

## **Financial Markets Tribunal Rules of Procedure**

### **Explanatory memorandum of the President, Tim Herrington, regarding amendments made on 2 May 2024**

#### **Introduction**

1. Following my appointment as President of the Financial Markets Tribunal on 1 October 2023, I have undertaken a review of the Tribunal's rules of procedure. The purpose of the review was to identify any changes that were desirable or necessary in the light of the operation of the rules in practice since the last review was undertaken in May 2022.
2. In addition, the opportunity has been taken to carry out a benchmarking exercise against equivalent rules in other jurisdictions which have a similar legal and procedural structure to the DIFC as regards the review of decisions of financial services regulators. The purpose of the benchmarking exercise was to determine whether there were matters not currently covered by the rules of this Tribunal, but which might usefully be reflected in the rules.
3. In this regard, I have concluded a process started by my predecessor, His Honour David Mackie, who received helpful comments from a number of legal practitioners with experience of representing parties before the Tribunal. I have taken those comments into account, as well as points made by the Executive of the DFSA.
4. The decision as to what the rules should say is a matter reserved for the Tribunal itself, as provided by Article 27(6) of the Regulatory Law 2004. The Tribunal has made amendments to the existing rules following the conclusion of the review and those amendments came into force on 2 May 2024.
5. The amended rules are to be found on the DFSA's website alongside this memorandum and will apply to all proceedings in the Tribunal commenced after the date the amended rules came into force. There were no cases pending in the Tribunal at that time and accordingly no transitional provisions have been necessary.
6. This memorandum explains the principal changes that have been made to the rules and the purpose behind them.

#### **Role of the Registrar**

7. The rules previously contemplated the appointment of an individual to perform the role of a Registrar in dealing with administrative matters relating to proceedings in the Tribunal, under the supervision of the President. The post of Registrar is currently vacant and in view of the relatively small number of cases that are routinely brought to the Tribunal it is considered that the appointment of a Registrar is not at present necessary. Accordingly, references to the Registrar have been removed and replaced with references to the Tribunal's Secretariat, which will consist of such individuals who are allocated to support the President and the relevant Hearing Panel from time to time.

## **Scope of the Chairman's role**

8. Rule 11 provides that on commencement of proceedings before the Tribunal the President shall select a hearing panel of not less than three members, one of whom may be (and usually is) the President.

9. The amended rules give more scope for the Chairman alone to issue interim orders and make procedural directions without the need to involve a full Hearing Panel. This is reflected in amendments to Rule 13 which deals with interim orders and Rules 44 to 49 which deal with the power to make case management and other directions, such as directions permitting the amendment of pleadings or the hearing of a preliminary issue.

## **Pleadings**

10. Proceedings before the Tribunal on a reference are not in the nature of an appeal against the decision of the DFSA but rather a request by the applicant for the Tribunal to consider the matter afresh and make its own decision on the merits of the regulatory action which the DFSA has decided to take. Amendments have been made to the rules to emphasise these essential features of the proceedings in the provisions relating to the form and content of pleadings.

11. Accordingly, Rule 24 now provides that the reference notice need only be a short pleading stating in brief the issues arising out of the decision that the applicant wishes the Tribunal to consider and the relief which the applicant is seeking. It will no longer be necessary for the applicant to set out detailed reasons for the reference at this stage but will do so later in the proceedings in response to the DFSA's statement of case, the burden being with the DFSA to make good its case afresh before the Tribunal. The reference notice will also require the applicant to state whether the applicant is seeking a stay of the decision and whether privacy is sought.

12. FMT Form 1 has been revised to reflect these changes and a revised version of the form has been uploaded to the DFSA's website.

13. Rule 26 provides for the DFSA to respond to the reference notice within 28 days of the reference notice being filed. As the reference notice requires the applicant to set out the issues the applicant wishes to challenge (for example an applicant may be willing to accept liability but only dispute the proposed sanction) the statement of case need only deal with those issues which the applicant has specified in the reference notice.

14. Rule 27 requires the DFSA to state its reasons for the regulatory action it wishes to take and set out all the facts and matters on which the DFSA relies to support its case.

15. If the DFSA has any doubts about what issues are before the Tribunal it is anticipated that the DFSA would ask the Tribunal to direct the applicant to provide further clarification before the statement of case was prepared.

16. Rule 28 introduces a requirement for the DFSA to provide with the statement of case a list of documents on which it relies in support of its case as well as any further material which in its opinion might undermine the decision to take that action. The latter requirement is not currently reflected in the obligations imposed on the DFSA in the Regulatory Law in respect of the regulatory action which led to the decision referred, but it is proposed that the Regulatory Law be amended so as to bring it into line with the new provisions in the Tribunal's rules.

17. The previous requirement to provide witness statements with the pleadings has been removed. Witness statements will now be provided after the pleadings and disclosure exercise has been completed, according to a timetable set out in case management directions made pursuant to the power in Rule 44.

18. Rules 30 and 31 deal with the filing of a reply by the applicant to the statement of case. The filing of a reply is now mandatory and it is at this stage that the applicant will set out the detailed reasons for challenging the decision, identifying all matters in the statement of case which the applicant disputes and the reasons why those matters are disputed. The applicant will be required to file a list of the documents on which the applicant relies with the reply.

19. Rules 33 to 35 are new provisions which require the DFSA, in the light of the issues raised in the reply, to provide further disclosure of documents which might reasonably be expected to assist the applicant's case where those have not been listed in the applicant's list of documents provided with the reply. It is hoped that this provision will help to minimise the need for further applications for disclosure.

### **Privacy applications**

20. Both the Regulatory Law (Article 29) and the Tribunal's rules (Rules 15 to 20) create a presumption in favour of publication of decisions made by the DFSA (even where the decision concerned has been referred to the Tribunal) and a presumption in favour of the Tribunal's hearings being in public, in accordance with the open justice principle.

21. Accordingly, privacy applications should be made expeditiously. Therefore, as mentioned above, the applicant is now required to state in the reference notice whether the applicant seeks privacy in respect of the decision referred (in the form of an order from the Tribunal to prevent publication of that decision) or the Tribunal proceedings. If that is the case, the Tribunal will proceed to direct that a hearing of the privacy application take place promptly and issue directions for the filing of evidence by the applicant in support of the application and by the DFSA in response, pursuant to the powers contained in Rule 45(e).

22. Rule 16 now provides that a direction that the hearing be in private should only be made where not to do so would be likely to do serious harm to a party or other person and it is proportionate to give the direction concerned. This is the same test that the Tribunal is required to apply when considering whether to make an order prohibiting publication of the decision referred under Article 29(8) of the Regulatory Law.

### **Case management**

23. The power to give directions (Rule 45) has been clarified and expanded, so as to include a specific power to order the hearing of a preliminary issue, or any other issue as well as power to make directions as to the filing of evidence and submissions in relation to any issue. As mentioned above, it is now provided that such directions may be given by the Chairman alone.

24. In order to ensure that proceedings are progressed expeditiously following the completion of the filing of the pleadings and secondary disclosure, a new provision (Rule 48) has been introduced requiring the parties to cooperate with a view to submitting to the Tribunal within 28 days agreed directions for the bringing of the matter to trial. It is hoped that in most cases agreement will be possible but in default the Chairman is given power to settle the directions or direct that there is to be a case management conference for that purpose.

## **Evidence**

25. Rules 53 to 57 expand the powers to make directions to control the evidence, including a new power to direct that a witness statement of a witness who gives oral evidence shall stand as evidence in chief.

## **Suspension of referred decisions**

26. The power to suspend the operation of a decision, now contained in Rule 69(c), has been clarified to make it clear that it can be exercised subject to the applicant complying with such conditions that the Tribunal considers appropriate. It is envisaged, for example, that this power could be exercised so as to require the applicant to pay the amount of a disputed penalty to be held to the order of the FMT pending the determination of the proceedings on the basis that if the reference is allowed the sums paid would be returned to the applicant but, if not, they would be released to the DFSA.

## **Publication and coming into force of Tribunal decisions**

27. Rule 82 clarifies that substantive decisions of the Tribunal should set out reasons for the decision and state the date on which the decision comes into effect. It is made clear that all substantive decisions shall be made public, unless a privacy direction is made under Rule 16, and that at his discretion the Chairman may publish procedural or other interlocutory decisions if he considers that it is in the interests of justice to do so.

## **Non-compliance**

28. The provision enabling hearings to take place in a party's absence (now Rule 105) has been expanded so as to prescribe the circumstances in which such a direction may be made, namely that reasonable steps have been taken to notify the absent party of the hearing and that it is in the interests of justice to proceed.

29. The power to strike out proceedings or bar a party from participating in proceedings due to a lack of jurisdiction or non-compliance with directions has been expanded (now Rules 107 to 114), subject to the right of the party against whom a direction is made to seek to have the proceedings reinstated in appropriate circumstances. In particular, the Tribunal is given the express power to issue an “unless” direction giving rise to an automatic strike-out where the defaulting party fails to comply with such a direction.

## **Permission to appeal**

30. New provisions setting out the procedure for applying for permission to appeal and the issue and content of permission to appeal decisions are now set out in Rules 87 to 92.

Tim Herrington

President of the Financial Markets Tribunal

2 May 2024