

**Paper for the Bills Committee on
Securities and Futures (Amendment) Bill 2005**

**Observations on the United Kingdom legislation in respect of
the separation of the roles of the Chairman and Chief Executive
of the Financial Services Authority**

At the meeting of the Bills Committee held on 30 May 2005, the Chairman directed that the Legal Service Division should look at the legislation in the United Kingdom (UK) to see whether any legislative provisions have been made for the separation of the roles of the Chairman and Chief Executive of the Financial Services Authority (FSA) and for the acting arrangement concerning the Chairman and the Chief Executive. This paper reports on our observations on the subject after research into the relevant UK legislation.

2. In the final report concluding the banking review commissioned by the Chancellor of Exchequer entitled “*Competition in UK Banking. A report to the Chancellor of the Exchequer*” and submitted by Don Cruickshank in March 2000, it was recommended, *inter alia*, that the roles of the Chairman and the Chief Executive of FSA be separated.¹ The UK government gave effect to the recommendation in September 2003 when the Treasury appointed a new Chief Executive and a new Chairman of FSA. The Board of FSA has set out on its website specifically the responsibilities of the Chairman and the Chief Executive.² The Board also publishes its resolution on the governance of FSA from time to time.³

3. FSA is a private company limited by guarantee. The Financial Services and Markets Act 2000 (FSMA) gives it statutory powers to discharge its functions as the sole regulator of the financial services industry and markets

¹ At paragraph 2.136 of the Report. Full Report is available at http://www.hm-treasury.gov.uk/documents/financial_services/banking/bankreview/fin_bank_reviewfinal.cfm.

² At <http://www.fsa.gov.uk/Pages/about/who/management/who/index.shtml>. The respective lists of the responsibilities that each role entails have been provide to Members as Annex C to the paper entitled “Further discussion on proposed amendments to the Securities and Futures Ordinance (LC Paper No. CB(1)880/04-05) issued by the Financial Services Branch on 7 February 2005. The Research and Library Division has also prepared an information note on *Overseas Securities and Futures Regulators* (IN12/04-05), in which there is a section on UK that gives further background information on FSA.

³ The latest is of 21 April 2005 and is available at http://www.fsa.gov.uk/pubs/other/Gov_memo.pdf.

in UK.⁴ Its constitution is set out in Schedule 1 of FSMA.⁵ It is observed that FSMA does not mention the post of Chief Executive nor has it any provisions for the separation of the roles of the Chairman and the Chief Executive. It is also observed that no subsidiary legislation has been made for the separation. The separation of the roles has been implemented by the creation of the post of Chief Executive and the appointment of different persons to be the Chairman and the Chief Executive. No acting arrangement has been provided in FSMA or any subsidiary legislation made under the Act. Our enquiry with FSA has confirmed that although the Chairman is taking on some of the responsibilities of the Chief Executive during whose absence on sick leave, he does not have any executive responsibilities.⁶

4. Perhaps it is appropriate to mention that before any analogy is being drawn between FSA of UK and the Securities and Futures Commission (SFC) in Hong Kong, it must not be overlooked that FSA is the sole regulator of the financial services industry in UK, including the banking, the investment business, and the insurance sectors. It regulates the markets, the regulated activities and the people engaged in those activities. There is an unprecedented concentration of powers in a single regulatory body. If there had been no separation of roles, then there would also be a concentration of powers in its chairman. The same cannot be said of SFC.

Annex

Legal Services Division
Legislative Council Secretariat
6 June 2005

⁴ Section 1 of FSMA.

⁵ Sections 1-7 of and Schedule 1 to FSMA are copied and attached as Annex for Members' easy reference.

⁶ We have been given to understand that FSA's annual report to be published at the end of June will provide clarity on this point.

**Extract from the Financial Services and
Markets Act 2000**

Financial Services and Markets Act 2000

2000 Chapter c.8 - *continued*

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An Act to make provision about the regulation of financial services and markets; to provide for the transfer of certain statutory functions relating to building societies, friendly societies, industrial and provident societies and certain other mutual societies; and for connected purposes.

[14th June 2000]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

PART I

THE REGULATOR

The Financial Services Authority.

1. - (1) The body corporate known as the Financial Services Authority ("the Authority") is to have the functions conferred on it by or under this Act.

(2) The Authority must comply with the requirements as to its constitution set out in Schedule 1.

(3) Schedule 1 also makes provision about the status of the Authority and the exercise of certain of its functions.

The Authority's general duties

The Authority's general duties.

2. - (1) In discharging its general functions the Authority must, so far as is reasonably possible, act in a way-

- (a) which is compatible with the regulatory objectives; and
- (b) which the Authority considers most appropriate for the purpose of meeting those objectives.

(2) The regulatory objectives are-

- (a) market confidence;
- (b) public awareness;
- (c) the protection of consumers; and
- (d) the reduction of financial crime.

- (3) In discharging its general functions the Authority must have regard to-
- (a) the need to use its resources in the most efficient and economic way;
 - (b) the responsibilities of those who manage the affairs of authorised persons;
 - (c) the principle that a burden or restriction which is imposed on a person, or on the carrying on of an activity, should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction;
 - (d) the desirability of facilitating innovation in connection with regulated activities;
 - (e) the international character of financial services and markets and the desirability of maintaining the competitive position of the United Kingdom;
 - (f) the need to minimise the adverse effects on competition that may arise from anything done in the discharge of those functions;
 - (g) the desirability of facilitating competition between those who are subject to any form of regulation by the Authority.
- (4) The Authority's general functions are-
- (a) its function of making rules under this Act (considered as a whole);
 - (b) its function of preparing and issuing codes under this Act (considered as a whole);
 - (c) its functions in relation to the giving of general guidance (considered as a whole); and
 - (d) its function of determining the general policy and principles by reference to which it performs particular functions.
- (5) "General guidance" has the meaning given in section 158(5).

The regulatory objectives

Market confidence.

3. - (1) The market confidence objective is: maintaining confidence in the financial system.

(2) "The financial system" means the financial system operating in the United Kingdom and includes-

- (a) financial markets and exchanges;
- (b) regulated activities; and
- (c) other activities connected with financial markets and exchanges.

Public awareness.

4. - (1) The public awareness objective is: promoting public understanding of the financial system.

(2) It includes, in particular-

(a) promoting awareness of the benefits and risks associated with different kinds of investment or other financial dealing; and

(b) the provision of appropriate information and advice.

(3) "The financial system" has the same meaning as in section 3.

The protection of consumers.

5. - (1) The protection of consumers objective is: securing the appropriate degree of protection for consumers.

(2) In considering what degree of protection may be appropriate, the Authority must have regard to-

(a) the differing degrees of risk involved in different kinds of investment or other transaction;

(b) the differing degrees of experience and expertise that different consumers may have in relation to different kinds of regulated activity;

(c) the needs that consumers may have for advice and accurate information; and

(d) the general principle that consumers should take responsibility for their decisions.

(3) "Consumers" means persons-

(a) who are consumers for the purposes of section 138; or

(b) who, in relation to regulated activities carried on otherwise than by authorised persons, would be consumers for those purposes if the activities were carried on by authorised persons.

The reduction of financial crime.

6. - (1) The reduction of financial crime objective is: reducing the extent to which it is possible for a business carried on-

(a) by a regulated person, or

(b) in contravention of the general prohibition,

to be used for a purpose connected with financial crime.

(2) In considering that objective the Authority must, in particular, have regard to the desirability of-

(a) regulated persons being aware of the risk of their businesses being used in connection with the commission of financial crime;

(b) regulated persons taking appropriate measures (in relation to their administration and employment practices, the conduct of transactions by them and otherwise) to prevent financial crime, facilitate its detection and monitor its incidence;

(c) regulated persons devoting adequate resources to the matters mentioned

in paragraph (b).

(3) "Financial crime" includes any offence involving-

(a) fraud or dishonesty;

(b) misconduct in, or misuse of information relating to, a financial market;
or

(c) handling the proceeds of crime.

(4) "Offence" includes an act or omission which would be an offence if it had taken place in the United Kingdom.

(5) "Regulated person" means an authorised person, a recognised investment exchange or a recognised clearing house.

Corporate governance

Duty of Authority to follow principles of good governance.

7. In managing its affairs, the Authority must have regard to such generally accepted principles of good corporate governance as it is reasonable to regard as applicable to it.

Financial Services and Markets Act 2000

2000 Chapter c.8 - *continued*

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SCHEDULES

SCHEDULE 1

THE FINANCIAL SERVICES AUTHORITY

PART I

GENERAL

Interpretation

1. - (1) In this Schedule-

"the 1985 Act" means the Companies Act 1985;

"non-executive committee" means the committee maintained under paragraph 3;

"functions", in relation to the Authority, means functions conferred on the Authority by or under any provision of this Act.

(2) For the purposes of this Schedule, the following are the Authority's legislative functions-

(a) making rules;

(b) issuing codes under section 64 or 119;

(c) issuing statements under section 64, 69, 124 or 210;

(d) giving directions under section 316, 318 or 328;

(e) issuing general guidance (as defined by section 158(5)).

Constitution

2. - (1) The constitution of the Authority must continue to provide for the Authority to have-

(a) a chairman; and

(b) a governing body.

(2) The governing body must include the chairman.

(3) The chairman and other members of the governing body must be appointed, and be liable to removal from office, by the Treasury.

(4) The validity of any act of the Authority is not affected-

(a) by a vacancy in the office of chairman; or

(b) by a defect in the appointment of a person as a member of the governing body or as chairman.

Non-executive members of the governing body

3. - (1) The Authority must secure-

(a) that the majority of the members of its governing body are non-executive members; and

(b) that a committee of its governing body, consisting solely of the non-executive members, is set up and maintained for the purposes of discharging the functions conferred on the committee by this Schedule.

(2) The members of the non-executive committee are to be appointed by the Authority.

(3) The non-executive committee is to have a chairman appointed by the Treasury from among its members.

Functions of the non-executive committee

4. - (1) In this paragraph "the committee" means the non-executive committee.

(2) The non-executive functions are functions of the Authority but must be discharged by the committee.

(3) The non-executive functions are-

(a) keeping under review the question whether the Authority is, in discharging its functions in accordance with decisions of its governing body, using its resources in the most efficient and economic way;

(b) keeping under review the question whether the Authority's internal financial controls secure the proper conduct of its financial affairs; and

(c) determining the remuneration of-

(i) the chairman of the Authority's governing body; and

(ii) the executive members of that body.

(4) The function mentioned in sub-paragraph (3)(b) and those mentioned in sub-paragraph (3)(c) may be discharged on behalf of the committee by a sub-committee.

(5) Any sub-committee of the committee-

(a) must have as its chairman the chairman of the committee; but

- (b) may include persons other than members of the committee.
- (6) The committee must prepare a report on the discharge of its functions for inclusion in the Authority's annual report to the Treasury under paragraph 10.
- (7) The committee's report must relate to the same period as that covered by the Authority's report.

Arrangements for discharging functions

5. - (1) The Authority may make arrangements for any of its functions to be discharged by a committee, sub-committee, officer or member of staff of the Authority.
- (2) But in exercising its legislative functions, the Authority must act through its governing body.
- (3) Sub-paragraph (1) does not apply to the non-executive functions.

Monitoring and enforcement

6. - (1) The Authority must maintain arrangements designed to enable it to determine whether persons on whom requirements are imposed by or under this Act are complying with them.
- (2) Those arrangements may provide for functions to be performed on behalf of the Authority by any body or person who, in its opinion, is competent to perform them.
- (3) The Authority must also maintain arrangements for enforcing the provisions of, or made under, this Act.
- (4) Sub-paragraph (2) does not affect the Authority's duty under sub-paragraph (1).

Arrangements for the investigation of complaints

7. - (1) The Authority must-
- (a) make arrangements ("the complaints scheme") for the investigation of complaints arising in connection with the exercise of, or failure to exercise, any of its functions (other than its legislative functions); and
- (b) appoint an independent person ("the investigator") to be responsible for the conduct of investigations in accordance with the complaints scheme.
- (2) The complaints scheme must be designed so that, as far as reasonably practicable, complaints are investigated quickly.
- (3) The Treasury's approval is required for the appointment or dismissal of the investigator.

(4) The terms and conditions on which the investigator is appointed must be such as, in the opinion of the Authority, are reasonably designed to secure-

- (a) that he will be free at all times to act independently of the Authority; and
- (b) that complaints will be investigated under the complaints scheme without favouring the Authority.

(5) Before making the complaints scheme, the Authority must publish a draft of the proposed scheme in the way appearing to the Authority best calculated to bring it to the attention of the public.

(6) The draft must be accompanied by notice that representations about it may be made to the Authority within a specified time.

(7) Before making the proposed complaints scheme, the Authority must have regard to any representations made to it in accordance with sub-paragraph (6).

(8) If the Authority makes the proposed complaints scheme, it must publish an account, in general terms, of-

- (a) the representations made to it in accordance with sub-paragraph (6); and
- (b) its response to them.

(9) If the complaints scheme differs from the draft published under sub-paragraph (5) in a way which is, in the opinion of the Authority, significant the Authority must (in addition to complying with sub-paragraph (8)) publish details of the difference.

(10) The Authority must publish up-to-date details of the complaints scheme including, in particular, details of-

- (a) the provision made under paragraph 8(5); and
- (b) the powers which the investigator has to investigate a complaint.

(11) Those details must be published in the way appearing to the Authority to be best calculated to bring them to the attention of the public.

(12) The Authority must, without delay, give the Treasury a copy of any details published by it under this paragraph.

(13) The Authority may charge a reasonable fee for providing a person with a copy of-

- (a) a draft published under sub-paragraph (5);
- (b) details published under sub-paragraph (10).

(14) Sub-paragraphs (5) to (9) and (13)(a) also apply to a proposal to alter or replace the complaints scheme.

Investigation of complaints

8. - (1) The Authority is not obliged to investigate a complaint in accordance with the complaints scheme which it reasonably considers would be more appropriately dealt with in another way (for example by referring the matter to the Tribunal or by the institution of other legal proceedings).

(2) The complaints scheme must provide-

(a) for reference to the investigator of any complaint which the Authority is investigating; and

(b) for him-

(i) to have the means to conduct a full investigation of the complaint;

(ii) to report on the result of his investigation to the Authority and the complainant; and

(iii) to be able to publish his report (or any part of it) if he considers that it (or the part) ought to be brought to the attention of the public.

(3) If the Authority has decided not to investigate a complaint, it must notify the investigator.

(4) If the investigator considers that a complaint of which he has been notified under sub-paragraph (3) ought to be investigated, he may proceed as if the complaint had been referred to him under the complaints scheme.

(5) The complaints scheme must confer on the investigator the power to recommend, if he thinks it appropriate, that the Authority-

(a) makes a compensatory payment to the complainant,

(b) remedies the matter complained of,

or takes both of those steps.

(6) The complaints scheme must require the Authority, in a case where the investigator-

(a) has reported that a complaint is well-founded, or

(b) has criticised the Authority in his report,

to inform the investigator and the complainant of the steps which it proposes to take in response to the report.

(7) The investigator may require the Authority to publish the whole or a specified part of the response.

(8) The investigator may appoint a person to conduct the investigation on his behalf

but subject to his direction.

(9) Neither an officer nor an employee of the Authority may be appointed under sub-paragraph (8).

(10) Sub-paragraph (2) is not to be taken as preventing the Authority from making arrangements for the initial investigation of a complaint to be conducted by the Authority.

Records

9. The Authority must maintain satisfactory arrangements for-

- (a) recording decisions made in the exercise of its functions; and
- (b) the safe-keeping of those records which it considers ought to be preserved.

Annual report

10. - (1) At least once a year the Authority must make a report to the Treasury on-

- (a) the discharge of its functions;
- (b) the extent to which, in its opinion, the regulatory objectives have been met;
- (c) its consideration of the matters mentioned in section 2(3); and
- (d) such other matters as the Treasury may from time to time direct.

(2) The report must be accompanied by-

- (a) the report prepared by the non-executive committee under paragraph 4(6); and
- (b) such other reports or information, prepared by such persons, as the Treasury may from time to time direct.

(3) The Treasury must lay before Parliament a copy of each report received by them under this paragraph.

(4) The Treasury may-

- (a) require the Authority to comply with any provisions of the 1985 Act about accounts and their audit which would not otherwise apply to it; or
- (b) direct that any such provision of that Act is to apply to the Authority with such modifications as are specified in the direction.

(5) Compliance with any requirement imposed under sub-paragraph (4)(a) or (b) is enforceable by injunction or, in Scotland, an order under section 45(b) of the Court of Session Act 1988.

(6) Proceedings under sub-paragraph (5) may be brought only by the Treasury.

Annual public meeting

11. - (1) Not later than three months after making a report under paragraph 10, the Authority must hold a public meeting ("the annual meeting") for the purposes of enabling that report to be considered.

(2) The Authority must organise the annual meeting so as to allow-

(a) a general discussion of the contents of the report which is being considered; and

(b) a reasonable opportunity for those attending the meeting to put questions to the Authority about the way in which it discharged, or failed to discharge, its functions during the period to which the report relates.

(3) But otherwise the annual meeting is to be organised and conducted in such a way as the Authority considers appropriate.

(4) The Authority must give reasonable notice of its annual meeting.

(5) That notice must-

(a) give details of the time and place at which the meeting is to be held;

(b) set out the proposed agenda for the meeting;

(c) indicate the proposed duration of the meeting;

(d) give details of the Authority's arrangements for enabling persons to attend; and

(e) be published by the Authority in the way appearing to it to be most suitable for bringing the notice to the attention of the public.

(6) If the Authority proposes to alter any of the arrangements which have been included in the notice given under sub-paragraph (4) it must-

(a) give reasonable notice of the alteration; and

(b) publish that notice in the way appearing to the Authority to be best calculated to bring it to the attention of the public.

Report of annual meeting

12. Not later than one month after its annual meeting, the Authority must publish a report of the proceedings of the meeting.

PART II

STATUS

13. In relation to any of its functions-

(a) the Authority is not to be regarded as acting on behalf of the Crown; and

(b) its members, officers and staff are not to be regarded as Crown servants.

Exemption from requirement of "limited" in Authority's name

14. The Authority is to continue to be exempt from the requirements of the 1985 Act relating to the use of "limited" as part of its name.

15. If the Secretary of State is satisfied that any action taken by the Authority makes it inappropriate for the exemption given by paragraph 14 to continue he may, after consulting the Treasury, give a direction removing it.

PART III

PENALTIES AND FEES

Penalties

16. - (1) In determining its policy with respect to the amounts of penalties to be imposed by it under this Act, the Authority must take no account of the expenses which it incurs, or expects to incur, in discharging its functions.

(2) The Authority must prepare and operate a scheme for ensuring that the amounts paid to the Authority by way of penalties imposed under this Act are applied for the benefit of authorised persons.

(3) The scheme may, in particular, make different provision with respect to different classes of authorised person.

(4) Up to date details of the scheme must be set out in a document ("the scheme details").

(5) The scheme details must be published by the Authority in the way appearing to it to be best calculated to bring them to the attention of the public.

(6) Before making the scheme, the Authority must publish a draft of the proposed scheme in the way appearing to the Authority to be best calculated to bring it to the attention of the public.

(7) The draft must be accompanied by notice that representations about the proposals may be made to the Authority within a specified time.

(8) Before making the scheme, the Authority must have regard to any representations made to it in accordance with sub-paragraph (7).

(9) If the Authority makes the proposed scheme, it must publish an account, in general terms, of-

(a) the representations made to it in accordance with sub-paragraph (7); and

(b) its response to them.

(10) If the scheme differs from the draft published under sub-paragraph (6) in a way which is, in the opinion of the Authority, significant the Authority must (in addition to complying with sub-paragraph (9)) publish details of the difference.

(11) The Authority must, without delay, give the Treasury a copy of any scheme details published by it.

(12) The Authority may charge a reasonable fee for providing a person with a copy of-

(a) a draft published under sub-paragraph (6);

(b) scheme details.

(13) Sub-paragraphs (6) to (10) and (12)(a) also apply to a proposal to alter or replace the complaints scheme.

Fees

17. - (1) The Authority may make rules providing for the payment to it of such fees, in connection with the discharge of any of its functions under or as a result of this Act, as it considers will (taking account of its expected income from fees and charges provided for by any other provision of this Act) enable it-

(a) to meet expenses incurred in carrying out its functions or for any incidental purpose;

(b) to repay the principal of, and pay any interest on, any money which it has borrowed and which has been used for the purpose of meeting expenses incurred in relation to its assumption of functions under this Act or the Bank of England Act 1998; and

(c) to maintain adequate reserves.

(2) In fixing the amount of any fee which is to be payable to the Authority, no account is to be taken of any sums which the Authority receives, or expects to receive, by way of penalties imposed by it under this Act.

(3) Sub-paragraph (1)(b) applies whether expenses were incurred before or after the coming into force of this Act or the Bank of England Act 1998.

(4) Any fee which is owed to the Authority under any provision made by or under this Act may be recovered as a debt due to the Authority.

Services for which fees may not be charged

18. The power conferred by paragraph 17 may not be used to require-

(a) a fee to be paid in respect of the discharge of any of the Authority's functions

under paragraphs 13, 14, 19 or 20 of Schedule 3; or

(b) a fee to be paid by any person whose application for approval under section 59 has been granted.

PART IV

MISCELLANEOUS

Exemption from liability in damages

19. - (1) Neither the Authority nor any person who is, or is acting as, a member, officer or member of staff of the Authority is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of the Authority's functions.

(2) Neither the investigator appointed under paragraph 7 nor a person appointed to conduct an investigation on his behalf under paragraph 8(8) is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of his functions in relation to the investigation of a complaint.

(3) Neither sub-paragraph (1) nor sub-paragraph (2) applies-

(a) if the act or omission is shown to have been in bad faith; or

(b) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the Human Rights Act 1998.

Disqualification for membership of House of Commons

20. In Part III of Schedule 1 to the House of Commons Disqualification Act 1975 (disqualifying offices), insert at the appropriate place-

"Member of the governing body of the Financial Services Authority".

Disqualification for membership of Northern Ireland Assembly

21. In Part III of Schedule 1 to the Northern Ireland Assembly Disqualification Act 1975 (disqualifying offices), insert at the appropriate place-

"Member of the governing body of the Financial Services Authority".