

Snapshot: the GFSC's decision-making process and challenging GFSC decisions

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If a licensee or individual finds itself the subject of Guernsey Financial Services Commission (GFSC) action, it is important to understand the GFSC's decision-making process. This will help your business to identify and make best use of the opportunities to put your case to the GFSC, potentially influencing what (if any) action it takes.

This briefing considers the GFSC decision-making process and the key questions concerning challenges to GFSC decisions.

Where can I find the GFSC's decision-making process?

In September 2022 the GFSC issued its updated policy statement entitled "*Decision-Making Process*" (DMP) [1] that sets out the decision-making process (Process) the GFSC will follow when it takes administrative actions that could result in the imposition of a 'regulatory sanction' under the Regulatory Laws[2].

To what decisions does the Process apply?

These are listed in Part A of the DMP, and broadly comprise decisions that can result in 'regulatory enforcement action' (e.g. objecting to a principle person's continued appointment or imposing a civil penalty) but not urgent or supervisory decisions.

Decisions will be taken by the "Commissioners' Decisions Committee" (CDC), which typically comprises not less than three Commissioners.

Is a sanction inevitable once the GFSC commences its Process?

No. As the GFSC makes clear in the DMP, "[a]t 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 enhanced supervision".

What is the GFSC's Process?

As the DMP notes, "the [GFSC] is not a judicial body. However it does undertake quasi-judicial functions. So, whilst the [GFSC] is not bound to follow fixed rules of procedure in reaching decisions, it must follow principles of natural justice and fairness". However, the GFSC is ultimately subject to judicial oversight through the appeal rights discussed below.

In overview, the Process has been divided into several key stages:

Initial review by Enforcement Division: The Enforcement division will typically open an investigation, of which the subject will be notified. It will gather the information it requires and at an appropriate stage will produce a draft report setting out the recommended sanctions.

Consideration of the case by the Case Review Panel (CRP): The CRP will review the case and consider the recommended sanctions to decide whether further investigation is required and how the matter should be dealt with from this stage.

Provision of case material and draft report: The Enforcement division will then disclose the draft report and case material to the Subject. Once the Subject has considered all the material and provided a response, the Enforcement division will then produce the "Final Enforcement Report" to the Commission, upon which they will rely to decide whether the matter should proceed to a decision-maker.

Appointment of a decision-maker: The Commission Secretary will appointed the decision-maker and notify the Subject of such appointment.

Consideration by the decision-maker: The decision-maker will consider the Enforcement Report and documents presented to him/her to decide whether further information is required or to move on to the next stage.

Representation: Once the decision-maker has issued a "minded to" notice, the licensee or individual will generally be given 28 days to make written and/or oral representations.

Where oral submissions are made, the licensee or individual may be accompanied by their legal advisers (who may speak on their behalf). The decision-maker may ask questions.

Deliberation by the decision-maker: The decision-maker, through the Committee Secretary, will give the subject written notice of its decision. If the decision is to impose a regulatory sanction, the subject will receive the formal notice required by statute that includes the reasons for that decision.

At what stage in the Process can I put my case across?

The GFSC's Process builds in a number of opportunities for the subject to communicate their position before the GFSC takes its decision: during the course of the investigation or information-gathering stage (e.g. during interview); when reviewing any draft investigation report; and by written and oral submissions to the Committee.

It is important that subjects make best use of each of these opportunities to present their case, to ensure that the GFSC properly understands the matter before reaching its final view.

Will the GFSC engage in settlement discussions and what is involved?

In its explanatory note on "*the Investigation and Decision-Making Process Relating to the Use of Enforcement Powers*" [3], the GFSC confirmed that it is willing to explore settlement of regulatory investigations (in effect where a disciplinary sanction is possible). However, the GFSC will only explore settlement once it has a sufficient understanding of the nature and gravity of the suspected misconduct.

The settlement process provides a valuable opportunity to try and negotiate the wording of public statements and to secure a potential maximum 30% discount on any discretionary financial penalty (the level of discount depends on the stage at which the matter settles).

If the GFSC is willing to engage in settlement discussions, it will invite the subject to a without prejudice

meeting. The subject's attendees must have authority to settle the matter at that meeting. If settlement is not achieved, the Process resumes.

Can I appeal a GFSC decision?

The Regulatory Laws provide that the subject of a notice issued at the end of stage 4 may appeal that decision to the Royal Court of Guernsey (**Court**) within 28 days following the notice of the Commission's decision. From this point, the Court's rules in the *Royal Court Civil Rules 2007 (RCCR)* will apply and must be complied with strictly.

The subject will need to demonstrate that (broadly speaking) the GFSC's decision was unreasonable, and if unsuccessful they face the risk that the Court orders them to contribute towards the GFSC's costs.

[1] <https://www.gfsc.gg/commission/enforcement/decision-making-process#:~:text=The%20Decision%2DMaking%20Process%20is,Process%20document%20dated%20January%202021>

[2] These include the Banking Supervision (Bailiwick of Guernsey) Law, 2020, , the Insurance Business (Bailiwick of Guernsey) Law, 2002, and the Financial Services Commission (Bailiwick of Guernsey) Law, 1987. The civil penalty power is contained in the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020.

[3] [Explanatory Note on the Investigation and Decision-Making Process Relating to the Use of Enforcement Powers; November 2021.pdf \(gfsc.gg\)](#) Section 9 (Settlement)

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