Complaints Commissioner

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Financial Services Future Regulatory Framework Review Phase II Consultation – submission from Amerdeep Somal, the Financial Regulators Complaints Commissioner

Sent to: FRF.Review@hmtreasury.gov.uk

Responding to Question 6 of the consultation questions in Chapter 3 Accountability, scrutiny and stakeholder participation as follows:

Question 6 *Do you think the focus for review and adaptation of key accountability, scrutiny and public engagement mechanisms for the regulators, as set out in the consultation, is the right one? Are there other issues that should be reviewed?*

1. **The review does not take account of the existence of the Financial Regulators Complaints Commissioner as part of these arrangements.**

   i) Part 6 of the Financial Services Act 2012 (the Act) requires the regulators (FCA, PRA and Bank of England) to maintain a scheme (the Scheme) for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of their relevant functions[1]. The regulators must appoint an independent person ("the investigator", also referred to as the Complaints Commissioner) to be responsible for the conduct of investigations in accordance with the Scheme. The Commissioner is also responsible for the independent review of complaints against the Payment Systems Regulator. Whilst the appointment is made by the regulators, it is an independent role, subject to approval by HM Treasury. As a statutory appointment, the Complaints Commissioner is an important stakeholder and has a unique place in the accountability and scrutiny arrangements for UK financial services regulation.

   ii) Although the Commissioner is not directly involved in policy setting, the role provides independent scrutiny, can recommend remedies and redress for affected complainants, and forms part of the democratic accountability framework for assessment of the regulators' performance. Complaints are an important part of the regulatory feedback mechanism and provide insights into how individuals and firms have been directly affected by regulatory action and/or inaction. It is therefore a significant omission that neither the Scheme nor the Commissioner are mentioned in the consultation document.

2. **The review should acknowledge the role of the Complaints Commissioner in ensuring that Parliament's intentions for the regulators to maintain an effective Complaints Scheme are being met**.

[1] For the Bank of England, the Commissioner's' role is only in respect of its oversight of the banking clearing houses and payment schemes.

i) The Commissioner's role is to review independently complaints about the actions or inactions of the UK's financial services regulators. The current Commissioner is Amerdeep Somal, appointed from 1 November 2020. She is the fourth person to hold this role since 2001, when the Scheme was first established by the Financial Services and Markets Act 2000 (FSMA). The Commissioner's Final Reports and Annual Reports reviewing how the regulators consider complaints are published and, since 2015, HM Treasury is responsible for laying the Annual Report and responses to it before Parliament[2].

ii) The Complaints Commissioner's reports have highlighted issues affecting regulated firms, including small businesses, and consumers, drawing attention to systemic themes arising from complaints, including the accuracy of the FCA's Register (which has led to improvements), poor supervision of firms and delays in regulatory processes. Final reports issued in 2016 were instrumental in the FCA commissioning an Independent Review from Mr Raj Parker into the FSA and FCA's handling of the Connaught Income Fund Series 1 and connected companies.

iii) In 2020, the previous Commissioner corresponded with the Chair of the Treasury Select Committee in response to questions about delay and other current problems in the FCA's complaints handling function, which are also highlighted in the Commissioner's 2019-2020 Annual Report. There are ongoing conversations between the Commissioner and the regulators about the need for adequate proposals for financial redress under the Scheme.

3. **There are improvements to be made by recognising and enhancing the Commissioner's role and assessing whether any changes are required.**

i) It is important not to just have a 'top-down' approach, pushing more responsibility for delegated decision-making onto regulators, particularly given recent regulatory failure at the FCA. There also needs to be 'upward' accountability and scrutiny. The Complaints Commissioner sees and assesses independently the inner workings of the regulators on a regular basis. This is an important part of the feedback mechanism, providing valuable insights that must form part of the framework for accountability, scrutiny and stakeholder participation.

ii) The Scheme is restricted to actions or omissions arising in connection with the regulators' relevant functions; but the relevant functions are tied to the Financial Services and Markets Act 2000 (FSMA). Problems can arise when the regulators are granted additional functions by other legislation. For example, the expansion of the FCA's functions in relation to fraud, because it is conferred by legislation other than FSMA, is excluded from

[2] See sections 7.16, 7.17 and 7.18 of the Complaints Scheme, pursuant to Section 87 of the Financial Services Act 2012 (as amended by the Small Business, Enterprise and Employment Act 2015)

the Scheme. There is no logic to this, and consideration should be given to extending the Complaints Scheme to functions conferred under other legislation (the Treasury can do this by means of an order under section 85 of the Act[3]). Another example of an exclusion that affects accessibility and stakeholder participation, is the exclusion of complaints about the FCA's compliance with the Equality Act 2010 from the Scheme.

iii) The Scheme is also confined to complaints about the 'relevant functions' of the FCA and the PRA, that is "their functions other than their legislative functions." This excludes complaints about rules and policy-making, whereas the Commissioner often hears from complainants who wish to challenge the current rules or ask why new rules are not made. Although the FCA or PRA will sometimes offer an explanation, there is an argument that this should happen more consistently for greater transparency and to enhance public understanding. Consideration should also be given to complaints of this nature being recorded by the regulators, even though excluded, and reported to Parliament as part of the feedback structure for accountability and scrutiny to inform policy.

iv) There also needs to be clarity about ownership of the Scheme. The Act says that the regulators must: 'make arrangements ("the complaints scheme") for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of their relevant functions (see section 85)'. In making these arrangements, it is important that adherence to the central tenets of the Scheme are a joint effort between the Commissioner and the Regulators, rather than the regulators imposing their interpretation of the provisions of the Scheme. A recent public consultation on the Scheme has highlighted disagreement between the regulators and the previous Complaints Commissioner about long-awaited proposals for ex gratia compensation – see Annex*. The current Commissioner supports her predecessor's approach and is developing her own policy position on these matters, which must not be decided unilaterally by the regulators.

v) The Act provides that the Commissioner can make recommendations which the regulators are not obliged to accept. There have been several instances when the regulators have not accepted recommendations. It may be advisable for the regulators to specifically report to Parliament on recommendations they have not accepted for reasons of accountability and scrutiny.

vi) As part of the arrangements for accountability and scrutiny, the Treasury Select Committee would benefit from greater liaison with the Complaints Commissioner, whose complaint reports and Annual Reports can provide useful insight on the regulators to Parliament, either in person or via written submissions.

[3] http://www.legislation.gov.uk/ukpga/2012/21/section/85

*ANNEX: Antony Townsend to Charles Randell and Sam Woods 12 Aug. 2020

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12 August 2020

Dear Charles and Sam

Complaints Scheme Consultation (CP21/11)

I am writing to you in response to the regulators' consultation on proposed amendments to the Scheme for Complaints Against the Regulators (CP20/11). I have attached as an appendix some detailed comments on the draft Scheme [omitted 15/2/2021], but I wanted to write to you to highlight some key systemic points which I think need to be taken into account.

I should start by saying that I am pleased that the regulators have taken this initiative - I have been arguing for several years that the Scheme rules need to be simpler and clearer. Overall, the new document is a great improvement on the current one.

Before the consultation was launched, the FCA told me that you intended to consult for eight weeks only. I said that I could see no justification for curtailing the usual 12-week period – particularly over the summer months and in the midst of the Covid crisis. The consultation document says that an eight-week consultation is appropriate 'since we believe these revisions improve the Scheme, and that the outcomes for most complainants would be broadly consistent with our current practice'. For reasons which I set out more fully below, I consider that there are some significant policy issues raised by the revisions to the Scheme, issues which affect potentially vulnerable people and involve restrictions upon a statutory scheme. In those circumstances, and particularly given how long it has taken the regulators to reach this point, my view remains that truncating this consultation is not defensible.

I also consider that it is important that people who have used the Scheme, and groups representing those who might use the Scheme, are explicitly consulted – it would be helpful if the regulators could make clear what steps they have taken to ensure this. A consultation which had no input from Scheme users would clearly be incomplete.

Compensation

The most contentious issue in the draft Scheme is that of compensation. This is a difficult problem, which I have debated with the FCA on several occasions, and I accept that there is no easy solution. In broad terms, the situation is as follows:

a. The regulators enjoy statutory immunity in most circumstances from being sued for damages;
b. The statutory basis for the Complaints Scheme includes provision for compensation where the regulators are found to be at fault.

There is an inherent tension in these two provisions, and this gives rise to two problems. First, under the current Scheme rules, it is not clear to those operating the Scheme – i.e. the regulators and I – at what point an *ex gratia* payment tips into becoming a payment for damages through the back door; and second, it is unclear to complainants what they might expect.

Since the Scheme was established, this issue has been fudged – reference has been made to 'modest payments', 'having regard to the source of the regulators' funds', and 'not undermining statutory immunity' – but that has proved unsatisfactory to complainants and to me. The myth (not backed by the statutory provisions) grew up – and was related to me - that the Scheme was 'not primarily a compensation scheme', and that compensation payments should be considered 'exceptional'. In fact, compensation payments are a core feature of the Scheme, as provided by statute.

The draft new provisions in Annex A to the consultation document are a welcome step to introduce transparency. In particular, the proposed bands for payments for distress and inconvenience introduce clarity, and seem broadly in line with other complaints schemes – though it will be important to keep the bands under review.

The more contentious area is that of compensation for financial loss. Again, I welcome the proposal to make the regulators' approach more structured and transparent.

The draft is right to make it clear that the Scheme cannot be used as an alternative means of 'insurance' for products not covered by the Financial Ombudsman Scheme (FOS) or the Financial Services Compensation Scheme (FSCS); and that the fact that a regulator 'might have done better' in supervising a firm should not translate into an entitlement to compensation – that seems to me to have been the danger against which statutory immunity was intended to guard. Complainants need to understand this at the outset.

However, where the regulator is the *sole or principal cause* of a complainant's *demonstrable financial loss*, in my view the presumption should be that the regulator will compensate the complainant in full. (An example of this might be gross failure to maintain a reliable register, or an indefensible failure to take any action in response to repeated and credible warnings.) It is hard to see why that should not be the case – other complaints schemes, of the kind operated by Ombudsmen, operate on that basis, and may make substantial payments without having to apply the kinds of approach to causation which a court would do. Where the fault is the regulator's – as distinct from a regulated firm or individual – there appears to me to be no basis for arguing that full compensation should not be awarded, unless the sum required is of such an exceptional scale that it would have a significant impact upon the FCA's levies (which seems unlikely).

The draft indicates that payments for direct financial loss will be limited to £10,000 save in exceptional circumstances. While I agree that it is likely that the vast majority of such payments would be below that figure, as a matter of principle it seems to me undesirable to impose a ceiling of this kind. It does not seem to me that the statutory immunity granted by Parliament was intended to protect the regulators from major blunders of their own making.

In my view, the approach to compensation for financial loss set out in paragraphs 8-15 is broadly sound, but I think that the caveats in paragraph 16-17 are not, and represent an explicit fettering of compensation for direct financial loss, which makes it especially important that there is proper

consultation before it is adopted. I suggest that the approach should be that compensation for demonstrable financial loss caused by the regulators (as distinct from principally caused by regulated firms) should be for the full loss, save in exceptional circumstances.

Finally, it should be made clear that the approach to compensatory payments cannot bind the Commissioner.

Other matters

There are two other matters which go beyond the current consultation, and which would require further time, but which I flag for further consideration.

The first relates to the scope of the Scheme. The Scheme is restricted to actions or omissions arising in connection with the regulators' relevant functions; but the relevant functions are tied to the Financial Services and Markets Act 2000 (FSMA). The problem arises when the regulators are granted additional functions by other legislation. For example, the expansion of the FCA's functions in relation to fraud, because it is conferred by legislation other than FSMA, is excluded from the Scheme. In my view, there is no logic to this. I think that the Treasury (to whom I am copying this letter) should consider extending the Complaints Scheme to functions conferred under other legislation (the Treasury can do this by means of an order under section 85 of the Financial Services Act 2012).

The second relates to the arrangements for the appointment of Complaints Commissioners. Complainants have pointed to the fact that I have been appointed by the regulators themselves, with the approval of HM Treasury – the procedure which has also been used for the appointment of my successor. Although I believe I have demonstrated my independence in robust challenge to the regulators where justified, and doubtless my successor will do the same, public confidence and the perception of independence (which is important) would be enhanced if in future appointments were undertaken by an independent panel. I also consider that – in line with good practice for ombudsman and similar schemes – the term of appointment should be for five rather than three years.

I am copying this letter to the Economic Secretary to the Treasury, and to the Chair of the Treasury Committee.

With best wishes,

Yours,

Antony Townsend

Complaints Commissioner