Lisa Wrigley, FSA and Tony King, FOS
Financial Ombudsman Service Review Secretariat
c/o Retail Themes Division
25 The North Colonade
Canary Wharf
London E14 5HS

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FSA Consultation Paper 04/12

Section 1.4 *"...the Government does not intend to change the structure established by FSMA and is not seeking primary legislation to do so"*

Section 426 (Attached) allows for secondary legislation to amend FSMA.

Section 2.5 *"FSMA...require a FOS Ombudsman to decide individual cases on the basis of the Ombudsman's opinion of what is fair and reasonable in the circumstances of the case. This must take into account the relevant law, regulations, regulator's rules and guidance and standards, relevant codes of practice and, where appropriate, what the Ombudsman considers to have been good industry practice at the relevant time."*

This requirement conflicts with public statements made by the Chief Ombudsman concerning his role. For instance in March 2004 to the British and Irish Ombudsman Association Mr Merricks stated, *"…Our authority entitles us to go straight to the evidence we know to be relevant."*

Legal opinion provided by Anthony Speaight Q.C (Item 34) stated:- *"there is authority from a Lord Chancellor that an arbitration clause that permitted arbitrators to disregard the law would render them arbitrary in their dealings with the parties"*

It is also appropriate to quote the opinion of the Financial Services Practitioner Panel in their March 2004 report as to the application of the current process that results in double jeopardy.

"The role of the Financial Ombudsman Service (FOS) and its relationship with the FSA has caused unease among practitioners for some time. The Panel has repeatedly pointed out the concern over the FOS's quasi rule-making abilities and the often blurred line of demarcation between the FOS and the FSA. In particular... the absence of a practical appeal mechanism against FOS decisions, have been the source of much anxiety. The resulting uncertainty... further undermines market confidence, as well as firms' ability to manage their business risks effectively... the Panel would like greater assurance that practitioners do not face double jeopardy - specifically, where a firm may have complied with FSA rules, but despite that is subsequently found 'guilty' by the FOS."

Section 2.17 *"…FOS is required to proceed in line with the rules of natural justice and...the Human Rights Act 1998. FOS procedures are designed accordingly."*

Prior to the enactment of the Bill it was considered in April 1999 by the Joint Committee on Financial Services and Markets. Legal opinions presented by Lord Lester of Herne Hill Q.C challenged compliance with Article 6 of the Convention.

In reply to a question by Lord Taverne *"…is there any danger that the fairness requirements of Article 6 of the Convention can also be invoked against the provisions dealing with the Ombudsman? He seems to*

have a certain amount of arbitrary jurisdiction against which there appears to be no possibility of appeal..."

Lord Lester replied *"...my own opinion is that the article 6 provisions undoubtedly apply to the Ombudsman and have serious implications for the way that the Ombudsman system is brought into existence"*

Mr Peter Dean, as the Investment Ombudsman, in evidence to the same Committee, at which Mr Walter Merricks was present as the Insurance Ombudsman, confirmed *"Article 6 will apply to the new scheme as it is currently envisaged because it is conceived as a compulsory scheme which will bind..."*

Mr Anthony Holland, in his position as the Personal Investment Authority Ombudsman (now Sir Anthony Holland appointed FSA Independent Complaints Commissioner from September 2004) stated *"...we do not have adversarial hearings…it is an investigative, inquisitorial type of hearing and an agenda is set by the Ombudsman. That will be very difficult to sustain in that mode in the future...it is going to be very difficult to prevent what is up to now an informal and flexible operation becoming legalistic and effectively becoming a financial services court.*"

Legal opinion provided by Anthony Speaight Q.C (Item 41) *stated:- "no procedure for the Ombudsman is indicated in the Bill. Therefore it remains at present an open question whether the procedure would accord with the fair trial requirements of Article 6"*

Mr Justice Lightman in his speech of March 2001 to the Association of Pension Lawyers stated in connection with the Pensions Ombudsman:-

"The European Convention on Human Rights and the Human Rights Act give greater significance and attention to the legal process and its adequacy to afford a fair trial...There are serious questions whether proceedings before the Ombudsman meet the requirements satisfactorily.

It is troubling that the Ombudsman as the investigator sets the standard and as judge rules on compliance and decides on the remedy.

The European Convention on Human Rights requires that in the determination of civil rights a court or tribunal affords to the parties before it a fair trial before an impartial and independent tribunal. In respect of his judicial role the Ombudsman is clearly a tribunal within the meaning of Article 6.

The question of an impartial tribunal and the question of a fair trial can conveniently be considered together. Concern on this score may be expressed on a number of grounds:

(a) The Ombudsman combines investigatory and judicial roles.

(b) His staff investigate complaints...and prepare draft decisions for his consideration.

(c) Since the decision of the Ombudsman is final on questions of fact, there is likely to be an entitlement to an oral hearing and the examination of witnesses...though he recognises the right to both the Ombudsman has had very few such hearings.

(d) In cases where on grounds of entitlement to a fair trial a party in proceedings before the Ombudsman is entitled to object to a hearing before the Ombudsman, there is no alternate before whom the matter may proceed, resulting in a failure of the legal system to comply with its duties under the European Convention.

(e) The Ombudsman (has) the extraordinary role of appellant against decisions of the High Court.

(f) The Ombudsman...respects none of the constraints to be expected of a judicial officer respecting decisions made by superior courts, but conducts campaigns in furtherance of his ideas casting ridicule on those members of the judiciary who have the temerity to disagree...."

Section 2.18 *"The FOS board has appointed an Independent Assessor to consider any complaints about FOS procedures"*

The Independent Assessor cannot investigate methodology complaints if the Ombudsman's determination has been previously challenged. As the processes are separate the terms of reference are too narrow.

Section 3.17(Q.2) *"...wider implications referral...are there other criteria FSA should consider..."*

The Memorandum of Understanding dated 11th July 2002 allows for consultation between FSA and FOS. In clear instances where the action of FOS is rigid, for instance denying a review on the basis of new evidence, even if maladministration in methodology was subsequently proved the decision as to application of the Memorandum of Understanding rests with FOS since FSA by FSMA set the parameters for the FOS but cannot direct them. FSA and FOS should be '*pari passu*'.

Section 4.13 *"...in the unlikely event that a one off case raises wider implications that could not have become apparent until after the Ombudsman issued the final decision, the process...suggested above, could be invoked..."*

(See comments for Section 5.5 (b))

Section 5.3 *"Establishing a right of appeal...would require amendment of FSMA"*

As stated in Section 1.4, Section 426 provides for secondary rather than primary legislation.

Section 5.5 (a) "*the absence of an external appeal created an inbalance, particularly as the complainant had the choice of accepting the Ombudsman's final decision or retaining the right to go to court."*

Legal opinion provided by Anthony Speaight Q.C (Item 39) stated:- *"The Bill provides for an appeal to the High Court on a point of law. But if the ombudsman makes a decision under the arbitrary jurisdiction, rather than the law jurisdiction, then ex hypothesi no point of law could arise. So in the field where the ombudsman's power is arbitrary it is also unappealable."*

"*It may be arguable that such discriminatory rules are in themselves in breach of the fairness requirement of Article 6 or the non-discrimination requirement of Article 14."*

Section 5.5 (b) *"An external appeal could overturn a wrong decision...where a party turns up new evidence"*

At present new evidence is denied a hearing even though the process complies with natural justice (Chief Ombudsman to the Treasury Select Committee 8th June 2004). New evidence cannot be considered by the Ombudsman even if it was proved subsequently that there had been maladministration in the methodology before the decision was reached so that fundamental evidence that would overturn the original decision had not been taken into account. Although the terms of reference of the Independent Assessor enable him to inform the Ombudsman of such a situation it requires the permission of both the complainant and the firm for the case to be reopened. This also applies whether the new evidence was not made available until after the decision. This is contrary to the usual judicial process which with permission provides for an appeal process on merit..

Section 5.5 (c) *"An appeal would allow a higher authority to consider those cases where the issues are novel or have significant implications for the parties."*

Mr Anthony Holland in evidence to the Joint Committee on Financial Services and Markets stated:-

"After the Ombudsman makes his decision, if somebody still wants a hearing, 'you have some kind of review operation at the end, ring fenced, which is done by different Ombudsman, which would mean that any concerns the court may have would be directed towards the review section rather than the process as a whole.' "

His proposal was appropriate and in compliance with Article 6 of ECHR.

Section 5.6 *"The scope of judicial review has not reduced. It is wider than some firms think..."*

Judicial Review considers process not decision. It is based on 'ultra vires' and a restricted definition of reasonableness. By FSMA, challenge is not limited to the Wednesbury doctrine but the higher hurdle of egregious unreasonableness. Moreover the cost of judicial review is subject to a maximum longstop of 3 months from the original decision with permission required for a later application due to exceptional circumstances (process less rigid in Scotland). The cost is prohibitive and beyond the means of the majority of practitioner firms. In the event of a challenge subsequently lost, FOS legal costs could be recovered against the firm.

Section 5.7 (a) *"...fairer to make any appeal mechanism available to consumers as well as firms."*

This would be a requirement under ECHR.

Section 5.7 (b) *"Should the appeal be to another body?*"

The eloquence of the judiciary is a powerful argument for the creation of a separate tribunal. Mr Justice Lightman in his speech of March 2001 to the Association of Pension Lawyers stated in connection with the Pensions Ombudsman:-

"There is no reason why the administration of justice before the Tribunal should not be quick, cheap and efficient, and most certainly as professional and sure as the present procedure before the Ombudsman.... The obvious advantages would include the following... (1) the Tribunal will be equipped to handle expertly and efficiently...oral hearings...(2)...a clear demarcation between the investigatory role of the Ombudsman and the adjudicatory role of the Tribunal (3) there would be avoided the...problems where the Ombudsman should be disqualified from hearing a complaint but where there is no alternative available (4) The requirements of the Human Rights Act could and would clearly be satisfied...(5) To secure equality of arms...legal aid will become available to the parties to proceedings before such a tribunal...

Section 5.7 (c) "*Would the creation of an appeals process result in 'too many' appeals...causing a significant delay in resolution of large numbers of complaints..."*

The House of Lords Select Committee of the Constitution published its report into the Accountability of Regulators to Citizens and Parliament in May 2004.

The remit considered 'To what extent are Regulators both prosecutors and juries on an issue; what rights of appeal are there against decisions by Regulators?'

Their recommendation was for an accessible and efficient appeals mechanism based on the merits of the case rather than by judicial review. "*...the appeal body should have the...power to identify and penalise appeals designed to frustrate equitable jurisdiction"*

The Government response, published 26th July 2004, stated:-

"Government believes that the existing appeals arrangements are broadly proportionate, and that universal adoption of review on the merits could have a significant impact on the current regulatory framework."

This supports the evidence given to the Treasury Select Committee on 28th June 2004 by Ruth Kelly MP, Financial Secretary, where the impression given was a clear reluctance to provide a right of appeal in the current Treasury review (N2 +2) of FSA and FOS. If this proves to be the case it will not only disadvantage IFAs and claimants but be in breach of Article 6 of ECHR.

Yours sincerely

Susan E King

SUSAN E KING MLIA (Dip)