

Reference Document

GFSC Decision Making Committee ("DMC")

ABOUT THE DMC

The Decision Making Committee (“DMC”) is established by Section 24 of the Financial Services Act 2019 (“the Act”) as a statutory committee of the GFSC.

The DMC has been established in order to enhance the delivery of fair and proportionate regulation of financial services by the making of key decisions by experienced people who are completely independent of the management and staff of the GFSC who are responsible for supervision and investigation of regulatory breaches and threats to the GFSC’s statutory objectives. The DMC is therefore separate from the GFSC’s executive management structure and staff.

The functions of the DMC (see below “Functions of the DMC” for more detail) are to exercise, on behalf of the GFSC, the GFSC’s powers in respect of specified regulatory decisions, which (except in very limited circumstances set out in the Act) may only be taken by the GFSC acting by the DMC. These “specified regulatory decisions” are set out in section 24 of the Act, and includes all regulatory enforcement decisions as from the moment that the GFSC issues a warning notice in cases where the regulated firm or individual have not accepted the position as set out in the warning notice in writing.

How the DMC is appointed

The Act provides for there to be up to six members of the DMC and for them to be appointed by the Minister with responsibility for financial services after consulting the GFSC. One of the members is to be appointed Chairman. Three members must be lawyers of at least 10 years standing as Gibraltar lawyers. Three must have significant experience in one or more of the financial services sectors regulated by the GFSC.

The length of the term for which a member is appointed and the other terms of his or her appointment is as may be decided by the Minister.

The composition of the DMC

On 15th January 2020, the Minister with responsibility for financial Services appointed the following persons to be members of the DMC (all of whom were re-appointed by the Minister in January 2023):

The Hon. Sir Peter Caruana KCMG, KC (Chairman)

Mr. Joseph Caruana

The Hon. Neil Costa LLB

Mr. Nigel Feetham KC

Mrs Emma Perez

Mr Edgar Lavarello

Secretary to the DMC

Under the Act, the DMC must appoint a suitable person (in the opinion of the DMC Chairman) to be its secretary. The DMC has appointed Mr Julian Warwick, an employee of the GFSC, to be its secretary. The DMC Secretary will act, under the direction of the panel chair, as the liaison point between the DMC and (i) the relevant GFSC Team and (ii) the regulated firm or individual concerned and their legal representative.

Functions of the DMC

The function of the DMC is to exercise, on behalf of the GFSC, the GFSC's powers in respect of 'specified regulatory decisions'. Examples of 'specified regulatory decisions' most relevant to Enforcement include:

- a decision to impose a requirement on a regulated firm
- 'urgent' decision notices for directions to vary or suspend a regulated activity or vary the description of a regulated activity without having been preceded by a warning notice
- a decision to cancel a firm's permission
- decision notices linked to sanctioning powers where the recipient has not agreed to the action proposed in a warning notice in writing such as the imposition of administrative penalties; public statements; cease and desist orders; temporary suspensions orders; prohibition orders
- a decision to publish information about a sanctioning action or to apply to Court for permission to publish a decision which is, or may be, subject to an appeal
- a decision to publish an inspector's report
- a decision to require a person to pay an inspection costs contribution.

The list above is not exhaustive. The full definition of 'specified regulatory decisions' can be found at Section 24(3) of the Act, as supplemented in the Financial Services (Specified Decisions) Regulations 2020.

HOW the DMC OPERATES

Issue of Warning Notice by the GFSC

As already stated, the DMC assumes its competence to make specified regulatory decisions as from the time of issue by the GFSC of a Warning Notice to a regulated firm or individual if they do not agree in writing to its contents. A Warning Notice must be in writing and must:

- state the action which the GFSC proposes to take
- give the reasons why the GFSC is proposing to take that action
- contain any information that the provision under which it is given requires to be included in a warning notice

- subject to section 612(4) of the Act,
 - disclose the evidence on which the GFSC’s decision to give the warning notice was based
 - disclose all evidence presented or to be presented to the DMC for the purposes of enabling it to make a decision.
- State the period, being not less than 28 days in which the regulated firm or individual may make representations to the DMC and the period, of not less than 14 days in which the regulated firm or individual may decide whether to make oral representations.

Selection of a Panel

The Act also provides that in certain circumstances of urgency (which are carefully defined in the Act) the GFSC may dispense with the issue of a warning notice.

When the GFSC has issued a warning notice (unless the regulated firm or person accepts the position as set out by the GFSC in the warning notice) it will send a copy thereof to the DMC, and, whether a warning notice has been issued or dispensed with, will send to the DMC all facts, allegations, evidence and other relevant papers to the Chairman of the DMC.

In either of these cases, the Chairman of the DMC will then appoint a panel of three members of the DMC (of which at least one must be a legally qualified member) to make the decision . In doing so, the Chairman will have regard to the provisions relating to disclosure and conflicts of interests set out in the Act (Schedule 6 paragraph 4(7) and Schedule 4 paragraph (2)), and also in the DMC’s own conflict of interests (as to which see “Conflict of Interests’ below).

Decisions

A decision of the DMC may be made by a majority vote of those present and, in the event of an equality of votes, the member presiding at the meeting (“the chairman of the panel”) has a second and casting vote.

Urgent Decisions

The Act provides that the Chairman of the DMC may make a specified regulatory decision, acting alone, in the case where he is satisfied that it is necessary for the protection of the interests of investors or customers or is otherwise in the public interest that the steps proposed by the GFSC be taken before it is practicable to convene a meeting of the DMC.

DMC – Decision making process & procedure

Procedural powers of the DMC

Under the Act, the DMC has power to:

- (a) Direct any person to provide evidence in writing with respect to any matter it considers to be relevant to the specified regulatory decision before it;
- (b) Direct any person to attend at a specified time and place and answer questions appearing to the DMC to be relevant to the specified regulatory decision before it; and

- (c) Direct any person to produce a specified document, or documents of a specified kind.

The DMC may also do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any function conferred on the DMC by or under the Act.

The DMC regulates its own procedure

The DMC also has power, subject to the provisions of paragraph 4 of Schedule 6 of the Act, to determine its own procedures. Accordingly, the DMC may upon application of the GFSC or the regulated firm or individual to whom the warning notice is addressed, or upon its own motion, extend the periods of time specified in the warning notice for the regulated firm or individual to make representations or to decide whether to make oral representations.

Subject to the DMC's right to change its procedure generally (of which it will give prior notice on the GFSC's website) and to depart from the published procedure when the Chairman or other member presiding in his absence over a particular case or matter considers it expedient to do so for good reason in a particular case, the DMC will operate under the following procedure:

1. The Secretary will circulate all relevant papers to members of the DMC who constitute the panel for the decision making in that case or matter ("the Panel"). The DMC will ensure that the regulated firm or individual to whom the warning notice has been issued has the same information and documents as are made available to the DMC.
2. After the GFSC has given a warning notice and the case has been passed to the DMC for decision-making, the DMC Panel will not, prior to issuing its Decision Notice in the case, discuss the matter with GFSC staff without the regulated firm or person to whom the warning notice was issued having the opportunity of being present in person or by their legal representative.
3. The GFSC may, in writing addressed to the chair of the panel, at any time provide additional or updated information, analysis or clarification to the DMC and/or may make representations about its position in relation to any matter before the DMC for decision, or relevant to any such matter, and the chair of the panel will ensure that the Secretary expeditiously on a timely basis provides a copy thereof to the regulated firm or person.
4. The regulated firm or person may, in writing addressed to the chair of the panel, at any time provide additional or updated information, analysis or clarification to the DMC and/or may make representations about its or his/her position in relation to any matter before the DMC for decision, or relevant to any such matter, and the chair of the panel will ensure that the Secretary expeditiously on a timely basis provides a copy thereof to the relevant GFSC Team.
5. The chair of the panel may at any time request the relevant GFSC Team or the regulated firm or person to provide additional or updated information, analysis or clarification to the DMC and/or may make representations about its or his/her position in relation to any matter before the DMC for decision, or relevant to any such matter, and the chair of the panel will ensure that the Secretary

expeditiously on a timely basis provides a copy of any response received to the to the relevant GFSC Team or the regulated firm or person (as the case may be) who was not the requested party.

6. The chair of the panel may at any time direct that no further additional or updated information, analysis, representation or clarification may be provided to the DMC.
7. The Panel members will, as and when required by them, meet or confer between themselves by telephone or otherwise electronically to:
 - 7.1 Decide whether to extend the periods of time specified in the warning notice for the regulated firm or individual to make representations or to decide whether to make oral representations.
 - 7.2 Fix the date and time for the receipt of representations or the taking of oral representations (as the case may be).
 - 7.3 Decide whether, and if so, how to exercise any of their procedural powers in (a), (b) and/or (c) above.
 - 7.4 Deliberate about the case.
8. All communications between the members of the Panel are confidential and will not be made available or reported on to the person to whom the warning notice was issued or to the GFSC.
9. Oral representations
 - 9.1 All oral representations will, unless the Chairman directs otherwise, be conducted in the offices of the GFSC.
 - 9.2 Oral representations may be made by a director or employee of the regulated firm, or by the regulated individual, or by their legal representative. With the permission of the chairman of the panel, these persons may sequentially or intermittently make the oral representations.
 - 9.3 Oral representations will be limited to two hours, unless the regulated firm or individual making the representations considers that two hours is insufficient time, in which case, application may be made to the chairman of the panel, at least 3 working days before the date of the making of the representations, for the length of time to be extended stating (i) how much time the maker of the representations seeks and (ii) the reasons why two hours is insufficient time. The chairman of the panel may extend the time as he or she thinks fit. In making such decision the guiding principle will be that a party should be given a reasonable opportunity to put their case orally having regard to the extent to which it has already been put in writing and may benefit from oral clarification.
 - 9.4 Unless the chair of the panel directs otherwise, members of the relevant GFSC Team may be present during oral representations by the regulated firm or individual. If the DMC considers it relevant to its consideration, it may ask GFSC staff to explain or provide any or all of the following:
 - (1) Additional information about the matter (which GFSC staff may seek by further investigation);or

- (2) Further explanation of any aspect of the GFSC's staff recommendation or accompanying papers; or
- (3) Information about GFSC's priorities and policies (including as to the GFSC staff's view on the law or on the correct legal interpretation of provisions of the Act); or
- (4) Such other relevant matter as the chair of the panel may consider appropriate,

Provided that the regulated firm or person shall have the opportunity to respond to any statements made by the GFSC under this paragraph.

9.5 Members of the panel may ask questions to any person that makes representations.

9.6 Oral representations, questions asked and answers given will be recorded and a transcript thereof will be provided to the regulated firm or individual as soon as it becomes available.

10. Oral evidence

The chairman of the panel may direct any person to attend at a specified time and place and answer questions ("an oral evidence session") appearing to the DMC to be relevant to the specified regulatory decision before it, in which case:

- 10.1 the oral evidence will be recorded and a transcript thereof will be provided to the regulated firm or individual as soon as it becomes available.
- 10.2 The Panel members may ask questions to that person.
- 10.3 Questions may not be put by or on behalf of the regulated firm or person.
- 10.4 The regulated firm or person and their legal representative may be present throughout the oral evidence session.
- 10.5 At least three full working days before the oral evidence session, the regulated firm or person may suggest to the DMC issues or questions which it/he or she would like the Panel to put to the person answering questions. The Panel may but shall not be obliged to do so.

11. Further Representations etc.

If the DMC -

- (a) directs any person to provide evidence in writing with respect to any matter it considers to be relevant to the specified regulatory decision before it;
- (b) directs any person to attend at a specified time and place and answer questions appearing to the DMC to be relevant to the specified regulatory decision before it; or
- (c) directs any person to produce a specified document, or documents of a specified kind:

11.1 In the case of (a) and (c), will provide the written evidence or documents provided to the regulated firm or person;

11.2 If written evidence or documents are provided to the regulated firm or person after (or less than 7 days before) oral or written representations have been made by the regulated firm or person, the latter will be offered a further opportunity to make further written or oral representations (in the time to be decided by the chairman of the panel) in relation to that written evidence and/or those documents; and

11.3 In the case of (b) the regulated firm or person will be offered a further opportunity to make further written or oral representations (in the time to be decided by the chairman of the panel) in relation to subject-matter of the questions posed and answers given in the oral evidence session.

12. The Panel may (but shall not be obliged to):

12.1 At any time, invite the regulated firm or person to answer questions or make further representations on any matter.

12.2 If the Panel is minded to impose a sanction, invite the regulated firm or person and the GFSC to comment on the possible or intended sanctions and:

- (a) in the case of the regulated firm or person, their impact on the regulated firm or person; and
- (b) in the case of GFSC their impact on the GFSC's regulatory objectives.

13. Communications by and to the DMC

13.1 Unless directed otherwise by the chair of the panel in a specific instance, all communications with the DMC in relation to proceedings before it shall be in writing addressed to the chair of the panel, but sent to chair c/o the Secretary, DMC, at the offices or to the Secretary's email address.

13.2 The GFSC and the regulated firm or person may continue to communicate in writing directly between each other in relation to any matter, including the matters before the DMC for decision, but any such communication shall be copied to the DMC panel chair expeditiously and on a timely basis, and shall not be deemed to be information relevant to the DMC's decision until it is so provided to the DMC.

14. Discontinuance of proceedings

14.1 Any proceedings before the DMC may be discontinued at any time in one of the following ways:

- (i) Unilaterally by the GFSC, in writing addressed to the regulated firm or person ("discontinuance notice"); or
- (ii) In consequence of a written agreement between the GDSC and the regulated firm or person ("settlement agreement").

14.2 A proceeding before the DMC shall not stand discontinued until the chair of the panel has received a copy of the discontinuance notice or the settlement agreement (as the case may be).

Decision Notice by the DMC

After considering all documents and information placed before and all representations made to it, the DMC must, as required by the Act, make a decision within a reasonable period of time.

The DMC may issue:

- (a) a decision notice stating that the GFSC will take the action proposed;
- (b) a discontinuance notice stating that the GFSC will not take the action proposed; or
- (c) a notice comprising a combination of:
 - (i) a decision notice stating that the GFSC will take certain proposed action; and
 - (ii) a discontinuance notice in respect of the remaining proposed action.

A decision notice or discontinuance notice will be in writing and will set out:

- (a) any information that the provision under which it is given requires to be included in such a notice;
- (b) the proposed action and the reasons for taking or not taking it, as the case may be; and
- (c) information of any right of appeal under section 615 of the Act.

PUBLICATION OF DECISIONS BY DMC

The DMC may decide to publish (without undue delay after the person has been informed of the decision) in the GFSC's website only the details listed in section 616 of a decision imposing any sanction i.e. the identity of the person concerned, the type and nature of the contravention and the details of the sanctioning action taken.

APPEALS FROM DECISIONS OF THE GFSC MADE BY THE DMC

All decisions of the GFSC made by the DMC (except those listed in section 613(4)) can be appealed under section 615 of the Act to the Supreme Court. An appeal must be made within 28 days of the date on which the decision notice is served on the recipient by the GFSC. The court may extend this time-limit if it considers that it would be unjust not to do so.

On the appeal, the court may (i) dismiss the appeal (ii) allow it and quash the GFSC's decision or (iii) remit the matter back to the GFSC for further consideration, in accordance with any directions of the court.

An appeal does not have the effect of staying a decision which under the Act takes effect immediately, but the court may in its discretion grant a stay of the decision or other relief until the appeal has been determined.

CONFLICTS OF INTERESTS

Purpose & Statutory provisions

1. This policy sets out the DMC's approach to the disclosure and management of conflicts of interests by DMC members that may arise in respect of matters before the DMC. The DMC's approach accords with the relevant provisions of the Act. The owner of this policy is the Chairman of the DMC. Changes to the policy are to be determined by the DMC, on the recommendation of the Chairman.

2. Schedule 6 (para 4(7)) applies the provisions of Schedule 4 (para 2) of the Act, relating to conflicts of interest, to the DMC (with any necessary modifications). As relevant to the DMC, para 2 of Schedule 4 requires members of the DMC –

(i) to declare any pecuniary, personal or other interest in any matter before the DMC; and

(ii) not to participate in the DMC's consideration of any such matter.

3. Paragraph 2(3) of Schedule 4 provides as follows:

“For the purposes of this paragraph a person does not have a pecuniary, personal or other interest in a matter only by virtue of practising a profession in Gibraltar or having a position or ownership interest in an entity that may be affected by the matter, but only in the sense that the matter is or will be of application or interest to the person or entity in the same way as all other persons or entities which are or will be similarly affected or interested.”

Accordingly, and as already stated above, it is not actual or perceived bias for a DMC member to be an employee, member of management or director of a firm that operates in the same sector as the firm or person who is the subject of a matter before the DMC for consideration and decision.

Principles

4. This policy is based on the following principles. Subject as stated above, DMC members must ensure that they perform all aspects of their work impartially, by:

(i) avoiding any situation where actions they take or decisions they make in their role as a member of the DMC could be seen to influence or be influenced by their private interests (e.g. company directorships, shareholdings, partnerships, professional interests and/or financial rewards);

(ii) avoiding situations that could impair objectivity or lead a fair-minded lay observer to reasonably apprehend that the member might not bring an open mind to resolution of a matter (i.e. the perception of bias is as important as actual bias);

(iii) ensuring they are free from any obligation to another party (such as a professional or other duty to them);

- (iv) complying with their duties to act with honesty and integrity, and in good faith;
- (v) applying principles of fairness in all their dealings as a member of the DMC; and
- (vi) applying these principles in determining a matter, or considering whether they may be disqualified from considering a matter before the DMC.

Procedure

5. When a matter is referred to the DMC for decision, the Chairman of the DMC shall, through the DMC Secretary, cause the GFSC to identify which (if any) members of the DMC may be conflicted by virtue of a relevant professional relationship with the person to whom the Warning Notice relates.

6. Bearing in mind the information provided to him by the GFSC under para 7 above, the Chairman of the DMC shall appoint a panel to consider each case, and before doing so shall require each member that he invites onto the panel to disclose to him any relevant conflict of interests as aforesaid. Disclosure of any relevant interest must be made in sufficient detail such that the Chairman of the DMC can determine whether the member may act on a particular matter.

7. The Chairman shall not appoint to a panel any member that has a conflict of interests in respect of the person or matter to which the Warning Notice relates. But the decision of the Chairman of the DMC in this respect shall be final.

Sir Peter Caruana KCMG KC

Chairman

GFSC Decision Making Committee