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STATUTORY INSTRUMENTS

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**2001 No. 2476**

**The Financial Services and Markets Tribunal Rules 2001**

**PART II**

**PRELIMINARY MATTERS**

**Reference notice**

4.—(1) A reference shall be made by way of a written notice (“the reference notice”) signed by or on behalf of the applicant and filed by the applicant.

(2) In any case not covered by section 133(1)(a) (which provides that a reference must be made before the end of the period of 28 days beginning with the date on which a decision notice or supervisory notice is given), the period specified for the purposes of section 133(1)(b) (such other period as may be specified for making a reference) shall be the period of 28 days beginning with the date on which the Authority notice is given.

(3) The reference notice shall state—

- (a) the name and address of the applicant;
- (b) the name and address of the applicant’s representative (if any);
- (c) if no representative is named under sub-paragraph (b), the applicant’s address for service in the United Kingdom (if different from the address notified under sub-paragraph (a));
- (d) that the notice is a reference notice; and
- (e) the issues concerning the Authority notice that the applicant wishes the Tribunal to consider.

(4) In sub-paragraph (3)(a), “address”, where the applicant is a corporation, means the address of the applicant’s registered or principal office.

(5) The applicant shall file with the reference notice a copy of any Authority notice to which the reference relates.

(6) The applicant may include with the reference notice an application for directions, such as a direction extending any time limit for making a reference, a direction under rule 10(1)(e) (suspension of Authority’s action) or a direction under rule 10(1)(p) (that the register shall include no particulars about the reference).

(7) At the same time as he files the reference notice, the applicant shall send a copy of that notice (and of any application for directions in accordance with paragraph (6)) to the Authority.

(8) In all cases where an application for directions is made under paragraph (6) the Secretary shall refer the application for directions to the Tribunal for determination and he shall take no further action in relation to the reference notice until the application for directions has been determined.

(9) Subject to paragraph (8) and to any directions given by the Tribunal, upon receiving a reference notice the Secretary shall—

- (a) enter particulars of the reference in the register; and
- (b) inform the parties in writing of—

- (i) the fact that the reference has been received;
  - (ii) the date when the Tribunal received the notice; and
  - (iii) the Tribunal's decision on any application made for directions (and include a copy of any direction given),
- and the Secretary when sending the parties this information shall specify the date on which he is sending it.

**Authority's statement of case**

5.—(1) The Authority shall file a written statement (“a statement of case”) in support of the referred action so that it is received by the Tribunal no later than 28 days after the day on which the Authority received the information sent by the Secretary in accordance with rule 4(9)(b).

- (2) The statement of case shall—
  - (a) specify the statutory provisions providing for the referred action;
  - (b) specify the reasons for the referred action;
  - (c) set out all the matters and facts upon which the Authority relies to support the referred action; and
  - (d) specify the date on which the statement of case is filed.
- (3) The statement of case shall be accompanied by a list of—
  - (a) the documents on which the Authority relies in support of the referred action; and
  - (b) the further material which in the opinion of the Authority might undermine the decision to take that action.

(4) At the same time as it files the statement of case, the Authority shall send to the applicant a copy of the statement of case and of the list referred to in paragraph (3).

**Applicant's reply**

6.—(1) The applicant shall file a written reply so that it is received by the Tribunal no later than 28 days after—

- (a) the date on which the applicant received a copy of the statement of case; or
  - (b) if the Authority amends its statement of case, the date on which the applicant received a copy of the amended statement of case.
- (2) The reply shall—
- (a) state the grounds on which the applicant relies in the reference;
  - (b) identify all matters contained in the statement of case which are disputed by the applicant;
  - (c) state the applicant's reasons for disputing them; and
  - (d) specify the date on which it is filed.

(3) The reply shall be accompanied by a list of all the documents on which the applicant relies in support of his case.

(4) At the same time as he files the reply, the applicant shall send to the Authority a copy of the reply and of the list referred to in paragraph (3).

**Secondary disclosure by the Authority**

7.—(1) Following the filing of the applicant's reply, if there is any further material which might be reasonably expected to assist the applicant's case as disclosed by the applicant's reply and which

is not mentioned in the list provided in accordance with rule 5(3), the Authority shall file a list of such further material.

(2) Any list required to be filed by paragraph (1) shall be filed so that it is received no later than 14 days after the day on which the Authority received the applicant's reply.

(3) At the same time as it files any list required by paragraph (1) the Authority shall send a copy to the applicant.

### **Exceptions to disclosure**

8.—(1) A list provided in accordance with rule 5(3) or 7(1) need not include any document that relates to a case involving a person other than the applicant which was taken into account by the Authority in the applicant's case only for the purposes of comparison with other cases.

(2) A list provided in accordance with rule 5(3), 6(3) or 7(1) need not include any document that is material the disclosure of which for the purposes of or in connection with any legal proceedings is prohibited by section 17 of the Regulation of Investigatory Powers Act 2000<sup>(1)</sup>.

(3) A list provided in accordance with rule 5(3), 6(3) or 7(1) need not include any document in respect of which an application has been or is being made under paragraph (4).

(4) A party may apply to the Tribunal (without giving notice to the other party) for a direction authorising that party not to include in the list required by rule 5(3), 6(3) or 7(1) a document on the ground that disclosure of the document—

(a) would not be in the public interest; or

(b) would not be fair, having regard to—

(i) the likely significance of the document to the applicant in relation to the matter referred to the Tribunal; and

(ii) the potential prejudice to the commercial interests of a person other than the applicant which would be caused by disclosure of the document.

(5) For the purpose of deciding an application by a party under paragraph (4), the Tribunal may—

(a) require that the document be produced to the Tribunal together with a statement of the reasons why its inclusion in the list would—

(i) in the case of an application under paragraph (4)(a), not be in the public interest; or

(ii) in the case of an application under paragraph (4)(b), not be fair; and

(b) invite the other party to make representations.

(6) If the Tribunal refuses an application under paragraph (4) for a direction authorising a party not to include a document in a list, it shall direct that party—

(a) to revise the list so as to include the document; and

(b) to file a copy of that list as revised and send a copy to the other party.

(7) A party who has filed a list under rule 5(3), 6(3) or 7(1) shall, upon the request of the other party, provide that other party with a copy of any document specified in the list or make any such document available to that party for inspection or copying.

(8) Paragraph (7) does not apply to any document that is a protected item.

## **Directions**

9.—(1) The Tribunal may at any time give directions to enable the parties to prepare for the hearing of the reference, to assist the Tribunal to determine the issues and generally to ensure the just, expeditious and economical determination of the reference.

(2) The Tribunal may give directions on the application of any party or of all the parties or of its own initiative and, where it gives a direction of its own initiative, it may (but need not) give prior notice to the parties of its intention to do so.

(3) Any application for directions shall include the reasons for making that application.

(4) Except where it is made during the pre-hearing review or during the hearing of the reference, an application for directions shall be filed and, unless the application is accompanied by the written consent of all the parties or an application without notice is permitted by these Rules, the party making the application shall at the same time send a copy to the other party.

(5) If any party objects to the directions applied for, the Tribunal shall consider the objection and, if it considers it necessary for the determination of the application, shall give the parties an opportunity to make representations.

(6) Directions may be given orally or in writing and, unless the Tribunal decides otherwise in any particular case, notice of any written direction (or refusal to give a direction) shall be given to the parties.

(7) Directions containing a requirement may specify a time limit for complying with the requirement and shall include a statement of the possible consequences of a party's failure to comply with the requirement.

(8) A person to whom a direction is given under these Rules may apply to the Tribunal showing good cause why it should be varied or set aside, but the Tribunal shall not grant such an application without first notifying any person who applied for the direction and giving that party an opportunity to make representations.

(9) The following paragraphs of this rule shall apply if the Chairman directs that it is appropriate to hold a pre-hearing review.

(10) The Secretary shall give the parties not less than 14 days' notice of the time and place of the pre-hearing review.

(11) At the pre-hearing review, which shall be held before the Chairman—

(a) the Chairman shall give all directions appearing necessary or desirable for securing the just, expeditious and economical conduct of the reference; and

(b) the Chairman shall endeavour to secure that the parties make all admissions and agreements as they ought reasonably to have made in relation to the proceedings.

(12) In this rule, "pre-hearing review" means a review of the reference that may be held at any time before the hearing of the reference.

## **Particular types of direction**

10.—(1) Directions given by the Tribunal may—

(a) fix the time and place of the hearing of the reference and alter any time and place so fixed;

(b) provide for an oral hearing, upon such notice as the Tribunal may determine, in connection with any matter arising under the reference;

(c) adjourn any oral hearing;

(d) extend any time limit for making a reference under the Act or these Rules, or vary (whether by extending or shortening) any other time limit for anything to be done under these Rules;

- (e) suspend the effect of an Authority notice (or prevent it taking effect) until the reference has been finally disposed of, or until any appeal against the Tribunal's determination of the reference has been finally disposed of, or both;
- (f) permit or require any party to provide further information or supplementary statements or to amend a response document or a supplementary statement;
- (g) require any party to file any document—
  - (i) that is in the custody or under the control of that party;
  - (ii) that the Tribunal considers is or may be relevant to the determination of the reference; and
  - (iii) that has neither been exempted from disclosure by direction given pursuant to rule 8(4) nor been made available pursuant to rule 8(7),and may also require that any such document directed for filing as above shall be copied to the other party or else be made available to that other party for inspection and copying;
- (h) require any party to provide a statement of relevant issues and facts, identifying those which are, and are not, agreed by the other party;
- (j) require any party to file documents for any hearing under these Rules or to agree with the other party the documents to be filed;
- (k) require any party to file—
  - (i) a list of the witnesses whom the party wishes to call to give evidence at the hearing of the reference; and
  - (ii) statements of the evidence which those witnesses intend to give, if called;
- (l) make provision as to any expert witnesses to be called including the number of such witnesses and the evidence to be given by them;
- (m) provide for the appointment of any expert under paragraph 7(4) of Schedule 13 and for that expert to send the parties copies of any report that he produces;
- (n) provide for the manner in which any evidence may be given;
- (o) provide for the use of languages in addition to English, including provision—
  - (i) as to the venue of any hearing under these Rules so as to ensure the availability of simultaneous translation facilities; and
  - (ii) for the translation of any document;
- (p) require that the register shall include no particulars about the reference; and
- (q) where two or more reference notices have been filed—
  - (i) in respect of the same matter;
  - (ii) in respect of separate interests in the same subject in dispute; or
  - (iii) which involve the same issues,

provide that the references or any particular issue or matter raised in the references be consolidated or heard together.

(2) In the case of an application for a direction under paragraph (1)(d) extending any time limit, the Tribunal may direct that the time limit be extended (whether or not it has already expired) if it is satisfied that to do so would be in the interests of justice but, in the case of an application for a direction extending any time limit for making a reference, the Tribunal shall not determine the application without—

- (a) considering whether the Authority notice was such as to notify the applicant properly and effectively of the referred action; and

(b) considering whether the existence of the right to make the reference and the time limit had been notified to the applicant, whether in the Authority notice or otherwise.

(3) A time limit extended under paragraph (2) may from time to time be further extended by directions of the Tribunal (whether or not that or any subsequent such time limit has already expired) made upon an application under paragraph (1)(d), but no such direction shall be given unless the Tribunal is satisfied that the further extension would be in the interests of justice.

(4) Where a party files a response document or list later than any time limit imposed by or extended under these Rules but without applying for a direction under paragraph (1)(d) extending the time limit, that party shall be treated as applying for such a direction but no such direction shall be given unless the Tribunal is satisfied that such an extension would be in the interests of justice.

(5) If a response document or list is not filed in accordance with the time limit imposed by (or extended under) these Rules, the Tribunal may of its own initiative direct that the document or list be filed by a specified date.

(6) Where an application for a direction is made under paragraph (1)(e), the Tribunal may give such a direction only if it is satisfied that to do so would not prejudice—

- (a) the interests of any persons (whether consumers, investors or otherwise) intended to be protected by the Authority notice; or
- (b) the smooth operation or integrity of any market intended to be protected by that notice.

(7) If the Tribunal gives a direction under paragraph (1)(f) to permit or require a party to provide a supplementary statement or to amend a response document or supplementary statement, the direction may require that party to file any such statement or amendment and send a copy to the other party.

(8) The Tribunal shall not give a direction under paragraph (1)(g) or (1)(j) in relation to the disclosure of any document to the extent that the Tribunal is satisfied that—

- (a) it is a protected item or would be included in an exemption provided by rule 8(1) or (2); or
- (b) it should not be disclosed on one of the grounds specified in rule 8(4),

and, for the purpose of determining whether such a direction should be given in respect of any such document, the Tribunal may—

- (i) require that the document be produced to the Tribunal;
- (ii) hear the application in the absence of any party; and
- (iii) invite any party to make representations.

(9) In the case of an application for a direction under paragraph (1)(p) that the register should include no particulars about the reference, the Tribunal may give such a direction if it is satisfied that this is necessary, having regard to—

- (a) the interests of morals, public order, national security or the protection of the private lives of the parties; or
- (b) any unfairness to the applicant or prejudice to the interests of consumers that might result from the register including particulars about the reference.

### **Filing of subsequent notices in relation to the referred action**

**11.** Where, after the filing of a reference notice, the Authority gives the applicant any notice under the Act in relation to the referred action, the Authority shall without delay file a copy of that notice.

### **Summoning of witnesses**

**12.—(1)** The Tribunal may by summons require any person to—

- (a) attend, at such time and place as is specified in the summons, to give evidence as a witness;

(b) file, within the time specified in the summons, any document in his custody or under his control which the Tribunal considers it necessary to examine; or

(c) both attend and file in accordance with sub-paragraphs (a) and (b) above.

(2) No person may be required under this rule to file a document to the extent that the Tribunal is satisfied that—

(a) it is a protected item or would be included in an exemption provided by rule 8(1) or (2); or

(b) it should not be disclosed on one of the grounds specified in rule 8(4),

and, for the purpose of satisfying itself in respect of any such document, the Tribunal may—

(i) require that the document be produced to the Tribunal;

(ii) conduct any hearing in the absence of any party; and

(iii) invite any party to make representations.

(3) A witness summons shall be sent so as to be received by the person to whom it is addressed not less than seven days before the time specified in the summons.

(4) Every summons under paragraph (1) shall contain a statement warning of the effect of paragraph 11(3) to (5) of Schedule 13 (penalty for refusal or failure to attend or give evidence).

(5) No person shall be required, in obedience to a summons under paragraph (1), to travel more than 16 kilometres from his place of residence unless the necessary expenses of his attendance are paid or tendered to him in advance, and when the summons is issued at the request of a party, those expenses shall be paid by that party.

(6) The Tribunal may, upon the application of the person to whom the witness summons is addressed, direct that the witness summons be set aside or varied.

### **Preliminary hearing**

**13.—**(1) The Tribunal may direct that any question of fact or law which appears to be in issue in relation to the reference be determined at a preliminary hearing.

(2) If, in the opinion of the Tribunal, the determination of that question substantially disposes of the reference, the Tribunal may treat the preliminary hearing as the hearing of the reference and may make such order by way of disposing of the reference as it thinks fit.

(3) If the parties so agree in writing, the Tribunal may determine the question without an oral hearing, but, in any such case, the Tribunal may not at the same time dispose of the reference unless the parties have agreed in writing that it may do so.

### **Withdrawal of reference and unopposed references**

**14.—**(1) The applicant may withdraw the reference—

(a) at any time before the hearing of the reference, without permission, by filing a notice to that effect; or

(b) at the hearing of the reference, with the Tribunal's permission,

and the Tribunal may determine any reference that is so withdrawn.

(2) The Authority may state that it does not oppose the reference or that it is withdrawing its opposition to it—

(a) at any time before the hearing of the reference, without permission, by filing a notice to that effect; or

(b) at the hearing of the reference, with the Tribunal's permission.

(3) In any case where—

- (a) the Authority makes a statement within paragraph (2)(a);
- (b) the Authority does not file a statement of case within the time limit imposed by rule 5(1) (or any such time limit as extended under rule 10(1)(d)); or
- (c) the applicant does not file a reply within any time limit imposed by rule 6(1) (or any such time limit as extended under rule 10(1)(d)),

the Tribunal may (subject to its power to give a direction pursuant to rule 10(5)) determine the reference without an oral hearing in accordance with rule 16, but it shall not dismiss a reference without notifying the applicant that it is minded to do so and giving him an opportunity to make representations.

(4) When determining proceedings pursuant to paragraph (1) or (3), the Tribunal may make a costs order under rule 21.

### **References by third parties**

**15.**—(1) In the case of any reference made by an applicant under section 393 (third party rights) these Rules apply subject to the modifications set out in this rule.

(2) The following definitions apply in place of the definitions of “Authority notice” and “referred action” given in rule 2(1)—

- (a) if the reference was made under section 393(9) (reference to the Tribunal by a third party to whom a decision notice was copied), “Authority notice” means the decision notice which was copied to the applicant by the Authority;
- (b) if the reference was made under section 393(11) (reference to the Tribunal by a third party who alleges that he was not given a copy of a decision notice), “Authority notice” means the decision notice which the applicant alleges was not copied to him; and
- (c) in either case, “referred action” means the action set out in the Authority notice.

(3) If the reference was made under section 393(11), rule 4(5) (requirement on applicant to file a copy of the Authority notice) does not apply.

(4) The duties of the Authority to set out information under rule 5(2) (statement of case) or to list material under rule 5(3) or 7(1) (lists of documents and further material) apply only to information, documents or material which relate to the matters referred to the Tribunal in accordance with section 393(9) or (as the case may be) section 393(11).