

**2004 No. 454**

**FINANCIAL SERVICES AND MARKETS**

**The Financial Services and Markets Act 2000 (Transitional Provisions) (Complaints Relating to General Insurance and Mortgages) Order 2004**

*Made - - - - - 25th February 2004*

*Laid before Parliament 25th February 2004*

*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<sup>(a)</sup> 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 2004.

(2) This Order comes into force—

- (a) in so far as it relates to a complaint relating to an activity to which, immediately before 31st October 2004, the MCAS Scheme applied, on 31st October 2004;
- (b) for all other purposes, on 14th January 2005.

(3) In this Order—

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

“former scheme” means the GISC Facility or, as the case may be, the MCAS Scheme;

“GISC Facility” means the Dispute Resolution Facility established by the General Insurance Standards Council;

“MCAS Scheme” means the Mortgage Code Arbitration Scheme;

“new scheme” means the ombudsman scheme provided for by Part 16 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.

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(a) 2000 c. 8.

## **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<sup>(a)</sup> 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 on or after 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 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<sup>(b)</sup>;
- (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 transitional complaint”.

## **Procedure applying to relevant transitional complaints**

3. In paragraph 13 of Schedule 17 to the Act<sup>(c)</sup> (Authority’s procedural rules)—

- (a) the references to a complaint are to be taken to include a relevant transitional complaint; and
- (b) the references to the ombudsman scheme are, in relation to a relevant transitional 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 transitional complaint.

## **Scheme rules applying to relevant transitional 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 transitional complaints;
- (b) sub-paragraph (2)(a) (matters which are to be taken into account in making determinations) does not apply to a relevant transitional complaint.

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(a) Modified by S.I. 2001/2326.

(b) Published by the Council of Mortgage Lenders, 3 Savile Row, London W1S 3PB in April 1998 (second edition).

(c) Modified by S.I. 2001/2326.

(2) In deciding whether a relevant transitional complaint is to be dismissed without consideration of its merits as mentioned in paragraph 14(2)(b) of that Schedule, an ombudsman must take into account whether an equivalent complaint would have been so dismissed 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 construed accordingly.

### **Determination of relevant transitional complaints**

5.—(1) Sections 228 to 232 of the Act apply in relation to a relevant transitional 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 transitional 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 or recommended 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 transitional complaints.

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

(3) Any fee which, by reason of paragraph (2), is owed to the scheme operator 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**

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 transitional complaint.

### **Record-keeping and reporting requirements relating to relevant transitional 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 transitional 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)(a), “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

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

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

### **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<sup>(a)</sup> to information which has been disclosed in accordance with this article.
- (5) Sections 231 and 232 apply in relation to relevant transitional complaints as they apply in relation to complaints relating to acts or omissions occurring after commencement.

*Nick Ainger*  
*Joan Ryan*

25th February 2004

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

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(a) 1998 c. 29; section 31(4A) 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 16 of the Act.

## **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. 2003/1475) and the Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2003 (S.I. 2003/1476) (“the RAO amendment Orders”). Those Orders specify the activities of arranging and advising on regulated mortgage contracts and insurance mediation activities (dealing as agent in contracts of insurance, arranging deals in contracts of insurance, assisting in the performance and administration of a contract of insurance and advising on the merits of buying or selling a contract of insurance) as regulated activities for the purposes of the Financial Services and Markets Act 2000 (“the Act”).

This Order modifies Part 16 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 3 to 11 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. Copies of the Mortgage Code may be obtained from the Council of Mortgage Lenders, 3 Savile Row, London W1S 3PB.





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