

First-tier and Upper Tribunal Rules

Implementing Part 1 of the Tribunals, Courts and Enforcement Act 2007

Response to consultation on amendments to the Tribunal Procedure (Upper Tribunal) Rules 2008 to accommodate the transfer of the Financial Services and Markets Tribunal

(31 August 2009 – 23 November 2009)

Response from the Tribunal Procedure Committee

May 2010

Foreword by the Right Honourable Lord Justice Patrick Elias

The Tribunal Procedure Committee is charged with formulating procedural rules for tribunals which have become, or are becoming, part of the unified structure created by the Tribunals Courts and Enforcement Act 2007. The members of the Committee have between them a broad and diverse knowledge of the practical operation of the Tribunal system.

The Committee has been guided by the following principles: to make the rules as simple and streamlined as possible; to avoid unnecessarily technical language; to enable tribunals to continue to operate tried and tested procedures which have been shown to work well; and to adopt common rules across tribunals wherever possible, so that rules specific to a chamber or a tribunal are permitted only where there is a clear and demonstrated need for them.

Inevitably experience will demonstrate difficulties with the operation of the rules, or gaps in their coverage. However, the Committee's remit is to keep rules under review, and periodic amendments can be made to try to ensure that the rules work as smoothly and fairly as possible.

Consultation is a fundamental part of the rule making process. Those involved in the day to day work of particular tribunals are often best placed to assess the potential impact of rule changes. We have benefited considerably from the responses to our consultations; they have helped eradicate errors, identify problems in the initial drafts, and suggested improvements. The Committee is extremely grateful to all who have taken the trouble to respond to the consultation documents. Even where proposed amendments have not been adopted, they have frequently generated important debates in the Committee which have helped sharpen the drafting process.

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Introduction

This document is the post-consultation report for the consultation that led to:

- The Tribunal Procedure (Upper Tribunal) (Amendment) Rules 2010

Background

The Tribunal, Courts and Enforcement Act 2007 provides, in section 22 and Schedule 5, for a Tribunal Procedure Committee. The Committee was established in May 2008 and chaired until April 2010 by Patrick Elias. It has the function of making and amending Tribunal Procedure Rules for the First-tier Tribunal and the Upper Tribunal.

The intention behind the Upper Tribunal Rules is to create a single set of rules that can apply to all jurisdictions rather than have several sets of rules applying. It is intended that the rules should be simple and easy to follow and should not include provisions that contain unnecessary requirements or repeat requirements contained elsewhere.

It was not intended to radically overhaul the existing processes within tribunals through these rules. The aim is to put all the rules in one place and reflect existing processes as far as possible. In some instances there is a need for specific provisions to apply or disapply to one or more jurisdictions, as indicated in these rules, but for the most part the intention is that the provisions should apply to all jurisdictions and be expressed in the same manner so that the rules meet the overriding objective, to deal with cases fairly and justly, in a consistent manner across all jurisdictions.

The Tribunal Procedure Committee has an ongoing role in reviewing the rules and processes that lie behind them and bringing forward proposals where it is considered that changes to the procedure rules would improve existing processes for the benefit of users.

The jurisdiction of the Financial Services and Markets Tribunal (FinSMAT) transferred to the Upper Tribunal with effect from 6 April 2010. This response outlines the decisions the Committee took in light of the responses received from the consultation, which invited comment on what changes were needed to the Upper Tribunal Rules in order to accommodate the transfer of FinSMAT to the Upper Tribunal.

The Consultation Process

As with all tribunals moving into the unified tribunals' structure, existing rules are revoked and replaced by chamber-specific rules. There is a single set of Rules that apply to the chambers in the Upper Tribunal, which are supported by Practice Directions and Statements.

The consultation sought views on whether amendments to the existing rules for the Upper Tribunal would be required in order to incorporate the jurisdiction of the FinSMAT into the Upper Tribunal. The consultation period began on 31 August 2009.

The Committee invited Colin Bishopp, an Upper Tribunal Judge and current FinSMAT judge, to join the Committee for the purposes of considering the responses to the consultation. His experience was invaluable in helping the Committee to consider the issues that arose in this jurisdiction.

The jurisdiction of FinsMAT is closely related to the Pensions Regulator Tribunal which transferred into the Upper Tribunal also with effect from 6 April 2010. The Committee conducted a separate consultation exercise for the Pensions Regulator Tribunal but many of the decisions were made in respect of both jurisdictions because both sets of existing rules were identical in many parts.

There were 3 questions in the consultation namely:

- Any areas in the Upper Tribunal Rules that should be amended to incorporate the jurisdiction of the FinSMAT in the Upper Tribunal?
- Any specific additions that are necessary to the Upper Tribunal Rules in order to incorporate the jurisdiction of the FinSMAT in the Upper Tribunal?

- Any current Upper Tribunal rules that should not apply to the jurisdiction in the Upper Tribunal?

As there were 5 respondents to the consultation, the Committee decision in respect of the points raised have been provided.

Prior to transfer to the Upper Tribunal, FinSMAT had its own separate rules namely the Financial Services and Markets Tribunal Rules 2001. Some respondents used reference to these Rules in their responses to illustrate their points. Where this occurs they are referred to as the '2001 Rules.'

General Observations

Respondents highlighted that unlike existing Upper Tribunal cases, financial services and markets cases were not in their nature an appeal nor a form of judicial review and because of this some rules were not suitable for these jurisdictions without substantial amendment. Two respondents believed that separate rules should be made for financial services cases whilst the remaining respondents highlighted the need for substantial amendments.

Response

The Committee decided that whilst a completely separate set of rules was not appropriate, there was a need to accommodate the special needs for financial services and markets cases. However, taking these views into account, the Tribunal Procedure Committee inserted a new Schedule 3 in the Upper Tribunal Rules to provide for procedures that apply to financial services cases (which include financial services and markets cases) only. The remaining Upper Tribunal Rules apply for financial services cases unless expressly excluded. Other amendments were made to the main body of the Upper Tribunal Rules to accommodate financial services cases.

Issues from the responses with the decision of the Committee

1. Two respondents highlighted the 'de novo' nature of the jurisdiction and the need for specific definitions within the Upper Tribunal Rules to cater for financial services cases.

Decision

The Committee accepted this and new definitions were inserted for financial services cases for appellant, applicant, respondent and party.

2. One respondent said it would be appropriate that there should be an opportunity for mediation to be considered reflecting provision in the 2001 Rules.

Decision

The Committee did not make any amendment in this regard given that Upper Tribunal Rule 3 provides that the Upper Tribunal should seek to bring to the attention of the parties the availability of appropriate alternative dispute resolution.

3. One respondent believed that Upper Tribunal Rule 4, which provides for delegation of functions of a judicial nature to staff, should be restricted for financial services cases to more closely reflect the existing 2001 Rules.

Decision

The Committee did not make any amendment in this regard given that Upper Tribunal Rule 4 provides a permissive power rather than a mandatory requirement to delegate. The Committee therefore believed that financial services cases could be accommodated within Upper Tribunal Rule 4.

4. One respondent proposed a requirement to require the party making the application for directions should copy the other party. In addition, that the Upper Tribunal Rules 5 and 6 should be amended to require the tribunal to consider the objections of any party to a direction and give the parties the opportunity to make directions

Decision

The Committee did not make any amendment in this regard as it was satisfied that the existing approach taken in the Upper Tribunal Rules was correct, given that rule 6(5) confers a right to challenge a direction by way of an application to amend, suspend or set aside the first direction.

5. One respondent highlighted the need to shorten or amend the time in Upper Tribunal Rule 5(3)(a) to provide for the power to extend time limits for making a reference.

Decision

The Committee agreed with this response and inserted Upper Tribunal Rule 5(5) to provide this power.

6. One respondent believed that the deemed application for an extension of time was helpful for applicants who were not legally represented and encouraged retention of this rule from the 2001 Rules.

Decision

The Committee did not make any amendment in this regard as it was satisfied that the general time limits provided within the Upper Tribunal Rules would provide adequate safeguards for not represented applicants

7. One respondent believe that there should be a power for the appointment of an expert and for the expert to send the parties copies of any report

Decision

The Committee did not make any amendment in this regard as it was satisfied that section 28 of the Tribunals, Courts and Enforcement Act 2007 provided for assessors to be used in appropriate cases

8. One respondent proposed that there should be a power to require that the register include no particulars about the reference

Decision

The Committee agreed with this response and inserted paragraph 3(3) in as part of the new Schedule 3.

9. One respondent proposed that Upper Tribunal Rule 9 relating to addition, substitution and removal of parties was not appropriate for financial services cases.

Decision

The Committee did not dis-apply this Rule but made modifications to address the concerns within the definition of a party.

10. One respondent proposed that the power to award costs in Upper Tribunal Rule 10 in respect of the financial services case needed to be aligned with the provisions in the 2001 Rules.

Decision

The Committee agreed and provided for the provision in Upper Tribunal Rule 10(3) (e)

11. One respondent believed that it was not appropriate for there to be a power to strike out a party's case in Upper Tribunal Rule 8(3)(c)

Decision

The Committee did not make any amendment in this regard as it was satisfied that these provisions are a permissive power and not mandatory. The provisions allow the necessary flexibility to be applied in such cases.

12. One respondent believed there to be a lack of clarity in the Upper Tribunal Rules as to the procedure for safeguarding commercially sensitive information.

Decision

The Committee agreed and provided for the provision in Schedule 3 paragraph 7(4).

13. One respondent saw the need for an expedited procedure in the Rules to deal with cases involving decisions to which the Financial Services Authority gives immediate effect. They also saw a need for the Upper Tribunal rules to

incorporate the power to suspend the effect of an Authority notice (or prevent it from taking effect), for a specified period or until the reference has been finally disposed of, or until any appeals has been considered.

Decision

The Committee decided that expedition was adequately dealt with in the existing rules and was covered by existing case management powers within the Upper Tribunal Rules. The Committee agreed that there was a need for further rules in relation to suspension and new rule 5(5) was added to cater for this requirement.

14. One respondent proposed that there was no need for the right of withdrawal to be subject to the Tribunal's consent as envisaged by Upper Tribunal Rule 17.

Decision

The Committee agreed and dis-applied Rule 17 to financial services cases.

15. One respondent believed that Upper Tribunal Rule 34, which permits Upper Tribunal to make decisions without a hearing, should be modified to safeguard a right of hearing in financial services cases.

Decision

The Committee did not make any amendment in this regard as it was satisfied that these provisions are a permissive power and not mandatory. The provisions allow the necessary flexibility to be applied in such cases.

16. One respondent asked that the Upper Tribunal should consider whether the decision should be made public in its entirety or whether it should be anonymised, edited or not published.

Decision

The Committee did not make any amendment in this regard as the existing rules covered this issue

The Respondents

A total of 5 responses to the consultation were received, by email and post. A list of the respondents can be found at [Annex A](#).

Keeping the Rules under review

The Tribunal Procedure Committee wishes to thank all those who contributed to this consultation process.

The Committee will monitor the operation of the Rules and will make amendments as and when it appears necessary. Any suggestions for amendments should be sent to the Tribunal Procedure Committee Secretariat at the address below.

Contact details

Further copies of this report and the rules can be obtained by contacting the Tribunal Procedure Committee Secretariat at the address below:

TPC Secretariat
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London
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Email: tpcsecretariat@justice.gsi.gov.uk

This report and the Rules are also available on the website:
www.tribunals.gov.uk/Tribunals/Rules/tribunalprocedurecommittee.htm

Annex A

List of respondents Financial Services and Markets Tribunal Consultation

Financial Services and Markets Legislation City Liaison Group

The City of London Law Society

Financial Services Authority

Sir Stephen Oliver

The Honourable Mr Justice Warren

Membership of the Tribunal Procedure Committee

(as at March 2010)

Lord Justice Patrick Elias (Chair)

Bronwyn McKenna

Douglas May QC

Mark Rowland

Nick Warren

Philip Brook Smith QC

Carolyn Kirby

Michael James Reed

Lesley Clare

Alison McKenna

Peter Lane

George Bartlett QC