



**Response to a Question Pursuant to Rule 14
of The Rules of Procedure of the States of Deliberation and their Committees**

Subject: Guernsey Financial Services Commission

States' Member: Deputy Laurie Queripel

Date received: 22nd September 2020

Date acknowledged: 22nd September 2020

Date of reply: 2nd October 2020

Thank you for the opportunity to respond to your questions. I kept to the numbering set out in your letter for ease of reference.

Question 1.

A 2003 IMF report stated that the GFSC had to comply with Guernsey Human Rights Laws and the European Convention on Human Rights. The conclusion was that Guernsey should establish a Financial Services Tribunal to provide for a fair and public hearing within a reasonable time frame by an independent and impartial tribunal established by Law. Guernsey has not legislated to establish a Financial Services Tribunal but the GFSC operated a Shadow Tribunal until around about 2009 and so was in accord with the IMF Report until that time. The States of Deliberation has passed several pieces of legislation setting up tribunals, for example the Housing or Income Tax Tribunals. Could you please advise why legislation has not been forthcoming to establish a Financial Services Tribunal to provide an independent and impartial tribunal for licensees or individuals who do not agree with the decisions of the GFSC?

Response to Question 1

The proposal for a Financial Services Tribunal pre-dates the establishment of the Guernsey Financial Services Commission's panel of senior decision-makers ("**SDMs**"). The SDMs are QC's and other senior lawyers highly experienced in administrative, regulatory and human rights law. The Guernsey Financial Services Commission (the "**Commission**") complies with all international standards in relation to providing a fair process of decision-making, including a full right of appeal for individuals and licensees against decisions of the SDMs. To establish a further tribunal would appear to offer no clear, or additional, benefit for individuals and licensees choosing to appeal against decisions of the Commission, and would add additional financial burden to the taxpayer and/or the industry.

Question 2

Why is it thought the GFSC are unique in no longer requiring their actions to be reviewed by a truly independent panel following the closure of the Shadow Tribunal?

Response to Question 2

It is not clear from the question who thinks that the Commission is unique in the respect set out in the question. The model which the Commission operates provides for decisions to be made by a panel of SDMs and then – if an appellant chooses – these decisions can be appealed to the Royal Court.

Question 3

Following the dissolution of the Shadow Tribunal the GFSC relied upon the Commissioners Decisions Committee to decide any sanctions/penalties imposed upon licensees or relevant officers. If sanctioning decisions have been taken by either the CDC, or in more recent times the Senior Decision Makers (SDM), all of whom are either Commissioners or officers of the GFSC, does this mean that the Commission has acted, in effect, as judge and jury in its own cause, thus possibly breaching Article 6 of the Convention?

Response to Question 3

No, it does not. In recent years, the Royal Court has twice been called upon to answer the very question you raise. I refer you to the most recent decision, that of the former Bailiff in *Chick v GFSC* [2020] GRC035 (the “**Judgment**”). A copy of the Judgment can be found on the Guernsey Legal Resources website at: <http://www.guernseylegalresources.gg/article/176140/2020>. Although the Judgment relates to a specific appeal it does address, and answer, the points raised in your correspondence. Specifically, the Judgment confirms that the process currently adopted by the Commission is fully compliant with an individual’s Article 6 rights, thereby affirming the Royal Court decision made in the 2018 case of *Y. v. GFSC*.

Question 4

The Convention definition of an independent tribunal means the tribunal must be independent of the executive (the GFSC in this instance). Are the current arrangements truly believed to be compliant with this definition?

Response to Question 4

As noted above, the Royal Court has recently confirmed that the SDM process is fully compliant with an individual’s Article 6 rights.

Question 5

The SDM panel was established during the course of 2014 and started to review cases referred by the Enforcement Division. Unlike the three member CDC the appointed SDM sat alone to consider the matter referred to him or her. Does the review by a SDM, sitting alone, comply with section 19 (5) of the Financial Services Law which required any sanctioning decisions to be taken by the three member CDC?

Response to Question 5

Section 19(1) of the Financial Services Commission Law, 1987 (the “**FSC Law**”) enables the Commission to delegate a wide range of statutory functions to any of its members (Commissioners) or officers (such as the SDMs). These Commissioners or officers may be delegated to in their individual capacity. There are, however, some decisions of the Commission that cannot be delegated to SDM’s, and may instead be made by a committee of at least three Commissioners (s.

19(5)). The decisions that are referred to SDMs are only those that may lawfully be delegated to them under s. 19(1).

Question 6

In August 2015 a Policy Letter was submitted for debate by the Policy & Resources Committee. That Policy Letter contained the following text, However, there are certain matters that cannot be delegated to Senior Decision Makers because the FSC Law reserves them exclusively to Commissioners. Amendments should, therefore, be made to the FSC Law to enable the Commissioners to delegate to the Senior Decision Makers the GFSCs powers to make a decision to cancel, revoke, suspend or withdraw any permission and to carry any representations made in relation to such a proposed decision. Could you please explain why the GFSC has, since 2014, been allowed to continue referring enforcement matters to SDMs for review and the imposition of sanctions and financial penalties when the States were of the opinion that SDMs could not receive the sanctioning powers reserved exclusively to the Commissioners?

Response to Question 6

Section 19(1)(c) of the FSC Law states that the Commission cannot delegate to an SDM power to cancel, revoke, suspend or withdraw a licence, consent, registration, permission or authorisation. These cases are instead considered by Commission Decision Committees pursuant to s. 19(5) of the FSC Law. Decisions of the SDMs are limited to those matters which may lawfully be delegated to them under s. 19(1) of the FSC Law, such as whether or not to impose financial penalties and/or prohibitions, and/or issue public statements.

Question 7

As the referral of cases to SDMs has continued despite the States resolution of 30 October 2015, can you please confirm which sections(s) of the FSC Law enable SDMs to issue sanctions and financial penalties against licensees?

Response to Question 7

The delegation to the SDMs is made quite lawfully pursuant to s. 19(1) of the FSC Law. The powers to impose sanctions such as financial penalties, prohibitions and public statements are not included in the list of functions in s. 19(1) (c) of the FSC Law that cannot be delegated.

Question 7

If the SDMs were not authorised to impose sanctions and financial penalties, were the decisions of SDMs in this respect null and void, if not why not?

Response to Question 7(sic.) As noted above, the SDMs are authorised to make all but a very limited number of sanctions decisions. No SDM has ever purported to make a decision that is in the list of functions that cannot be delegated.

Question 8

The version of a Guidance Note issued on 14 November 2019 contains the following caveat, Delegation of these powers to a SDM is currently prohibited by section 19 of the Financial Services Commission Law 1987. In light of this could you please explain how it was possible for the GFSC to continue to operate what appears to be an invalid sanctioning regime since 2014?

Response to Question 8

The extract that you quote from para 1.5 of the *Guidance Note* refers to the powers to cancel, revoke, suspend or withdraw a licence, consent, registration, permission or authorisation or to make an application for the winding-up of a body corporate. These are the powers included in the list of functions in s. 19(1) of the FSC Law which cannot be delegated. All other enforcement powers can legally be delegated to a SDM.

Question 9

In relation to the proposed introduction of the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law 2020. Could you please confirm that legal advice has provided assurance that every element of the Law is compliant with the Human Rights (Bailiwick of Guernsey) Law 2000, bearing in mind the original IMF Report stated that the GFSC could not be judge and jury in its own cause and Article 6 of the Convention provides everyone with the right to a fair and public hearing within a reasonable time frame by an independent and impartial tribunal established by Law?

Response to Question 9

I refer you to the Judgment, which addresses, and answers, these points.

Question 10

Does the new legislation provide the Guernsey Human Rights Law and Convention protections referred to in question 9 and does any legal advice received confirm this?

Response to Question 10

I refer you to the Judgment, which addresses, and answers, these points.

Deputy Lyndon Trott

Policy

&

Resources

Committee

