
STATUTORY INSTRUMENTS

2001 No. 2326

**The Financial Services and Markets Act
2000 (Transitional Provisions) (Ombudsman
Scheme and Complaints Scheme) Order 2001**

The Ombudsman Scheme

Partly completed complaints under former schemes

2.—(1) Subject to the provisions of this Order, a complaint which—

- (a) was referred to a former scheme (other than the PIAS) at any time before commencement, by a person who was at that time entitled, under the terms of the former scheme, to refer such a complaint (whether described in that scheme as the making of a complaint, the referral of a dispute, the submission of a claim, or otherwise), and
- (b) was not determined before commencement,

is, after commencement, to be dealt with under the new scheme (and not the former scheme).

(2) For the purposes of paragraph (1)(b), a complaint is to be treated as determined before commencement where it had, before commencement, been rejected, withdrawn, settled or determined by the former ombudsman (whether by a substantive decision, or by closure of the case without a substantive decision).

(3) But a complaint is not to be treated as determined before commencement if, pursuant to the terms of the former scheme, the determination was at commencement subject to (or capable of being subject to) an appeal, a reference to arbitration or other like procedure.

(4) Paragraph (1) applies notwithstanding that the conditions in section 226(2) are not met.

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

Complaints made after commencement about acts or omissions before commencement

3.—(1) Subject to the provisions of this Order, the compulsory jurisdiction resulting from section 226 applies to a complaint referred to the new scheme after commencement which relates to an act or omission occurring before commencement, 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 who was, immediately before commencement, subject to a former scheme;
- (b) the act or omission occurred in the carrying on by that person of an activity to which that former scheme applied; and
- (c) the complainant is eligible and wishes to have the complaint dealt with under the new scheme.

(3) For the purposes of paragraph (2)(c), where the complainant is not eligible in accordance with rules made under section 226(6) and (7) (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 to refer an equivalent complaint to the former scheme in question immediately before commencement.

(4) Where the former scheme in question is the insurance scheme, a complainant is not to be treated as eligible for the purposes of paragraph (2)(c) unless—

- (a) he is an individual; and
- (b) the complaint does not concern aspects of a policy relating to a business or trade carried on by him.

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

Procedure applying to relevant complaints

4.—(1) In paragraph 13(1) of Schedule 17 (time limits for making complaints)—

- (a) the reference to “a complaint” is to be taken to include a relevant complaint;
- (b) the reference to “the ombudsman scheme” is, in relation to a relevant existing complaint, to be taken to mean the former scheme in question; and
- (c) the reference 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.

(2) Paragraph 13(2) of Schedule 17 (discretion for ombudsman to extend time limits) is to be taken to require an ombudsman to extend any time limit applying to a relevant complaint by virtue of paragraph (1) where—

- (a) the complaint is a relevant existing complaint, or is a relevant new complaint referred to the new scheme not later than twelve months after commencement; and
- (b) the effect of the extension is that the time limit applying to the complaint is the same as that which would have applied under the former scheme in question as it had effect immediately before commencement;

but subject to that, paragraph 13(2) of Schedule 17 applies in relation to relevant complaints as it applies in relation to complaints of the kind mentioned in section 226(1) (compulsory jurisdiction).

(3) In paragraph 13(3) of Schedule 17 (rules requiring complaint to be first communicated to the respondent), the reference to “a complaint” is to be taken to include a relevant complaint.

(4) In paragraph 13(4) of Schedule 17 (rules requiring the maintenance of complaint procedures), the reference to complaints which may be referred to the scheme is to be taken to include—

- (a) relevant existing complaints; and
- (b) any complaint which may be referred to the scheme as a relevant new complaint.

Scheme rules applying to relevant complaints

5.—(1) In paragraph 14 of Schedule 17 (the scheme operator’s rules), references to “complaints” are to be taken to include relevant complaints.

(2) Paragraph (1) is subject to the following—

- (a) paragraph 14(2)(a) of Schedule 17 (matters to be taken into account in making determinations) does not apply to a relevant existing complaint (as to which see article 6(2));

- (b) so far as relating to relevant new complaints, scheme rules made under that paragraph are subject to article 7(2);
- (c) in deciding whether a relevant 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 under the former scheme in question, as it had effect immediately before commencement; 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 existing complaints

6.—(1) The following provisions do not apply in relation to a relevant existing complaint—

- (a) section 228(2) (criteria for determining complaints);
- (b) except as provided in paragraphs (4) and (5), section 229 (awards); and
- (c) except as provided in paragraph (6), section 230 (costs).

(2) A relevant existing complaint is to be determined (so far as practicable) by reference to such criteria as would have applied to the determination of the complaint by the former ombudsman under the former scheme in question immediately before commencement (provided that where the former scheme is the FSA scheme, the criteria are those which would have applied to the determination of the complaint by an independent investigator under that scheme at that time).

(3) A determination of a relevant existing complaint may include such remedy as could have been included in a determination (whether described as a determination, award, recommendation or otherwise) made by the former ombudsman under the former scheme in question immediately before commencement.

(4) Where such a determination includes an award against the respondent of compensation payable to the complainant, section 229(8)(b) and paragraph 16 of Schedule 17 apply in relation to such an award as they apply in relation to a money award (as defined in section 229(2)(a)).

(5) Where such a determination includes a requirement for the respondent to take any steps in relation to the complainant, section 229(9) and (10) apply in relation to such a requirement as they apply in relation to a direction under section 229(2)(b).

(6) Where the former scheme in question, as it had effect immediately before commencement, included provision for the award of costs, an ombudsman may, on determining the relevant existing complaint, award costs in accordance with that provision (irrespective of whether those costs were incurred, or relate to anything done, before or after commencement); and subsections (6) and (7) of section 230, and paragraph 16 of Schedule 17, apply in relation to such an award of costs as they apply in relation to an award under that section.

(7) Where, in relation to a relevant existing complaint, the former scheme in question was the FSA scheme—

- (a) if the complaint was, at commencement, subject to arbitration in accordance with that scheme, the extent to which the determination of the complaint under the new scheme is binding and final depends on the terms of the arbitration (which are not affected by this Order);
- (b) in any other case, the determination of the complaint under the new scheme is not binding on the respondent or the complainant;

and subsections (4)(c) and (5) to (7) of section 228 (determination of complaints) do not apply in relation to the complaint.

(8) Where, in relation to a relevant existing complaint, the former scheme in question was the SFA scheme—

- (a) if the complaint has not been submitted to arbitration under that scheme, and would not have been eligible to be so submitted under that scheme as it had effect immediately before commencement (disregarding any requirement for certification by the Complaints Bureau that the complaint had not been resolved by conciliation), the determination of the complaint under the new scheme is not binding on the respondent or the complainant;
- (b) if the complaint has been submitted to arbitration under that scheme, or would have been eligible to be so submitted under that scheme as it had effect immediately before commencement (disregarding any such requirement), the determination of the complaint under the new scheme is binding on the respondent and the complainant and final (but if the complaint has been submitted to arbitration the terms of the arbitration are otherwise unaffected by this Order);

and subsections (4)(c) and (5) to (7) of section 228 do not apply in relation to the complaint.

(9) Where, in relation to a relevant existing complaint—

- (a) the former scheme in question was the building societies scheme, and
- (b) the complaint was, at commencement, subject to arbitration in accordance with that scheme,

the extent to which the determination of the complaint under the new scheme is binding and final depends on the terms of the arbitration (which are not affected by this Order); and subsections (4)(c) and (5) to (7) of section 228 do not apply in relation to the complaint.

(10) Where, in relation to a relevant existing complaint—

- (a) the former scheme in question was the building societies scheme, and
- (b) if the complaint had been determined under that scheme as it had effect immediately before commencement, the respondent would have been relieved of his obligation to comply with the determination if he had complied with conditions as to the giving of notice of his non-fulfilment of the obligations imposed by the determination,

the determination of the complaint under the new scheme is (notwithstanding section 228(5)) not binding on the respondent if he complies with equivalent conditions.

(11) But subject to paragraphs (1) to (10), section 228 applies in relation to a relevant existing complaint as it applies in relation to a complaint of the kind mentioned in section 226(1) (compulsory jurisdiction).

Determination of relevant new complaints

7.—(1) Sections 228 to 230 apply in relation to a relevant new complaint as they apply in relation to a complaint of the kind mentioned in section 226(1) (compulsory jurisdiction), subject as follows.

(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), and
- (b) what amount (if any) constitutes fair compensation for the purposes of section 229(2)(a),

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

Complaints determined before commencement: adjudication under the IMRO scheme

8.—(1) This article applies where, before commencement—

- (a) a complaint had been determined by a former ombudsman under the IMRO scheme; and

(b) that former ombudsman had offered the complainant adjudication.

(2) If the matter was subject to adjudication at commencement, this Order does not affect that adjudication and the relevant provisions of the IMRO scheme are to continue to apply so far as practicable, provided that references to the Investment Ombudsman or “the Ombudsman” are to be read as references to the scheme operator or an ombudsman appointed under paragraph 4 of Schedule 17, as appropriate.

(3) If the matter had not been referred to adjudication before commencement, if the complainant accepts adjudication, the scheme operator must appoint an adjudicator to determine the matter; and if the complainant agrees to the appointment of the adjudicator, the respondent must concur in the reference to adjudication.

(4) For the purposes of paragraph (3), the relevant provisions of the IMRO scheme are to apply, so far as practicable, as they would have applied to adjudication under that scheme, references to the Investment Ombudsman or “the Ombudsman” being read as references to the scheme operator or an ombudsman appointed under paragraph 4 of Schedule 17, as appropriate.

Complaints determined before commencement: appeals under the SFA scheme

9.—(1) This article applies where a complaint had been determined before commencement by a person appointed as an arbitrator under the SFA scheme.

(2) Where, at commencement, the determination was the subject of an appeal, or an application for leave to appeal, under that scheme which had not been determined or withdrawn, this Order does not affect that appeal or that application for leave (and any ensuing appeal), and (subject to paragraph (4)) the relevant provisions of that scheme are to continue to apply to that appeal or application (and any ensuing appeal) so far as practicable.

(3) Where, at commencement, an application for leave to appeal against the determination was capable of being entertained under that scheme, the relevant provisions of that scheme are (subject to paragraph (4)) to apply, so far as practicable, to the making of any such application for leave and any ensuing appeal, as they would have applied to an application for leave or an appeal before commencement.

(4) The scheme operator may appoint such persons, on such terms and for such duration, as it thinks fit to hear any appeal or application for leave to appeal made after commencement pursuant to paragraph (2) or (3); and for the purposes of those paragraphs, references in the relevant provisions of the SFA scheme to the Securities and Futures Authority Limited or its Arbitration Secretariat are to be read as references to the scheme operator.

Complaints determined before commencement: appeals under the building societies scheme

10.—(1) This article applies where a complaint had been determined before commencement under the building societies scheme.

(2) Where, at commencement—

- (a) a case had been stated with respect to that determination for the opinion of the High Court or Court of Session under subsections (5) to (7) of section 84 of the Building Societies Act 1986⁽¹⁾, and no decision had been reached on that case, or
- (b) the determination was capable of being subject to the stating of a case under those subsections,

notwithstanding any repeal of those subsections they continue to apply as if they provided for the Court to direct that the complaint be dealt with under the new scheme as a relevant existing complaint.

(1) 1986 c. 53. Subsection (5) was amended by the Building Societies Act 1997 (c. 32), Sch. 7, para 36.

Information

11.—(1) Any information held by any person responsible for the operation of a former scheme (“the former holder”) in connection with the operation of a former scheme may be disclosed by that person to the scheme operator or to an ombudsman (“the new holder”).

(2) Any such disclosure is not to be treated as contravening any restriction on disclosure of the information (imposed by statute or otherwise) to which the former holder is subject.

(3) When information has been disclosed in accordance with this article, the new holder is to be treated as subject to any such restriction on disclosure as would have applied to the former holder (subject to any exceptions which would have so applied).

(4) But paragraph (3) does not prevent the application of section 31(4A) of the Data Protection Act 1998⁽²⁾ (which was inserted by section 233 of the Act, and provides for an exemption in respect of the processing of personal data for the purpose of discharging functions under Part XVI of the Act) to information which has been disclosed in accordance with this article.

(5) Sections 231 and 232 (ombudsman’s power to require information, and powers of court where information required) apply in relation to relevant complaints as they apply in relation to complaints relating to acts or omissions occurring after commencement.

Funding and fees

12.—(1) In section 234(1) (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 complaints by virtue of this Order.

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

(3) Any fee which, by virtue of paragraph (2), is owed to the scheme operator under paragraph 15 of Schedule 17 by a respondent who is not an authorised person, may be recovered as a debt due to the scheme operator.

Exemption from liability in damages

13. In paragraph 10(1) of Schedule 17 (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

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

Record-keeping and reporting requirements relating to relevant complaints

15. 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 complaints.

Anticipatory consultation on scheme rules

16. If, before 19th July 2001, any consultation was undertaken—

(2) 1998 c. 29.

- (a) on proposed scheme rules which, had it been undertaken by the scheme operator after that day, would to any extent have satisfied the requirements of paragraph 14(4) and (5) of Schedule 17 (consultation on scheme rules), or
- (b) on proposed voluntary jurisdiction rules which, had it been undertaken by the scheme operator after that day, would to any extent have satisfied the requirements of paragraph 22(1) and (2) of Schedule 17 (consultation on voluntary jurisdiction rules),

those requirements are to that extent to be taken to have been satisfied.

Liability of former schemes in respect of pre-commencement acts and omissions

17.—(1) Any liability incurred by a former ombudsman or other person responsible for the operation of a former scheme as a result of an act or omission occurring before commencement in dealing with (or failing to deal with) a complaint referred to that scheme is, after commencement, a liability of the scheme operator.

(2) For the purposes of paragraph (1), it is immaterial whether the complaint is a relevant existing complaint.