

Financial Services Ombudsman Scheme for Jersey and Guernsey Economic Development Department

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Consultation document

Purpose of the consultation

To invite comments about the proposed structure and funding of the financial ombudsman scheme to ensure it best meets the needs of customers and Jersey's financial services industry.

Deadline for responses: Midday Friday 15th April 2011

1. Background

1.1 Ombudsman schemes offer independent complaint resolution as a more accessible alternative to the courts for most people. Schemes are usually free to the complainant, legal representation is not required and the approach is inquisitorial with the ombudsman impartially investigating complaints. This is especially of value in the complex field of financial services where there may be a great imbalance in information and understanding between the parties to a complaint. Determinations are made considering not just the legal position but also what is fair and reasonable in the particular circumstances of the case. Ombudsman schemes do not alter the normal relationship between a service provider and the customer but are available as a last resort, if the service provider has had a reasonable opportunity to deal with the complaint but has not resolved it.

1.2 The 1999 Edwards Report recommended the introduction of an ombudsman scheme for financial complaints in the Crown Dependencies and it has been under consideration in Jersey since then. The Financial Ombudsman Service (FOS) in the UK covers financial services provided in or from the UK, the Isle of Man introduced its Financial Services Ombudsman Scheme in 2002 and the States of Jersey is now committed to introducing an ombudsman scheme for financial services offered in Jersey. The States of Guernsey is also consulting on introducing an ombudsman scheme and it is proposed that a joint ombudsman service is set up to cover both islands. As Guernsey is conducting its own consultation exercise, the rest of this document concentrates on Jersey.

1.3 The provision of an ombudsman scheme should support the proposed application to the European Payments Council (the "EPC") for Jersey's membership of the Single Euro Payments Area (the "SEPA"). For further information, see the Jersey Financial Services Commission Consultation Paper No.6 2010: Options for meeting the SEPA admittance criteria concerned with the regulation and supervision of payment services and subsequent feedback paper.

2. Purpose of the scheme

2.1 To provide an independent dispute resolution service to settle complaints between consumers and businesses providing financial services in Jersey. The

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scheme will determine complaints based on what is fair and reasonable in the circumstances and can make awards to make good financial loss incurred by a customer. The service will be free to the complainant and will be financed by financial services providers that are covered by the scope of the scheme.

2.2 Ombudsman schemes have a different role to that of regulator: they consider individual complaints with a view to providing independent redress as appropriate for that customer. They do not set the rules for financial services providers or punish transgression. However, a secondary benefit of ombudsman schemes is that they can provide useful feedback to industry and regulators based on complaints experience.

3. Scope of the scheme

3.1 It is proposed that the main framework of the scheme is covered in primary legislation, with the ability to provide additional detail by order, such as the activities that are covered. This will give better flexibility to amend the scheme over time, in the light of complaints experience. This has been the approach in the UK and has been useful even with its near-30 years experience of financial ombudsman schemes.

3.2 It is intended that the ombudsman scheme will cover complaints relating to all areas of financial services provided in or from Jersey, both regulated and non-regulated. The aim is to provide a comprehensive service for consumers, so that whether utilising investment services or taking out a loan for a new car a customer can have the protection of knowing any subsequent, unresolved complaints can be referred to the Ombudsman.

3.3 The scheme will cover all activities that are regulated and supervised by the Jersey Financial Services Commission, and in addition, consumer lending and personal pensions. The UK FOS covers most areas of financial services offered in the UK (broadly banking; insurance; mortgages; credit cards and store cards; loans and credit; pensions; savings and investments; hire purchase and pawnbroking; money transfer; financial advice; stocks, shares, unit trusts and bonds, see Part XVI and Schedule 17 of the UK Financial Services and Markets Act 2000 and section 59 of the UK Consumer Credit Act 2006 and the FSA Handbook). The Isle of Man scheme currently covers services relating to collective investment schemes, investment business, banking business, insurance business, credit business and pension schemes as defined in the relevant legislation (see Schedule 4 of the Isle of Man Financial Services Act 2008). It does not cover trust and corporate business at present.

3.4 The legislation will need to be clear that the scheme covers the provision of financial products and related advice and not all services offered by providers of financial services. For example, the Scheme is intended to cover the sale of travel insurance by travel agents but not the sale of holidays.

4. Registration

4.1 The legislation will set a requirement, with penalty for non-compliance, for providers of financial services in Jersey to register with the ombudsman scheme

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in order to assist with funding. This will be particularly useful to capture the unregulated firms, which would otherwise be hard to identify.

5. Consideration of complaints

5.1 Complaints will be assessed first as to whether they fall within the jurisdiction of the scheme: the complaint must relate to financial services provided in or from Jersey; must be from an eligible complainant (see Complainants section 7); must be within the time limits (see section 9); must have been considered by the financial services provider first (section 9) and the complaint must be eligible (see section 8).

5.2 The Ombudsman will consider complaints within the scheme's jurisdiction and can seek to mediate a resolution between the parties and can also investigate and make a determination on the complaint (see also sections 11 and 12).

5.3 Both (or all) parties to a complaint will have opportunities to present their side of the complaint and to comment on what is put forward by the other parties. Ombudsman schemes usually consider cases based on consideration of the evidence without hearings but there will be provision for the Ombudsman to decide if a hearing is appropriate.

5.4 Providers can make a case for information provided to the ombudsman scheme to be treated as confidential and the Ombudsman will have discretion to accept this. Examples could include information that concerns third parties or security issues.

5.5 In order to be effective, the Ombudsman must be able to inquire into a complaint and require documentation to be provided. The Ombudsman will have powers to require the provision of information by financial services providers; where failure to do so can be punished as if guilty of contempt of court.

5.6 When considering complaints, the Ombudsman will make determinations based on what is fair and reasonable in all the circumstances. So, while reference will of course be made to legal requirements, other aspects may be considered such as codes of practice, guidance notes, best practice and industry standards as relates to the act or omission under investigation. A preliminary determination will be circulated for comment.

6. Territorial Scope

6.1 The scheme will cover complaints relating to the acts or omissions of financial service providers operating from the Bailiwick of Jersey. There is no restriction as to the residence of the complainant.

6.2 The scheme will dovetail with other ombudsman schemes, particularly in the UK, rather than giving complainants a choice of where to complain. For example, many general insurance products available to Jersey residents are provided by UK insurance companies and so if an unresolved dispute arose about the policy

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itself, this would be covered by the UK Financial Ombudsman Service. However, if the policyholder had used a local insurance intermediary when taking out the insurance and later had a dispute involving the selling of the policy, this would be covered by the Jersey ombudsman scheme. If a complaint came to the Jersey ombudsman scheme that related to a service provided in or from the UK, it could not be considered and the complainant would be referred to the UK FOS.

7. Complainants

7.1 The aim of the ombudsman scheme is to offer individuals an alternative redress route, as they might feel daunted at progressing a complaint against a financial firm through the courts. It is not just that a financial firm is likely to have more financial and legal resources, but also more knowledge and understanding about the subject matter. Others, such as small businesses and charities, will be able to use the scheme as they are likely to be at a similar resource and informational disadvantage.

7.2 Individuals who are trustees or council members in the case of foundations will be able to bring complaints about financial services received. The UK's Financial Ombudsman Service allows trustees to complain where the trust has a net asset value of less than £1million. That limit is thought to be too low to be applicable to Jersey. The principle should be that the ombudsman scheme is only open to those for whom using the courts is not a viable option, so complaints will be excluded from trustees and council members who are carrying on trust company business. It is fair to consider that these professionals are better able and resourced to progress a complaint with the financial services provider without the need to use the ombudsman scheme. So, examples of trustees who could complain would include family members who are appointed as trustees on a family trust or an individual who has set up a self-invested personal pension and is a trustee. **Comments are invited on this approach and whether there should be a limit on the size of the trust or foundation. If so, what would be a sensible limit for Jersey?**

7.3 Some individuals using Jersey financial services choose to access those services via a holding or private investment company. It could be argued that these will be more financially sophisticated and wealthy individuals who would be able to progress any dispute through the courts but this may not be true in all cases. These companies may be able to bring complaints to the ombudsman scheme, if their turnover is below the small business threshold (see 7.4).

7.4 To summarise, the following categories of complainant will be able to use the scheme:

- Consumer/private individual with no limitations
- Small businesses: a suitable definition of small businesses will be used, this could simply be below the turnover threshold used for Goods and Service Tax or could include other factors such as number of employees.
- Charities with an annual income of less than £1million
- Trustee of a trust or council member of a foundation who is not carrying on trust company business.

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Comments are invited on these categories.

7.5 Complainants may not always have an ongoing, direct relationship with the financial services provider. However, they may still have experienced financial loss as a result of the actions of the provider and so have a valid complaint to be considered. (Please note there is provision to exclude complaints that are for example frivolous or vexatious or where the complainant has not suffered any loss, see section 8). So, it is proposed that the complainant will be further defined as having one of the following relationships with the financial services provider. **Comments are welcomed on this list taken broadly from the UK scheme, as at least some of them will not be relevant to Jersey:**

- the complainant is or was an actual or potential customer
- the complainant is the holder, or the beneficial owner, of units (defined to include shares and partnership interests) in a collective investment fund as defined in the Collective Investment Funds (Jersey) Law 1988 and the complaint is made against a financial services provider that is a fund services business, or a functionary of a fund; or against the holder of the fund certificate. This would not include unregulated funds or COBO only funds as these are considered not to be available generally to consumers;
- the complainant is the holder of shares in an investment trust company and the firm is the manager or investment manager of the investment trust company
- the complainant is a beneficiary of, or has a beneficial interest in, a personal pension scheme;
- the complainant is a beneficiary under a trust, foundation or estate of which the respondent is trustee, council member or personal representative;
- the complainant is a person for whose benefit a contract of insurance was taken out or was intended to be taken out with or through the financial services provider or the complainant has a legal right to benefit from a claim
- the complainant relied in the course of business on a cheque guarantee card issued by the provider;
- the complainant is the true owner of a cheque collected by the provider for someone else's account;
- the complainant has received a banker's reference issued by the provider;
- the complainant gave the provider a guarantee or security for a mortgage or other lending
- the provider in operating a credit reference agency held information relevant to the complainant's financial standing;
- the provider has sought to recover payment or the provision of other duties from the complainant under a consumer credit agreement in relation to debt collection or debt administration;
- (where the respondent is a dormant account fund operator) the complainant is (or was) a customer of a bank or building society which transferred any balance from a dormant account to the respondent.

Respondents are invited to comment on whether all the proposed relationships are applicable to Jersey or if there are any others that should be included.

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8. Ineligible complaints

8.1 The legislation will allow for a number of conditions where complaints may be dismissed without consideration or the Scheme can cease to act, to include where:

- the complainant has not suffered financial loss (including consequential or prospective loss), material inconvenience or material distress;
- The complaint is frivolous or vexatious;
- The matter has been or is being considered in court or under other dispute resolution arrangements;
- The matter would be more suitably dealt with by a court or under other dispute resolution arrangements;
- The dispute relates to the legitimate exercise of the financial services provider's commercial judgement;
- The dispute relates to the legitimate exercise of discretion under a will or private trust;
- The dispute relates to a failure to consult beneficiaries before exercising a discretion under a will or trust, where there is no legal obligation to consult;
- Resolution of the dispute may prejudice the rights of other parties, who have not consented to the consideration of the complaint by the Ombudsman scheme;
- The dispute relates to investment performance;
- The financial services provider has already made an offer of compensation, which is fair and reasonable and still open for acceptance.

8.2 An example of where a complaint could be dismissed would be where a customer is displeased about a mistake that a financial services provider has made and wishes to have the provider 'punished', even though the customer has not suffered any loss. Also, if a complaint involved a detailed issue of trust law, for example, the ombudsman scheme could refer the complaint to court if it would be better considered there.

9. Time limits

9.1 The legislation will specify the general time limits for referral of a complaint, although the ombudsman should have discretion for exceptional circumstances. It is proposed that these are:

- The complaint should be received by the ombudsman scheme within 6 years of the act or omission that is the subject of the complaint, **or**
- within 2 years of when the complainant should reasonably be expected to have become aware of the act or omission.

9.2 The reasoning behind the second limit is that financial services products can be long-term commitments (for example, a 25-year endowment policy), so problems may only come to light years after the initial investment decision. These limits are similar to the UK scheme (which uses 6 years and 3 years) and the Isle of Man scheme (which uses 6 years and 2 years).

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9.3 In Jersey, however, the limitation or prescriptive period for contract is more generally 10 years so a decision will need to be made about whether to use 6 years or 10 years. (see the Jersey Law Commission Consultation Paper No 1/2008/CP, March 2008). **Comments would be welcomed on the most suitable time limit to be used.**

9.4 In addition to the limits on the length of time after the act or omission leading to the complaint, there will also be limits relating to the length of time after the financial services provider considered the complaint. The Jersey Financial Services Commission has issued codes of practice for registered persons that require financial services providers to have effective complaints handling systems. Providers should be able to resolve the majority of complaints internally but there will need to be a time limit set on financial service providers for issuing a final response. So, where a complainant remains dissatisfied or a final response has not been received within the set time limit, the complainant can bring the complaint to the Ombudsman Scheme. The UK sets a limit of 8 weeks for firms to issue a final response to a complaint; in the Isle of Man a 12-week period is set. **A 3-month time limit is proposed for Jersey, do respondents agree?**

9.5 Complainants will have 6 months from the final response within which to refer the complaint, but this limit can be waived if the financial services provider does not, in the final response letter, inform the complainant that they can refer the complaint to the ombudsman scheme and that this must be done within 6 months.

10. Starting date

10.1 There will need to be a starting date from which complaints can be considered by the Ombudsman Scheme. Complaints by their very nature are retrospective, concerning acts or omissions that have occurred previously, so it is proposed that the scheme can consider complaints relating to acts or omissions occurring on or after 1st January 2010. **Comments would be welcomed on the most suitable starting date to be used.**

11. Awards

11.1 If the final determination of the Ombudsman is to uphold the complaint in full or in part, it may include a monetary award payable to the complainant by the financial services provider of such amount as the Ombudsman considers fair compensation for loss or damage. The determination may include a direction to the financial services provider to take steps that are just and appropriate. The overall aim is to put the complainant back into the position they would have been in, had the act or omission leading to the complaint not occurred.

11.2 It is proposed that the monetary award is limited to a maximum of £150,000 to be in line with the UK. The UK FOS is consulting on extending its limit from £100,000 to £150,000 and the IOM may be expected to follow suit.

11.3 The determination will be enforceable through the Royal Court.

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12. Appeals

12.1 The ombudsman scheme is intended to be the final arbiter on the dispute. It is proposed to mirror the UK's approach with ombudsman decisions and have them binding on the financial services provider and binding on the complainant only if they accept the decision. This satisfies the European Convention on Human Rights by giving complainants the option of taking the case on to court however, in practice the UK FOS has found this is rarely exercised.

12.2 There is no appeal against the Ombudsman's decision for financial services providers. Providers may seek a judicial review in the Royal Court on the process adopted by the ombudsman in making the determination but not on the decision itself.

13. Independence

13.1 It is crucial that the ombudsman scheme is independent of the industry about which it considers complaints so that it can act impartially. This is a key principle of ombudsman schemes and is important as regards human rights issues (ref. British and Irish Ombudsman Association criteria, EU Commission Recommendation 1998/257/EC on the principles applicable to out-of-court dispute resolution schemes). It is proposed that the scheme is set up as a body corporate with a predominately public-interest Board to appoint and protect the independence of the ombudsman. If a shared approach is taken with a single scheme to cover Jersey and Guernsey, Jersey will likely become operational first, so the Board could consist at first of 2 board members and a chairman appointed by the States of Jersey, with 2 further board members later appointed by the States of Guernsey.

13.2 The ombudsman scheme and Board would be independent of the Minister for Economic Development and the States, with the Board reporting to the Minister on an annual basis and the Minister laying the annual report and accounts before the States.

14. Best practice loop

14.1 The ombudsman scheme should not operate in isolation, as over time useful lessons can be learnt from its complaints experience. The ombudsman scheme should be able to share information with the following:

- information aimed at customers publicising the ombudsman scheme and potentially targeted at specific areas based on complaints history;
- information for industry on the Ombudsman's procedure with investigations and feedback on any lessons to be learnt from the Ombudsman's experience with complaints, for example on complaints handling or particular areas where complaints arise;
- feedback to JFSC on general regulatory breaches/issues identified; where a significant breach appears to be occurring with particular detriment to customers, the Ombudsman should alert the JFSC to the need for it to investigate. This should be at the Ombudsman's discretion and without file-sharing, as financial services providers need to trust the relationship with the ombudsman scheme and provide full information to allow complaints to be investigated;

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- feedback to Trading Standards and Jersey Consumer Council in relation to consumer credit complaints experience.

15. Funding

15.1 Budget

15.1.1 The Ombudsman Scheme is to be funded by the financial services industry and provision will be made in the legislation for fees and charges, however imposed. The Scheme will need to raise funding to set up an office, for the Board and for staffing; although this would not be physically undertaken until the States passes the legislation. Future numbers of complaints are unknown but the Isle of Man Financial Services Ombudsman Scheme has received between 230 and 390 complaints per year since inception in 2002, so those figures can be taken as an indication.

15.1.2 The start-up budget would be raised by an initial levy on financial services providers. Any surplus at year-end could be put into reserves or used to lower future funding requirements.

15.2 Funding model

15.2.1 While the IOM scheme is currently funded entirely by government, the UK FOS is funded entirely by industry. Around 20% of the FOS's funding comes from an annual levy on firms covered by the service and 80% from case fees of £500, which are charged to firms, regardless of 'outcome', on the 4th and any subsequent complaints handled by the FOS in a year. So, the first three complaints in any year are free for the financial services firm involved, giving some incentive to limit the number of unresolved complaints. This weighting towards case fees is favoured by the UK industry.

15.2.2 Initially, in Jersey, funding will need to come from an industry levy but over time the funding model can be adjusted as to the proportion from an annual levy and from case fees. **Comments from Jersey's industry are specifically invited as to the favoured percentage split between income from annual levies and case fees.**

15.2.3 Comments are also invited on the approach of not charging fees on the first few complaints received from a financial services provider per year. However, it is likely that this approach would need to be developed after the ombudsman scheme had gained some complaints experience.

15.2.4 In the UK, the levy is based on the proportion of complaints from each sector and, in certain sectors, the market share of each business within the sector. There is an information requirement on firms in those sectors to provide an annual statement of the total amount of "relevant business" (source: UK Financial Services Authority Handbook, Fees section).

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15.2.5 We need to consider the best approach to reach an equitable levy on different financial services providers in Jersey. After the scheme has been in operation for a while, data from complaints experience can be factored into the levy. However, an initial flat fee for all providers could be inequitable on small local firms as compared to large, multi-national businesses.

15.2.6 In the UK, the FOS charges a flat fee of £50-200 for categories of financial service providers such as fund managers, collective investment schemes, personal pension schemes, stakeholder pension schemes, dealers, corporate financial advisers, cashplan health providers, credit unions, friendly societies and home finance firms. Firms that do not do business with consumers are not charged an annual levy (source: UK Financial Services Authority Handbook, Fees section).

15.2.7 In the UK, financial services providers must provide the Financial Services Authority with annual statements giving the amount of “relevant business” done with consumers. For the areas of banking and insurance, the UK FOS bases the levy on “relevant business”:

- Number of accounts for deposit-takers;
- Annual gross premium income for life and general insurers;
- Number of regulated advisers in financial advice firms;
- Relevant income for payment service providers;
- Annual income for general insurance mediation.

15.2.8 It is proposed that an outline approach for funding the scheme in Jersey is for a graded-fee for certain sectors, with a flat fee for providers that deal with consumers/personal customers in other areas. The sectors with a graded-fee approach could consist of banking, life insurance, insurance mediation and financial advice. **Comments are invited on this approach.**

15.2.9 Data would need to be collected to enable a graded-fee approach in certain sectors in Jersey, based on the size of consumer (ie. personal customer) business. Other data potentially more readily available is the number of employees, which could be used as a more basic tool for quantifying the levy for different providers. **Comments are invited as to whether this approach would be sensible for these areas in Jersey.**

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16. Consultation questions

16.1 Respondents are invited to comment generally on the ombudsman scheme proposals, specific questions are listed below.

Complainants

Comments are invited on whether there should be a limit on the size of trust/foundation whose trustees or council members can bring a complaint to the ombudsman scheme, and if so, what the limit should be. (section 7.2)

Comments are invited on the proposed categories of complainants able to use the scheme (section 7.4)

Respondents are invited to comment on whether all the proposed relationships between complainants and financial services providers are applicable to Jersey or if there are any others that should be included (section 7.5).

Time periods

A decision will need to be made about whether to use 6 or 10 years as the general time limit within which to bring a complaint. **Comments would be welcomed on the most suitable time limit to be used (section 9.3).**

A 3-month time limit on financial services providers is proposed (to issue a final response to a complaint), do respondents agree? (section 9.4)

A starting date of 1st January 2010 is suggested. Comments would be welcomed on the suitability of this date (section 10.1).

Funding

What would be your favoured percentage split between income from annual levies and case fees? (section 15.2.2)

Do you agree with the approach of not charging fees on the first few complaints per year? (section 15.2.3)

Do you agree there should be flat fees for financial services providers that deal with consumers, except in certain areas where it should be graded? (section 15.2.8)

Should these graded areas include banking, life insurance, insurance mediation and financial advice? (section 15.2.8)

Do you agree the data to inform these graded areas should be measures of the size of consumer business or could more basic data such as number of employees be used? (section 15.2.9)

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17. How to respond

Please send comments by Midday Friday 15th April 2011 to:

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