



Jersey Financial Services Commission

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Your Ref.:

Our Ref.: I&P/P07-001

14 April 2011

Dear Sir

Financial Services Ombudsman Scheme

Thank you for allowing the Commission an opportunity to comment on the proposals for a Financial Services Ombudsman Scheme ("Scheme") for Jersey and Guernsey set out in a consultation document published in February 2011.

As you will be aware, the insular authorities have been discussing the possibility of introducing a Scheme for a number of years. The introduction of a Scheme was encouraged by the 1998 United Kingdom ("UK") Home Office Review of Financial Regulation in the Crown Dependencies, as a result of which the Commission carried out a comprehensive consultation on how such a Scheme might be introduced in Jersey. Following this consultation, proposals were developed and submitted to the Finance and Economics Committee in the autumn of 2002.

Since that time, the Commission's position has been that the absence of a body in Jersey with the power to investigate and adjudicate financial services complaints could be seen as a gap in the Island's consumer protection environment, particularly in the case of Jersey residents¹. Against this background, the Commission is supportive of the principle that there should be a mechanism in place in Jersey for the investigation and adjudication of complaints.

However, the Commission has two particular strategic concerns with the consultation process and the proposals of the Economic Development Department (the "Department").

¹ Jersey residents that use non-Jersey financial services providers may already have access to overseas dispute resolution mechanisms, e.g. the UK Financial Ombudsman Service.



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First, the consultation paper does not explain whether any other mechanism to investigate and adjudicate complaints has been considered by the Department. Whilst the proposal in 2002 was to establish a Scheme, the Commission is not aware of any subsequent review of this to determine whether such a Scheme continues to offer the most appropriate forum in which to investigate and adjudicate complaints, given developments in the Island's financial services sector during the period.

Second, the Commission is concerned that the Department's proposals are too UK-centric and do not address some of the important differences between the financial services sectors in the UK and Jersey. In particular:

- It appears that the Scheme will be open to use by all natural persons, including "high net worth" individuals that are attracted to financial centres such as Jersey. In the case of such individuals, it is much less likely that there will be a significant gap between the resources, knowledge and understanding of the complainant and financial services provider and it is doubtful that they would wish to resolve conflicts through a third party such as the Scheme. But no consideration is given in the consultation paper to the "pros and cons" of limiting access of "high net worth" individuals to the Scheme or, in this context, to some form of "capping" that would have the effect of restricting claims to a lower maximum monetary amount than is currently proposed.
- The size of the trust company business sector (compared also to the Isle of Man) and its different regulatory status in Jersey is not sufficiently addressed in the paper. Whilst some of the points that are made in section 8.1 of the paper (addressing ineligible complaints, such as those relating to the legitimate exercise of discretion) will be relevant to trustee relationships, there is a risk that the trust company business sector may see the proposals as interfering with the administration of a trust and well developed legal infrastructure in which trustees operate in Jersey.
- The proportion of complaints made by non-residents to the total number of complaints made is likely to be much higher in Jersey than in the UK, but the paper does not consider what variations to the UK model might be appropriate to reflect this different usage.

Having reviewed the proposals, the Commission has also identified a number of possible issues arising from them, as shown in paragraphs 1 to 19 inclusive below.



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Scope of the Scheme

1. The proposed geographical scope of the Scheme is not entirely clear. It is stated at section 3.2 that the Scheme will cover “financial services provided *in or from* Jersey”, at section 4.1 that providers of financial services *in* Jersey must register, and at section 6.1 that the Scheme will cover providers “operating *from*” the Bailiwick.
2. The Scheme’s scope might be clarified by using similar terminology to that used in the four regulatory laws that are administered by the Commission. For example, Article 7(1) of the Financial Services (Jersey) Law 1998 (the “**Financial Services Law**”) refers to business carried on “*in or from within*” Jersey. It may also be helpful to give some examples of what this would mean in practice. For example, the scheme would cover the branch activities in Jersey of a company incorporated outside the Island, but would not cover the activities of a Jersey incorporated company carried on outside the Island.
3. The reference at section 3.3 of the paper to “personal pensions” is unclear. So too is the reference to a person having a beneficial interest in a personal pension scheme at section 7.5. Overall, it is not clear from the paper which pension providers or aspect of pension provision will be covered.

Registration

4. The suggestion at section 4 that all financial services providers register with the Scheme may be unnecessary. The Commission already publishes a list of the financial services providers that it regulates and supervises, and holds a private list of lenders that it oversees for the purpose of countering money laundering and terrorist financing. Dependant on the type of information that the Scheme wishes to collect, it may be unnecessary to duplicate registration.
5. For the avoidance of doubt, it is not proposed that the Commission should have any role in the collection of fees that may be applied to financial services providers.

Complainants

6. It is noted at section 7.2 of the paper that the UK’s Financial Ombudsman Service allows trustees to complain where a trust has a net asset value of less than £1 million. We do not consider that such a “test” should be applied in Jersey; rather trustees that are regulated and supervised by the Commission (or which are exempt from registration but otherwise subject to the Financial Services Law) should be excluded from using the Scheme, leaving the



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Scheme available for use by trustees that act otherwise than by way of business (or which - by exemption - are excluded from the scope of the Financial Services Law).

7. In practice, measurement of a "net asset value" will be fraught with difficulty. For example, at what point in time must the calculation be made? What is to be done with respect to assets that cannot easily be valued? How will the Ombudsman verify the calculation of net assets?
8. Overall use of the Scheme by financial services providers is unclear. Whilst there is a suggestion (at section 7.4) that those carrying on trust company business be excluded from using the Scheme, there is no similar statement for others. Is it intended that financial services providers that are "small businesses" could make a complaint under the Scheme?
9. Section 7.5 of the paper sets out a number of relationships with financial services providers that could qualify for accessing the Scheme. For trust company business there should be a full list of all types of relationships that exist or some generic wording to catch the entire population of trust company business customers. For example, the list covers beneficiaries of trusts and foundations, but ought to address beneficial owners of companies, partners of partnerships, and enforcers, protectors, and settlors of trusts. Each one of these may have a legitimate and unresolved complaint with a trust company business.

Ineligible complaints

10. In a case where a complaint is connected to regulatory action that is being taken by the Commission against a financial services provider, the Commission believes that the Scheme should defer consideration of that complaint until such time as the Commission has decided what action (if any) to take against the financial services provider. The Commission considers that it should not be possible for the determination of a particular complaint by the Scheme to effect the Commission's assessment of the fitness and propriety of the financial services provider or nature of regulatory action taken.

Time limits

11. The Commission does not support the proposal in section 9.4 of the paper for a three month time limit in which to issue a final response to a complainant. Whilst this is the same period of time that is allowed before an unresolved complaint must be notified to the Commission (unless another notification criterion applies) under its Codes of Practice, it is not unusual for complaints to remain unresolved after three months (often as a result of action taken (or not taken) by the complainant). An alternative might be to allow a complaint to be



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considered by the Scheme three months after it has been made, where this would be appropriate in the particular circumstances.

12. Section 9.5 of the paper states that complainants will have a period of 6 months from receipt of a final response to refer a complaint to the Scheme. The paper does not explain why a period of six months (a generous period) is considered to be necessary, when financial services providers are bound to deal with complaints within three months.

Starting date

13. Section 10 of the paper proposes that the Scheme will apply to acts or omissions that pre-date its implementation. It will be necessary to consider what transitional time limits should apply to such complaints. For example, would the three month time limit that is suggested in section 9.4 apply to a complaint that is made on the day before the Scheme is introduced?

Awards

14. Section 11.1 of the paper includes a provision for the Scheme to direct a financial services provider to take "steps that are just and appropriate". The Commission would be concerned to ensure that any such steps were clearly accommodated by principles and rules set by the Commission in its Codes of Practice. This highlights the need for close cooperation between the two agencies (and need for a memorandum of understanding to be put in place).

Independence

15. The proposed role of the board at section 13 of the paper is not clear. Would board members be Ombudsmen or would board members have a non-executive function?

Best practice loop

16. Section 14 sets out some of the "gateways" that would be available to the Scheme and types of generic information that could be shared. What is proposed would not appear to allow "confidential" information to be disclosed, e.g. the number of unresolved complaints handled in respect of specified financial services providers.



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Funding

17. The Commission does not consider it appropriate to comment generally on the proposed funding model outlined at section 15 of the paper.
18. However, it is not clear from the paper who may set the fees that are to be applied. In the absence of any statement to the contrary, it is assumed that fees will be set by an Order of the Minister for Economic Development, providing a check that the fees proposed by the Scheme can be justified and are reasonable.
19. It is also surprising that it is proposed that two of the Island's largest sectors (trust company business and funds services business) are to be subject to "flat" rather than "graded" fees.

Finally, given the "high-level" nature of the proposals in the consultation paper, and need for close liaison with Guernsey's Commerce and Employment Department, the Commission considers that there should be further consultation on the Scheme, once draft legislation is available. At, or before this time, the Commission would wish to also have available a draft memorandum of understanding, clearly identifying the basis on which the Scheme and Commission are to cooperate.

Responses to specific questions posed in the consultation paper are referenced in the annex to this letter.

Please let me know if you have any questions concerning the above.

Yours faithfully

John Harris
Director General



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Annex

Comments are invited on whether there should be a limit on the size of trust/foundation whose trustees or council members can bring a complaint to the ombudsman scheme, and if so, what the limit should be. (section 7.2)
See numbered paragraphs 6 and 7 above.
Comments are invited on the proposed categories of complainants able to use the scheme (section 7.4)
See numbered paragraph 8 above.
Respondents are invited to comment on whether all the proposed relationships between complainants and financial services providers are applicable to Jersey or if there are any others that should be included (section 7.5).
See numbered paragraph 9 above.
A decision will need to be made about whether to use 6 or 10 years as the general time limit within which to bring a complaint. Comments would be welcomed on the most suitable time limit to be used (section 9.3).
No comment.
A 3-month time limit on financial services providers is proposed (to issue a final response to a complaint), do respondents agree? (section 9.4)
See numbered paragraph 11 above.
A starting date of 1st January 2010 is suggested. Comments would be welcomed on the suitability of this date (section 10.1).
No comment.



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What would be your favoured percentage split between income from annual levies and case fees? (section 15.2.2)
No comment.
Do you agree with the approach of not charging fees on the first few complaints per year? (section 15.2.3)
No comment.
Do you agree there should be flat fees for financial services providers that deal with consumers, except in certain areas where it should be graded? (section 15.2.8)
See numbered paragraph 19 above.
Should these graded areas include banking, life insurance, insurance mediation and financial advice? (section 15.2.8)
See numbered paragraph 19 above.
Do you agree the data to inform these graded areas should be measures of the size of consumer business or could more basic data such as number of employees be used? (section 15.2.9)
No comment.