead of the full Board being the decision-maker in contested cases, a committee of three Commissioners – the Board DMP Committee – would be the decision-maker. Meetings of that committee would be arranged on an ad-hoc basis to ensure that cases would be heard as quickly as practicable.

Respondents' comments

- 2.3.2 Several respondents expressed reservations about only three Commissioners considering cases.
- 2.3.3 The reservations covered: concerns that decision-making would be concentrated in the hands of a smaller number of individuals; whether a committee of three would have an adequate spread of knowledge and experience (particularly in relation to the DNFBP⁵ sector); and, how decision-making would be kept consistent given that membership of the Board DMP Committee would change over time.
- 2.3.4 Some respondents also commented that it was essential for Commissioners, as the decision-makers, to have appropriate personal qualities, experience and knowledge – and to act independently of the Executive.

Our response

- 2.3.5 We can appreciate why the reservations and comments were expressed, but consider that there are a number of features in place to address them.
- 2.3.6 Firstly, the membership of the Board DMP Committee will rotate ensuring that all Commissioners have exposure to Enforcement cases over time.

⁵ Designated Non-Financial Business and Professions: in the Jersey context this principally covers lawyers, accountants and estate agents.

- 2.3.7 Secondly, all Commissioners will have access to precedent decisions and we have internal processes in place to ensure that a consistent approach to cases is taken.
- 2.3.8 Thirdly, should they consider it would be helpful, the Commissioners on the Board DMP Committee may access the knowledge and experience of other Commissioners on the Board (the members of which includes financial services practitioners, as well as lawyers and accountants) as well as any officer in the JFSC (including the Subject's supervisor). In addition, should the Board DMP Committee consider that external specialist technical advice would assist it in a particular case it may commission the same.
- 2.3.9 Fourthly, the recruitment process for Commissioners ensures that those appointed to the Board are persons with the necessary skills, experience and temperament to act fairly and independently of the Executive.

- 2.3.10 A small number of respondents considered a decision of the Board DMP Committee should be appealable to the full Board or to a separate group of Commissioners not involved in the original case.

Our response

- 2.3.11 Such an appeal mechanism is considered unnecessary given the existence of a statutory right of appeal to the Royal Court.
- 2.3.12 In addition, if such an appeal mechanism were to be put in place it may, in practice, result in Subjects routinely making such appeals. This would add additional time and cost to the decision-making process both for Subjects and us.

2.4 Other comments

- 2.4.1 A respondent asked how much time would be given to a Subject to make representations on a Notice of Intent issued at the end of the new Stage 3.
- 2.4.2 Another respondent thought that indicative timescales for each of the four stages should have been included in the proposed revised DMP.

Our response

- 2.4.3 A Subject will be given one month in which to make their written representations on a Notice of Intent. Paragraph 26 of the revised DMP now explicitly states that.
- 2.4.4 Although a Notice of Intent may relate to a regulatory sanction other than a civil financial penalty, the one month time period has been chosen for consistency with the time period that applies under Article 21C of the Commission Law to a notice for a proposed civil financial penalty.
- 2.4.5 On the second point, it is not possible to provide indicative timescales for each stage of the decision-making process given that each case is different and some are more complex than others. However, we are mindful of our obligation to act fairly and this includes progressing a case as expeditiously as possible.

- 2.4.6 Noting that the appendix to the proposed revised DMP sets out the principles that we would apply when deciding if a civil financial penalty should be imposed where

there had been a contravention of a Code of Practice that was “significant and material”, one respondent sought a definition of “significant and material”.

- 2.4.7 The same respondent thought it would be helpful if we issued guidance on how we would interpret the statutory provisions in Article 21A of the Commission Law that give us the power to impose a civil financial penalty on a principal person.

Our response

- 2.4.8 It is not practicable to provide a definition of “significant and material” given that whether a contravention meets that threshold will be case specific.
- 2.4.9 That said, in deciding whether a contravention is significant and material we will pay particular attention – on a risk-based approach – to the consequences or potential consequences of the contravention.
- 2.4.10 For precedent decisions, practitioners are advised to review the public statements that we issue when civil financial penalties are imposed.
- 2.4.11 On the respondent’s second point, Article 21A of the Commission Law provides that we may impose a civil financial penalty on a principal person where it is “... satisfied that the contravention [by the associated registered person] was committed with the consent or connivance of, or is attributable to neglect on the part of a principal person; or aided, abetted, counselled or procured by a principal person.”
- 2.4.12 That statutory provision is based on language used, on a longstanding basis, elsewhere in Jersey legislation (e.g. Article 41(3) and 41(6) of the Financial Services (Jersey) Law 1998). Consequently, how those provisions should be interpreted will be guided by case law.

- 2.4.13 A number of respondents suggested that a tribunal independent of the JFSC should be established. Most of those in favour of a tribunal saw it acting as an expert appellate body (in place of the present appeal to the Royal Court). A smaller number appeared to favour a tribunal actually making the first-instance decision on any regulatory sanction.

Our response

- 2.4.14 Any decision in relation to the establishment of a tribunal would be a matter for the Government of Jersey.
- 2.4.15 We note that in the Government’s Response Paper to its separate consultation on revisions to the Commission Law (see paragraphs 2.1.2 and 2.1.3 above) it indicates that it is unpersuaded by arguments put to it in favour of a change to some form of tribunal system.⁶

⁶ See paragraph 22 at <https://www.gov.je/SiteCollectionDocuments/Industry%20and%20finance/ID%20Response%20JFSC%20Civil%20Penalties%20Consultation.pdf>

- 2.4.16 A small number of respondents considered that the present route of appeal – to the Royal Court - against a decision by us to impose a regulatory sanction could be prohibitive, especially for smaller firms and individuals.

Our response

- 2.4.17 Whilst any change to the appeal provisions would be a matter for Government, we note that professional indemnity insurance would normally provide cover for expenses incurred in an appeal to the Royal Court.

- 2.4.18 One respondent was of the view that the drafting of paragraphs 22 and 24 of the proposed revised DMP assumed that a case would always proceed from Stage 2 to 3 and from Stage 3 to 4, respectively.

Our response

- 2.4.19 The respondent may have overlooked paragraph 13 of the proposed revised DMP that states, “It is important to note that where a firm or individual (the Subject) becomes subject to the decision-making process it is not inevitable that a regulatory sanction will be the resulting outcome. At any stage, the decision-making process will be terminated if it is determined that no further action is required, or that the matter should be addressed through normal or heightened supervision, or the JFSC and the Subject have agreed a course of action.”

- 2.4.20 One respondent, noting that in paragraph 4 of the proposed revised DMP, that we indicate there might be occasions when it is necessary to vary the published decision-making process, commented that any variation should be notified to the Subject to give them an opportunity to propose amendments.

Our response

- 2.4.21 Paragraph 4 of the proposed revised DMP reflects the reality that it is impossible for any published decision-making process to anticipate all circumstances.
- 2.4.22 Should we consider it necessary to materially vary or supplement the published process, we will notify the Subject who will be at liberty to provide its comments, which we will give due consideration to.
- 2.4.23 In practice, we do not expect that we would often need to vary or supplement the published process but, should we need to do so, the principles of natural justice will require us to ensure that the variation does not prejudice the Subject.

- 2.4.24 Although not directly related to this consultation, some respondents raised an issue on outsourcing which may be helpful for us to comment on at this time.

- 2.4.25 The issue raised was whether, given the resource pressures on compliance functions, we would consider permitting outsourcing in some form (one suggestion was to allow outsourcing to specialist corporate compliance providers).

Our response

- 2.4.26 We are sensitive to the pressures on compliance resources and are engaging with various representative bodies as well as employer groups to discuss potential ways to develop solutions that will help alleviate those pressures on a short and longer-term basis. Work to develop solutions did not form part of this consultation, but will feature in our 2022 programme of work.
- 2.4.27 A significant number of businesses already engage the services of compliance, legal and consultancy firms to support their in-house compliance functions. However, there is a clear line between outsourcing certain activities and outsourcing responsibility for compliance, which must sit with principal persons, key persons, and senior managers.

Appendix A – List of respondents to the consultation

Name of respondent	Type of business
BNP Paribas	Banking, fund services business, investment business, money service business, trust company business
Concentric Financial Services Limited	Investment business
Ernst & Young LLP	Accountancy / audit
Jersey Bankers' Association	Represents banks
Jersey Finance	The responses consisted of comments that Jersey Finance had received from: four trust company businesses; three banks; two investment businesses; one law firm.
PwC CI LLP	Accountancy / audit
The Royal Bank of Scotland International Limited	Banking, fund services business, general insurance mediation business, investment business, money service business
The Law Society of Jersey	Represents law firms
Viberts	Law firm