



# Complaints Commissioner

## THE CONSTITUTION COMMITTEE

### INQUIRY INTO THE ACCOUNTABILITY OF REGULATORS TO CITIZENS AND PARLIAMENT

#### Submission by the Complaints Commissioner for the Financial Services Authority

#### Introduction

1. Members of the Committee will be aware that the arrangements set up under the Financial Services and Markets Act 2000 (FSMA) require the Financial Services Authority (FSA) to have in place arrangements for the independent investigation of complaints against the FSA. It is the role of the Complaints Commissioner to conduct such impartial investigations into complaints that are referred to her. Her role, therefore, forms part of the overall accountability arrangements that Parliament put in place under FSMA: it represents one component of the system of 'checks and balances' that it was felt appropriate to apply to the FSA once it was equipped with its new powers under the Act.

2. In the light of the scope of the Committee's investigations, the Commissioner believes that her observations on how this aspect of the arrangements applying to the FSA is working out in practice might be of interest. In particular, these may be relevant to the Committee's deliberations on the rights of individuals in relation to the decisions of regulators; and on the accountability of regulators to the public. Accordingly, below in this submission we comment briefly on the background to the Complaints Scheme and the role, powers and duties of the Commissioner (paragraphs 3 to 9); on the FSA's role under the Scheme (paragraphs 10 to 14); on experience to date (paragraphs 15 to 22); and on resources (paragraphs 23 to 27). At the end of the submission, in paragraphs 28 to 34, we provide a summary and some conclusions on accountability issues for the Committee's consideration.

#### Background to the Scheme and the role, powers and duties of the Commissioner

3. The passage into law of the Financial Services and Markets Act 2000 marked major changes not only to the way in which the financial services industry is regulated but also to the handling and investigation of complaints about products and services and about regulated businesses as well as about the actions of the regulator. It is important to emphasise that, prior to FSMA, a complainant looking at the complaints arrangements as a whole would have seen a patchwork of different schemes, with different bodies working to somewhat different objectives and with different processes and procedures. Frequently it was far from clear to where they should be directing their complaint and/or who should be helping them. FSMA has helped considerably to simplify this situation, and lines of accountability are therefore clearer, but it should be emphasised that the arrangements continue to be complex and are, as yet, not well-understood by all those who need to access them. This point is returned to below in this submission; however, against this

background the approach to the handling of complaints about the FSA represents one key component of the new arrangements.

4. FSMA requires the FSA to maintain a Complaints Scheme for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of its functions under the Act, other than its legislative functions. FSMA also requires the FSA to appoint, with Treasury approval, an independent person (the Commissioner) to be responsible for the conduct of investigations in accordance with the Complaints Scheme. That person (and any member of her staff) must not be an employee of the FSA and is required to act independently of, and without favouring, the FSA. The FSA must provide the Commissioner with the resources necessary to do the job.<sup>1</sup> Detailed proposals for a Scheme were consulted upon by the FSA and the terms of the Scheme<sup>2</sup> as finally approved after consultation are specified in detail in the FSA's Handbook. It was introduced in September 2001.

5. The Scheme covers, with certain exclusions, complaints about the way the FSA has carried out, or failed to carry out, its role. This includes complaints about mistakes or lack of care, unreasonable delay, unprofessional behaviour, bias and lack of integrity. To be eligible to make a complaint under the Scheme, a complainant must be seeking a remedy in respect of some inconvenience, distress or loss that s/he has suffered as a result of being directly affected by the FSA's actions or inaction. The Scheme does not cover complaints about the actions of the Financial Ombudsman Service (FOS) or the Financial Services Compensation Scheme (FSCS). Specifically excluded from the Scheme are complaints about the FSA's relationship with its employees and complaints connected with contractual or commercial disputes, and complaints 'in relation to the performance of the FSA's legislative functions under the Act (including making rules and issuing codes and general guidance)'.

6. In addition to the above exclusions, under the terms of the FSA's Handbook the FSA may decide not to investigate a complaint that it 'reasonably considers' could have been or would be more appropriately dealt with in another way (for example by referring the matter to the Tribunal); or 'amounts to no more than dissatisfaction with the FSA's general policies or with the exercise of discretion where no unreasonable, unprofessional or other misconduct is alleged'.

7. The Scheme envisages that complaints will generally first be investigated by the FSA (known as the Stage 1 investigation). If the complainant remains dissatisfied with the outcome of an investigation s/he may refer the matter to the Commissioner who will carry out her own independent investigation (known as a Stage 2 investigation). A complainant may also refer a complaint to the Commissioner if s/he is dissatisfied with the FSA's progress in investigating it. And, if the FSA decides not to admit a complaint to the

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<sup>1</sup> In practice, this means the resources are provided by the financial services industry as the industry has to meet the costs of the FSA.

<sup>2</sup> There are, in fact, two Schemes: a Main Scheme that deals with complaints about the way in which the FSA has carried out, or failed to carry out, its role under FSMA; and a Transitional Scheme that deals with the investigation of complaints about the FSA and predecessor bodies under previous legislation. The provisions of both Schemes are, however, very similar (the only substantive difference relates to the power to recommend money compensation, which applies only to the Main Scheme), hence in the remainder of this submission we refer, for simplicity, to the Scheme as if it were a single Scheme.

Scheme, or decides not to investigate it, they must notify the Commissioner, who then decides whether or not the complaint falls within the scope of the Scheme and, if so, whether to conduct an investigation.

8. The FSA is required to afford the Commissioner 'all reasonable co-operation' in the conduct of her investigations. The Commissioner may conduct an investigation in whatever manner she thinks appropriate but in deciding whether or not a complaint is made out she has to have regard to the FSA's statutory objectives. If the Commissioner finds that a complaint is made out, she may, if she thinks it appropriate, recommend that the FSA remedy the matters complained of and/or make a compensatory payment to the complainant. The Commissioner must report to both the FSA and the complainant on the results of her investigations, giving reasons for any recommendations, and may, at her discretion, publish her report in whole or in part. The FSA is not obliged to implement her recommendations; however, in cases where a complaint is made out and/or the FSA has been criticised in a report the FSA must inform both the Commissioner and the complainant of the steps that it proposes to take by way of response and must publish its response if the Commissioner requests it.

9. Additionally, the Commissioner must submit to the FSA Board, and publish, an Annual Report on investigations concluded in the year; this may include information on trends and on general lessons that the FSA should learn. The Commissioner has also chosen to publish a Quarterly Report to supplement the Annual Report.

### **The FSA's role under the Scheme**

10. It is a fundamental feature of the complaints arrangements that the Scheme provides the framework within which the FSA itself approaches the identification and investigation of complaints. Complaints arrangements for any organisation are crucial to engendering a culture of continuous improvement; in the case of the industry regulator such a culture is of paramount importance. The Commissioner's role is to provide an independent view where a complainant is dissatisfied or where the FSA has not, or may have not, followed Scheme processes or procedures. In this sense the role of the Commissioner is one component, albeit it a vital one, of the wider arrangements.

11. It is key to engendering the right culture that the regulator and its staff not only welcome independent scrutiny but also aim to reap the benefits of it. Indeed, the Commissioner herself recognises the importance of the latter point; one of the five key objectives she set out in her first Annual Report was the need 'to assist the FSA as well as complainants to reap the benefits of the Complaints Scheme, by helping them to ensure that mistakes, once identified, are rectified and processes and procedures improved in the light of experience.' It is therefore helpful to explore how the Commissioner and the FSA work together in implementing these arrangements. Of course, it is essential that the Office of the Commissioner is and must be fully independent of the FSA but it has to be helpful from the viewpoint of complainants if the staff of the Commissioner's Office and those in the FSA responsible for administering the complaints arrangements adopt a co-ordinated approach to the handling of complaints.

12. Responsibility for the administration of the complaints arrangements within the FSA lies with the Company Secretariat. They maintain the records of complaints made (all parts of the FSA are under an obligation to notify the Secretariat as and when they become aware that a complaint has been or is being made) and manage the process of conducting Stage

1 investigations. All such investigations have to be conducted by a suitably senior member of staff who has not been involved in the matter complained of; frequently such staff are drawn from the Company Secretariat and, where others are involved, the Secretariat will arrange for this to happen. The Secretariat is thus the nominated point of liaison with the FSA for the Commissioner; all information about complaints and all requests for information or input to Stage 2 investigations go through the Secretariat. Written protocols govern these working arrangements.

13. Generally, therefore, the Office of the Commissioner is dependent on the FSA to provide relevant information and to make its staff available for interviews in support of investigations. This can, inevitably, seem an onerous task for FSA staff who have to prioritise the Commissioner's enquiries and needs in addition to their existing responsibilities. The Commissioner's many requests have, with a few exceptions, to date received a positive and professional response from the FSA; nonetheless, it remains important for all parts of the FSA to recognise the important role of the Commissioner and the need to respond to requests on a timely basis if the FSA is itself to reap the benefits of the complaints arrangements.

14. Also of great potential importance to the FSA's role under the Scheme is the degree of Board involvement. The Commissioner delivers a quarterly report to the FSA Board on her work and findings and any lessons learned and more recently regular meetings with the Non-Executive Directors' Committee have been introduced, which all helps to provide top level support for and interest in the Commissioner's work and findings. But it is noticeable that, thus far, reports on progress with the internal operation of the Scheme go to the executive directors but not to the full Board. Thus the non-executive directors hear at first hand about the independent element of the arrangements but not about the FSA's own role in the Scheme.

#### **Experience to date: enquiries and complaints received by the Commissioner**

15. Experience to date with the operation of the Scheme in practice has revealed some interesting issues. Details on the work of the Commissioner's office and on the enquiries and complaints handled are provided in the Commissioner's published Reports and are not repeated in this submission. (Four Quarterly Reports have been published to date; the first Annual Report covering the period to 31 March 2002 was published last year and the second Report for the year to 31 March 2003 will be published shortly.) The following points may, however, be of interest to the Committee.

16. With regard to the **volume of enquiries and complaints**, it was difficult at the outset to predict the likely level of these but there were a number of reasons to suppose it would be greater than under the old arrangements. New legislation regarding the regulation of financial services created in the form of the FSA a new entity that brought together a number of predecessor bodies but also extended its powers and brought in new ones (a process that is not yet at an end). In these circumstances, some number of administrative problems giving rise to complaints would be inevitable. Further, this was at a time when a series of high profile issues were manifesting themselves (for example pensions mis-selling, Equitable Life, mortgage endowments). And since the inception of the Scheme difficult market conditions in the financial services industry have deteriorated; this alone might be expected to increase the number of complaints as consumers look for avenues to

recover their losses. In practice, the volume of enquiries and complaints<sup>3</sup> has grown significantly since the Scheme was introduced. The Commissioner's Office currently handles about 50 per quarter (the FSA itself is handling approximately three times as many).

17. When, however, we look in more detail at the **organisation to which the enquiry or complaint relates**, we find that in the year to 31 March 2003 only 55% of enquiries and complaints received by the Commissioner related to the FSA (although in a number of instances a certain amount of investigation was necessary to establish that this was the case). More than one quarter of enquiries and complaints proved to be about financial services firms and were thus properly the province of the Financial Ombudsman Service (FOS). Additionally, 10% proved to be about the way in which FOS itself (or a predecessor body) had handled a complaint. This is also a matter for FOS; however, a few complainants feel strongly that the FSA, as regulator, ought to be concerned about the practices and performance of FOS, albeit that under the current arrangements FOS is clearly operationally independent of the FSA. A number of complainants are also unaware that they may be able to take a dispute about FOS's handling of their case to the FOS Independent Assessor when they have exhausted FOS's own arrangements.

18. Also of interest is the **type of complainant**. In advance of the Scheme's implementation, it seemed probable that a substantial proportion of enquiries and complaints arising would come from the firms and advisers regulated by the FSA. In the event, this has not proved to be the case. Enquiries and complaints have come predominantly from individual members of the public rather than from organisations. Only 20 % of enquiries and complaints received by the Commissioner in the year to 31 March 2003 came from independent financial advisers, approved individuals or officers of other organisations such as credit unions or mutuals. There were no enquiries or complaints from major financial services firms.

19. The **source of complaints** also sheds light on how the Scheme is working. More than half the enquiries and complaints received in the year to 31 March 2003 were sent directly to the Commissioner. These included a substantial proportion of the complaints that turned out to be the province of FOS or the FOS Independent Assessor. But nearly one in three were referrals to the Commissioner by the FSA of a decision to exclude a complaint from the Scheme or not to investigate it, either in whole or in part. Thus, a minority of matters brought to the Commissioner by a complainant had been the subject of a Stage 1 investigation by the FSA. This again contrasts with expectations at the outset that most complaints received by the Commissioner would come via this route.

20. The matter of **referrals to the Commissioner of matters that the FSA have declined to admit to the Scheme, or to investigate**, merits special attention. Initially such referrals were not only few in number but also they were not controversial. The Commissioner found herself able readily to agree with the FSA's decision in most cases. More recently, however, although the Commissioner has continued to be able to agree with the FSA's decision in the majority of cases, during the year ended 31 March 2003 she examined eleven cases

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<sup>3</sup> Numbers of enquiries and complaints are based on files opened by the Commissioner. Files are opened in all cases where the Commissioner is in correspondence with or about an actual or potential complaint; they thus include cases that do not ultimately give rise to a complaint under the Scheme.

where she disagreed. And nine further referrals were still under consideration at 31 March. The Commissioner has disagreed with the FSA for various reasons. In some cases, for example, the FSA had mistakenly excluded the complaint on grounds that do not appear in the FSA Handbook, and in other cases, where the FSA had decided not to investigate, the Commissioner decided that the complainant was clearly alleging misconduct and that the FSA should have recognised this. In any event, this development has implications for the Commissioner's workload but also for the overall working of the Scheme.

21. The **subject matter** of the enquiries and complaints received is also of considerable interest. A large proportion of complaints about the FSA itself include an element relating to some aspect of the FSA's supervisory activities, including the FSA's supervision of Equitable Life, and the markets for mortgage endowments and split cap investments; the impact of money-laundering regulations; advice given about outstanding pensions reviews; and the "unfriendliness" to users of the FSA Handbook. Complaints relating to the FSA's enforcement and authorisation functions have been relatively few in number. But analysis also shows that nearly one in three of complaints relate either in whole or in part to administrative problems. Allegations of bias or of major misdemeanours have been few. The problems reported by complainants have included delays of various kinds; letters not answered; persistently mis-addressed mailings; or lost files. But of particular interest is that a number of these administrative failures relate to the complaints arrangements themselves. A complaint with its origins in some other alleged failure on the part of the FSA is not infrequently added to by a failure to recognise the complaint as such or to investigate it adequately.

22. Last, some aspects of the Commissioner's **findings and recommendations** are also of interest. As noted above, many of the complainants are consumers. A common theme in many cases is failure to adopt a co-ordinated approach to 'customer' or 'consumer' management. Although the FSA has effected some improvements in this area (in part in response to points made by the Commissioner) there is no common system for use by all departments that make direct contact with customers and this can result in significant failures of communication. Another common theme relates to awareness of the Scheme and understanding of its procedures. This is still patchy across the organisation. And the FSA Company Secretariat that administers the arrangements has suffered from inadequate resourcing.

## **Resources**

23. At the start of the Scheme, as noted above, it was extremely difficult to predict what the volume of enquiries and complaints might be. The Scheme requires the FSA to provide the Commissioner with the resources necessary to discharge her remit, but it was necessary to make some assumptions about the most appropriate approach to resourcing in these conditions of uncertainty. Further constraints were that the powers and responsibilities of the Commissioner are personal to her; the Scheme does not provide for an Office of the Commissioner with any legal status or standing, and, of course, anyone assisting the Commissioner in the discharge of her responsibilities has to be fully independent of the FSA. (The crucial need for independence from the FSA affects resourcing quite widely; not only does it mean that staff may not be seconded from the FSA to support the Commissioner; it means that advisers must, similarly, be independent.)

24. Accordingly, once the basic processes and procedures needed to support her work were put in place, the Commissioner decided to operate on the basis of a small core team,

supported by additional resources on an 'as-needed' basis. The Commissioner herself is part-time; at the inception of the Scheme her core team comprised herself, a part-time Personal Assistant and a part-time Administrator. At the start of 2002/3, another part-time member joined the core team to assist with the planning and executing of investigations. During the year the workload has necessitated substantially increased input from all these individuals.

25. Additional resources to support investigations are obtained from two sources. The Commissioner has a small panel of experienced investigators who are self-employed and who will assist with particular investigations from time to time; and in certain circumstances resource can also be bought in from the Commissioner's professional advisers.

26. As it is impossible to foresee accurately the volume or complexity of the enquiries and complaints that might be received during the year, the Commissioner agrees a budget with the FSA that assumes a 'base' caseload of routine enquiries and complaints. Major investigations arising during the year are treated as additional specific projects, and project budgets notified to the FSA in advance.

27. This approach to resourcing gives flexibility, but may lead to problems when demand is increasing. In these circumstances, it may be necessary to buy in resource to cope with a backlog and this may result in expenditure on professional fees over and above what 'permanent' staff might have cost. To an extent, this has happened as the workload has built up since the Scheme's inception. It seems probable that similar problems have been and are being encountered by those discharging similar responsibilities in relation to other regulators or with other 'ombudsman' functions deploying similar skills; to the extent to which this is so there could be benefit in co-ordinating resource planning and, perhaps, providing support from a common pool of people.

### **Summary and conclusions on accountability**

28. The Complaints Scheme provided for under FSMA is a key component of the framework within which the FSA is held accountable. The Scheme arrangements should:

- engender and support a culture of continuous improvement; such a culture provides an important safeguard against the improper or incompetent use of power by the FSA; and
- give comfort to the industry, to the public more widely and to Parliament by providing for the independent investigation of complaints where a complainant remains dissatisfied or where the FSA has not followed Scheme processes and procedures.

29. In order to meet these objectives, however, a number of criteria need to be met:

- the scope of the Scheme needs to be broad enough to encompass complaints about improper or incompetent use of power;
- the Scheme needs to make appropriate provision in terms of the role and powers of the Commissioner as the independent investigator, including the ability to apply appropriate remedies and sanctions where power is found to be used improperly or incompetently;

- the FSA itself needs to administer the complaints arrangements properly and ensure that all its staff understand the arrangements and how they work, and are prepared and willing to support both internal and independent investigations of complaints and learn from the conclusions of these investigations;
- awareness of the Scheme (and the arrangements that apply in the financial services sector for the handling of complaints other than those about the FSA) needs to be actively promoted so that complainants know how and when to access the Scheme should they need it; and
- the Scheme should be resourced adequately to meet its objectives but should be operated as effectively and efficiently as possible.

Against these criteria the following observations may be made.

30. With regard to **the scope of the Scheme**:

- the general approach taken in the Scheme to the matters that may be the subject of a complaint is broadly drawn; virtually any complaint involving an element of misconduct on the part of the FSA may in principle be covered; it is important that the Scheme be operated in practice to reflect this and not to focus only on administrative errors or matters of process;
- the approach to potential complainants is, similarly, broadly drawn; to use the Scheme, a complainant has merely to be seeking a remedy (which could include an apology) in respect of some inconvenience, distress or loss;
- most of the specific exclusions provided for in the FSA Handbook are not only clear but reasonable (e.g. employee disputes, where other arrangements operate, or contractual disputes where conventional legal remedies are available); the exclusion of matters relating to the FSA's legislative functions is also in principle reasonable as these represent the exercise of powers granted by Parliament (the question of whether a complaint relates solely to the exercise of legislative functions or also involves some element of maladministration may be complex in practice, but the fact that the Commissioner has the right to adjudicate on exclusions provides some safeguard);
- one potential area of difficulty (and one that has generated problems in practice) relates to the FSA's ability, under the Handbook, to decline to investigate a complaint that they believe 'amounts to no more than dissatisfaction with the FSA's general policies or with the exercise of discretion' where no misconduct is alleged; the Commissioner believes that a regulator's exercise of discretion is, prima facie, a matter that should be capable of independent scrutiny; however, in practice if a complaint is being made at all the likelihood is that misconduct of some kind is being alleged, and the fact that the Commissioner has the right to adjudicate on such cases provides some further safeguard.

31. With regard to **the role and powers of the Commissioner:**

- the fact that a complainant can access a fully independent third party if they are dissatisfied with the FSA's response to them is a crucial safeguard;
- the full independence of the Commissioner and her staff from the FSA is assured; the Commissioner was appointed by a panel comprising the (non-executive) Deputy Chairman of the FSA, the Chairmen of the Practitioner and Consumer Panels and another independent person, and the appointment approved by the Treasury, and all the staff and advisers supporting her are also fully independent of the FSA;
- the Commissioner has full powers to conduct her investigations as she deems appropriate and to recommend accordingly, and must be given the necessary resources to do the job; but
- noticeably absent from the arrangements is any power to fine the FSA; also there is no obligation on the part of the FSA to implement the Commissioner's recommendations; however
- the Commissioner's powers to require the FSA to publish its response to her reports, including its reasons for any decision not to follow a recommendation, is a relatively powerful sanction; and
- the Scheme does make provision for the Commissioner herself to be accountable to the public through the medium of reporting, both on investigations and annually, and for the latter to be published; in practice the Commissioner has chosen to publish more rather than less information on her activities.

32. With regard to **the FSA's role under the Scheme:**

- the FSA has made significant efforts to get its staff to understand the objectives and processes of the Scheme; but
- awareness and understanding are still patchy across the organisation and there have been problems of insufficient resource being made available to support the Scheme internally;
- although in general the FSA has made a positive and professional response to the Commissioner's requirements for input to her investigations, and to many of her findings and recommendations, there are still areas of difficulty, including the key area of consistent customer handling;
- there is Board level support for and involvement in the independent element of the complaints arrangements (although less involvement on the part of non-executive directors in the internal element of the arrangements);
- overall, work continues to be needed to make sure not only that complainants benefit from the arrangements but that the FSA also benefits to the maximum extent as well.

33. With regard to **awareness of the Scheme**:

- it is clear that more needs to be done to ensure that those who may need to make use of the complaints arrangements know how and when to access them.

34. With regard to **resourcing**:

- adequate resourcing is essential; this is difficult to plan for under circumstances where future workloads are far from clear and where the requirements for independence impose a number of constraints on operations; and
- there may be merit in looking at the operations of all those discharging similar responsibilities in relation to other regulators, or with other 'ombudsman' functions deploying similar skills, to see whether there could be benefit in co-ordinating resource planning and, perhaps, providing support from a common pool of people.

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