

Mortgages and general insurance regulation: transitioning complaints

Consultation document

September 2003



HM TREASURY



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MORTGAGES AND GENERAL INSURANCE REGULATION: TRANSITIONING COMPLAINTS

On 5 June 2003, Paul Boateng, the Chief Secretary to the Treasury, announced that legislation would be laid before Parliament to give the Financial Services Authority responsibility for regulating mortgages and the selling of general insurance. This legislation was approved by Parliament on 1 July 2003.

On 5 June 2003 the Chief Secretary to the Treasury also announced an open consultation about transitioning of complaints to the Financial Ombudsman Service (FOS). This would consider whether the FOS should be given powers to deal with consumer complaints which are made after FSA regulation starts but which relate to conduct before FSA regulation commences of firms regulated by the Mortgage Code Compliance Board (MCCB) or the General Insurance Standards Council (GISC).

The Chief Secretary noted in his statement to Parliament that transitioning these complaints would benefit consumers. However he also noted that this has to be weighed up against the possibility of additional costs for firms, and any differences in approach and scope between the FOS and the current self-regulatory schemes. This consultation aims to give all interested parties a chance to respond on these issues.

The Treasury would welcome feedback on the proposals explained here. Please write to:

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It would be helpful to receive your response by **21 November 2003**. The Government cannot guarantee to consider your response if it is received after that date. Please explain in your reply if you represent an organisation, and, if so, its membership and coverage, and any further details about the organisation, for example if it is a business brief details of the nature of the business including volume, customers and products. In accordance with the code of practice on open government, comments will be made publicly available unless

respondents specifically request otherwise. Any email response sent from a corporate system may carry an automatically generated message stating that the content of the message should be treated as confidential. If you are replying by email, please make it clear in the body of your response whether or not you wish your comments to be treated as confidential.

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1. INTRODUCTION

- 1.1 On 1 July 2003 legislation was approved by Parliament to bring mortgages and the selling of general insurance into the scope of statutory regulation by the Financial Services Authority (FSA). FSA regulation will commence on 31 October 2004 for mortgage business and the selling of long term care insurance, and on 14 January 2005 for the selling of other general insurances.
- 1.2 Currently mortgages and the selling of general insurance are not subject to statutory regulation. Instead there are industry self-regulatory bodies such as the Mortgage Code Compliance Board (MCCB) and the General Insurance Standards Council (GISC), as well as other trade bodies which operate self-regulatory arrangements. In addition some firms have decided not to submit themselves to regulation at all. More information on how consumer complaints are currently handled is given in the next section.
- 1.3 When FSA regulation commences it is expected that the MCCB and GISC will wind down. This consultation considers what if anything should happen to consumer complaints made after FSA regulation commences which relate to either the mortgage business of MCCB firms, or the selling of insurance by GISC firms, before FSA regulation commences. The main alternatives appear to be to not transition such complaints at all, or to transition complaints from the MCCB and GISC to the Financial Ombudsman Service (FOS).

2. CURRENT HANDLING OF CONSUMER COMPLAINTS

Mortgages

- 2.1 The Mortgage Code Compliance Board (MCCB) is an independent non-statutory organisation which requires that all lenders and intermediaries registered with it comply with the “Mortgage Code”. The Mortgage Code sets out standards of good mortgage lending practice to ensure that consumers are informed and protected when taking out a mortgage. More than 150 lenders and around 12,500 intermediaries are registered with the MCCB covering over 98% of the mortgage market.
- 2.2 FSA authorised bank and building society lenders registered with MCCB are subject to the compulsory jurisdiction of the FOS in respect of their mortgage lending activities. For intermediary firms and non-bank/building

society lenders registered with the MCCB, unresolved consumer complaints are dealt with by an independent arbitration scheme through the Mortgage Code Arbitration Scheme (MCAS). MCAS handled 102 complaints in the year ended 30 April 2003, charging firms an up front case fee of £881.75 per case. About half the cases were upheld with an average award in year ended 30 April 2003 of £1,942.

- 2.3 The relatively small share of the market which is not registered with the MCCB does not provide its customers with access to MCAS or the FOS.

General Insurance

- 2.4 In the general insurance market the self-regulatory system is more varied.

General Insurance Standards Council (GISC)

- 2.5 It is estimated that about a third of insurance intermediaries by number belong to the General Insurance Standards Council (GISC). However intermediaries belonging to GISC account for significantly larger proportion of the insurance broking market by volume. GISC is an independent, non-statutory organisation which regulates the sales, advice and service standards of its members, to ensure that general insurance customers are treated fairly. GISC has around 6,100 member businesses as at 30 June 2003. GISC members are either insurers or intermediaries or others involved in general insurance such as claims handlers.
- 2.6 For firms registered with GISC, the GISC Dispute Resolution Facility (DRF) provides a formal conciliation service to resolve customer complaints. GISC receives about 9710 complaints a year¹, of which about 3985 are handled within the Terms of Reference of its DRF. Many of these are then resolved relatively quickly and informally by GISC members. About 500 of the complaints become “formal complaints” under the DRF. Direct staff costs to GISC associated with formal complaints handled within the terms of reference of the DRF vary depending on their complexity, but would not normally exceed £115 per case. The GISC DRF is free to consumers. Firms do not normally pay a case fee, but the running costs are met from GISC’s general fees which are paid by firms.

¹ Figures in this paragraph from GISC DRF figures for the year to April 2003

Institute of Insurance Brokers (IIB)

- 2.7 A smaller number of brokers, about 400, have signed up to the Institute of Insurance Brokers' Regulatory Council (IIBRC), another non-statutory self-regulatory organisation. The IIBRC forms part of the Institute of Insurance Brokers (IIB) trade body. The IIBRC was established on 1 May 2001. It did not develop formal dispute resolution procedures as FSA regulation was announced before these were complete. The IIBRC gives informal advice to consumers and firms about complaints.
- 2.8 When FSA regulation commences, although IIBRC will formally cease to exist, the IIB will still be willing to provide informal advice about complaints.

Other self-regulatory arrangements

- 2.9 Many of those who sell insurance are "secondary insurance intermediaries" for whom insurance broking is not their main business, for example a car dealer selling an extended warranty which is a contract of insurance. Many of these secondary insurance intermediaries are either not regulated at all for the selling of insurance, or are members of self regulatory bodies which are connected to trade bodies related to the primary business of the firm. Such trade bodies are likely to continue after FSA regulation commences. They would therefore be able to deal with complaints arising after FSA regulation commences which relate to conduct before the commencement of FSA regulation, on the same basis as now.

3. TRANSITIONAL OPTIONS

Scope of transitional arrangements

- 3.1 The purpose of transitioning complaints would be to preserve the protections provided by an independent mechanism for resolving complaints where such a scheme is expected to be wound up at or shortly after the commencement of FSA regulation. This applies in the cases of MCCB and GISC. Firms registered with these organisations have signed up to an independent mechanism for resolving complaints, and both

MCCB and GISC are expected to wind up at or shortly after the commencement of FSA regulation of mortgages and general insurance.

- 3.2 This consultation, therefore, focuses on whether there should be transitional arrangements to deal with complaints from customers of GISC or MCCB firms which are made after the commencement of FSA regulation, but which relate to conduct which took place before the commencement of FSA regulation (“transitional complaints”).

Legal position

- 3.3 Where an independent mechanism for resolving complaints does not currently apply, the Government does not consider that it has the legal powers to bring complaints within the scope of the FOS. This is because such provision would not be “transitional” as there are no arrangements currently in place to transition. Instead such provision would amount to the retrospective imposition of the complaints handling aspect of the new regulatory regime. This would be beyond the scope of the Treasury’s powers.

- 3.4 The Government is not considering transitional arrangements:

- ⌘ **where a provider has not signed up to any self regulatory arrangements.** This is because neither firms nor consumers have signed up to such regulation.
- ⌘ **where the provider has signed up to a self regulatory body which does not provide an independent complaints resolution mechanism.** This is because consumers and firms have not signed up to such a mechanism and there would be no arrangements to transition. An example is the Institute of Insurance Brokers’ Regulatory Council (IIBRC), see paragraph 2.7 above.
- ⌘ **where existing arrangements will continue after the commencement of FSA regulation.** It would not be appropriate to transition complaints relating to firms regulated by self regulatory bodies which will continue to exist after the commencement of FSA regulation. These bodies would still be able to deal with complaints in the same way they do currently, whether or not they provide access to an independent complaints mechanism.

⊘ **for complaints in the process of being resolved when FSA regulation starts.** It would be inappropriate to transition complaints already raised with the GISC DRF or already subject to the MCAS arbitration process but which have not been resolved when FSA regulation commences. To have a complaint dealt with by two different dispute resolution bodies would be confusing for firms and for consumers. In any case GISC aims to put in place arrangements for completing consideration of such complaints, and once a case has started under MCAS it will take its course until it is resolved.

⊘ **For complaints relating to MCCB or GISC firms which are not then authorised by the FSA.** Some firms currently regulated by the MCCB and GISC will not seek authorisation from the FSA. They may decide to cease trading or restructure their business so they do not carry on regulated activities. Alternatively they may decide to become appointed representatives of an authorised firm. Such firms would not be subject to the FOS for their post FSA regulation business. The Government therefore considers it would be impractical to transition the complaints of such firms. This reflects the current MCCB dispute resolution arrangements which do not apply to firms which cease trading or decide to leave MCCB.

⊘ **For complaints relating to MCCB and GISC registered firms which would have fallen outside the scope of MCAS and the GISC DRF.** It should be noted that the GISC arrangements only cover general insurance and not pure protection policies or long-term care insurance. Some types of permanent health insurance and critical illness insurance are also excluded from the GISC arrangements. Transitional arrangements would only cover those policies currently covered by the GISC arrangements.

The main options for transitional arrangements

3.5 The main options for dealing with transitional complaints relating to GISC and MCCB registered firms are:

- a) **do nothing:** there would be no transitional arrangements for dealing with transitional complaints. Therefore MCCB and GISC registered firms would not be obliged to sign up to an independent mechanism for dealing with such complaints. However in the absence of such a mechanism some consumers may bring their claims before the courts. Firms would be likely to incur some costs associated with this.

Individual firms registered with MCCB and GISC would still have the option of signing up to the voluntary jurisdiction of the FOS without any transitioning legislation being put in place. The VJ is “voluntary” because a firm has the choice whether to sign up to it, but having done so is contractually bound to follow the FOS’s rulings.

- b) Industry-led solution.** The industry could put in place arrangements to deal with residual complaints. An industry led solution would enable the industry to address any reputational risk to it that might otherwise arise if there were no independent mechanism for dealing with transitional complaints. An industry-led solution might be an appropriate method of dealing with transitional complaints as MCCB and GISC are themselves self-regulatory bodies created by the industry.

An example of an industry led solution would be for MCCB and GISC to continue in some form to deal with transitional complaints. MCCB and GISC have indicated that it would be difficult for them to continue and raise funds from the industry once FSA regulation has started. From this time there would be little incentive for firms to comply with the rulings of these self regulatory bodies, as the ultimate sanction of ejection from regulation would have little effect. An industry led solution would therefore raise issues of funding, organisation and enforcement for the industry. As these are matters for the industry we have not pursued this further in our consultation document.

Could the industry put in place practicable arrangements for dealing with transitional complaints?

Would an industry-led solution be preferable?

- c) Pass legislation** to give the FOS automatic and compulsory jurisdiction over such complaints.

The arguments for and against legislating to transition complaints to the FOS for mortgages are discussed in section 4 and for general insurance, where some different arguments apply, in section 5.

4. ARGUMENTS FOR AND AGAINST TRANSITIONING COMPLAINTS FOR MORTGAGES

Arguments in favour of transitioning complaints against MCCB firms.

There are a number of arguments which could be made in favour of transitioning complaints against MCCB registered firms.

- 4.1 **Benefits to consumers.** Mortgages can be long term products meaning that consumers may only realise they have been mis-sold a product after several years. A mortgage is for many people the biggest financial transaction they enter into and the impact of any consumer detriment can be significant.
- 4.2 **Good practice across the market.** The Mortgage Code has become accepted good practice over the vast majority of the mortgage market. Lenders registered with MCCB, who account for 98% of the mortgage lending market, will only sell through mortgage intermediaries who are registered with the MCCB. Intermediaries registered with the MCCB have agreed to comply with the Mortgage Code and have their complaints dealt with by an independent body, under MCAS.
- 4.3 **Level playing field.** The FOS already has jurisdiction over banks and building societies as mortgage lenders. So it would provide a level playing field to transition complaints relating to other mortgage lenders. Also, where a broker has arranged a bank or building society mortgage it would save confusion to avoid a situation where the broker is not covered even though the FOS already covers the lender.
- 4.4 **Seamless transition.** Transitional arrangements would ensure a seamless transition to the new regulatory regime. There would be no “gap” in the availability of complaints handling procedures. The reputation of the industry might be at risk if there was no credible independent mechanism for resolving allegations of misselling before 31 October 2004 which arise after 31 October 2004.
- 4.5 **Continuity with “N2”.** Transitional arrangements would reflect the position at “N2”, 30 November 2001, when FSA regulation commenced for a range of financial services. Complaints which arose after N2 relating to conduct before “N2”, which had been governed by various

self-regulatory complaints mechanisms, were transitioned to the FOS. These transitional arrangements applied to both statutory and voluntary self-regulatory complaints mechanisms.

What are your views on the arguments in favour of transitioning complaints from MCCB registered firms?

Are there other arguments in favour of transitioning complaints from MCCB registered firms?

Arguments against transitioning of complaints against MCCB firms

There are a number of arguments which could be made against transitioning complaints from MCCB registered firms.

- 4.6 **Incomplete market coverage.** Such transitional arrangements, whilst covering most of the mortgage market, will not cover the whole market and could be seen as penalising those lenders and intermediaries who have agreed to join the MCCB.
- 4.7 **Costs for business.** Transitioning complaints to the FOS would clearly be more expensive for the industry than not transitioning, as MCCB will not continue. A detailed cost benefit analysis is contained in Annex B, the Regulatory Impact Assessment. The FOS would need to consult on its fees. The estimated cost to the industry of transitioning complaints is £155,000 in the first year after regulation. This is based on a FOS case fee of £600². The costing also assumes that the same number of cases are considered by the FOS as by MCAS, and that the FOS awards the same compensation as MCAS. The annual cost of transitioning complaints is then estimated to decline gradually, because as time goes on the numbers of mortgages still in existence that were taken out before FSA regulation will reduce.
- 4.8 If complaints were not transitioned to the FOS some consumers would pursue their complaints through the courts, incurring costs for firms in court fees and compensation. However we assume most consumers would not pursue their complaints through the courts, being put off by the

² This is the case fee currently applied to small firms, including small mortgage intermediaries, which have joined the FOS voluntary jurisdiction and do not pay the FOS annual levy.

procedures and potential costs. Therefore we assume this option will be much less expensive for firms.

- 4.9 **Profile of the FOS.** It may be that more consumers will complain to the FOS than would have complained to MCAS. Although MCCB registered firms are obliged to inform their customers about MCAS, the FOS may have a higher profile than MCAS. Ombudsman schemes such as the FOS offer a conciliation service which consumers may find less formal and legalistic than an arbitration service like MCAS. For example the FOS may be more ready to discuss complaints informally with consumers. This may benefit consumers, encouraging more of them to pursue complaints. However this could result in greater costs to firms due to the need to deal with more complaints.
- 4.10 **Possible wider impact of FOS rulings.** Concerns have also been raised that transitioning complaints to the FOS may enable the FOS to make rulings which may have a wider impact on the industry than the rulings of the arbitrators under MCAS.
- 4.11 **FOS and MCAS processes may differ.** The processes of the FOS would be different to those of MCAS. MCAS is an arbitration service whereas the FOS is not, and as discussed in paragraph 4.9 above consumers may find the FOS less formal and legalistic than MCAS. However in contrast to many arbitration schemes MCAS does not permit the parties to choose the arbitrator and there is no flexibility to customise the arbitration process. Both processes are free to the consumer.

What are your views on the arguments against transitioning complaints from MCCB registered firms?

Would the costs of transitioning complaints from MCCB registered firms outweigh the consumer protection benefits?

Are there any other arguments against transitioning complaints from MCCB registered firms?

5. ARGUMENTS FOR AND AGAINST TRANSITIONING COMPLAINTS FOR GENERAL INSURANCE

Arguments in favour of transitioning complaints against GISC firms

There are a number of arguments which could be made in favour of transitioning complaints against GISC registered firms.

- 5.1 **Benefits to consumers.** Such transitional arrangements would benefit consumers. Insurance provides important benefits for consumers, and can be particularly important in mitigating the impact of unexpected and difficult events such as an accident or a burglary. As noted in paragraph 2.6 above about 500 complaints a year become “formal complaints” under the GISC DRF.
- 5.2 **Seamless transition.** Transitional arrangements would ensure a seamless transition to the new regulatory regime. There would be no “gap” in the availability of complaints handling procedures. The reputation of the insurance industry might be at risk if there was no credible independent mechanism for resolving allegations of misselling and other incidents of non-compliance before 14 January 2005 which arise from that date.
- 5.3 **Level playing field.** The FOS already has jurisdiction over insurers. So, it would save confusion to avoid a situation where the broker is not covered even though the insurer already is, so that the customer would receive redress if the fault were the insurer’s, but not if the fault was the broker’s.
- 5.4 **Continuity with “N2”.** Transitional arrangements would reflect the position at “N2”, 30 November 2001, when FSA regulation commenced for a range of financial services. Complaints which arose after N2 relating to conduct before “N2” which had been governed by various self-regulatory complaints mechanisms, were transitioned to the FOS. These transitional arrangements applied to both statutory and voluntary self-regulatory complaints mechanisms.

What are your views on the arguments in favour of transitioning complaints from GISC?

Are there other arguments in favour of transitioning complaints from GISC?

Arguments against transitioning of complaints against GISC firms

There are a number of arguments which could be made against transitioning complaints from MCCB registered firms.

- 5.5 **Incomplete market coverage.** Such transitional arrangements will not cover the whole market and could be seen as penalising those intermediaries who have agreed to join a self-regulatory regime.
- 5.6 **Costs for industry.** Transitioning complaints to the FOS would clearly be more expensive for the industry than not transitioning, as GISC will not continue. The FOS would need to consult on its fees. This is based on a FOS case fee of £600³. The estimated cost to the industry of transitioning complaints is £410,000 in the first year after regulation. The costing assumes that the same number of cases to be considered by the FOS as those that progress to conciliation under the GISC DRF. It is also assumed that firms pay out similar amounts as now. The annual cost of transitioning complaints is then estimated to reduce rapidly, because most general insurance is annually renewable. Therefore, after the first year, the number of insurance contracts still in existence that were taken out before FSA regulation will be far fewer. For a more detailed cost benefit analysis see the draft Regulatory Impact Assessment at Annex B.
- 5.7 If complaints were not transitioned to the FOS some consumers would pursue their complaints through the courts, incurring costs for firms in court fees and compensation. However we assume most consumers would not pursue their complaints through the courts being put off by the procedures and potential costs. Therefore the “do nothing” option will be less expensive for firms than transitioning complaints to the FOS.
- 5.8 Extra costs due to the FOS may be particularly burdensome for the smallest brokers if they face complaints which progress to cases under the FOS. A further risk for firms is that the FOS fee, assuming a £600 case fee⁴, may outweigh the value of the compensation sought (average £400). Firms may be inclined to settle rather than take the case to the FOS, even where they consider the case has little merit.

³ This is the case fee currently applied to small firms which have joined the FOS voluntary jurisdiction and do not pay the FOS annual levy.

⁴ This is the case fee currently applied to small firms which have joined the FOS voluntary jurisdiction and do not pay the FOS annual levy.

- 5.9 The FOS is committed to addressing the special circumstances of the smallest brokers in its fees consultations, and the fee structure has to be approved by the FSA which is aware of the issue.
- 5.10 FOS and GISC DRF processes differ. In particular, in contrast to both FOS and MCAS **the GISC DRF cannot force firms to pay compensation to consumers.**
- 5.11 **Possible wider impact of FOS rulings.** Concerns have been raised that transitioning complaints to the FOS may enable the FOS to make rulings which may have a wider impact on the industry than the rulings of GISC.
- 5.12 **Profile of the FOS.** The FOS may have a higher profile than the GISC DRF and it may be that more consumers complain to the FOS than would have complained to the GISC DRF. This may benefit consumers but would result in increased costs to firms.
- 5.13 Even if complaints are not automatically transitioned to the FOS, GISC registered firms have the option of joining the voluntary jurisdiction (“VJ”) of the FOS. Firms have the choice whether to sign up to the VJ, but having done so are contractually bound to follow the FOS’s rulings.

What are your views on the arguments against transitioning complaints from GISC members?

Would the costs of transitioning complaints from GISC members outweigh the consumer protection benefits?

Are there any other arguments against transitioning complaints from GISC members?

6. EXPLANATION OF THE DRAFT STATUTORY INSTRUMENT

- 6.1 Annex C contains the draft Statutory Instrument (SI) containing provisions to transition complaints of MCCB and GISC firms to the FOS. The inclusion of a draft SI does not in any way pre-empt any decision on transitioning of complaints – this is an open consultation. But we consider that it would be helpful to illustrate the kind of provision that would be required were it to be decided that transitional provisions are needed.

- 6.2 The Order provides that a complaint can be made to the FOS so long as the person is authorised by the FSA in the new regulatory regime, and was subject to either the GISC DRF or MCAS when the relevant act took place. So, if a firm leaves either GISC or the MCCB before FSA regulation commences, but is subsequently authorised by the FSA, then complaints during the period which the firm was a member of either GISC or the MCCB will be covered by this Order.
- 6.3 The Order does not precisely copy the provisions for making a complaint under the GISC and MCAS schemes where there is a similar provision in the FOS rules. For example the GISC DRF limitations have not been expressly carried forward. Under the GISC DRF the complainant had to have suffered financial loss, distress, or material inconvenience. However the FOS has discretion to dismiss claims where there is no financial loss.
- 6.4 The Order replicates some conditions of the MCCB and GISC schemes where they have no parallel in the FOS scheme. For example the Order replicates the provision of the GISC scheme that it can only be used by individuals. It also replicates the provision that the jurisdiction of MCAS is limited to breaches of the Mortgage Code.
- 6.5 On the time limits for dealing with the claim, the GISC requires that complaints must be made within six months of final dealing with the firm. There are not any time limits in the MCAS scheme. The FOS limits complainants to complaining within 6 years of the date of the event, and the draft Order lets this time limit stand.
- 6.6 The Order does not make provision requiring or enabling MCCB and GISC to provide information to the FOS as MCCB and GISC should be able to provide information to the FOS under voluntary arrangements.

Do you have any comments on the draft Orders?

7. SUMMARY

- 7.1 The arguments for and against transitioning complaints from both GISC and MCCB are finely balanced, and there are some differences in the arguments which apply for mortgages and those which apply for general insurance. Transitioning complaints would bring clear benefits to

consumers. However there are concerns about costs and the different processes and scope of the FOS.

Do you consider that complaints relating to the business of MCCB firms before 31 October 2004 which are made after 31 October should be transitioned to the FOS?

Do you consider that complaints relating to the business of GISC firms before 14 January 2005 which are made from 14 January 2005 should be transitioned to the FOS?

Regulatory Impact Assessment

7.2 Annex B contains the draft Regulatory Impact Assessment (RIA) setting out the expected impact, costs and benefits of transitioning complaints.

Do you have any views on the assumptions made in the Regulatory Impact Assessment?

ANNEX A SUMMARY OF ISSUES FOR FEEDBACK

1. Could the industry put in place practicable arrangements for dealing with transitional complaints? [paragraph 3.5]
2. Would an industry led solution be preferable? [paragraph 3.5]
3. What are your views on the arguments in favour of transitioning complaints from MCCB registered firms? [paragraph 4.5]
4. Are there other arguments in favour of transitioning complaints from MCCB registered firms? [paragraph 4.5]
5. What are your views on the arguments against transitioning complaints from MCCB registered firms? [paragraph 4.11]
6. Would the costs of transitioning complaints from MCCB registered firms outweigh the consumer protection benefits? [paragraph 4.11]
7. Are there any other arguments against transitioning complaints from MCCB registered firms? [paragraph 4.11]
8. What are your views on the arguments in favour of transitioning complaints from GISC? [paragraph 5.4]
9. Are there other arguments in favour of transitioning complaints from GISC? [paragraph 5.4]
10. What are your views on the arguments against transitioning complaints from GISC members? [paragraph 5.13]
11. Would the costs of transitioning complaints from GISC members outweigh the consumer protection benefits? [paragraph 5.13]
12. Are there any other arguments against transitioning complaints from GISC members? [paragraph 5.13]
13. Do you have any comments on the draft Orders? [paragraph 6.6]

14. Do you consider that complaints relating to the business of MCCB firms before 31 October 2004 which are made after 31 October should be transitioned to the FOS? [paragraph 7.1]

15. Do you consider that complaints relating to the business of GISC firms before 14 January 2005 which are made from 14 January 2005 should be transitioned to the FOS? [paragraph 7.1]

16. Do you have any views on the assumptions made in the Regulatory Impact Assessment? [paragraph 7.2]

REGULATORY IMPACT ASSESSMENT

Mortgages and General Insurance regulation: transitioning complaints

ISSUE

The Financial Services Authority (FSA) will take on responsibility for regulating mortgages from 31 October 2004, and the selling of general insurance from 14 January 2005. It is expected that the self-regulatory bodies, the Mortgage Code Compliance Board (MCCB) and the General Insurance Standards Council (GISC) will wind themselves up at or shortly after the commencement of FSA regulation.

Consumers purchasing mortgage products or insurance products after FSA regulation comes into force will have access to the Compulsory Jurisdiction (CJ) of the Financial Ombudsman Service (FOS) to adjudicate on complaints. However concerns have been expressed as to what redress mechanism would be available to a consumer who had a complaint about the conduct of a firm regulated by the MCCB or GISC prior to FSA regulation, but which came to light after FSA regulation commences. The purpose of this RIA is to set out the costs and benefits of making transitional arrangements to enable the FOS to adjudicate on these complaints as well.

PURPOSE & INTENDED EFFECT OF THE MEASURE

i) The objective

The purpose of the consultation is to consider whether the Government should enable access to the FOS for consumers who have complaints about mortgage and general insurance products sold by MCCB and GISC member firms before FSA regulation comes into force but which come to light after FSA regulation comes into force.

ii) Background

There are currently different dispute resolution arrangements for mortgages and general insurance.

Mortgages

The Mortgage Code Compliance Board (MCCB) is a non-statutory regulator. Its role is to regulate the provision of mortgage advice and information by ensuring that firms registered with it comply with the “Mortgage Code”¹. In May 2003, there were 153 mortgage lenders and around 12,500 mortgage brokers registered with the MCCB covering over 98% of the mortgage market.

FSA authorised bank and building society lenders registered with MCCB are subject to the compulsory jurisdiction of the FOS in respect of their mortgage lending activities. For intermediary firms and non-bank/building society lenders registered with MCCB, unresolved consumer complaints are dealt with by an independent arbitration scheme through the Mortgage Code Arbitration Scheme (MCAS). The relatively small share of the market which is not registered with the MCCB does not provide its customers with access to MCAS or the FOS.

For the purposes of this RIA, we are only considering, in relation to mortgages, transitioning consumer complaints in relation to MCCB registered firms. For more detailed reasoning see the consultation document. Complaints that are in the course of being dealt with by MCAS when FSA regulation commences are also not considered in this RIA, as once a case has started under MCAS it will take its course until it is resolved.

General insurance

It is estimated that about a third of insurance intermediaries by number belong to the General Insurance Standards Council (GISC). However intermediaries belonging to GISC account for a significantly larger proportion of the insurance broking market by volume. GISC is an independent non-statutory organisation that regulates the sales, advice and service standards of its members. For firms registered with GISC, the GISC Dispute Resolution Facility (GISC DRF) provides a formal conciliation service to resolve customer complaints.

For the purposes of this RIA for general insurance, we are only considering transitioning the consumer complaints in relation to GISC registered firms. For more detailed reasoning see the consultation document. Complaints that are in the course of being dealt with by GISC are also not considered in this RIA, as these would not be transferred to the FOS. GISC aims to put in place arrangements for completing consideration of such complaints.

¹ The Mortgage Code sets standards of good practice as to how mortgage lenders and intermediaries deal with their customers.

iii) Overall risk assessment

When FSA regulation of mortgage business and the selling of general insurance commences it is expected that MCCB and GISC will wind down. The main risk to consumers of not making arrangements to transition complaints is that the rights of consumers of MCCB and GISC registered firms in respect of redress for business carried on before FSA regulation commences will not be available after FSA regulation commences. Consumers will be left with no other option but to pursue their cases through the courts, even though they completed their mortgage or general insurance transaction in the knowledge that an independent dispute resolution system would be in place.

The main risk to firms of transitioning complaints is that the costs of transitioning complaints will be greater than if nothing is done to transition complaints. Also the FOS may have a higher profile among consumers than MCAS or the GISC DRF so there may be more complaints. Transitioning complaints to the FOS may enable the FOS to make rulings which may have a wider impact on the industry than the rulings of the arbitrators under MCAS.

OPTIONS

The main options for dealing with transitional complaints relating to GISC and MCCB registered firms are:

- A) Do nothing: There would be no transitional arrangements for dealing with transitional complaints, so that MCCB and GISC registered firms were not obliged to sign up to an independent mechanism for dealing with such complaints. However in the absence of such a mechanism some consumers may bring their complaints before the courts so firms would be likely to incur some costs associated with this. Individual firms registered with MCCB and GISC would still have the option of signing up to the voluntary jurisdiction of the FOS without any transitioning legislation being put in place.
- B) Industry-led solution: The industry could put in place arrangements to deal with residual complaints. An industry-led solution might be an appropriate method of dealing with transitional complaints as MCCB and GISC are themselves self-regulatory bodies.
- C) Pass legislation to give the FOS automatic and compulsory jurisdiction over mortgages and general insurance: It would be possible to transition complaints for both mortgages and general insurance, or just for mortgages or just for general insurance. The arguments for and against

legislating to transition complaints to the FOS are discussed in section 4 of the consultation document and for general insurance where some different arguments apply, in section 5.

Risks of each option

- A) Do nothing: The only option for consumers to seek redress would be for them to go through the courts. Most consumers would probably not take their complaints to the courts because the costs and processes would discourage them. Therefore it is likely some consumers with legitimate complaints will not receive the redress they would have done had MCAS and the GISC DRF continued. There would also be reputational risks to the industry if there were no independent dispute resolution mechanism to deal with transitional complaints.
- B) Industry-led solution: Once FSA regulation has started there may be little incentive for firms to comply with an industry self regulatory body, as the ultimate sanction of ejection from the body would probably have little effect. An industry led solution would therefore raise issues of funding organisation and enforcement for the industry. As these are matters for the industry we have not pursued this further in the consultation document or RIA.
- C) Pass legislation to give the FOS jurisdiction over mortgages and general insurance:

Transitioning mortgage complaints would pose a number of risks to firms, summarised below. For more detailed reasoning see the consultation document. Transitioning complaints to the FOS would be **more costly** to the industry than not transitioning, as MCCB will not continue. **The FOS may have a higher profile** among consumers than MCAS and therefore more consumers may complain to the FOS than would have complained to MCAS. **The processes of the FOS and MCAS may differ**, for example consumers may find FOS less formal and legalistic than MCAS.

Transitioning general insurance complaints would pose a number of risks to firms, summarised below. For more detailed reasoning see the consultation document. Such arrangements would **not cover the whole market** but would only cover the third of brokers who are registered with GISC. Transitioning complaints to the FOS would be **more costly** to the industry than not transitioning, as GISC will not continue. **The FOS may have a higher profile** among consumers than GISC and therefore more

consumers may complain to the FOS than would have complained to GISC. **The processes of the FOS and GISC DRF differ.** In particular **the GISC DRF cannot force firms to pay compensation**, in contrast to the FOS.

Analysing the benefits

- A) Do nothing: The main benefit of doing nothing is that firms would save the costs of FOS fees and compensation, see the costing tables at Annex 1 for more details. There would also be a clean break between the self-regulatory regime and statutory regulation.
- B) Industry-led solution: This would enable consumers to continue to benefit from self-regulatory mechanisms for dealing with transitional complaints. This solution would also enable the industry to address any reputational risk to it that might otherwise arise if there were no independent mechanism for dealing with transitional complaints.
- C) Pass legislation to give the FOS jurisdiction over mortgages and general insurance:

Transitioning mortgage complaints would provide a number of benefits summarised below, for more details see the consultation document. Consumers will benefit from continuing to have **access to an independent complaints mechanism**, preserving protections that have become **good practice across the vast majority of the mortgage market**. Transitional arrangements would ensure a **seamless transition** to the new regime. The FOS already has jurisdiction over banks and building societies as mortgage lenders and it would provide a **level playing field** to transition the complaints of other mortgage lenders. Transitioning would avoid the **risk to the industry's reputation** that would arise were there no independent mechanism to handle complaints.

Transitioning insurance complaints would provide a number of benefits summarised below, for more details see the consultation document. Consumers will benefit from continuing to have **access to an independent complaints mechanism**. Transitional arrangements would ensure a **seamless transition** to the new regime. The FOS already has jurisdiction over insurers so it would **avoid the confusion** that might arise where the customer could complain to an independent body about the actions of the insurer but not the broker. Transitioning would avoid the risk to the industry's reputation that would arise were there no independent mechanism to handle complaints.

CALCULATING THE COSTS

- A) Do nothing: In the absence of independent dispute resolution mechanisms, firms would not have to incur the redress and any case fees associated with such mechanisms. Consumers' only recourse would be through the courts. Firms would therefore incur some costs related to such court cases. Whilst the costs associated with an individual case may be relatively high, we expect most consumers to be discouraged from pursuing their cases through the courts due to the costs and processes. Therefore we expect the overall costs to firms under option A to be significantly lower than under other options. For more details see the costings tables at Annex 1, option a).
- B) Industry-led solution: Any industry-led arrangements to deal with transitioned complaints would be a matter for the industry, and the costs would depend on the type of arrangements put in place. For purely illustrative purposes we have calculated the costs to firms if transitioned complaints were dealt with under the current GISC and MCAS regimes, see Annex 1, option b).
- C) Pass legislation to give the FOS jurisdiction over mortgages and general insurance: Annually, there are around 100 complaints about mortgages that are adjudicated by MCAS. Around 500 complaints are registered as "formal complaints" under the GISC DRF. The assumption is that in the first year after the commencement of FSA regulation, similar numbers of transitional complaints, about 100 for mortgages and 500 for general insurance would go to the FOS, incurring the case fee. It is assumed that as time goes on the numbers of transitional complaints will fall as there will be fewer mortgages and general insurance contracts left that were taken out before the commencement of FSA regulation. It is expected this reduction will be swifter in the case of general insurance. This is because general insurance products tend to be renewed annually. Therefore after the first year of FSA regulation most insurance contracts will have been renewed and thus fall within the scope of FSA regulation.

The main costs to firms in transitioning complaints to the FOS are FOS case fees and compensation paid to consumers as a result of FOS adjudications. It is assumed the costs of complaints handling to firms are of minimal significance. This is because, following commencement of regulation, firms will already have procedures in place to deal with complaints. These would probably require few changes to deal with transitioned complaints.

If it is decided to transition complaints, the FOS will need to consult on its fees. For the purposes of this RIA, a straightforward FOS case fee of £600 per case² is assumed. It is also assumed that the FOS would award the same average compensation as that awarded by MCAS in the case of mortgages and as that paid by firms following recommendation by the GISC DRF in the case of general insurance. It is also assumed the same proportion of complaints would be found in favour of the consumer by the FOS as by MCAS and the GISC DRF. For the costings resulting from these assumptions, see annex 1.

SMALL FIRMS IMPACT TEST

Many of the 12,500 mortgage brokers who are registered with the MCCB are small firms. But with an average of 100³ complaints a year being dealt with by MCAS, this proposal is unlikely to have a significant impact on most of them. Similarly, many of the 6,100 GISC members are small firms - about 5,400 have annual revenue of up to £1m. About 500 complaints a year become formal complaints under the GISC Dispute Resolution Facility. This is far less than one complaint per firm. Therefore we do not think that this proposal will have a significant impact on the small firms. Most will not have any complaints to transition to the FOS, and those that do are likely only to have a small number of complaints.

COMPETITION ASSESSMENT

The proposal will impact on businesses involved in the mortgage and general insurance sectors. We do not expect that this will have any significant impact on competition. This is because we consider the costs under each option are not sufficient to create implications for competition. It appears unlikely that any firm will go out of business or withdraw from the market because of this proposal.

ENFORCEMENT, SANCTIONS, MONITORING AND REVIEW

The FOS was set up to help settle individual disputes between consumers and financial firms. FOS can consider complaints about a range of financial services. The service is free to consumers and is completely independent. FOS decisions are binding on firms but not on consumers.

² This is the case fee currently applied to small firms which have joined the FOS voluntary jurisdiction and do not pay the FOS annual levy.

³ MCCB Annual report 2002

SUMMARY

This is an open consultation by the Government. It has no view on which of the options should be pursued and would welcome views on the assumptions made in this RIA.

HM TREASURY
22 September 2003

Option 1 - Costs to business and consumers of not transitioning mortgages and general insurance complaints.

Because of the procedures and potential costs, we assume that many fewer consumers will take their case to the courts than would have done if the MCAS and GISC arrangements had continued. It is difficult to estimate how many transitional complaints would be taken to the courts, but for illustrative purposes we have assumed 20% of the cases would be taken to the courts. It is assumed the number of transitional complaints which would have gone to the GISC DRF and MCAS will reduce as time goes on. This is because there will be fewer mortgages and insurance contracts left in existence sold before the commencement of FSA regulation. It is expected this reduction will be sharper in the case of insurance as most insurance contracts are annually renewable.

Table 1 – Numbers of transitional complaints expected to go before the courts

	Year 1	Year 2	Year 5	Year 10
Transitional complaints which would have gone to GISC DRF	500	100	5	5
20% of which expected to go to the courts	100	20	1	1
Transitional complaints which would have gone to MCCB	100	80	50	10
20% of which expected to go to the courts	20	16	10	2

It is assumed the courts would award the same average amount of redress as firms pay under the MCAS and GISC DRF schemes for mortgages and insurance respectively, in the same proportion of cases. MCAS pays an average compensation of £1,900 in the 50% of cases found in the consumer's favour. The GISC Dispute Resolution Facility (DRF) cannot award compensation. However £400 is the average redress that a firm pays following recommendation by the GISC DRF in the 55% of cases where the DRF found in the consumer's favour.

Firms are also likely to incur costs in handling the court cases, but it is difficult to estimate these accurately. Therefore these are not included in the table below, which therefore probably under estimates the costs to firms of dealing with the court cases. However the costs in the table below reflect the redress awarded to consumers, calculated according to the assumptions above.

Table 2 – Costs to business of option A.

	Year 1	Year 2	Year 5	Year 10
A. Cases expected to go to Courts (mortgages)	20	16	10	2
B. Cases found in favour of consumer (50% of A)	10	8	5	1
C. Redress (£1,900*B) £'000	19	15	10	2
D. Cases expected to go to Courts (General insurance)	100	20	1	1
E. Cases found in favour of consumer (55% of D)	55	11	1	1
F. Redress (£400*C) £'000	22	4	0	0
Total estimated costs (C + F) £'000	41	19	10	2

Option B – Industry-led solution

Any industry-led arrangements to deal with transitioned complaints would be a matter for the industry, and the costs would depend on the type of arrangements put in place. For *illustrative purposes only* we have calculated the costs to firms dealing with transitioned complaints to firms under the current GISC and MCAS regimes.

The current MCAS case fee of £882 is applied. In addition, figures for the redress that MCAS might have awarded for the transitioned complaints are included based on the current average compensation of around £1,900 paid out in 50% of cases. The GISC DRF is funded through the general GISC membership fees paid by firms, and there is no case fee. There is therefore no case fee reflected in the illustrative costs below. However an industry led solution to dealing with transitional complaints would need to be funded, so the figures below would represent an under estimate of the costs of an industry led solution. Figures for the redress that GISC DRF might have awarded for the transitioned complaints are included based on the current average compensation of around £400 paid out in 55% of cases

Table 4 – Costs to business of dealing with transitional mortgage complaints under the current MCAS arrangements

	Year 1	Year 2	Year 5	Year 10
A. Transitional complaints which would have gone to MCCB	100	80	50	10
B. Complaints found in consumers' favour (50%*A)	50	40	25	5
C. MCAS fees (882*A) £'000	88	71	44	9
D. Redress awarded by MCAS (£1,900*B) £'000	95	76	48	10
Total cost to business £'000	183	147	92	19

Table 5 – Costs to business of dealing with transitional complaints – general insurance under the current GISC arrangements

	Year 1	Year 2	Year 5	Year 10
A. Transitional complaints which would have gone to GISC DRF	500	100	5	5
B. Complaints found in consumers' favour (55%*A)	275	55	3	3
C. Redress through GISC DRF (£400*B) (£'000)	110	22	1	1

Option C - Pass legislation to give the FOS jurisdiction over mortgages and general insurance

Mortgages

Table 6 represents the costs to MCCB registered firms of transitioning complaints to the FOS. The FOS case fee for small intermediary firms in its voluntary jurisdiction of £600 is applied. Figures for the redress awarded are calculated on the basis that the FOS awards the same average compensation of £1,900 in successful cases as by MCAS, and that the success rate is the same in FOS cases as MCAS, at 50%.

Table 6 – Costs to business of transitioning complaints to the FOS – mortgages

	Year 1	Year 2	Year 5	Year 10
A. Transitional complaints	100	80	50	10
B. Complaints found in consumers' favour	50	40	25	5
C. FOS fees (£600*A) (£'000)	60	48	30	6
D. Redress (£1,900*B) (£'000)	95	76	48	10
Total	155	124	78	16

Subtracting these totals from the costs of the do “nothing option”, see table 2 above, gives the additional costs to firms of transitioning complaints to the FOS, over and above the costs of the “do nothing” option.

Table 7 – additional costs to business of transitioning complaints to the FOS compared with the “do nothing” option – mortgages

Total	155	124	78	16
Less costs of do nothing option	19	15	10	2
Cost of transitioning complaints compared with “do nothing” option	136	109	68	14

Insurance

Table 8 gives the estimated costs to GISC registered firms of transitioning complaints to the FOS. The FOS case fee for small intermediary firms in its voluntary jurisdiction of £600 is applied. Figures for the redress awarded are calculated on the basis that the FOS awards the same average compensation of £1,900 in successful cases as by MCAS, and that the success rate is the same in FOS cases as MCAS, at 50%.

Table 8 – Costs to business of transitioning complaints to the FOS – general insurance

	Year 1	Year 2	Year 5	Year 10
A. Transitional complaints	500	100	5	5
B. Complaints found in consumers' favour	275	55	3	3
C. FOS fees (£600*A) (£'000)	300	60	3	3
D. Redress (£400*B) (£'000)	110	22	1	1
Total (£'000)	410	82	4	4

Subtracting these totals from the costs of the do nothing option, see table 2 above, gives the additional costs of transitioning complaints to the FOS.

Table 9 - Costs of transitioning complaints to the FOS compared with the “do nothing” option

	Year 1	Year 2	Year 5	Year 10
Total (£'000)	410	82	4	4
Less costs of “do nothing” option (£'000)	22	4	0	0
Cost of transitioning insurance complaints compared with “do nothing” option (£'000)	388	78	4	4

Mortgages and General Insurance

Adding the additional costs for mortgages and insurance together from the tables above we arrive at the total additional costs of transitioning complaints to the FOS compared with the “do nothing” option.

Table 10 – Costs of transitioning complaints to the FOS compared with the “do nothing option – mortgages and general insurance.

	Year 1	Year 2	Year 5	Year 10
Additional costs of transitioning mortgages (£'000)	136	108	68	14
Additional costs of transitioning general insurance (£'000)	388	78	4	4
Totals (£'000)	524	186	72	18

DRAFT STATUTORY INSTRUMENTS

2003 No.

FINANCIAL SERVICES AND MARKETS
The Financial Services and Markets Act 2000 (Transitional Provisions) (Complaints Relating to General Insurance and Mortgages) Order 2003

Made - - - - - 2003

Laid before Parliament 2003

Coming into force in accordance with article 1

The Treasury, in exercise of the powers conferred upon them by sections 426 to 428 of the Financial Services and Markets Act 2000⁽¹⁾ hereby make the following Order:

Citation, commencement and interpretation

1.—(1) This Order may be cited as the Financial Services and Markets Act 2000 (Transitional Provisions) (Complaints Relating to General Insurance and Mortgages) Order 2003.

(2) In so far as it relates to a complaint which relates to an activity to which, immediately before 31st October 2004, the MCAS Scheme applied, this Order comes into force on 31st October 2004.

(3) Otherwise, this Order comes into force on 14th January 2005.

(4) In this Order –

“the Act” means the Financial Services and Markets Act 2000;

“former scheme” means –

(a) the Dispute Resolution Facility established by the General Insurance Standards Council (“the GISC Facility”); or

(b) the Mortgage Code Arbitration Scheme (“the MCAS Scheme”);

“new scheme” means the ombudsman scheme provided for by Part XVI of the Act (the ombudsman service);

“relevant commencement date” means –

(a) in relation to a complaint which relates to an activity to which, immediately before 14th January 2005, the GISC Facility applied, the beginning of 14th January 2005;

(b) in relation to a complaint which relates to an activity to which, immediately before 31st October 2004, the MCAS Scheme applied, the beginning of 31st October 2004.

¹ 2000 c8

Complaints made after commencement about acts or omissions before commencement

2.—(1) Subject to the provisions of this Order, the compulsory jurisdiction resulting from section 226 of the Act⁽²⁾ applies to a complaint referred to the new scheme after the relevant commencement date which relates to an act or omission occurring before that date if the conditions mentioned in paragraph (2) are satisfied (notwithstanding that the conditions in subsection (2)(b) and (c) of that section are not met).

(2) The conditions are that –

- (a) the act or omission is that of a person (“R”) who, at the time of that act or omission, was subject to a former scheme;
- (b) R was an authorised person or appointed representative on the relevant commencement date;
- (c) the act or omission occurred in the carrying on by R of an activity to which that former scheme applied; and
- (d) the complainant is eligible and wishes to have the complaint dealt with under the new scheme.

(3) For the purposes of paragraph (2)(d), where the complainant is not eligible in accordance with the rules made under section 226(6) and (7) of the Act (power to specify in rules the classes of persons who are eligible complainants), an ombudsman may nonetheless, if he considers it appropriate, treat the complainant as eligible if he would have been entitled (subject to the consent of the complainant) to refer an equivalent complaint to the former scheme in question immediately before the relevant commencement date.

(4) Where the former scheme in question is the GISC Facility, a complainant is not to be treated as eligible for the purposes of paragraph (2)(d) unless –

- (a) he is an individual; and
- (b) he is acting otherwise than solely for the purposes of his business.

(5) Where the former scheme in question is the MCAS Scheme, a complainant is not to be treated as eligible for the purposes of paragraph (2)(d) if –

- (a) the complaint does not relate to a breach of the Mortgage Code;
- (b) the complaint concerns physical injury, illness, nervous shock or their consequences; or
- (c) the complainant is claiming a sum of money that exceeds £100,000.

(6) A complaint falling within paragraph (1) is referred to in this Order as a “relevant new complaint”.

Procedure applying to relevant new complaints

3. In paragraph 13 of Schedule 17 to the Act⁽³⁾ (Authority’s procedural rules) –

- (a) the references to “a complaint” are to be taken to include a relevant new complaint; and
- (b) the reference in sub-paragraph (1) to the “ombudsman scheme” is, in relation to a relevant new complaint, to be taken to mean the new scheme as it applies to such complaints by virtue of this Order; and
- (c) in sub-paragraph (4), the reference to complaints which may be referred to the scheme is to be taken to include any complaint which may be referred to the scheme as a relevant new complaint.

⁽²⁾ Modified by S.I. 2001/2326.

⁽³⁾ Modified by S.I. 2001/2326.

Scheme rules applying to relevant new complaints

4.—(1) In paragraph 14 of Schedule 17 to the Act (the scheme operator’s rules) –

- (a) references to “complaints” are to be taken to include relevant new complaints;
- (b) sub-paragraph (2)(a) (matters which are to be taken into account in making determinations) does not apply to a relevant new complaint (as to which see article 5(2)).

(2) In deciding whether a relevant new complaint is to be dismissed without consideration of its merits as mentioned in paragraph 14(2)(b) of that Schedule, an ombudsman is to take into account whether an equivalent complaint would have been so dismissed, or would not have been an eligible complaint, under the former scheme in question, as it had effect immediately before the relevant commencement date; and any scheme rules made under paragraph 14(2)(b) and (3) of that Schedule (rejection of a complaint without consideration of its merits) are to be read accordingly.

Determination of relevant new complaints

5.—(1) Sections 228 to 232 of the Act apply in relation to a relevant new complaint as they apply in relation to a complaint of the kind mentioned in section 226(1) of the Act (compulsory jurisdiction), subject to paragraph (2).

(2) In determining, in relation to a relevant new complaint –

- (a) what is fair and reasonable in all the circumstances of the case, for the purposes of section 228(2) of the Act, and
- (b) what amount (if any) constitutes fair compensation for the purposes of section 229(2)(a) of the Act,

an ombudsman is to take into account what determination might have been expected to be made under the former scheme in question, and what amount (if any) might have been expected to be awarded by way of compensation under that scheme, in relation to an equivalent complaint dealt with under the former scheme immediately before the relevant commencement date.

Funding and fees

6.—(1) In section 234(1) of the Act (industry funding), the reference to the operation of the new scheme in relation to the compulsory jurisdiction is to be taken to include the operation of the scheme in relation to relevant new complaints by virtue of this Order.

(2) In paragraph 15 of Schedule 17 to the Act (fees), the references to “a complaint” are to be taken to include a relevant new complaint.

Exemption from liability in damages

7. In paragraph 10(1) of Schedule 17 to the Act (exemption from liability in damages), the reference to functions under the Act in relation to the compulsory jurisdiction is to be taken to include functions exercisable by virtue of this Order.

Privilege

8. In paragraph 11 of Schedule 17 to the Act (privilege), the reference to a complaint which is subject to the compulsory jurisdiction is to be taken to include a relevant new complaint.

Record-keeping and reporting requirements relating to relevant new complaints

9. The Authority may make rules applying to authorised persons with respect to the keeping of records and the making of reports in relation to relevant new complaints.

Application of definition of “consumer” to customers of firms before commencement

10.—(1) In section 138 of the Act (Authority’s general rule-making power)⁽⁴⁾, “consumers” includes (in addition to persons defined as “consumers” in subsection (7)) persons—

- (a) who before commencement used services provided by a person (“P”) who was, in relation to those services, subject to a former scheme;
- (b) who have rights or interests which are derived from, or are otherwise attributable to, the use of such services by other persons; or
- (c) who have rights or interests which may be adversely affected by the use of any such services by persons acting on their behalf or in a fiduciary capacity in relation to them.

(2) The definition of “consumers” in paragraph (1) is referred to in this article as “the extended definition”.

(3) For the purposes of the extended definition, subsections (8) and (9) of section 138 of the Act apply as if—

- (a) references to an authorised person were references to P; and
- (b) references to carrying on a regulated activity were references to activities to which either former scheme applied.

(4) The extended definition applies for the purposes of subsection (3) of section 5 (the protection of consumers), subsection (7) of section 10 (the Consumer Panel), subsection (5) of section 14 (cases in which the Treasury may arrange independent inquiries), subsection (6) of section 186 (objection to acquisition of control) and subsection (11) of section 391 (publication of notices) of the Act.

(5) But the extended definition does not apply for the purposes of paragraph 1 of Schedule 4 to the Act (Treaty rights).

Two of the Lords Commissioners’ of Her Majesty’s Treasury

⁽⁴⁾ Modified by S.I. 2001/1821 and S.I. 2002/1775.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order makes transitional provisions in connection with the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.1) Order 2003 (S.I. 2003/[]) and the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2003 (S.I. 2003/[]) (“the RAO amendment Orders”). Those Orders specify the mediation of general insurance and of mortgages as regulated activities for the purposes of the Financial Services and Markets Act 2000 (“the Act”).

This Order modifies Part XVI of the Act, which provides for the establishment of an ombudsman scheme (“the new scheme”). The Order provides for certain complaints relating to acts or omissions occurring before the commencement of the operative provisions of the RAO amendment Orders which would have fallen within the Mortgage Code Arbitration Scheme or the Dispute Resolution Facility established by the General Insurance Standards Council to be dealt with under the new scheme. Articles [] set out various modifications of the new scheme, in so far as it applies to such complaints.

*Copies of the Dispute Resolution Facility may be obtained from the Financial Ombudsman Service at South Quay Plaza, 183 March Wall, London, E14 9SR.
Copies of the Mortgage Code Arbitration Scheme may be obtained from the Chartered Institute of Arbitrators, International Arbitration Centre, 12 Bloomsbury Square, London WC1A 2LP.*

