**Complaints Commissioner's response to Complaints Scheme consultation CP20-11**

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, 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.

**Complaints Commissioner**

**August 2020**

Appendix

**Points of detail**

*Paragraph 1.5*

We suggest including a cross reference to Annex C.

*Paragraph 2.1*

We suggest a cross reference to Annex A.

*Paragraph 2.11 (a)*

The inclusion of the word ‘practices’ gives the regulators a very wide discretion not to investigate matters. It does not appear in the existing Scheme, so would represent a reduction in the coverage of the Scheme. We think this is undesirable, and that the word ‘practices’ should be removed.

*Paragraph 2.11 (d)*

The draft says that the regulators may choose not to investigate a complaint if they consider it ‘vexatious’. While it is acceptable for complaints schemes to cease to investigate complaints where a complainant is persistently non-co-operative or persistently refuses to accept decisions, discontinuing an investigation should be a last resort. It is important to bear in mind that complainants are often distressed and may have disabilities which make it harder for them to interact with an organisation.

In our view, the fact that the complaint is seen as ‘vexatious’ should not be a stand-alone ground for excluding the complaint at the outset. If the complaint is a repetition of one that has already been considered, then the complaint can be excluded on the ground that it has already been decided. If, during an investigation, a complainant repeatedly refuses to co-operate with reasonable requests, then there should be a stand-alone procedure (separate from the Scheme itself) under which the regulator may decide not to investigate further. In all such cases, the complainant should have the right to go to the Complaints Commissioner if dissatisfied.

In our view, paragraph 2.11(d) should be deleted, on the grounds that 5.7 is sufficient.

*Paragraph 5.1*

We suggest that the wording here might be simplified, since ‘resolving’, ‘investigating’, and ‘concluding’ may cause confusion.

*Paragraphs 6.2 and 6.5*

See covering letter.

*Paragraph 8.1*

This paragraph might make it clear that one option open to the Commissioner is to ask the regulator to undertake an investigation.