



CONSULTATION PAPER NO. 90

16 SEPTEMBER 2013

**PROPOSED CHANGES TO THE FMT JURISDICTION AND
ENHANCEMENTS TO THE DFSA'S ENFORCEMENT POWERS**

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Why are we issuing this paper?

1. This Consultation Paper seeks public comment on the DFSA's proposal to restructure its appeals and tribunals processes. The proposed amendments, which are set out in Appendices 1 and 2, are intended to enhance the efficiency and independence of decision-making in reviews of regulatory decisions. These changes are considered appropriate for the maturity of the DIFC, given that it has now experienced a decade of operations.
2. In brief, the DFSA is consulting on proposals to change the jurisdiction of the Financial Markets Tribunal (FMT) so that matters currently appealed to the Regulatory Appeals Committee (RAC) would in future be referred to the FMT. The FMT would become primarily a review body to hear and determine referrals from decisions of the DFSA, which would consequently take on the majority of the current first instance decision-making powers of the FMT. Note that for the purposes of this paper, unless the context provides, when we refer to decisions of the "DFSA" we are referring to the formal decisions and powers of the DFSA's Executive, in contrast to the DFSA's Board or FMT.¹
3. This Consultation Paper is the first of two planned on this topic, and seeks comments on the concepts - as described by envisaged changes to laws (in Appendices 1 and 2) and supporting policy relating to the imposition of fines (in Appendix 3). It is anticipated that the second Consultation Paper will be released in early 2014 (see paragraphs 9 and 10 for more detail).

Who should read this paper?

4. 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.

Structure of this paper

5. The proposals in this paper are structured as follows:
 - (a) Part A: Overview of changes proposed – paragraphs 13 to 22;
 - (b) Part B: Background – paragraphs 23 to 38;
 - (c) Part C: Rationale for, and detail of, proposed changes – paragraphs 39 to 113;
 - (d) Part D: The DFSA's approach to decision making – paragraphs 114 to 122;
 - (e) Part E: The DFSA's approach to setting the level of fines – paragraphs 123 to 133;

¹ Also for ease of reference, throughout this paper we refer to the current RAC and FMT as the RAC and FMT, respectively, and the FMT with its proposed expanded role as the Tribunal. The exception to this is, of necessity, in the draft amendments to legislation in Appendices 1 and 2.

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- (f) Appendices 1 and 2 – draft amendments to the Regulatory Law 2004 (the “Regulatory Law”) and other DFSA-administered laws; and
 - (g) Appendix 3 – draft policy on setting the level of fines.

Terminology in this paper

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

How to provide comments?

- 7. 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. 90
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Dubai, UAE

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What happens next?

- 8. The deadline for providing comments on this consultation is **16 November 2013**.
- 9. We plan to issue a second Consultation Paper on this topic in the early part of 2014. This will provide further detail on the matters discussed in Parts C, D and E of this paper, including any necessary Rule changes and a proposed policy on decision making. In addition, that paper will revisit any issues, as necessary, to address comments received from stakeholders on this paper.
- 10. In particular, the second Consultation Paper will consider whether the DFSA's existing supervisory powers (i.e., including both regulatory and enforcement powers):
 - (a) are effective and adequate in meeting its regulatory objectives and the guiding principles of the DFSA;
 - (b) meet the relevant standards set by international standard setters² for supervisors regulating the banking, insurance and securities sectors, while also addressing

² The three main international standard setters in financial services are the Basel Committee on Banking Supervision (BCBS or Basel); the International Association of Insurance Supervisors (IAIS); and the International Organization of Securities Commissions (IOSCO).

specific features of the DIFC as a jurisdiction; and

- (c) are exercisable through processes which are commensurate with the nature of the power and the outcome intended to be achieved, through the exercise of the power, and in a transparent manner.

That paper will make any further (i.e., in addition to the proposals in this paper) recommendations for change as regards the DFSA's supervisory powers that are felt to be necessary.

11. After that second consultation, we expect then to proceed with the relevant changes to the DFSA-administered legislation. You should not act on these proposals until the relevant changes to the DFSA legislation are made. We will issue a notice on our website telling you when this happens.
12. It should be noted that the law changes proposed in this paper would be subject, as always, to the approval of His Highness the Ruler of Dubai. Any proposals regarding the rules described in this paper are subject to change and any legislation which eventually comes into force to implement the proposed rules may differ from that described in these rules and any attachments. This should be taken into consideration when reading this paper and any guidance it contains.

PART A Overview of changes proposed

13. As discussed at the outset of this paper, the DFSA seeks public comment on its proposal to change the jurisdiction of the FMT and thereby restructure its appeals and tribunals processes, including the abolition of the RAC. The proposed amendments are intended to enhance the efficiency and independence of decision-making in appeals from regulatory decisions, given the maturity and experience gained in the first decade of operation of the DIFC. Under the proposals, matters that are currently appealed to the RAC would in future be referred to the Tribunal. In addition, the DFSA would take on the majority of the current first instance powers of the FMT (i.e., primary enforcement decision-making). As a consequence, it is proposed that the FMT would be primarily a review body to hear and determine referrals from authorisation, supervisory, disciplinary and enforcement decisions of the DFSA. If these changes come into effect, the system for reviewing such DFSA decisions would function as set out below.

The composition and responsibilities of the Tribunal

14. The Tribunal, that is the FMT with a revised jurisdiction, would continue to:
- (a) be composed of members entirely independent of the DFSA's Board and Executive;
 - (b) have its members appointed by the DFSA Board; and
 - (c) hear regulatory proceedings - see Article 70 of the Markets Law 2012 ('the Markets Law').
15. In terms of its organisation, the Tribunal, as is currently the case, would:
- (a) have a designated President. The President would be able to take decisions relating to procedural matters, with or without giving interested parties a right of hearing; and
 - (b) establish a panel from amongst its members to hear any particular matter.
16. The Tribunal would have the power to:
- (a) conduct a full merits review of referrals of the DFSA's regulatory and enforcement decisions. This would be a fresh ("*de novo*") review of the DFSA's original decision, taking into account all relevant information, including any new evidence that had come to light subsequent to the DFSA's original decision; and
 - (b) affirm, vary or set aside the DFSA's original decision, or to remit the matter to the DFSA with directions as to how the DFSA should make its decision.

Appeal of the Tribunal's decisions

17. Further appeal of a Tribunal decision would be to the DIFC Court on a point of law. (see paragraphs 67 to 72).

Existing first instance powers of the FMT

18. The existing first instance powers of the FMT, i.e., its powers in making initial decisions on enforcement matters, would (subject to paragraph 20) be transferred to the DFSA.
19. As a consequence, the DFSA would take on a range of powers that currently lie within the remit of the FMT, including the ability to impose a fine. As is now the case with the FMT, the level of potential fines would be uncapped. The use of these powers would be subject to an unfettered right of appeal to the Tribunal.
20. The Tribunal would, as noted in paragraph 14, retain its existing powers to make determinations relating to regulatory proceedings, including its capacity to review decisions taken by Authorised Market Institutions (AMIs) under their Business Rules (see Chapter 11 of the AMI Module (AMI)).
21. All of the matters set out in paragraphs 14 to 20 above are discussed in more detail in Part C.

Additional controls to ensure due process

22. As it is proposed that the DFSA's executive powers are to be expanded, it is also proposed that these powers should be subject to additional controls to ensure due process. Amendments to the Regulatory Law are proposed, based on similar provisions under the UK regime, which would oblige the DFSA to:
 - (a) publish its policy on the making of regulatory and enforcement decisions (see Part D) including to ensure that the decision maker is not directly involved in establishing the evidence on which a decision is made; and
 - (b) publish its policy setting out the criteria and process it would use to set the level of any enforcement fines (see Part E and Appendix 3).

PART B Background

23. The DFSA's current tribunal regime ('existing regime') consists of an internal appeals committee called the RAC and an enforcement tribunal called the FMT.
24. The existing regime was, in part, modelled on that of the UK FSA but adapted for the DIFC. The primary rationale for two tribunals was to have purely regulatory or administrative decisions treated differently from enforcement decisions. This was to ensure that the DFSA retained control of regulatory discretion and policy and to ensure that enforcement matters were considered by a body operationally independent of the DFSA's Executive and Board.

The Regulatory Appeals Committee (RAC)

25. When the DFSA's tribunal regime was designed, the RAC was intended to function as an "internal" appeal mechanism for the DFSA Executive's decisions regarding regulatory (i.e., administrative, as opposed to enforcement) matters. The thinking was that, while it was important for affected parties to be able to review the DFSA's exercise of regulatory discretion, it was considered necessary for the regulator, and not the courts, to have the final say about who was allowed into the "regulated arena". Simply put, it was necessary to have a check, or second 'set of eyes', on the DFSA's exercise of regulatory discretion, without losing control of regulatory policy e.g. in relation to who may be authorised to conduct Financial Services in the DIFC. Consequently, licensing decisions were put under the appellate jurisdiction of the RAC, a committee of the DFSA Board.
26. The Regulatory Law empowers the RAC to conduct a full merits review of decisions that come before it on appeal. Appropriate to its function, the RAC is restricted to determining what action the DFSA should take on regulatory matters and to remitting the matter to the Chief Executive with directions. RAC decisions are subject to independent oversight in that they may be reviewed by the DIFC Court by way of judicial review on a point of law.
27. The core jurisdiction of the RAC is set out in Article 27(2) of the Regulatory Law, and centres on decisions affecting licensing and powers of intervention such as those set out in Articles 74³, 75⁴, 76⁵ and 88⁶. It may, however, be extended by Rules, and has been extended to embrace a range of regulatory discretions. For example, if the DFSA imposes an Individual Capital Requirement on a firm, this may be appealed to the RAC. The RAC also has jurisdiction under the Markets Law to review certain decisions, for example, directions to an AMI and suspensions and delisting of Securities.
28. The initial legislative intent was to give the RAC limited review jurisdiction over certain DFSA decisions. Therefore, where no right of appeal is specifically prescribed in the law or Rules, there is no right of appeal to the RAC.
29. The Regulatory Law provides that the RAC is a DFSA Board committee, to be chaired by a non-executive member of the Board, and it may include other persons independent of the Board and Executive. The Law specifically provides that Board members may be appointed to the RAC, and currently three Board members, one

³ Requirement to Provide a Report.

⁴ Imposing Restrictions on Business.

⁵ Restriction on Dealing with Property.

⁶ Appointment of Managers.

external member of a DFSA Board Committee and four independent persons have been appointed as members of the RAC. Subject to the provisions appointing Board members to the RAC, the Regulatory Law prohibits the appointment of any officer, director, employee or agent of the DFSA or of any other agency or body of the DIFC established under Dubai Law. The Law also requires that all persons appointed to the RAC must have relevant qualifications, expertise and experience in the regulatory aspects of financial services and related activities.

The Financial Markets Tribunal (FMT)

30. The FMT was established under the Regulatory Law to function as an enforcement tribunal.
31. The core jurisdiction of the FMT is set out in Article 32(1) and is essentially disciplinary, focusing on breaches of DFSA-administered Laws or Rules. Its powers centre on fines, censures and orders for restitution. It is a first instance tribunal.
32. Where the DFSA imposes an administrative fine or censure under the powers in Article 90 or 91, and the respondent objects, the DFSA's decision falls away, and the DFSA would need to bring proceedings in the FMT for it to hear the matter and make a decision.
33. Under the Markets Law, the FMT's remit was expanded substantially, moving it from a purely enforcement tribunal to a broadly empowered financial services and markets tribunal with a remit and powers comparable to other international financial services regulatory tribunals in the markets arena. Consequently, the FMT's jurisdiction also includes the power:
 - (a) under Article 68 of the Markets Law to hear and determine applications brought by the DFSA for a broad range of permanent, interim and *ex parte* orders, irrespective of whether a contravention has occurred (DIFC "public interest" orders). Some of these DIFC "public interest" orders have a market related focus, for example, cease trading orders, orders prohibiting persons from offering securities or from being involved in listed companies, orders withdrawing exemptions in the Markets Rules and Takeover Rules, orders relating to takeover offer activities and orders directing market disclosure. Others are much broader, for example, orders directing a person to submit to a review of his practices and procedures, prohibiting persons from acting as directors or officers of any company, reprimanding and fining persons or ordering them to disgorge ill-gotten gains or any other order that the FMT thinks fit in order to maintain the integrity of the DIFC and to ensure an efficient, honest, fair and transparent market;
 - (b) under Article 70(2) of the Markets Law to hear and determine 'regulatory proceedings' between persons to the extent they arise out of issues enumerated in Article 70(2). These include issues arising out of the supervision of an AMI, an offer of securities, a takeover offer, merger or acquisition of shares or any matter subsequently prescribed in the Law or Rules; under Article 70(3) of the Markets Law to make, at the conclusion of any proceedings, a finding or declaration of unacceptable circumstances or contravention of the Law or Rules and, in addition to any orders it could make under Article 70, a variety of orders as broad as an order "requiring a respondent to do any act or thing" and any "consequential orders the FMT sees fit following a finding or the making of a declaration". The Collective Investment Law 2010 and the Investment Trust Law

2006 also prescribe 'regulatory proceedings' at Article 71 and Article 29 respectively; and

- (c) under Chapter 11 of the AMI Module in the DFSA Rulebook to hear and determine regulatory proceedings that are appeals of certain decisions taken by an AMI in accordance with its Business Rules.
34. All FMT decisions are currently subject to an appeal to the DIFC Court under the statutory regime set out in Article 28 of the DIFC Court Law 2004.
 35. As for its composition, the FMT was intended to be an "external" enforcement tribunal which operated independently of the DFSA Board and Executive. Its membership is subject to restrictions similar to RAC, except that it must not include any member of the DFSA Board or any DFSA employee. The Law also requires, as with RAC members, that all persons appointed to the FMT must have relevant qualifications, expertise and experience in the regulatory aspects of financial services and related activities. No RAC members have been appointed to the FMT.
 36. It followed that the separate jurisdictions of the RAC and the FMT could lead to two sets of proceedings based on the same facts, for example, if in some instance the DFSA sought both a fine and the withdrawal of a licence. Objection to an administrative fine (under the former provision) required the DFSA, if so minded, to initiate proceedings in the FMT, whereas the objections to a withdrawal of a licence would be dealt with by the RAC. Accordingly, the RAC and FMT cover some common regulatory territory.
 37. Given this, in 2007, the Regulatory Law was amended so that the president of the FMT has the power to refer a matter to the RAC, which then has the powers of the FMT, or to take certain other actions due to the fact that the RAC can deal with non-licensing related decisions of the DFSA. The chairman of the RAC gained similar power.
 38. Further details on the RAC and FMT, including decisions, can be found on the DFSA website.

PART C Rationale for, and detail of, proposed changes

39. This Part:
- (a) sets out the drivers for change that underpin the proposals in this paper;
 - (b) reviews the position in other jurisdictions;
 - (c) discusses the options open to the DFSA;
 - (d) sets out the proposed changes; and
 - (e) discusses consequential matters, including transitional provisions.
40. Appendices 1 and 2 to this paper contain the draft amendments to DFSA-administered laws that arise from these proposals.

The need for change

41. There are three main reasons why the DFSA feels that the changes proposed in this paper are warranted.
42. Firstly, it is desirable, and in accord with international best practice, that regulatory cases should be subject to referral to an independent tribunal with full jurisdiction to review administrative decisions. In this regard:
- (a) the argument, set out in paragraph 25, that justified the current structure of the RAC, has— in our view - considerably less force;
 - (b) the current structure, with regulatory matters being subject to an appeal to the RAC, which is not independent of the DFSA, and from which there is only access to the DIFC Court by way of judicial review, is no longer considered adequate in terms of the desired level of independent scrutiny;
 - (c) RAC members, who are also DFSA Board members, have to recuse themselves from certain DFSA Board discussions because of the possibility of a future RAC hearing. This is administratively inefficient and has the potential to impact on the effectiveness of the DFSA Board.
43. Secondly, the differences in decision-making structure for regulatory and enforcement issues are not logical, give rise to overlap, and lead to potential inefficiencies, including duplication of costs.
44. Under the current arrangements, it is relatively easy to imagine cases which would sit on the boundary between the two jurisdictions, in which the same facts are relied on, for example, to prohibit an individual and to fine the firm that failed to supervise him (see also paragraph 36).
45. More fundamentally, for a firm or individual active in the DIFC, removal of an authorisation is likely to be at least as severe a sanction as a fine, yet is handled by a different and (because of the involvement in the RAC of DFSA Board members) less independent process. A distinction based solely on regulatory action (RAC) vs. enforcement action (FMT) does not capture at all well the severity of impact on existing rights and expectations.

46. Amongst the potential inefficiencies is, as noted in paragraph 42(c), the need for RAC members who are also members of the DFSA Board to recuse themselves from discussion of certain matters at meetings of the DFSA Board.
47. The existence of two separate bodies – the RAC and the FMT – leads to two sets of costs. Two sets of procedures need to be established and maintained, and the DFSA potentially needs to provide secretariat-type services to both bodies. These costs are inevitably passed on directly or indirectly to those who fund the DFSA - the Dubai Government and fee-paying firms.
48. Also on this point, the existence of two bodies is contrary to the DFSA’s desire to have - wherever possible - simple, flexible structures in place, which can meet the needs of the regulated community and the DFSA. It also contravenes the principle, well established in other jurisdictions, that all regulatory and enforcement cases should be subject to the same decision making structure.
49. Thirdly, the fining powers available to the DFSA under the Regulatory Law are inadequate and inflexible. Any serious enforcement case would currently require commencement of proceedings before the FMT, or would need to be settled by way of an Enforceable Undertaking⁷.
50. The requirement to commence proceedings before the FMT in more serious cases leads to additional cost and delay, when compared to the model we are proposing in this Consultation Paper, and to the benchmark jurisdictions.

Issues for consideration

Q1: Do you have any comments about the reasons for change discussed in paragraphs 42 to 50?

Q2: Are there any additional factors that you feel are relevant to the proposed changes to the DFSA’s appeals and tribunal regime?

Benchmarking against international standards and other jurisdictions

51. In developing its proposals, the DFSA has considered the expectations of the international standard setters, and practices in other jurisdictions. However, the Core Principles of the three main international standard setters⁸ say little about the structure of decision making and appeals against regulatory and enforcement decisions.
52. The IOSCO Core Principles say:

“There should be a system permitting judicial review of final decisions of the regulator.”
(CP2, Key Issue 7)

and

“Are there means for natural or legal persons adversely affected by a regulator’s decisions or exercise of administrative authority ultimately to seek review in a court, specifically:

⁷ An Enforceable Undertaking is a statutory form of settlement enforceable by the Court.

⁸ See footnote 2.

(a) Does the regulator have to provide written reasons for its material decisions?

(b) Does the decision-making process for such decisions include sufficient procedural protections to be meaningful?

(c) Are affected persons permitted to make representations prior to such a decision being taken by a regulator in appropriate cases?

(d) Are all such decisions taken by the regulator subject to a sufficient, independent review process, ultimately including judicial review?" (CP2, Key Question 7)

53. The IAIS standard is:

"There are processes to appeal against supervisory decisions, including using judicial review. These processes are specific and balanced to preserve supervisory independence and effectiveness. However, they do not unduly impede the ability of the supervisor to make timely interventions in order to protect policyholders' interests." (CP 2, Standard 8)

54. Benchmarking against other jurisdictions (set out in the box below) reveals that there are some common characteristics relating to administrative review of the regulator's decisions. For example:

(a) the need to ensure a high degree of objectivity in the initial executive decision making; and

(b) the need to ensure that there is a right to have a full merits review of the initial executive decision available to a person affected by that decision.

UK (Financial Conduct Authority (FCA))

Process

The FCA issues a Warning Notice through its Regulatory Decisions Committee (RDC). The RDC makes the decision to issue a Warning Notice based on evidence gathered by FCA's Enforcement Division. The recipient of the Warning Notice may make representations to the RDC which issues a Decision Notice following a private hearing. If the Warning Notice is not contested, the RDC issues a Decision Notice. Following the issue of a Decision Notice, the person has the right to refer his case to the Upper Tribunal which will consider the entire case afresh. If no appeal is made a Final Decision Notice is issued. An Upper Tribunal hearing is normally held in public.

Composition

The Chairman of the RDC is a FCA employee and so the RDC is only operationally independent. Therefore, the RDC would not be regarded as an independent tribunal. The independent review function is performed by the Upper Tribunal whose members are appointed by the Judicial Appointments Commission.

Australia (Australian Securities and Investments Commission (ASIC) and Australian Prudential Regulatory Authority (APRA))

Process

An officer from ASIC or APRA makes a decision. A person can have his case referred to the Administrative Appeals Tribunal (AAT), which is empowered to conduct a review on the merits and remake the decision; hearings are normally public. AAT decisions

may be appealed on a point of law to the Federal Court of Australia (FCA).

Composition

The AAT is entirely independent as members are appointed by the Government.

USA (Securities and Exchange Commission (SEC))

Process

The SEC refers cases to the Administrative Law Judge (ALJ) who makes an Initial Decision. The ALJ's decision may be appealed to the Commissioners of the SEC, who would perform a merits review. Both the ALJ and SEC would normally hold public hearings. The SEC decision is appealable directly to the Federal Appellate Court.

Composition

Although the ALJ reports to the SEC he is operationally independent, and cannot be fired or otherwise removed by the SEC.

Hong Kong (Securities and Futures Commission (SFC))

Process

The Securities and Futures Appeal Tribunal (SFAT) can review, on application, the merits of a range of regulatory decisions; hearings are usually in public. SFAT decisions may be appealed on a point of law to the Court of Appeal.

Composition

The SFAT is an independent tribunal; its Chairman is a judge.

Jersey (Financial Services Commission (JFSC))

Process

Some decisions are made by the Review Committee (a committee of the JFSC Executive) and some by the JFSC's Board of Commissioners. Appeals are to the Royal Court of Jersey and are allowed solely on the grounds that "the decision was unreasonable having regard to all the circumstances of the case".

Composition

Neither the Review Committee nor the Board of Commissioners is independent of the JFSC. There are nine Commissioners and they include practitioners from within the finance industry, users of the industry and representatives of the public interest.

55. In this area, there are a wide variety of approaches adopted in other jurisdictions, even those that follow common law principles; there is no clear consensus. The approaches, and experiences, of other jurisdictions are perhaps best viewed as a source of tested ideas.

Key factors in the design of an updated model

56. In developing its proposals, the DFSA considered a number of different possible structures to achieve the objectives set by international standard setters, ensure a high degree of objectivity in executive decision making, and ensure that powers are used by regulators subject to due process and for proper purpose. These are also the legitimate expectations of the financial community. We consider that any proposals for change need to address – to as great an extent as possible – the issues set out in paragraphs 42 to 50. A number of key factors also need to be considered.

The size of the jurisdiction

57. The most obvious effect of the size of the DIFC is on caseloads. Even as the DIFC grows, any structure is likely to deal with at most a handful of cases each year. The more this is split between different bodies, the less efficient it is likely to be, not only in direct cost terms, but in terms of the accumulated knowledge in each.

The need for expertise

58. Any relevant body (tribunal) will need to have, or have access to, expertise in the various areas of financial services, as well as in related areas like accountancy. This can be secured in a variety of ways. There is, however, the well-established approach that specialised tribunals are often the best way to deal with specialised technical matters, such as those that arise in regulatory and enforcement decisions in financial services.

Maintenance of regulatory standards

59. This is related to, but distinct from, the point about expertise. It is clearly possible to imagine a panel of highly competent financial services professionals whose regulatory standards differ from those of the DFSA.
60. However, case law from the UK, Australia and Canada all suggests that in regulatory matters tribunals will give substantial weight to the regulator's judgement in areas where the law grants discretion and this is exercised consistently with the stated policies and guidance of the regulator. It must, however, be accepted that any tribunal reviewing original decisions or making fresh decisions in the exercise of administrative powers may not be bound by such policies and procedures, but will have the power to deviate from such policies and procedures in appropriate cases.

Independence

61. It is a good principle of regulation generally that those affected by it should be able to challenge executive decisions in some fair and impartial forum. It is clear that there needs to be scope within the system for a full merits review of at least the most important executive decisions, heard by a body whose members have not been previously involved with the case, and who are seen as independent of those that took the decision.

Checks and balances

62. It is important to ensure that there are appropriate checks and balances in conferring decision-making power on any executive body. In this case, the checks and balances need to include:
- (a) ensuring that the DFSA works within a clearly defined set of principles for decision-making;
 - (b) ensuring that the DFSA works within a clearly defined set of principles and as part of a clear process in relation to the setting of fines; and
 - (c) making sure that the DFSA's policy intent is evident in the statutory provisions.
63. In conclusion, the DIFC remains a jurisdiction with a small caseload of referrals of DFSA decisions, and – even as it grows - is likely to remain so for the foreseeable

future. We need to be able to achieve the fundamental objectives of good administrative decision making, premised on objectivity and proper purpose to be achieved through due process. We should aim for simplicity in our decision making and appeal processes, and ensure that complexity (which tends to lead to greater cost) is avoided wherever possible.

Issues for consideration

Q3 Do you have any comments on the key design factors set out in paragraphs 57 to 63? Are there any additional factors that you feel are relevant to the proposed changes to the DFSA's appeals and tribunal regime?

Options and proposals

The proposed structure of the Tribunal

64. The options considered have included the following:
- (a) retaining two bodies, but improving the clarity of their respective jurisdictions – this option was rejected as it does not address the drivers for change (see paragraphs 42 to 50) and it does not provide for administrative efficiency, especially given the size of the DIFC jurisdiction (see paragraph 57);
 - (b) using the DIFC Courts as an alternative to a specialist tribunal – this option is not considered appropriate as a court may not wish to interfere with regulatory policy, it is not supported by the benchmarking, and it falls short of providing the necessary regulatory expertise (see paragraph 58);
 - (c) a single tribunal with two panels. DFSA Board members would sit on one panel to hear “licensing cases” and non-Board members would sit on the second panel to hear enforcement cases – this option does not provide a sufficient degree of independence and does not adequately address the other drivers for change discussed in paragraphs 43 to 50; and
 - (d) a single tribunal to hear all referrals (i.e., for a review of an original decision or to exercise first instance exercise of discretionary powers), whose members are operationally independent of the DFSA – this is the preferred option reflected in the current proposals to enhance the jurisdiction of the existing FMT, as it provides a high degree of objectivity and independence, and it is consistent with the international standards and practices.
65. The consequence of a preference for option (d) is that the first instance decision (i.e., the decision which could be referred to the Tribunal) in each case would be taken by the DFSA.
66. As the DFSA would be making all enforcement decisions previously taken by the FMT, the independence of any subsequent review is paramount. Given the desire to increase the independence of hearing referrals of regulatory decisions (paragraph 42), a single Tribunal should continue the role of the existing FMT, and should take on the remit of the current RAC (amended as appropriate).

Issues for consideration

Q4: Do you have any concerns or comments about the proposed structure of the Tribunal? If so, what are those concerns and how should they be addressed?

The nature of hearings by the Tribunal and of further appeals

67. The proposed Tribunal would conduct a full merits (*de novo*) review of any original decision referred to it, rather than deciding the correctness of the DFSA's decision as at the date the decision was made. This reflects the current position for RAC appeals and is in line with the language used in the UK's Financial Services and Markets Act 2000, prior to the introduction of its Upper Tribunal. The question then arises as to the form that an appeal of a Tribunal decision to the DIFC Court should take.
68. Under the current arrangements, appeals from the RAC to the DIFC Courts are by way of judicial review on a question of law only, whereas appeals from the determinations of FMT can be appealed on questions of law, miscarriage of justice and procedural fairness, as set out in Part B.
69. In weighing the options, the DFSA has considered a model that maintains the current distinctions in the nature of appeals, but from a single Tribunal. The DFSA has also considered whether all appeals from the decisions of the proposed Tribunal should follow either the current RAC model, or the current FMT model. The model that we propose is:
- (a) first instance decisions would be taken by the DFSA, following published policies on decision making (see Part D) and on setting the level of fines (see Part E). This would include affected parties having a statutory right to make representations (the right to be heard), in the normal course before the DFSA takes the decision;
 - (b) following a referral, the Tribunal would conduct a full merits review of the matter; and
 - (c) the parties would have a right of appeal to the DIFC Court on a point of law.
70. A key change proposed here is that the DFSA would have a right to appeal a Tribunal determination to the DIFC Court in relation to matters which previously fell under the jurisdiction of the RAC. Under the existing regime, the DFSA has no right to have the RAC decision reviewed by the DIFC Court because such a review would amount to the DFSA's Executive appealing a decision of the DFSA Board. However, because these proposals transfer the RAC's review jurisdiction to the Tribunal, the DFSA considers that it too should have a right of appeal to the DIFC Court, consistent with its existing right to appeal an FMT decision.
71. This structure, and sequence, provides the right balance, we feel, between giving affected parties sufficient ability to challenge DFSA decisions, and maintaining a simple and straightforward system appropriate to the DIFC as a jurisdiction with a limited caseload of appeals.
72. Note that the above discussion addresses appeals to the DIFC Court from references heard and determined in the FMT. The FMT will also have jurisdiction to hear and determine regulatory proceedings as discussed in paragraphs 80 to 86, where you will see that we similarly propose a right of appeal to the Court on a point of law.

Issues for consideration

Q5: Do you have any concerns or comments about the proposals on the nature of Tribunal hearings and appeals of Tribunal determinations?

Membership

73. As noted earlier, one of the DFSA's aims in making these proposals is to reflect the growing maturity of the DIFC as a financial centre, and to ensure that all authorisation and enforcement decisions are subject to review by an independent tribunal.
74. It follows that the membership of the Tribunal should be independent from the DFSA, as is the case for the current FMT. This means that the Regulatory Law would continue to prohibit the appointment of any Board member of the DFSA (including its Chairman and Chief Executive), and of any officer, director, employee or agent of the DFSA, or of any other agency or body of the DIFC established under Dubai Law, to the Tribunal. This has, amongst other advantages, the clear benefit of addressing the issue relating to independence described in paragraph 42.
75. However, it should not be possible for the DFSA to change the membership of the Tribunal in an arbitrary manner, for example if the Tribunal made decisions that the DFSA was not happy with. To maintain independence, appointments to the Tribunal would be made on similar terms as DFSA Board appointments. Tribunal members would be appointed for a fixed term (such as three years) and could only be removed for just cause (e.g. misbehaviour), or in the situation where their circumstances changed so that they move into one of the prohibited categories (e.g., if they were appointed to the Board of another DIFC agency).
76. It is proposed that, as currently, the members of the Tribunal should be appointed by the DFSA Board. In appointing individuals as members of the Tribunal, the DFSA Board would, as now, seek to ensure that the Tribunal:
- (a) as a body, would have among its members the necessary skills, experience and expertise to make certain that matters that are to be brought before the Tribunal can be dealt with effectively. For this purpose, subject matter expertise relating to different segments of the financial markets that are subject to DFSA supervision would be considered; and
 - (b) has members who are sufficiently independent from the DFSA and the regulated community, whose rights, interests and legitimate expectations may be affected by the decisions the Tribunal may be called upon to make.

Issues for consideration

Q6: Do you have any concerns or comments about the proposed membership of the Tribunal?

The jurisdiction and powers of the Tribunal

77. The Tribunal would hear referrals of a wide range of DFSA regulatory and enforcement decisions. The DFSA plans to review the range of matters that attract a right of referral

and will set out in more detail, in the planned second consultation paper on this topic (see paragraphs 9 and 10), any changes proposed to the current position.⁹

78. As discussed earlier, the Tribunal would hear referrals against licensing decisions taken by the DFSA. Given the importance of licensing decisions when the DFSA was first established (see paragraph 25), we have considered whether additional protections are needed for such decisions.
79. It would be possible for the DFSA to adopt provisions similar to those recently adopted in the UK¹⁰. If such provisions were adopted for the DFSA, for a class of regulatory decisions (including licensing), this would limit the Tribunal's findings in such a way as to preserve the DFSA's judgement-based supervision. There are some perceived advantages to this model, such as leaving greater regulatory control in the hands of the DFSA, particularly in areas such as licensing, and prudential matters (where a judgement that the capital resources of a firm are insufficient is a difficult one for a Tribunal to strike). However, where a regulator exercises judgement, and does so reasonably and in accordance with its policies and guidelines, a Tribunal is generally likely to defer to that properly exercised judgement, so a model along the UK lines may not in practice add very much. Therefore, for this reason and because the provision is at present untested, we do not propose to follow this approach.

Issues for consideration

Q7: Do you have any concerns or comments about the proposals on the jurisdiction and powers of the Tribunal?

Regulatory Proceedings

80. The DFSA has considered how an existing category of FMT proceedings known as "regulatory proceedings" will be addressed under the updated regime. By way of background, regulatory proceedings are currently established by Article 70 of the Markets Law as a means to resolve matters that affect market participants¹¹. They would be likely to be capital markets matters¹². The parties to a hearing could be, for example, an issuer and an investor (either of whom could be a regulated firm), or an AMI and an investor, or two regulated firms.
81. Although this facility has existed in the DFSA regime for some years, there have been no regulatory proceedings to date. Nonetheless, the DFSA is minded to retain this avenue for matters to be heard, although we would welcome the views of stakeholders on this issue.
82. An additional category of regulatory proceedings prescribed under Article 70 of the Markets Law relates to the decisions of AMIs. An AMI is required to have adequate

⁹ Appendix 1 to the RPP Sourcebook provides a current list of the DFSA's regulatory powers, including whether the exercise of those powers involves a right of appeal to the current RAC.

¹⁰ The new provisions are to be found in Article 23 of the Financial Services Act 2012: <http://www.legislation.gov.uk/ukpga/2012/21/section/23/enacted>. The note to the new provisions says, "This distinction is drawn between "disciplinary" and other measures, as in line with the new judgement-based approach to supervision, the FCA, the PRA and the Bank are best placed to form a view as to the precise nature of supervisory action taken in pursuance of wider public-policy aims such as financial stability in the case of the PRA and the Bank or consumer protection, market integrity and competition in the case of the FCA."

¹¹ The UK Takeover Panel carries out a similar role.

¹² An example of a matter that could be heard in a regulatory proceeding is an investor arguing that an issuer should disclose more information to the market.

compliance procedures to ensure that its Business Rules are monitored and enforced. As part of these procedures, an AMI is required to have adequate mechanisms to resolve complaints arising from its operations or those of its Members, and also to take disciplinary action to enforce its Business Rules, including an internal mechanism to appeal initial decisions of the AMI.

83. A Person aggrieved by an AMI's decision can seek a review of that decision by the FMT provided the AMI's internal review processes referred to above had been exhausted, and on the specific grounds that the AMI's decision was reached on an error of law or jurisdiction, was in breach of the rules of natural justice or was manifestly unreasonable.
84. An appeal from a determination of the FMT on a regulatory proceeding is proposed to be to the DIFC Court on a point of law for similar reasons as set out in paragraphs 67 to 72 in relation to references. However, note that the proposal differs from the current arrangement where an appeal from the FMT in a regulatory proceeding is not limited to a point of law.
85. For any future regulatory proceedings, we have concluded that these should be heard by the Tribunal, as would be expected given that it is the current FMT with an increased role. However, it would be important that the Tribunal should have the flexibility to use a wider/different membership, or to call on experts who could carry out a range of roles, to be able rapidly to convene regulatory proceedings should the need arise. We also propose that, for consistency, the procedure for the hearing of regulatory proceedings be aligned to those for references.
86. The present legislation requires a person to seek the consent of the DFSA to commence a regulatory proceeding. This consent requirement was incorporated in the legislation so that the DFSA could:
 - (a) ensure that the person has the requisite standing to commence proceedings; and
 - (b) consider whether it may be able to provide the person with a more appropriate and timely remedy using its regulatory powers.

The requirement for consent also ensures that the DFSA is put on notice of any potential issues arising in the matter. We propose this requirement should be amended, so that a person seeking to commence a regulatory proceeding would still require the consent of the DFSA, but that should consent be denied, the person could seek the consent of the Tribunal in the alternative.

Issues for consideration

Q8: Do you agree that the DFSA regime should still allow affected parties to bring regulatory proceedings? If not, why not?

Q9: Do you agree that the DFSA regime should retain the current arrangements where a Person aggrieved by an AMI's decision may have that decision reviewed by the Tribunal? If not, why not?

Q10: Do you have any other concerns or comments about the proposals on regulatory proceedings? For instance, do you agree with the scope of appeal to the Court as discussed in paragraph 84?

The powers of the DFSA to make certain first instance decisions

87. Formulating the proposal to transfer first instance decision-making authority to the DFSA from the FMT, the DFSA has considered whether all of the powers currently available to the FMT should be transferred, or whether some are too wide or unnecessary.
88. We have considered whether certain powers of the current FMT are more relevant in a Companies Law context, or are quasi-judicial in nature, and so should not be available to the DFSA in making first instance decisions. If that were the case, then it follows that the powers would not be available to the Tribunal when hearing a referral.
89. The powers referred to above are currently found in Article 34(4) (e), (f) and (g) of the Regulatory Law. The powers would allow the DFSA to:
- (a) make a direction requiring the person to cease and desist from such activity as the order may stipulate (see Article 34(4) (e) of the Regulatory Law); or
 - (b) make a direction requiring the person to do an act or thing (Article 34(4)(f) of the Regulatory Law); or
 - (c) make a direction prohibiting a person from holding office at any body corporate carrying on business in the DIFC, not just regulated firms (Article 34(4)(g) of the Regulatory Law).
90. The proposed powers contain an automatic limitation of their application to 'unregulated' persons. This is because most of the DFSA Rulebook does not apply to unregulated persons, so for the powers to be engaged against an unregulated person the person would have to commit a contravention of the law. Therefore, the application of the powers to unregulated persons would automatically be limited to contraventions such as those in relation to:
- (a) the financial services or promotions prohibitions;
 - (b) the offers provisions in the Markets Law and Collective Investment Law;
 - (c) the Takeover provisions;
 - (d) market abuse;
 - (e) the Trust Law (but note that the Court has the primary duty to enforce under this law); and
 - (f) the general prohibition in the Investment Trust Law.
91. The DFSA is of the view that these powers may be necessary in order for the DFSA to properly carry out its functions. In particular, the powers in paragraph 89(a) and (b) are felt to be necessary so that the DFSA can properly enforce the regulatory perimeter and prevent the carrying on of unauthorised financial services and activities, or actions that may harm the DIFC markets. Issues in these areas generally require swift action, rather than going through judicial process, and such powers are generally available to financial market regulators, but subject to due process requirements.
92. The power in paragraph 89(c) may be necessary for the DFSA to supervise properly all companies in the DIFC under its anti-money laundering (AML) regime. However, it

is recognised that the use of this power, to prohibit a person from holding office at any body corporate in a jurisdiction, is a broad and far-reaching power which must be used sparingly and as a last measure.

93. The DFSA has looked at the position in other jurisdictions. As a general rule, the power to prohibit a person from holding office at any body corporate is typically a part of a jurisdiction's company law regime. It is often necessary for the authority that holds the power to apply for a court order to put in place the prohibition, particularly if it is permanent.
94. There are a number of options available as regards this power, which are as follows:
- (a) remove the power from the Regulatory Law, meaning that (as set out in paragraph 88) neither the DFSA nor the Tribunal would be able to make use of the power;
 - (b) restrict the scope of the power, so that it:
 - (i) allows only the prohibition (temporary or permanent) of a person from holding office in a regulated firm; and/or
 - (ii) allows the prohibition (temporary or permanent) of a person from holding office in any body corporate only where the concerns are in relation to AML issues;
 - (c) retain the power, but require the DFSA to ask the Tribunal to issue the prohibition order (this would be the same as the current position);
 - (d) retain the power, but require the DFSA to ask the DIFC Court to issue the prohibition order; or
 - (e) some combination of the above.
95. All of these options have advantages and disadvantages. The DFSA's preferred option at this stage is to:
- (a) have the powers described in paragraphs 89(a) and (b) available in their current form, applicable to regulated and unregulated persons where a contravention has been found, and in relation to remedying that contravention;
 - (b) have the power described in paragraph 89(c) available, but only for the purposes of prohibiting a person from holding office in, or being an employee of, a DFSA-regulated entity (an Authorised Person, Public Listed Company, Domestic Fund or Designated Non-Financial Business or Profession).
96. The drafting of the proposed new Article 90(1) of the Regulatory Law reflects the position described above and, also, is intended to make it even clearer that these powers can be used only in relation to remedying the circumstances relating to a contravention.
97. The DFSA:
- (a) requests feedback from stakeholders; and

- (b) will carry out further benchmarking against other jurisdictions as part of the work outlined in paragraph 10.

Issues for consideration

Q11: Do you agree that the DFSA should have powers (a) and (b) set out in paragraph 89? If not, why not?

Q12: Do you agree with the DFSA's preferred option, set out in paragraph 95, as regards the power (c) described in paragraph 89? If not, do you prefer another of the options discussed in paragraph 94, or a different option?

Fining powers

98. At present, the FMT has unlimited fining powers, but those exercised by the DFSA's Executive are capped at US \$20,000 for a natural person and US \$100,000 for a body corporate (under Article 90 of the Regulatory Law). These figures are low in relation to the fines levied by other regulators, even excluding the very large fines recently levied on some international banks by the US and UK regulators.
99. This raises the question as to whether there should be any limit on the fining powers of the DFSA. The viable options we have are, in summary:
- (a) the DFSA has an uncapped fining power, and the Tribunal is a purely appellate body;
 - (b) the DFSA's fining powers are capped, but the Tribunal becomes the first instance body for higher level fines, and in such cases there is a right of referral to the DIFC Court for a full merits review;
 - (c) fining powers are capped for both the DFSA and Tribunal, but are initially exercised by the DFSA (i.e. neither the DFSA nor Tribunal can exceed the cap).
100. Given that the existing situation is that the FMT can impose an unlimited fine, it is difficult to see that option (c) is appropriate. Option (b), on the other hand, introduces far greater complexity into the system than seems appropriate. Option (a) has the benefits of simplicity and of certainty, in that (unlike (b)) there would be no distinction between the powers available to the DFSA and the Tribunal. Benchmarking shows a wide variety of practice in terms of the level of fines that a regulator may impose, and the processes involved. Many of the firms active in the DIFC will come from, or have experience of, jurisdictions where the regulator can impose unlimited fines. For this reason, and because the DFSA can already impose unlimited fines through the FMT, the DFSA is proposing to adopt option (a).
101. However, it is essential that DFSA policies and processes are clear and appropriate, so that proportionate regulatory outcomes can be achieved if the DFSA is able to set unlimited fines. It is also essential that the DFSA's exercise of unlimited fining power is subject to full review by the Tribunal (see proposed Article 28(2)(k) of the Regulatory Law in Appendix 1). It also reinforces the need for Tribunal members to be operationally independent of the DFSA.
102. To provide the appropriate context for these fining powers, the DFSA proposes that:

- (a) there should be a statutory requirement (similar to the UK) in the Regulatory Law that the DFSA must publish its policy on fining; and
 - (b) this policy should set out:
 - (i) the general criteria that would be considered when imposing a fine;
 - (ii) the method by which the DFSA would set the level of a fine.
103. Section 5-16 of the RPP Sourcebook already gives some guidance on how the DFSA would set penalties. It is proposed, and discussed in Part E, that more detailed material be published.
104. The DFSA has considered whether it would be appropriate to set out in this policy the actual level of fines that would be imposed in certain circumstances. For example, some regulators in the USA have used a matrix for determining the level of penalty to be imposed for certain breaches of prudential rules.
105. The DFSA does not propose to go down the route of fixed-penalty fines in publishing its own policy, but we would welcome the views of stakeholders on the circumstances in which it might be appropriate to set out *ex ante* the level of fine that would be imposed for a particular breach.

Issues for consideration

Q13: Do you have any concerns or comments about the proposals on the DFSA's powers to set fines?

Transitional arrangements

106. Should the DFSA move forward with the proposals in this paper, we see a need for a set of transitional and saving provisions to permit the FMT to continue, to preserve the continuation of orders made under the current RAC and FMT regime, to allow the continuation of any unfinished appeals or proceedings commenced under the current RAC and FMT regime, and to ensure that rights that may have been created under the old regime may be pursued under the updated regime.
107. A key proposal, set out in Article 33 of the proposed Regulatory Law (at Appendix 1), is that while proceedings commenced prior to the coming into force of these proposals will continue under the previous regime, contraventions of the law and Rules which occur prior to the commencement of the new laws, but where no proceedings have been commenced, would be enforced under the new regime (with unlimited fining power) and would fall under the Tribunal's new jurisdiction.

Issues for consideration

Q14: Do you have any comments about the transitional provisions described above?

Miscellaneous and incidental changes

108. The DFSA has taken the opportunity afforded by this consultation to propose certain miscellaneous and incidental amendments to the laws, which are relevant to the tribunal and decision-making issues. The majority of these proposals are included in

Appendices 1 and 2. However, some are not included with the consultation as they have no policy content, including for example;

- (a) changes from “Financial Markets Tribunal” to the acronym “FMT”;
- (b) minor typographical corrections;
- (c) changes to Article numbering and cross-references within Articles, as a consequence of the consulted amendments and deletions.

Miscellaneous changes to the Regulatory Law

109. While proposed changes are footnoted in the draft Regulatory Law provisions in Appendix 1, we draw particular attention to the following:

- (a) new provisions in proposed Article 27(5) permitting the FMT to appoint experts to assist it in the hearing and determination of matters;
- (b) adoption of the language of “references” to the FMT from decisions of the DFSA, rather than the language of “appeals” to the RAC under the existing Regulatory Law as discussed in paragraph 67;
- (c) revision of the grounds for review of decisions under Article 58 of the Regulatory Law, where the structure in RAC’s current Article 27(2)(f) and (g) is revised as shown in the FMT’s proposed Article 28(2)(f) and (g), to clarify the availability of review where the Executive decides to vary or withdraw a notice;
- (d) revision of the FMT’s options at the conclusion of a reference, where the options in RAC’s current Article 29(3) are extended as shown in the FMT’s proposed Article 28(5) by the addition of powers to affirm, vary or set aside the DFSA’s decision and to make orders that it considers appropriate and necessary;
- (e) revision of current Article 70(5) of the Markets Law in its relocation as proposed Article 29(4) of the Regulatory Law, so that a regulatory proceeding may be brought by a person who not only has the DFSA’s consent, but also has sufficient interest in the matter;
- (f) a suite of options for the FMT under proposed Article 31(2) in event of contravention of Article 31(1), which is broader than the current fines and censures available to the FMT under existing Article 35(2), but narrower than those available to the FMT in respect of contraventions relating to proceedings in the RAC under existing Article 30(2);
- (g) amendment to Article 36(g) to clarify that the DFSA’s Executive may undertake remedial or enforcement actions, which reflects the existing powers of the DFSA under the Regulatory Law to, for example, impose fines and censures, and also the existing powers of the Chief Executive under Article 7(6)(e) of Dubai Law No.9 of 2004 to impose penalties; and
- (h) a minor amendment to Article 36(h) to clarify that the Chief Executive may delegate his decision-making powers and functions in enforcement matters not only to individual decision-makers, but also to committees, as may be appropriate to administer the broader enforcement powers of the Executive (see also paragraphs 114 to 122).

Miscellaneous changes to the Markets Law

110. In relation to the Markets Law, we propose deletion of a number of Articles:
- (a) the general contravention provision in Article 66, as this merely serves as a signpost to Article 85 of the Regulatory Law;
 - (b) Article 67 which empowers the Court and FMT to make declarations of contraventions, as such powers are already available under existing Articles 34(4) (reflected in proposed Article 30) and 92 of the Regulatory Law; and
 - (c) Article 69, as this is proposed to be consolidated with existing Article 34(6) of the Regulatory Law (as reflected in proposed Article 30), and references to Court decisions have been removed because we consider that the issue of certification of Court decisions should be left to the regime of laws and rules of the Court.
111. We also propose to seek amendment to Article 68 of the Markets Law to remove the FMT from the scope of its application, and to delete some types of orders. This Article currently gives the Court and the FMT broad powers to make orders covering a large range of matters in the markets sphere. Orders must be sought on the application of the DFSA and may be sought whether or not a contravention of the Markets Law or Rules has occurred. We propose to limit the power to make these orders to the Court because:
- (a) under these proposals the FMT will be primarily a review tribunal; and
 - (b) given that Article 68 does not require the DFSA to show that a contravention has occurred, the Court would appear to be the correct forum for seeking such orders.
112. We also propose to remove from the list of orders available under Article 68 the fining and reprimanding orders. This is because if the DFSA seeks such outcomes it should do so following an investigation and using its enforcement powers, the use of which would be referable to the Tribunal. The seeking of a fining or reprimanding order by the DFSA, without the need to show a contravention, does not, on the face of it, appear to be the proper course of action given the powers vested in the DFSA under the Regulatory Law.

Miscellaneous changes to the Law Regulating Islamic Financial Business

113. We also propose amendments to address certain ambiguities in DFSA decision-making in Articles 11 and 12 of the Law Regulating Islamic Financial Business 2004. Among the changes, we propose to remove the DFSA's absolute discretion to refuse to grant an application for an endorsement or variation of an endorsement to conduct Islamic Financial Business or to operate an Islamic Window under Article 11(5), as this discretion does not sit well with the prescription of requirements for applicants under Article 11(4). We also propose to empower the DFSA to withdraw an endorsement either at its own initiative or at the request of an Authorised Firm or AMI. The omission of this power appears to have been an oversight in the law. It is proposed that the threshold for withdrawal at the DFSA's own initiative is if the DFSA reasonably concludes that the holding of the endorsement is not "in the interests of the DIFC".

Issues for consideration

Q15: Do you have any comments about the miscellaneous or incidental changes described above, or any other proposed changes as noted in the footnotes to Appendices 1 and 2?

PART D The DFSA's approach to decision making

114. In this part of this paper, we set out – at a high level – the way in which the DFSA intends to approach decision making should the proposals in this paper go forward. It is our intention to publish for consultation a revised policy on decision making in the second consultation paper planned as part of this process (see paragraphs 9 and 10).
115. The DFSA has set out its current approach to decision making in Part 6 of the RPP Sourcebook. The key elements of that approach are worth repeating, as they remain valid for a revised approach to decision making under the proposals in this paper. The DFSA's approach to decision making will evolve from what is in place now, as that has served us well during the life of the DFSA to date, rather than adopting any more radical approach.
116. The key elements of the current approach, which remain valid, are:
- (a) DFSA decisions, whether regulatory or enforcement, are likely to affect the rights, interests and legitimate expectations of Persons. It follows that the DFSA must put in place fair and transparent decision making processes;
 - (b) in making its decisions, the DFSA must follow the well-established procedural fairness principles, that:
 - (i) the Person affected must be given a fair right to present his case;¹³
 - (ii) those making the decision must act without bias or conflict of interest;¹⁴ and
 - (iii) those making the decision must take into account only those considerations which are relevant to the matter to be decided upon;¹⁵
 - (c) subject to considerations of procedural fairness, the decision making procedures of the DFSA will generally take into account matters including:
 - (i) the requirements set out in the relevant law and Rules;
 - (ii) the nature of the decision, including its complexity, importance and urgency; and
 - (iii) the extent and manner in which the rights, interests and legitimate expectations of Persons may be affected by the decision;
 - (d) generally, a Person affected by a decision has a right of review of that decision. To enable the Person affected by the DFSA decision to exercise that right effectively, the DFSA will inform the relevant Person without undue delay of:
 - (i) the decision and the reasons for making that decision;
 - (ii) any information required to be provided by the relevant Law or Rule underpinning the action; and

¹³ Please see 6-4-6 and 6-4-7 of the RPP Sourcebook for more detail on this.

¹⁴ Please see 6-4-4 and 6-4-5 of the RPP Sourcebook for more detail on this.

¹⁵ Please see 6-4-8 of the RPP Sourcebook for more detail on this.

- (iii) where applicable, the fact that the Person has the right to refer the decision (to the FMT/Tribunal), the process for making the referral and the period within which the referral can be lodged;
 - (e) in certain circumstances, set out in the Law and Rules, the DFSA is not required to allow the Person affected to make prior representations. For example, the DFSA is not obliged to provide the Person with a prior opportunity to make representations where any delay likely to arise from giving such a right is prejudicial to the interests of the DIFC (see, for instance, the stop order power in Article 25 of the Markets Law). In these cases, the relevant provisions expressly require Persons to be given a right of representation following the making of a decision without being given prior representation rights.
117. The DFSA is considering the option of setting out most of the essential procedural requirements relevant to the DFSA's decision making, and the review of decisions (as set out in paragraph 116), in a single Article in the Law. This would largely be a matter of bringing currently separate provisions together in one place and ensuring that our decision-making processes have a common core of statutory requirements. Flexibility for any necessary variation from this common approach would be dealt with by Rules.
118. Similar procedural provisions are currently contained in many parts of the DFSA Rulebook; we believe this proposed change would promote further consistency in procedures and facilitate easy location of such procedures. We intend to consult on our new decision-making processes in the proposed second consultation paper.

Issues for consideration

Q16: Do you have any concerns or comments about the DFSA's proposed approach to decision making?

119. At present, most decisions taken by the DFSA are taken by an individual. Although the individual sometimes considers the recommendation of a committee, they are not bound to follow that recommendation.
120. The main substantive change to the DFSA's approach to decision making, arising from the proposal that all first instance decisions are to be made by the DFSA, is that it is likely that more decisions in future will need to be made by a committee, rather than by an individual.
121. We believe this to be the case because it will be even more important that the DFSA can act, and can demonstrate that it is acting, in a way that leads to decisions being made objectively. This is certainly true for some of the possible enforcement decisions that could be taken, but is also true for some regulatory decisions.
122. However, it would remain the case that many future decisions would be taken by individuals. This is for a number of reasons:
- (a) some decisions, particularly – but not necessarily solely - decisions that the DFSA already takes now, remain suitable to be taken by an individual;
 - (b) the DFSA remains a relatively small organisation and issues of practicality require some decisions to be taken by individuals; and

- (c) always using a committee to make decisions violates the guiding principle of having as simple a system as possible, as discussed earlier.

We envisage that, in the normal course of events, matters that are relatively weightier will be decided by a committee.

Issues for consideration

Q17: Are there particular decisions, or types of decision, that you believe should be taken by a committee? If so, please set out what they are and explain the reasons for your choice.

PART E The DFSA'S approach to setting the level of fines

123. In this part of this paper, we set out the way in which the DFSA would approach setting the level of fines in enforcement matters, should the proposals in the whole of this paper go forward. Appendix 3 to this paper contains a draft of the proposed policy in this area (which would become a new chapter 6 of the RPP Sourcebook), and we would welcome feedback from stakeholders on this proposal.
124. As noted earlier, the DFSA has set out its current approach to setting the level of fines in Part 5-16 of the RPP Sourcebook. As with our policy on decision making, it is our intention that our approach should evolve from this base.

Benchmarking

UK - FCA

125. When the DFSA first put in place its approach to setting the level of fines, we looked to the model established in the UK as a source of ideas. The UK's approach has itself evolved since that time, and the UK FCA's policy in this area¹⁶ contains material in a number of additional areas:
- (a) a more detailed list of factors to be taken into account, especially in relation to whether the FCA should take action in relation to market-specific matters;
 - (b) specific considerations relating to actions taken by the FCA against individuals (the DFSA's current approach has limited differentiation between individuals and firms);
 - (c) contains specific considerations for penalties relating to cases of market abuse;
 - (d) the considerations where the FCA may issue a public censure rather than impose a financial penalty;
 - (e) the considerations relevant to how the FCA determines the appropriate level of penalty;
 - (f) the specific steps to be taken for penalties imposed on firms and on individuals (in non-market abuse cases and market abuse cases);
 - (g) the FCA's approach to any serious financial hardship that an individual or firm may face; and
 - (h) the FCA's approach to giving a discount for early settlement.
126. The FCA's regime is based (see <http://www.fshandbook.info/FS/html/FCA/DEPP/6/5>) around three principles, namely:
- (a) disgorgement - a firm or individual should not benefit from any breach;
 - (b) discipline - a firm or individual should be penalised for wrongdoing; and
 - (c) deterrence - any penalty imposed should deter the firm or individual who committed the breach, and others, from committing further or similar breaches.

¹⁶ The FCA's policy is set out in Chapter 6 of the Decision Procedure and Penalties Manual (DEPP).

127. Lastly, the FCA's approach sets out five steps that are to be followed to set the level of any fine. These are:

- (a) disgorgement;
- (b) assessment of the seriousness of the breach;¹⁷
- (c) consideration of mitigating and aggravating factors;
- (d) adjustment (upwards) for deterrence; and
- (e) settlement discount.

Jersey

128. The Jersey Financial Services Commission has consulted publicly on amending its approach to decision making and to setting the level of fines (so far only in the case of firms). It has proposed a model based on the UK approach, but simplified in a number of ways. For example, rather than a five-point scale to assess the seriousness of a breach, the JFSC proposes to use a three-point scale and also to use a smaller proportion of a firm's relevant revenue, namely 4 to 8%, rather than 0 to 20% for the UK model.

129. The JFSC also gives a discount for early settlement, ranging from 0 to 20%, rather than 0 to 30% for the UK model.

Guernsey, Qatar and Hong Kong

130. The Guernsey Financial Services Commission, Qatar Financial Centre Regulatory Authority and the Hong Kong Securities and Futures Commission take approaches that are similar in principle to the UK approach. However, none of the three authorities has gone into as much detail, preferring to keep their policy at a higher level. For example, whilst their policies discuss the seriousness of a breach, none of the authorities have chosen to adopt an explicit scale, unlike the UK (five-point scale) and Jersey (three-point scale).

Our proposals

131. The DFSA intends to adopt an approach to setting the level of fines similar in its general purpose to that in place in the UK. In particular, we intend to:

- (a) distinguish in our policy between individuals and firms;
- (b) set out, for the first time, that the DFSA will consider reducing the size of proposed fines in cases of early settlement; and
- (c) set out our approach to dealing with cases of financial hardship.

¹⁷ In those cases where the FCA determines that revenue is an appropriate indicator of the harm or potential harm that a breach may cause, the FCA may determine a figure using a five point scale, with each point on the scale being linked to a specified proportion of the firm's relevant revenue (from 0 to 20%) or individual's relevant income (from 0 to 40%), as appropriate. Relevant revenue is the amount of revenue generated from a firm from a particular product line or business area which is indicative of the harm or potential harm that a breach may cause. Relevant income is the gross amount of all benefits received by the individual from the employment in connection with the breach – "benefits" includes salary, bonus, pension contributions, share options, etc.

132. While we also propose to adopt an approach based on the three principles discussed in paragraph 126, we intend not to have an explicit scale for assessing the seriousness of any breaches (as in Guernsey, Qatar and Hong Kong).

Costs of investigations

133. The DFSA will set out in the next Consultation Paper (see paragraphs 9 and 10) its proposed policy in regard to the circumstances, if any, in which it would take into account any costs arising from undertaking the relevant enforcement action (for example, investigation costs) when determining the amount of a financial penalty. The proposed policy would also address as necessary the types of associated costs that could be taken into account (for example, the cost of appointing an expert to produce a report and the time spent on the matter).

Issues for consideration

Q18: Do you have any concerns or comments about the DFSA's proposed approach to setting the level of fines?

Q19: Do you have any comments on the DFSA's proposals on recovering its expenses?