



CONSULTATION PAPER NO. 95

21 APRIL 2014

**MINOR CHANGES TO CP90 AND CP94
PROPOSALS**

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Why are we issuing this paper?

1. This Consultation Paper (CP) sets out the DFSA's proposals to change the effect of the proposals in CP90 and CP94,¹ as currently drafted, in two respects:
 - (a) by ensuring that the DFSA continues to have the ability, in appropriate cases, to recover its costs of investigations from persons who are found to have contravened the requirements of the DFSA-administered legislation ("the DFSA regime"); and²
 - (b) by reinstating the current position with regard to the Financial Market Tribunal's ability to impose cost orders covering not only the costs of the parties but also the costs of the FMT.

Overview of the proposals

2. With regard to the DFSA's ability to recover costs of its own investigations from persons who are found to have contravened the provisions of the DFSA regime, it is proposed that, while the DFSA should normally bear the costs of its investigations, in serious and complex cases, it should - as now - be able to recover such costs by making an application to the FMT or court. It is also proposed that the FMT, consistent with its current powers, should continue to have the ability to include in its cost orders the tribunal's own costs.

Who should read this paper?

3. The proposals in this paper would be of interest to all regulated persons, as well as financial market participants generally, together with their professional advisers.

Terminology in this paper

4. In the remainder of this paper, defined terms are identified by the capitalisation of the initial letter of a word or of each word in a phrase and are defined in the Glossary

¹ Public consultation on the CP94 proposals closes on 5 May 2014. CP90 contained proposals to enhance the administrative review of DFSA decisions by the Financial Markets Tribunal (FMT). CP94 contained detailed proposals to enhance the DFSA's supervisory powers resulting from a comprehensive review of the DFSA's current powers, as well as further refinements to the CP90 proposals in light of public comments received. Except to the extent set out in this paper, we expect the CP90 and CP94 proposals to remain substantially as they are, subject only to any changes we may introduce after reviewing any public comments received by 5 May 2014.

² In paragraph 28 of CP94, we said that "we would consider further our proposed policy in regard to the circumstances in which we would take into account costs arising from undertaking the relevant enforcement action (for example, investigation costs) when determining the amount of a financial penalty. We are currently considering this issue, as part of a debate on recovery of costs of investigation more generally. We may publish proposals on this issue in due course." See also paragraph 133 of CP90.

Module (GLO). Unless the context otherwise requires, where capitalisation of the initial letter is not used, the expression has its natural meaning.

5. A reference in this CP to the Law is a reference to the Regulatory Law 2004. A reference to FMT is generally a reference to the Financial Markets Tribunal in its expanded jurisdiction under the CP90 and CP94 proposals (which envisage FMT absorbing the current powers of the Regulatory Appeals Committee, thereby removing the need to maintain two tribunals). As they are still very much proposals, they should not be read or acted upon as enacted law.

How to provide comments?

6. The deadline for providing comments on this consultation is 21 May 2014. All comments should be in writing and sent to the address or email specified below. If sending your comments by email, please use the Consultation Paper number in the subject line. You may, if relevant, identify the organisation you represent in providing your comments. The DFSA reserves the right to publish, including on its website, any comments you provide, unless you expressly request otherwise at the time of making comments.

Comments to be addressed or emailed to:

Consultation Paper No. 95
Policy and Legal Services
DFSA
PO Box 75850
Dubai, UAE

Email: consultation@dfsa.ae

Tel: +971(0)4 3621500

What happens next?

7. Once we receive your comments, we shall consider what further amendments are needed to these proposals. We may then proceed to recommend the proposed changes to the Law to the President for enactment by the Ruler. You should not act on the proposals until the relevant changes to the laws are made. We shall issue a notice on our website telling you when this happens.

RECOVERY OF COSTS OF INVESTIGATIONS

8. As foreshadowed in CP94, we have considered whether and to what extent the DFSA should be able to recover its costs of investigations in light of number of considerations. These considerations included benchmarking against comparable jurisdictions, where we found that regulators either do not have the power to recover their costs of investigations at all or, where they do so, it is generally through an application to an independent tribunal or court, rather than by exercise of its own power to require those costs to be paid by a person found to have contravened the law.
9. Therefore, we are of the view that there should be no change to our current policy, namely that the DFSA will not normally seek to recover its costs of investigations on its own volition, but may seek to do so through the FMT or court in serious and complex cases.
10. However, in taking forward the policy described above, the CP90 and CP94 proposals would lead to an unintended effect if Article 79 remains unchanged. This is because, under the current arrangements, where a person is found by the FMT or court to have contravened a provision of the DFSA regime, the DFSA may apply to the FMT or court for an order to recover its costs of investigations into the contravention. However, under the CP90 and CP94 proposals, the DFSA would become the first instance decision maker in relation to all contraventions (whether or not they are minor or significant), with the FMT becoming an independent review body of the DFSA's first instance decisions.³ As a result, the DFSA's ability to recover its costs of investigations would become significantly narrower as it would be confined to cases where a person dissatisfied with a DFSA decision applies to the FMT to have that decision reviewed.
11. Further, the DFSA's power to seek an order for recovery of its costs of investigations from the FMT or the DIFC Court (Court) is currently based on a finding of a contravention by the FMT or the Court, but also of a finding of a contravention by any other court of law exercising criminal or civil jurisdiction. As the contravention has to be of a provision of the DFSA regime, we believe it is appropriate that the reference to any other court of civil or criminal jurisdiction is too wide, as only the Court would have jurisdiction over the DFSA administered regime. Therefore, we propose to narrow the reference to the "Court".

Proposal

12. We are of the view that allowing the DFSA to have an avenue to recover its costs of investigations is warranted provided there are adequate safeguards to ensure a proportionate and fair use of that power. Accordingly, we propose that the DFSA:

³ With the exception of Regulatory Proceedings where the FMT has original or first instance jurisdiction.

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- (a) retains its current power under Article 79 to apply to the FMT or court for an order to recover its own costs of investigations;
 - (b) be able to apply to the FMT or court regardless of whether or not the person, who is the subject of an administrative sanction it has imposed on the person, had challenged the DFSA's first instance decision;
 - (c) issues high level guidance relating to when it would consider it appropriate to seek an order from the FMT or court to recover its costs of investigations into a matter which can be regarded, on a reasonable basis, as a serious or complex matter; and
 - (d) remove the anomaly referred to in paragraph 11.

These purposes are achieved by the proposed amendments to Article 79 set out in Annex 1.

Reinstatement of the FMT's powers to recover its own costs

13. We draw attention to a drafting error in proposed Article 30(11) of the Law, contained in Appendix 1 to CP90. This proposed drafting was not intended to change the policy under the existing Articles 30(3)(c) and 34(4)(h) of the Law, which relates to the RAC and FMT respectively. However, in configuring the original provision into two paragraphs in proposed Article 30(10) and (11), we inadvertently referred to "a party's costs" when this should have merely read "costs". As a result, the FMT's ability to issue cost orders which include the costs of the tribunal may have been inadvertently removed.

Proposal

14. Therefore, we propose to reinstate the *status quo*, so that the FMT would continue to have the power to make orders relating to the costs of the parties which include the costs of the tribunal.

Issue for consideration

Do you have any concerns relating to the proposals outlined above? If so, what are they and how should they be addressed?