

JATCO

THE JERSEY ASSOCIATION OF TRUST COMPANIES

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D Scott,
Strategy Manager
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Dear Mr Scott

Ref Financial Services Ombudsman Scheme for Jersey and Guernsey Consultation

I am writing in response to the Ombudsman Consultation Paper, in my capacity as President of the Jersey Association of Trust Companies (JATCo). JATCO represents the vast majority of trust companies operating in Jersey.

It is our understanding that an Ombudsman scheme has been proposed for the following reasons:

1. To meet the SEPA requirement for an effective out of court redress system in relation to payments in Euros.
2. To produce a scheme to give a cheap and effective resolution system for consumers on lower income levels with concerns about financial services products that they have purchased.

We are fully supportive of these aims and hope that an effective and economic ombudsman system can be introduced to meet these needs. However we have grave reservations with regards to the inclusion of trusts within any such

Ombudsman scheme. Furthermore, whilst our comments below are made with reference to trusts, in many respects the same can be said about Jersey foundations. It is our view that foundations should, therefore, also be excluded from the ambit of any scheme.

Our understanding from the original scoping document is to produce a scheme that addresses consumer issues having purchased a financial services product, i.e. a retail item.

The trust sector whilst regulated in Jersey by the Jersey Financial Services Commission is anything but an industry that operates in the retail sector. Trusts set up in Jersey and administered in Jersey are of a very specialised nature requiring expert knowledge and advice and are certainly not an "off the shelf" type product. Indeed it is questionable whether a trust, which is in reality a relationship with associated rights and duties, can meaningfully be described as a financial product at all.

Whilst trust business is a large part of the Island's financial services the settlor who is the main "customer" is not the "ordinary man in the street" but someone who will invariably have already sought expert advice and understand the reasons for the setting up of a trust. Indeed there are very few Jersey consumers of Jersey Trusts. 99% of settlors and their beneficiaries are resident outside of the Island.

So far as beneficiaries of Jersey trusts or trusts with Jersey trustees are concerned, they already have the ability to make applications to the Royal Court of Jersey for orders in respect of numerous matters relating to their trust that fall short of claims for breach of trust (for example, questions concerning the provision of documents or fee disputes), and to ask the Court to exercise its supervisory jurisdiction in relation to trusts. Often their costs of doing so will be met out of the trust fund. What is more, the principles governing the exercise of the Court's supervisory jurisdiction in these matters are well established in statute and Jersey case law. We believe that the involvement of an Ombudsman is not only, therefore, unnecessary but could be a complicating factor in trustee / beneficiary disputes, where it is unclear that an Ombudsman will be subject to the same rules and principles laid down in statute and/or case law .

Jersey's extensive case and statutory law in the field of trusts together with its robust but fair judiciary with a global reputation for its expertise in this area, give settlors of Jersey trusts in particular certainty, assurance and knowledge on how matters would be treated. The introduction of an Ombudsman with the ability to look at what could be highly complex structures would add uncertainty which could in turn act as a deterrent to those settlors establishing their trusts here.

Furthermore, it is unlikely that any Financial Ombudsman would have the requisite degree of expertise in trusts in order to make decisions on the sorts of matters most likely to be raised (eg, a beneficiary seeking to challenge an exercise of the trustee's discretion, or a request for access to detailed information on a trust going beyond the scope of that to which a beneficiary is usually entitled, or fee disputes which are usually time based). This is likely to result in the need for expensive external legal support and advice. Furthermore, because on the face of it the scheme could extend not only to trusts of which the proper law is Jersey law, but also to any trusts administered in Jersey regardless of their proper law, the Financial Ombudsman would need also to involve foreign lawyers in an appropriate case.

In all the circumstances, the proposed process could well lead to the Ombudsman making decisions that are inconsistent with established legal principles.

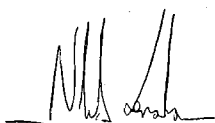
The introduction of the scheme as it is currently proposed would, we feel, have the potential to cause substantial damage to the reputation of the Island. The uncertainty that it would introduce with regard to who could complain and what the outcome could be could, we believe, lead to a downturn in business for the Island with trusts that would otherwise be set up and administered in Jersey instead being established in other jurisdictions. We are aware that other jurisdictions are already using these proposals as a marketing tool to divert business from the Island to their own jurisdiction which promises no such legislation.

The current proposals do set out substantial exemptions which it might be said would alleviate some of the problems referred to above, because the scheme would not then cover such matters. However, there may be an element of discretion in the Ombudsman to decide whether the exemptions apply in a particular case, leading to further uncertainty. In any event, these exemptions are so extensive that we believe that this could give rise to a negative view of the Ombudsman's powers. It would we believe be better to exclude the trust sector in its entirety.

The costs of running a scheme that would include the trust sector would be astronomical and certainly not commensurate with the outcome. It is our understanding that the costs for resolving a complaint to the Isle of Man's Ombudsman (which does not cover as complex subject areas as trusts) are substantial. The costs are funded by the Manx Government. The Jersey proposal is that the financial services industry covers all these costs. Jersey is already a high cost jurisdiction and these additional and what we can only conclude to be substantial costs looking at the experience of the Isle of Man may well drive firms out of the Island.

In conclusion whilst we understand the need for the introduction of an Ombudsman scheme, we would not wish to see such an extensive scheme that covers the trust sector. The above is by no means an exhaustive list of the problems which would be inherent in this but we hope that, nonetheless, it demonstrates that so far as trusts (and foundations) are concerned the proposed scheme would be fraught with difficulties. The urgency is to introduce a scheme that meets the needs of SEPA and we would encourage this need is met with a later review of a possible extension of a scheme at a later stage.

Yours sincerely



Nick Landor

President

JATCo

Jersey Association of Trust Companies