

Appendix 2

In this appendix underlining indicates new text and striking through indicates deleted text.



The DFSA Rulebook

Enforcement Module

(ENF)

5 INFORMATION GATHERING AND INVESTIGATION POWERS

5.1 Introduction

Guidance

1. The DFSA will, in every investigation, have regard to its objectives in undertaking that investigation and the relative effectiveness of the powers available to it in achieving those objectives. ~~In general, the DFSA will use only those powers that allow it to achieve its objectives whilst causing the least possible interference with the activities of participants in the DIFC.~~
2. The specific powers are considered separately below.

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7.12 Imposition of a fine

Introduction

Guidance

1. The DFSA may use the power to administratively impose fines to assist it in achieving its objectives. The main purposes of such a remedy are to minimise or offset any benefit a Person may obtain from non-compliance with the Regulatory Law 2004 or Rules or other legislation administered by the DFSA and to promote high standards of conduct and a culture of compliance by deterring firms and individuals from committing contraventions. This latter purpose will only be achieved where the imposition of fines is appropriately publicised.

Procedure in respect of the imposition of a fine

2. When considering the imposition of a fine, the DFSA will follow the process set out below and which is set out diagrammatically in App4.

Notice of administrative fine

7.12.1 For the purposes of Article 90(1)(a), Article 90 applies to the following provisions:

- (a) every Rule made by the DFSA ~~except for the Principles for Authorised Firms and the Principles for Authorised Individuals; and~~
- (b) every provision of any legislation administered by the DFSA the Regulatory Law 2004 except for the following: Articles 30 and 35 of the Regulatory Law 2004.
 - (i) ~~Article 30;~~

- ~~(ii) — Article 35;~~
- ~~(iii) — Article 41(1);~~
- ~~(iv) — Article 42(4);~~
- ~~(v) — Article 42(5);~~
- ~~(vi) — Article 43(2);~~
- ~~(vii) — Article 43(3);~~
- ~~(viii) — Article 43(4);~~
- ~~(ix) — Article 44(1);~~
- ~~(x) — Article 44(6);~~
- ~~(xi) — Article 70(3);~~
- ~~(xii) — Article 75;~~
- ~~(xiii) — Article 76;~~
- ~~(xiv) — Article 82(3); and~~

~~(c) — every other provision contained in any legislation administered by the DFSA.~~

7.12.2 Where the DFSA considers that a Person has committed a contravention of any provision referred to in Rule 7.12.1 and decides to impose a fine pursuant to Article 90, the DFSA will give the Person a written notice in accordance with form 5 in App1:

- (a) alleging that the Person has committed the contravention and giving particulars of the facts alleged by the DFSA to constitute the contravention;
- (b) setting out the fine imposed by the DFSA in respect of the contravention;
- (c) specifying the period during which the fine may be paid; and
- (d) providing an address for filing of a Notice of Objection.

7.12.3 Where a fine is imposed under Article 90(2) on a Person and the Person pays the fine within the period specified, no proceedings may be commenced by the DFSA in respect of the relevant contravention, but the DFSA may take further action in relation to any continuing obligation that remains outstanding.

7.12.4 Where a fine is imposed under Article 90(2) and the Person files a Notice of Objection with the DFSA within the period specified, the DFSA may not recover the fine as a debt due, but may commence proceedings in the Financial Markets Tribunal or the DIFC Court in respect of the contravention.

7.12.5 A Notice of Objection must be in accordance with form 6 of App1 and must set out every matter which the Person believes ought to be taken into account

by the DFSA in determining whether to commence further proceedings in the Financial Markets Tribunal or the DIFC Court.

7.12.6 Where the DFSA commences proceedings in the Financial Markets Tribunal or the DIFC Court, it may seek any order which the Financial Markets Tribunal or the DIFC Court has power to grant and is not limited to seeking the imposition of a fine.

7.12.7 In the event that the Financial Markets Tribunal or the DIFC Court determines to impose a fine, it need not consider the amount of the fine initially imposed by the DFSA.

7.12.8 If, at the end of the period for payment specified in the notice imposing the fine, the Person has not paid the full amount of the fine and has not filed a Notice of Objection, the DFSA may recover so much of the fine as remains outstanding as a debt due, together with costs.

7.12.9 The DFSA may withdraw a notice imposing a fine whenever it considers it appropriate.

Guidance

1. Where a Person receives a notice imposing a fine and pays the fine then no further action will be taken in respect of the past breach by virtue of Article 90(3). However, if the contravention arises out of a failure to do an act or thing and the act or thing is not done, then the obligation remains. Similarly, if the contravention arises out of continuing to do some act or thing, then the obligation to cease doing the act or thing continues. In both cases, the DFSA may take further action in relation to the contravention ~~as~~ if it continues after the payment of the fine.
2. In most cases, if the contravention is continuing, the DFSA will not impose a fine but will instead institute proceedings before the Financial Markets Tribunal or the DIFC Court seeking ~~additional~~ orders to remedy the continuing breach.
3. If the Person who receives the notice of fine files a Notice of Objection within the time specified in the notice imposing the fine, then the DFSA will consider all matters raised by the Person before determining whether to commence proceedings in the Financial Markets Tribunal or the DIFC Court. It will do so by placing the matter before the Enforcement Decisions Committee for a final decision to be made as to whether to recommend to the CEO that the proceedings be commenced. The CEO, or his delegate for this purpose, is the final decision maker.
4. Where the DFSA does decide to commence proceedings in the Financial Markets Tribunal or the DIFC Court, it will give prior notice to the relevant Person and allow that person the opportunity to pay the fine. If the person does not pay the fine, the DFSA may seek orders other than the imposition of a fine. Further, if it does seek the imposition of a fine, the Financial Markets Tribunal or the DIFC Court, may impose a fine in any amount it considers appropriate and need not take into account the amount of the fine initially imposed by the DFSA.
5. If the Person who receives a notice imposing a fine does not pay the fine ~~nor~~ file a Notice of Objection, the DFSA may recover the fine as a debt due, together with costs incurred by the DFSA in ~~taking this action~~ recovering such amount.

6. The DFSA is mindful of its duty to use its powers in a manner proportionate to its regulatory objectives and will be cognisant of this when imposing administrative fines. The DFSA would not generally seek to impose more than one administrative fine in relation to multiple contraventions which are closely connected to the same set of facts and circumstances. In this situation, to impose multiple fines for closely connected facts and circumstances would be disproportionate to the seriousness of the conduct that lead to the contraventions of the Rules and Laws.
7. Accordingly, the DFSA has a structure where less serious conduct can be dealt with administratively, while other more serious factual situations may be treated more severely in the Financial Markets Tribunal or the DIFC Court, even if the actual provision offended against is the same.

Policy on imposition of a fine

- ~~6.~~ 8. In determining whether to impose an administrative fine and ~~if so~~, the quantum of the fine, the DFSA will take into account all of the circumstances of the particular case. It follows that there will not be a standard fine for a particular contravention as the surrounding circumstances of each may vary. The DFSA will exercise its powers to impose fines in a manner that is proportionate and transparent so as to take full advantage of the flexibility of the remedy.
- ~~7.~~ 9. Should the DFSA determine to impose a fine, the maximum fine that can be imposed is set out in Article 90(2) and is ~~\$5,000~~ \$20,000 in respect of a natural Person and ~~\$25,000~~ \$100,000 in respect of a body corporate.
- ~~8.~~ 10. The circumstances and factors that the DFSA will take into account in determining whether to impose an administrative fine and, ~~if so~~, the quantum of the fine, may include the following:
 - a. the seriousness and the potential impact of the contravention;
 - b. the extent to which the contravention was deliberate or reckless or otherwise;
 - c. whether the entity on whom the penalty is to be imposed is an individual, and the size, financial resources and other circumstances of the ~~Person~~ individual;
 - d. the amount of profits accrued or loss avoided;
 - e. the conduct of the Person following the contravention;
 - f. whether the contravention is continuing or otherwise;
 - g. the disciplinary record and compliance history of the Person; and
 - h. action taken by law enforcement or other regulatory authorities, including regulators from foreign jurisdictions.

Recovery of fines

- ~~9.~~ 11. The imposition of fines will only assist the DFSA achieve its objectives if the imposition is enforced and the fines recovered. The DFSA must therefore endeavour to recover the levied fines in every case.

7.13 Administrative censures

Introduction

Guidance

The DFSA may censure a Person by means of publishing a written Notice of Administrative Censure, or by other means, where the DFSA considers that the Person has contravened a provision of the legislation prescribed in these Rules.

Power to censure

Administrative censure

7.13.1 For the purposes of Article 91(1)(a), Article 91 applies to the following provisions:

- (a) every Rule made by the DFSA ~~except for the Principles for Authorised Firms and the Principles for Authorised Individuals;~~
- (b) every provision of any legislation administered by the DFSA the Regulatory Law 2004 ~~except for the following: Articles 30 and 35 of the Regulatory Law 2004.~~
 - (i) ~~Article 30;~~
 - (ii) ~~Article 35;~~
 - (iii) ~~Article 41(1);~~
 - (iv) ~~Article 42(4);~~
 - (v) ~~Article 42(5);~~
 - (vi) ~~Article 43(2);~~
 - (vii) ~~Article 43(3);~~
 - (viii) ~~Article 43(4);~~
 - (ix) ~~Article 44(1);~~
 - (x) ~~Article 44(6);~~
 - (xi) ~~Article 70(3);~~
 - (xii) ~~Article 75;~~
 - (xiii) ~~Article 76;~~
 - (xiv) ~~Article 82(3); and~~
- (c) ~~every provision contained in any other legislation administered by the DFSA.~~

Guidance

1. The DFSA may censure a Person where it considers that the Person has contravened a provision of the Regulatory Law 2004 or the Rules or any other legislation administered by the DFSA set out in Rule 7.13.1.
2. This power may only be exercised by the DFSA if the Person has not objected to the censure and has been given an opportunity to make representations in Person and in writing in relation to the censure. Accordingly, when a censure is proposed, the Person affected has three options; he may object to the censure, in which case the censure will not occur; he may indicate that he wishes to make representations, in which case those representations will be received and considered before a final decision as to whether to censure is made; or he may do nothing, in which case he will be censured.

Procedure for Imposing a Censure

3. Generally, the DFSA will only consider exercising this power after an investigation.
4. If, having considered the results of the investigation, the Enforcement Decisions Committee considers that it may be appropriate to censure a Person, it must follow the procedure set out in this section.

7.13.2 Where the DFSA considers that a Person has contravened a provision referred to in Rule 7.13.1, and decides to censure the Person pursuant to Article 91, the DFSA will give the Person a written notice in accordance with Form 7 in App1:

- (a) alleging that the Person has committed the contravention and giving particulars of the facts alleged by the DFSA to constitute the contravention;
- (b) setting out the general effect of the censure to be published by the DFSA in respect of the contravention;
- (c) specifying the manner in which the DFSA proposes to publish the censure;
- (d) offering the Person an opportunity to make representations in Person and in writing in relation to the proposed censure; and
- (e) providing an address for filing of a Notice of Objection.

7.13.3 Where a notice is issued under Rule 7.13.2 of these Rules in respect of a Person and the Person files a Notice of Objection with the DFSA within the period specified, then the DFSA may not censure the Person, but may commence proceedings in the Financial Markets Tribunal or the DIFC Court in respect of the contravention.

7.13.4 A Notice of Objection must be in accordance with form 6 of App1 and should set out every matter which the Person believes ought to be taken into account by the DFSA in determining whether to commence further proceedings in the Financial Markets Tribunal or the DIFC Court.

7.13.5 Where the DFSA commences proceedings in the Financial Markets Tribunal or the DIFC Court in accordance with the foregoing Rules, it may seek any order which the Financial Markets Tribunal or the DIFC Court has power to grant and is not limited to seeking a censure.

7.13.6 If, at the conclusion of the period specified in the notice provided under Rule 7.13.2, the Person has not filed a Notice of Objection nor indicated that it seeks to make representations, then the DFSA may proceed to censure a Person in the manner set out in the Notice of Administrative Censure.

7.13.7 If the Person indicates within the time specified in the Notice of Administrative Censure that he wishes to make representations, then the DFSA must not censure the Person until the opportunity to make representations has been provided.

Guidance

Where a Person has indicated that he wishes to make representations then the Enforcement Decisions Committee must refer the matter to a nominated DFSA officer, referred to as the Decision Maker. The Decision Maker will, insofar as is applicable, follow the procedure set out in App3.

7.13.8 Where the DFSA censures a Person, no further action will be taken in respect of the contravention to which the censure relates. However, if the contravention arises out of the failure to do an act or thing, and the act or thing is not done, then the obligation remains. Similarly, if the contravention arises out of continuing to do some act or thing, then the obligation to cease doing the act or thing continues. In both cases, the DFSA may take further action in relation to the contravention ~~as~~ if it continues after the censure.

Guidance

1. In most cases, if the contravention is continuing, the DFSA will not impose a censure, but will instead institute proceedings before the Financial Markets Tribunal or the DIFC Court, seeking additional orders to remedy the breach.
2. Where a Notice of Administrative Censure is issued and a Notice of Objection filed, the matter will be placed before the Enforcement Decisions Committee for a final decision to be made on whether to recommend to the ~~CEO~~ Chief Executive that proceedings be commenced in the Financial Markets Tribunal or the DIFC Court. The ~~CEO~~ Chief Executive, or his delegate for this purpose, is the final Decision Maker.

Policy on administrative censures

3. The DFSA will take all of the surrounding circumstances into account in determining whether to issue a public censure. It is not possible to list every factor that might be relevant, as they will vary from case to case. Generally, however, the DFSA will impose a censure in circumstances where it considers that its concerns must be publicly expressed, but that other disciplinary action is not warranted, or may not be effective in addressing the conduct. A ~~C~~ensures will only be used where the DFSA is satisfied that this will assist in greater understanding of its approach to particular issues and, therefore, greater compliance with requirements.

4. Whilst it is not possible to list every factor, the DFSA will take into account the following factors as relevant in particular cases:
 - a. if the Person has made a profit or avoided a loss as a result of the conduct constituting the contravention. If so, then the DFSA is more likely to seek orders for the disgorgement of any financial benefit;
 - b. the seriousness of the conduct, taking into account the nature and effect of the contraventions;
 - c. the conduct of the Person following the contravention, and in particular, whether the Person has brought the contravention to the attention of the DFSA and has subsequently co-operated with the DFSA;
 - d. the regulatory history of the Person; and
 - e. the ability of the Person to satisfy any other form of regulatory action, whether it be payment of a financial penalty, or compliance with some form of injunction.