



JERSEY FINANCE

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18 April 2011

Dear Sir

Financial Services Ombudsman Scheme for Jersey and Guernsey

I write in response to the Consultation Paper issued on 1 February 2011.

First, some procedural observations. With regard to the length of the consultation period, it is customary to allow 3 months; we would note that the initial period stated in the Consultation Paper was less than 6 weeks. It is also the norm to provide that respondents may send their responses to Jersey Finance, should they wish to retain anonymity; we note this was not offered for this Consultation.

It would be appreciated by industry if EDD could follow the accepted procedure in terms of the above in future consultations.

Scope of the Scheme

Industry has expressed a number of views in relation to the concept of an Ombudsman scheme; whilst generally supportive of a service to assist consumer protection in the Island (with one exception, as described below), it is considered that such a scheme should exist to provide a cost efficient and effective resolution system for those for whom other means of redress are not feasible, and any scheme should only be appropriate and proportionate to the Island's requirements.

One trade association has queried whether there is a strong need for an Ombudsman Scheme, stating:

"A report to the States dated 6 June 2006 (the "2006 Report") recommends that a public consultation be carried out to better determine the appetite for and preferred scope of such a scheme, before a final decision is made on whether to progress the scheme and, if so, in what manner. No such consultation has taken place and the establishment of an Ombudsman Scheme has already been approved by the States."

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Another trade association has said that they 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 scheme. Query whether, had a consultation as recommended in the 2006 Report taken place, this opportunity for a competitor jurisdiction to divert business away from Jersey, would have arisen.

Jersey Finance notes that an Ombudsman Scheme is not an IMF requirement under international standards, nor was it a recommendation in the Foot report.

Jersey Finance understands that one driver for the scheme is to meet the requirements set out in the Single European Payments Directive. However, that requires only that an effective out of court system in relation to payments in Euro.

Another trade association commented that the aim of such a scheme was to be *“looking after ‘the common man’ rather than building any ‘gold plated’ scheme; essentially we should be following the same sort of approach we took to the provision of a Depositor Compensation Scheme.”*

Complainants

Industry are very concerned about the scope of complainants covered in the proposed Scheme.

Projected number of complaints: the Paper posits that a Jersey Ombudsman could expect to receive a similar number of complaints as the Isle of Man Ombudsman – which is between 230 and 390 complaints a year since its inception in 2002. One trade association highlighted the fact that the 2006 Report quotes how 94% of the complaints to the Isle of Man Ombudsman are from non-residents, and only 15 to 25 or complaints are received each year from residents. Clearly, if the main aim of the proposed Scheme is to offer protection to local residents, then a disproportionate amount of resource would be allocated to offering protection to non Jersey residents.

Nature of the industry: Jersey’s finance industry has traditionally attracted business from outside the Island, and for most financial services providers based here, resident customers form only a small minority of their customer base. One trade association has noted that there is no analysis in the Consultation Paper on whether it would be appropriate to restrict the Scheme to Jersey resident complainants, stating *“If it were so restricted it would significantly lower the potential cost and administrative burden of the Scheme”*. Another trade association notes that the Consultation Paper does not highlight any cases of a call from non-resident consumers of Jersey financial services for an Ombudsman Scheme.

Inclusion of the trust sector

This sector is not included in the Isle of Man scheme or the UK scheme. Jersey’s trust regime is internationally recognised as a world leader; however as one member commented *“the ‘trust’ relationship is not a retail product which is ‘sold over the counter’*. Indeed, it is questionable as to whether a trust could meaningfully be described as a financial product. Beneficiaries of Jersey trusts are able to seek redress through the Royal Court, and costs can be met out of the trust assets. In addition to a sound Trusts Law, there is an extensive framework of case law. To allow an Ombudsman to have access to documentation which is not allowed under trust law could result in catastrophic results for the trust industry. The expertise required of an Ombudsman dealing with complaints in this area would need to be extensive. It should not be forgotten that Jersey trustees can administer trusts formed under the law of other jurisdictions (eg Cayman Islands) and thus far wider expertise would be required.



To extend the proposed Scheme to the trust sector, when other competitor jurisdictions do not have the same, would put Jersey at a commercial disadvantage. One member commented it “...will frankly make doing trust business in Jersey uncertain and unattractive for the international ‘gatekeeping community...”.

Effect on competitiveness of Jersey

One trade association has highlighted elements of the proposed Scheme which are likely to make Jersey's product offering less attractive, and likely to be seized upon by competitors looking to take business from the Island. The decision as to where to establish fund structures, given that the Scheme is proposed to extend to all collective investment funds, and where managed entities may seek to set up, is usually highly sensitive to cost and regulatory burden. The implementation of the Scheme as proposed would increase that burden.

This may also have an adverse effect in relation to the inward investment drive of the Island; Jersey Finance has a dedicated staff member whose role relates solely to attracting new business to the Island, and the States Director of International Finance has recently relocated to London primarily to focus on inward investment. There are thus policy issues to consider.

It is not clear from the Consultation Paper whether any analysis has been done of other schemes in other jurisdictions, particular our competitor jurisdictions; the Isle of Man's finance industry is very different to ours and is perhaps not the best comparator.

Costs

One trade association commented as follows:

“Examination of the consultation paper evidences the expectation government have that the finance industry will pay although there are no cost parameters, budgets or estimates. It needs to be explained that the continued and increasing costs of operating in Jersey, which is already a relatively high cost jurisdiction, can have a detrimental effect on policy decisions, often taken off island, on location. Therefore in considering the provision of a scheme we must ensure any costs are minimised and that the jurisdiction remain competitive and an attractive place in which to set up or consolidate business.”

Another trade association conducted an analysis as follows:

“The 2006 Report anticipates the cost of the Ombudsman Scheme to be between £500,000 and £750,000 a year. The Draft Annual Business Plan 2010: Sixth Amendment - Comments presented to the States on 21 September 2009 suggests that the cost of 5 full-time employees, a panel of 10 off-Island ombudsmen and the costs of premises, accommodation and travel indicate that the Scheme would cost at least £500,000 a year to operate, and anticipates that costs will have increased even further by 2011 when the Scheme might come into effect.

Assuming a cost of £750,000 and a case load similar to that of the Isle of Man Ombudsman, the cost per complaint (including all ineligible complaints and complaints resolved against the complainant) would be around £1,900 - £3,250. For each Jersey resident complainant (including all ineligible complaints and complaints resolved against the complainant) the figure would be around £30,000 - 50,000. If, say, a third of all complaints are eligible and resolved in favour of the complainant, then the cost of each complaint resolved in favour of the complainants might be roughly between £5,700 and £9,750 for all complainants (resident and non-resident) and between £90,000 and £150,000 for each complaint from a Jersey resident resolved in favour of the complainant. There is no reason to believe that the average pay-out would not roughly mirror that in the Isle of Man, of around £600.”

One trade association was of the view that the operation of the Scheme, as a political and social measure, should be funded by general taxation, as in the Isle of Man, and that it was inappropriate



that it be funded by the financial services industry as a whole “as it would cause disproportionate costs to be borne by businesses which are unlikely to be the subject of a complaint”.

Another trade association stated that “Whilst the scheme must support the consumer it was suggested that a nominal service fee to any complainant may be appropriate such as to give any complainant a stake in the complaint. Any upheld complaint could include the refund of the fee.”

This is an interesting point, as it is not a requirement that such schemes be free to complainants. Having a nominal fee to use the service could deter vexatious complainants and help defer costs.

Anything which adds to the cost of doing business in Jersey goes directly to the competitiveness of the jurisdiction.

Binding nature of the Ombudsman decision

Jersey Finance notes that in the majority of other jurisdictions in Europe, an Ombudsman’s decision is by way of recommendation, rather than determination.

One trade association commented:

“On the whole Members preferred that any decisions made by the Ombudsman should NOT be binding on either parties, or indeed just the financial services provider.”

Absence of appeal mechanism

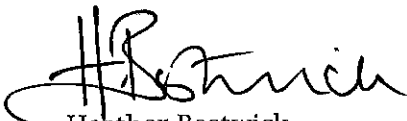
Article 6 of the European Convention on Human Rights states that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

The proposed Scheme has no appeal mechanism for financial services providers, and nor is any justification provided for its absence. Restricted access to judicial review is provided for process but not for the decision of the Ombudsman. It has been suggested that the Jersey scheme therefore would fall foul of human rights law.

The reputational risk for financial service providers being subject to a binding determination, with no right of appeal, should not be underestimated.

I trust the above is helpful but if you need to discuss please contact me.

Yours faithfully


Heather Bestwick
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