

# **FILLING THE GAP: A NEW BODY TO INVESTIGATE, SANCTION AND PROVIDE REMEDIES FOR ABUSES COMMITTED BY UK COMPANIES ABROAD**

**A report prepared for the Corporate  
Responsibility (CORE) Coalition**

**Jennifer A. Zerk**

This discussion paper has been written to stimulate debate amongst corporate accountability campaigners and policy makers. The aim of this paper is to stimulate debate amongst decision makers and experts in this area.

*Published December 2008*

For comments or further information, please contact:

Hannah Ellis, Coordinator, The Corporate Responsibility (CORE) Coalition  
[hannah.ellis@corporate-responsibility.org](mailto:hannah.ellis@corporate-responsibility.org)  
+44 (0) 207 566 1601

**Jennifer Zerk** is a writer, researcher and consultant specialising in the legal side of CSR. Her work covers a range of law-related topics, including regulatory design and analysis, international law and policy, governance frameworks for multi-stakeholder initiatives and the role of the legal profession in CSR. She holds a Masters degree in Law from the University of London (Queen Mary & Westfield College) and a Doctorate in Law from the University of Cambridge. Jennifer is the author of “Multinationals and Corporate Social Responsibility” (Cambridge University Press, 2006), the first book-length exploration of the international law context for CSR.

**The Corporate Responsibility (CORE) Coalition** works to make changes in UK company law to minimise companies’ negative impacts on people and the environment and to maximise companies’ contribution to sustainable societies. The Corporate Responsibility (CORE) Coalition represents over 130 civil society groups including Amnesty International UK, Friends of the Earth and Action Aid.

[www.corporate-responsibility.org](http://www.corporate-responsibility.org)

## Executive summary

Victims of abuse by multinational companies have limited options when it comes to enforcing their rights, especially in countries where regulatory oversight of corporate activities is weak. While local remedies may be a theoretical possibility, all too often problems of under-resourcing, lack of political will, intimidation and corruption make access to justice an unlikely prospect.

What, then, are the alternatives? Some victims groups have bypassed their local legal systems altogether and have brought claims directly against parent companies of corporate groups in their “home states” (e.g. the UK and the US). These claims are based on the idea that parent companies ought to bear some responsibility for the failings of their subsidiaries and suppliers. But the logistical, financial, legal and psychological obstacles are huge, meaning that many abuses go unlitigated. A major issue for claimants, still unresolved, is the extent to which the “corporate veil” (i.e. the legal distinction made between parent companies and their subsidiaries) protects the parent from liability for the wrongdoing of subsidiaries and their suppliers. To establish liability under UK tort law the claimant must show, at a minimum, that the parent company owed a duty of care to those affected, that the standard of care was not met, and that it was this failure that caused the damage complained of. The doctrine of the “corporate veil” creates problems for claimants at each step.<sup>1</sup>

Alternatively, it might be possible to bring a complaint under the OECD Guidelines<sup>2</sup> before the appropriate National Contact Point (“NCP”). But this is a process that still lacks transparency, consistency and legal force, and has no mechanism to compensate those affected. Numerous self-regulatory codes of conduct have been developed for different sectors of industry but these are designed primarily as guidance for companies and consumers. In practice, they do little to deter bad behaviour and offer no system of compensation when standards are breached.

The aim of this report is to try to identify a way of “filling the gap” between, on the one hand, a series of relatively toothless soft law and self-regulatory initiatives, and, on the other hand, a domestic civil liability system which, though well established, is fraught with difficulty for claimants (especially claimants against multinational corporate groups) and is too easily manipulated by companies seeking to avoid liability.

There is cause for optimism. In many areas of UK law, alternatives to expensive and uncertain court action have already been found. The last few years have seen a proliferation of “quasi-judicial” bodies and public complaints mechanisms whereby people can enforce their rights quickly, easily and inexpensively, and without having to resort to court action. Part 1 provides a brief overview of the different kinds of

---

<sup>1</sup> i.e. *On duty of care*: Although a parent company may owe a duty of care to those affected by *its own* operations, does it also owe a duty of care to those affected by its subsidiaries (and suppliers) as well? Or is the duty only owed by the subsidiary (or supplier) itself? *On standard of care*: What lengths must a parent company go to in order to ensure that its subsidiaries and their suppliers “do no harm”? *On causation*: Can the parent company’s acts and omissions *really* be treated in law as the cause of the harm, or do the actions of the subsidiary or supplier “break the chain of causation”? These issues have not yet been finally pronounced upon by a UK court.

<sup>2</sup> OECD Guidelines for Multinationals, 2000,  
[http://www.oecd.org/topic/0,3373,en\\_2649\\_34889\\_1\\_1\\_1\\_1\\_37461,00.html](http://www.oecd.org/topic/0,3373,en_2649_34889_1_1_1_1_37461,00.html)

mechanisms that have been created to date, and identifies some patterns in regulatory aims and responses. (Some more detailed case studies can be found at Appendix A of this report).

Part 2 then turns to the practical issues. If a new UK body were to be created to help deal with problems of abuse by subsidiaries and suppliers in other countries, what key features would it need to have? As will be seen, there are plenty of precedents to draw from, although none which provide an exact match in terms of mandate and jurisdictional reach. Some creativity will therefore be needed.

Part 3 considers some further technical, logistical and legal issues that would need to be addressed, such as relationships with foreign regulatory bodies, relationships with international initiatives, and how a new dispute resolution mechanism might fit within established UK civil and criminal law structures.

Part 4 lays out, for illustrative and discussion purposes, two possible models for a new UK body to deal with problems of corporate abuse overseas. The first (Option A) would be an ambitious project: a full-blown Commission with an extensive advisory and policy-making mandate, and with a dispute resolution mechanism attached. The second (Option B) is a much more modest proposition: a simple ombudsman service charged with resolving complaints involving UK-based groups as quickly, informally and inexpensively as possible.

Part 5 concludes the report with a summary of the key recommendations and observations in this report. It concludes that a new dispute resolution body with a mandate to receive, investigate and settle complaints against UK parent companies relating to subsidiary or supplier abuse in other countries is a realistic possibility (at least from a legal perspective) provided it (a) *respects international law restrictions* on extraterritorial jurisdiction (b) *complements existing civil liability processes*, rather than seeking to replicate or replace them and (c) is underpinned by a clear set of *standards* which focus, not on the day to day operations of subsidiaries and suppliers, but on the *role of the parent company* as the “overseer” or “coordinator” of the corporate group.

## Part 1: Existing UK mechanisms

### 1.1 A brief overview

The UK legislature has introduced numerous informal and “quasi-judicial” methods by which individuals can enforce their legal rights and resolve disputes. These range from court-like institutions (e.g. employment tribunals) to less formal methods of investigating and settling complaints by members of the public (e.g. various “ombudsmen” services). These mechanisms vary greatly in terms of the extent of public participation, and it is perhaps helpful to distinguish between:

- (a) pure “complaints mechanisms” in which a complaint may be a trigger for an official investigation into a breach of a legal standard (e.g. the Financial Services Authority (“FSA”), Office of Fair Trading (“OFT”), Health and Safety Executive (“HSE”), Environment Agency (“EA”), Independent Police Complaints Commission (“IPCC”)) but the complainant has limited involvement after that point; and
- (b) alternative dispute resolution (“ADR”) mechanisms (e.g. employment tribunals, Information Commissioner’s Office (“ICO”), Disability Conciliation Service (“DCS”), Financial Ombudsman Service (“FOS”) where an individual is seeking to enforce rights *personal to herself*. In these cases the enforcement process is treated more as a dispute between two private parties, and the complainant has a more ongoing involvement.

Regulatory bodies also differ in terms of the investigatory and enforcement powers given. Some bodies have extensive powers of investigation (e.g. the FSA, OFT, HSE and EA) and some do not, placing greater reliance on the co-operation of the parties concerned. Some have the power to award financial compensation (e.g. the FOS); others only the ability to make unenforceable recommendations, for instance that an apology be made, or that service standards be reviewed and corrected (e.g. IPCC, Health Services Ombudsman (“HSO”)). Some are aimed specifically at private activity (e.g. the FSA), others have been designed with public services in mind (e.g. the Healthcare Commission, IPCC). Some exist primarily as complaints or dispute resolution mechanisms; others have a broader mandate, such as research, issuing best practice guidelines or assisting with the development of government policy in a particular area (e.g. Commission on Equality and Human Rights (“CEHR”)). Some are able to co-exist with other methods of obtaining legal redress (e.g. investigations by the IPCC which may also be the subject of civil or criminal proceedings); others require exclusivity. And in some cases, investigations may be a pre-cursor to criminal prosecution, (e.g. HSE, FSA, EA).

Each of these regulatory responses is a bespoke solution to a particular set of problems. No two frameworks are identical. There is not the time and space to do justice to the sheer number and range of different ADR and complaints mechanisms available in the UK. However, the five case studies set out in Appendix A should give an indication of the diversity of structures and mechanisms available.

### 1.2 Designing “quasi-legal” mechanisms

As the case studies in Appendix A illustrate, there is considerable scope for creativity when it comes to designing ADR and complaints mechanisms. Of course there are some basic elements to a successful framework, such as transparency, accountability, and respect for due process, which are discussed in more detail in Parts 2 and 3 below. But beyond this, there are no fixed rules about how a

complaints system or ADR body should operate; it is possible to pick and choose the best method of implementation, depending on the particular context and aims.

Not surprisingly, though, it is possible to detect some patterns in the design of ADR and complaints mechanisms. The specific aims and objectives, taken together with common-sense considerations of practicality, efficiency and proportionality, will often suggest the choice of one regulatory response over another.

**Table 1: what factors influence the choice of one mechanism over another?**

Aim/consideration	Typical feature/response
Where enforcement of public law is at stake (e.g. health and safety, competition, environmental law) ...	... the greater the tendency to rely on public bodies for investigation and enforcement.
But where legal rights arise out of private relationships (e.g. contractual) ...	... expect to see the individual take a much greater role in enforcement (typically through a dispute resolution process).
The greater the potential vulnerability of complainants...	... the greater the emphasis on informality and accessibility of dispute resolution procedures; and legal assistance (practical and financial) may be on offer too.
The greater the reliance on financial settlements as a means of remedy; or the greater the potential size of claim ...	... the more formal the procedural and evidential requirements are likely to be.
But where the potential consequences for the defendant are relatively trivial ...	... expect to see greater emphasis on informality, accessibility and speed of dispute resolution procedures.
And where the remedies concern correction of poor performance rather than financial compensation ...	... expect to see less formal systems; wide and flexible rights of standing to bring a complaint; emphasis on conciliation (and less interest in apportioning blame); more modest powers of investigation; official recommendations will be a key outcome.
On the other hand, the greater the consequences of the breach for the victim, and greater the possibility of harm or danger or distress to members of the public ...	... the greater the powers of investigation (e.g. power to interview potential witnesses, to search premises, to seize evidence) and greater use of criminal sanctions.
And the greater the likelihood of criminal sanctions ...	... the greater the emphasis on formality; due process.
The wider the mandate of the regulating body, and the greater its range of functions ...	... the greater its organisational complexity.
But where the remit of the dispute resolution body is narrow ...	... speed and simplicity will be the name of the game.

## **Part 2: Access to justice for victims of corporate abuse abroad: what functions, powers and other features would a successful UK institution need?<sup>3</sup>**

### **2.1 Clearly defined role and scope of activities: e.g. promoting best practice, dispute resolution, educational and advisory work etc.**

The new body's mandate will be key to its functions, powers, structure and organisation. There are several choices to be made. For instance, the body could operate solely as a dispute resolution service (ranging in formality from an ombudsman or conciliation service to a tribunal) or, like many UK regulatory bodies (see case studies 2-5 below), it could have a broader mandate (e.g. research, educational, advisory, promoting best practice). It could be charged solely with responding to complaints, or it could be given the discretion to launch inquiries on its own initiative (e.g. CEHR, IPCC). Inquiries could be specific (e.g. independent IPCC inquiries), or more general and systemic (e.g. CEHR inquiries under the Equality Act).

Obviously, though, the scope of the body's activities and the range of functions have implications for the complexity of the organisation and the funding and resources needed.

### **2.2 Clear standards to work from**

For both practical and legal reasons, the new body's mandate cannot be open-ended. The subject matter over which it has jurisdiction – i.e. the *specific* kinds of corporate abuse to be addressed – will need to be clearly defined. For instance, will the new body be focussing on:

- health and safety?
- labour rights?
- environmental problems and pollution?
- consumer safety issues?
- supply chain problems?
- corruption?
- all of the above?

For most UK ADR and complaints bodies, the standards and rights that they are required to enforce are enshrined in UK legislation (e.g. CEHR/Equality Act, employment tribunals/employment law, ICO/Data Protection Act (“DPA”) and Freedom of Information Act (“FOI”). However, these standards can be amplified by a code of conduct (e.g. the Police Code of Conduct administered by the IPCC) or other best practice guidelines, see Appendix A, case studies 3 (CEHR) and 4 (ICO).

What standards, then, might our new UK body be called upon to enforce? The first point to note is that, because of international law restrictions on the use of extraterritorial jurisdiction (i.e. the application by a state of its laws beyond territorial boundaries), the UK body would usually only have jurisdiction over the UK parent company.<sup>4</sup> Foreign subsidiaries (even if 100 per cent owned by a UK parent) are

---

<sup>3</sup> See generally the recent report by Professor John Ruggie to the Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, A/HRC/8/5, 7<sup>th</sup> April 2008, para 92. For Ruggie, the basic requirements for a “non-judicial mechanism” to address breaches of human rights standards are legitimacy, accessibility, predictability, equity, rights-compatibility and transparency.

<sup>4</sup> Note that under civil procedure rules, foreign subsidiaries can be joined as “co-defendants” to UK civil liability proceedings if the court considers that they are a necessary and proper

treated as “foreign nationals” for the purposes of the jurisdictional rules. This means that the UK body could not seek to impose UK standards of behaviour (e.g. health, environmental or consumer standards) on a foreign subsidiary’s activities in another state. The second point to note is that UK courts and authorities will not enforce the public laws of other states.<sup>5</sup> This means that the UK body could not be made responsible for ensuring host state standards were complied with either. Numerous international “soft law” standards for multinationals exist, from the OECD Guidelines to the many general and sector-specific codes of practice.<sup>6</sup> However, these were developed specifically and explicitly as *voluntary initiatives*, and may not be so easily converted for use in a binding context. The OECD Guidelines, for example, are drafted very flexibly, as a set of general principles for multinationals and states alike. While this may be fine for a voluntary instrument, its provisions would rarely provide sufficient legal certainty for an adjudication of *binding* rights and responsibilities between parties in a *specific* case of corporate abuse. Similarly, provisions of international treaties,<sup>7</sup> addressed primarily to *states*, are not always so easily transposed to the corporate context.

Essentially, the permitted scope of activities for the new UK body would be limited to enforcing *UK law* (including international standards made part of UK law) against *UK parent companies*. But there would still be scope for the new initiative to influence the standards of foreign subsidiaries abroad, based on the “control relationships” that exist between parent companies, their subsidiaries and foreign suppliers. This could be done, for example, by placing all UK parent companies under a statutory obligation to “take all reasonable steps to *ensure* so far as is possible, that its foreign subsidiaries and suppliers respect human rights and ‘do no harm’<sup>8</sup> to workers, communities or the environment abroad”. Failure to meet this basic standard could then be actionable against the UK parent under a complaints or ADR-type mechanism.

However, a broad standard like this would need further elaboration if it is to be the basis of criminal or civil enforcement. What, precisely, are parent companies expected to do to meet their legal obligations? There are a number of ways this broad obligation could be amplified to create greater certainty for companies, namely:-

**Option 1:** *Set out detailed statutory requirements by either primary or secondary legislation.*<sup>9</sup>

The main *advantages* of this approach are legal certainty and clarity about the extent and scope of obligations. The main *disadvantage* is that primary and secondary legislation can be difficult to change, which means that the standards may not keep pace with best practice.

---

party to the proceedings, although courts do not otherwise enjoy jurisdiction over them “as of right”.

<sup>5</sup> See *AG for New Zealand v Ortiz* [1984] AC 1.

<sup>6</sup> e.g. the Ethical Trading Initiative (“ETI”) Base Code of Conduct. See [www.ethicaltrade.org](http://www.ethicaltrade.org).

<sup>7</sup> See for instance, the list of core labour and human rights standards incorporated into the EU Generalised System of Preferences (“GSP”) by virtue of Council Regulation (EC) No 980/2005, of 27 June 2005. (OJ L 169 30.6. 2005, p. 1-43).

<sup>8</sup> To borrow the wording in Ruggie, note 3 above, para. 24.

<sup>9</sup> Note that, if secondary legislation were to be the main method of creating binding standards, primary legislation would still be needed, not only to create the new body but also to create the necessary powers to issue further regulations.

**Option 2:** *Set out broad obligations in the new body's founding legislation, which may then be amplified by codes of practice.* (This could perhaps be modelled on the framework provided by the Equality Act. Under this legislation, the CEHR is given the power to issue codes of practice (following consultation) to “ensure or facilitate compliance” with a legal provision or “to promote equality of opportunity”). The codes of conduct may not be directly enforceable themselves, but could be used as evidence in a dispute about whether the parent company had met the relevant legislative standards (e.g. a failure to adhere to a code or practice could create a presumption that the legislative standard had not been complied with).

The main *advantage* of this approach is flexibility and the ability to respond (rather more quickly than legislative means) to changes in best practice. The main *disadvantage* is perhaps less legal certainty for companies.

### **2.3 Transparency and accountability**

There are numerous ways of building in opportunities for public scrutiny of the activities of regulatory bodies. These include allowing for public consultation on matters of policy and regulatory strategy, publishing annual reports on activities, regularly publishing information regarding the progress of investigations and providing opportunities for the public (and particularly affected interest groups and complainants) to comment.

Reports and outcomes of formal investigations by regulatory bodies are generally made public. Employment tribunal hearings, for example, are held in public (although pre-trial case meetings are private). Many regulatory bodies – the IPCC, FSA and the OFT, for example – publish the results of their investigations on their web-sites, including details of any recommendations made or undertakings obtained. However, there are exceptions to this to protect people's privacy. The service provided by the FOS, for example, is a confidential service. For the IPCC, publication of recommendations and other inquiry outcomes is subject to a “harm test.”<sup>10</sup>

### **2.4 Independence, credibility and balance**

It is usual for regulatory bodies to have one “sponsoring” department, e.g. the Treasury in the case of the FSA, or the Ministry of Justice in the case of the ICO.

In our case, there would be a number of government departments with a potential interest. The most obvious sponsoring departments would be the Department for Business, Enterprise and Regulatory Reform (“DBERR”) and/or the Ministry of Justice. Depending on the scope of the new body's activities, the Department for International Development (“DFID”) is another possibility. DEFRA on the other hand, may not be suitable, as much of the work of the new body (e.g. injuries to workers, human rights violations and environmental damage abroad) is likely to be outside the normal range of DEFRA activities and expertise.

But if a new institution is to have credibility as a complaints or ADR body, some degree of independence from government (and government policy) is important. The Information Commissioner, for example, is appointed by the Crown and reports directly to Parliament. Similarly, the IPCC, though funded by the Home Office, is required to be “politically independent” otherwise. Its Chairman is appointed directly

---

<sup>10</sup> i.e. will the disclosure do more harm than good? If the answer is “yes”, then the inquiry outcomes are either not published, or published only on a limited basis.

by the Crown and the other commissioners are appointed by the Home Secretary. Importantly, though, no member of the IPCC can have served as a police officer.

It is important, for the new body's credibility, that it not be seen as an "anti-business" project. Bringing a mix of viewpoints and experience will be vital. One possible way of achieving "balance" would be to make sure that a range of views and interest groups are reflected on the ADR or complaints panel itself. Employment tribunal panels, for instance, are made up of three members; one legally trained and two lay members. One of the lay members is drawn from an "employer" background, the other from an "employee background".

Another way of bringing different expertise and viewpoints into a regulatory structure is to make use of an independent advisory committee. The Advertising Standards Authority ("ASA") for example, has created an independent advisory committee of experts to advise its Broadcast Committee of Advertising Practice ("BCAP"). Whereas BCAP is comprised largely of industry representatives, their advisory committee includes people from consumer groups, appointed for their independence from the broadcast advertising industry.

## **2.5 Accessibility**

If a complaints or ADR mechanism is to be an attractive alternative to court action, then accessibility will obviously be an important consideration. Alternative dispute resolution bodies, such as the FOS service, the DCS and the ICO are deliberately informal, with minimal emphasis placed on procedure. (As the FOS web-site puts it "we look at the facts of the case – not how well you present your complaint"). Considerable help is given to potential complainants, from simply drafted "plain English" pamphlets and literature to telephone help-lines and extensive web-based resources. Even employment tribunals, though court-like in structure and procedure, offer special consideration to, and even positively encourage, "litigants in person" (i.e. people without formal legal representation). Some bodies, like the ICO, also provide a "customer charter" which gives certain commitments as to how complaints will be dealt with. Obviously it is important to publicise the mechanism widely so that potential users of the system are aware of it. This would be a particular challenge for a UK body set up to hear complaints originating from outside the UK.

Where complainants are in genuine fear of reprisals (e.g. from their employers, or from host country authorities), efforts should be made to assist them (e.g. through confidentiality measures).

Legal costs can also be a factor that discourages people from coming forward, so ADR and complaints services offered by UK regulatory bodies are often free of charge. Other "accessibility" features include wide rights of standing; see, for example, the IPCC (case study 5 below) and the FOS which allows friends and family to bring a complaint on another person's behalf (with written authority). There is sometimes also scope for public interest complaints, i.e. complaints where a person becomes aware of a possible breach of the law, but is not personally affected by it (e.g. data protection complaints to the ICO). If the new UK body is to hear environmental disputes, it will be important to extend rights of standing to interested environmental NGOs (either UK-based or foreign).

## **2.6 Appropriate investigatory powers**

Obviously, powers of investigation vary according to the particular role and functions of the body (see further Table 1 above). Powers can include being able to obtain a

warrant to enter and search premises (e.g. OFT, FSA, HSE), to order the production of documents and to require people to make themselves available for interview. The ICO has the power to issue “information notices” requiring that the recipient provide it with information in a particular form. Employment tribunals have the power to issue “witness orders” to compel reluctant witnesses to appear and give evidence.

These stronger powers of investigation are typically backed up by the general law of perjury and contempt of court. For example, untrue testimony given at an employment tribunal hearing can be punished as perjury. And failure to abide by orders by the FOS or the ICO to produce documentation can be treated as contempt of court.

A new UK body would not be able to issue information notices against foreign subsidiaries directly, nor would it be able to dispatch investigators to search foreign premises. This would be an extension of extraterritorial jurisdiction, beyond that which is permitted under international law. However, it could be given powers to investigate parent company policies and practices as regards the management of subsidiaries and/or the supply chain, which may include the right to question potential witnesses (e.g. parent company directors and employees), and the right to search premises (e.g. parent company head office) and request documents and reports.

## **2.7 Powers to remedy breaches of standards; other sanctions**

Powers to make remedial orders vary from body to body. Not all bodies have the power to make an award for financial compensation, for example. Whereas the FOS can make orders for compensation to complainants up to a maximum of £100,000, the ICO has no such powers, meaning that complainants must turn to the courts if they want to recover financial losses (e.g. under the law of contract or tort).

In some cases, the main motivation for bringing a complaint may not necessarily be financial compensation, but to ensure that a particular legal provision is enforced, or that a company or public service provider recognises where its standards of performance have fallen down and makes a commitment to improve. Alternatives to orders for financial compensation include the power to order an apology (e.g. CEHR, HSO, DCS), to make recommendations concerning how a company or public service is managed (e.g. IPCC, FSA, CEHR), or to obtain undertakings from a person found to be in breach of the law (either as part of enforcement procedures or as a condition of enforcement action not being taken) (e.g. CEHR, OFT, ICO).

Some regulatory authorities have the power to impose fines and other penal sanctions. The OFT, for example, has the power to levy fines of up to 10% of turnover for competition breaches. It may also issue a “competition disqualification order” against a director guilty of persistent and serious breaches of competition law, which bars that person from acting as a director of a UK company for a period of up to 15 years.

## **2.8 Adequate resources**

Finally, and obviously, the body needs to be adequately funded, either by its sponsoring department, or from central government funding, to enable it to fulfil its mandate. It needs an efficient and workable organisational structure, reflecting its particular role and functions.

## **Part 3: Additional technical, logistical and legal issues**

### **3.1 Relationships with other national regulatory authorities (and the problem of extraterritorial jurisdiction)**

Because the work of the new body would be concerned with activities of UK-based multinationals *overseas*, regulatory bodies in other countries (and the governments they answer to) will inevitably have an interest in the new body's activities, and how these might impact upon them.

Where there is likely to be a need for cross-border cooperation (e.g. the prosecution of a financial crime by the FSA, or in investigations into market abuses by the OFT) powers are given to the relevant UK regulatory body to exchange information with foreign regulatory bodies and, if appropriate, to enter into agreements with them. These agreements, or Memoranda of Understanding ("MOUs"), cover issues such as liaison, information-sharing and how problems of overlapping jurisdiction are to be resolved in the event that enforcement action becomes necessary.

While cross-border investigations are often problematic, it is certainly possible to give rights of access to ADR and complaints mechanisms to non-UK residents. The complaint mechanisms under FOI legislation, for instance, may be accessed by anyone (whether they live in the UK or not) who has tried and failed to gain access to information held by a UK public authority. Where the new body would be different from existing UK bodies, however, is that its mandate would concern, directly or indirectly, activities carried on by *foreign entities* and taking place in *foreign countries*. Although the same could be said of the OFT, the OFT's powers are still confined to foreign activities having an *effect* on UK markets. It is on this basis – the effect of corporate behaviour *within* the territory of the UK – that the OFT is able to claim jurisdiction over foreign corporate activity.

As discussed in paragraph 2.2 above, the problem of extraterritorial jurisdiction can to a large extent be overcome by focussing on the role of the *UK parent company* in relation to the abuse. However, in the event of a complaint relating to abuse in a third country, it may still be necessary to gather information from that third country to prove, at a minimum, that actual harm occurred and, if financial compensation is a possibility, the extent of the loss. Under international law, the permission of the third state would be needed before UK investigators could carry out an official investigation within their territory. Alternatively, foreign regulatory bodies could agree to assist UK investigators with information gathering etc. Either way, the new body would need to be given, in its constituting legislation, the necessary powers to cooperate and to enter into agreements with regulatory bodies of other states.

### **3.2 Relationships with other international initiatives**

The new body would need to operate in such a way so as to supplement, and not undermine, existing international initiatives relating to the health, safety, labour, environmental and human rights standards of multinationals.

Depending on the extent of the mandate given to the new body (and the subject matter it is required to oversee and investigate), it is quite likely that an incident of corporate abuse could give rise to both a complaint under the OECD Guidelines to the UK NCP *and* a complaint to the new UK body. However, while the subject matter may overlap, the UK NCP and the new UK complaints body would still be separate institutions with separate responsibilities, and a separate set of standards to administer. Whereas it would be the UK NCP's job to consider the multinational's

behaviour in light of a voluntary and broad set of *international* guidelines, the new UK body would be focussing on a much more detailed set of standards relating specifically to the management by UK parent companies of human rights and environmental impacts of foreign subsidiaries and suppliers.<sup>11</sup> Whereas the work of the UK NCP feeds directly into policy work by the OECD on international investment and enterprise issues, the new UK body would be operating purely at a national level and would be contributing to the outward investment policies of one state only. Moreover, the list of problem areas covered by the UK NCP under the OECD Guidelines is likely to be somewhat wider than those covered by the new UK body, extending to areas such as bribery, competition and tax.

The fact that the jurisdiction of the UK NCP and the new UK body may overlap on occasion should neither undermine the UK NCP, nor make it irrelevant. However, an important policy issue to consider will be the extent to which the two initiatives could (or should) be obliged cooperate with each other, e.g. share information and resources. This may be a difficulty for the UK NCP, which is often required to operate confidentially. However, it would obviously be desirable if these two initiatives could operate in such a way as to avoid duplication of effort, so far as this is possible.

The new body may also need the ability to liaise and cooperate directly with other international organisations, further afield. It may, for instance, have know-how and expertise relevant to other ongoing initiatives (e.g. WTO working groups, United Nations human rights committees, or the work of the UNSG Special Representative on Business and Human Rights). If this is to be one of the roles of the new body, then its constituting legislation will need to reflect this.<sup>12</sup>

### **3.3 Relationships with existing criminal and common law system**

Similarly, the new UK body should complement and support, rather than seek to replace, the civil liability system insofar as it relates to corporate abuse overseas. It could do this by providing an alternative means of resolving smaller scale disputes relating to foreign subsidiaries and suppliers through a specially designed mechanism. Claimants would have the use of a dispute resolution system that was fit for purpose, rather than having first to engage in lengthy persuasion processes using legal principles and arguments that have been developed with an entirely different set of circumstances and policy objectives in mind. Whereas civil court judges may feel uneasy second-guessing the motives behind different corporate structures and policies, the new UK body would have access to a range of expertise and a specific set of standards to administer. Whereas few judges have real-life corporate or civil society experience to draw upon, a new UK body would have the flexibility (if its constitutional arrangements allowed) to tailor a dispute-resolution panel to a particular dispute, choosing the panel of experts best suited to finding a fair resolution. (This would include, but certainly not be limited to, legal experts). And whereas civil courts are required to adjudicate on the basis of the evidence placed before them, a new UK body could take a more “inquisitorial” approach, e.g. by seeking the views of suitably qualified panellists and/or commissioners on its own initiative.

---

<sup>11</sup> Assuming that the general recommendations set out in this report (regarding the scope of the UK body’s mandate) are accepted. See para. 2.2 above and Part 5 below.

<sup>12</sup> See, for example, the Equality Act 2006, which creates the CEHR. See in particular, section 18, which gives the CEHR the power to “cooperate with persons interested in human rights in the United Kingdom or elsewhere”.

On the other hand, if the new body is to provide a relatively quick and inexpensive way of resolving simple disputes, it is unlikely to be equipped to deal with the larger class actions against UK parent companies that have emerged in recent years.<sup>13</sup> Large-scale class actions, more complex litigation, and cases over which the new UK body did not have jurisdiction (e.g. because it involved a complaint not covered by the relevant UK legal standards) would continue to be directed towards the civil courts.

One way of helping claimants to choose between (a) an informal ADR-type mechanism and (b) litigating in the civil courts might be to impose a monetary limit on the amount of compensation that could be awarded by the new UK body. This solution has been adopted by the FOS, which has the power to award financial compensation up to £100,000. This offers a relatively quick, informal and inexpensive way of resolving smaller claims, and larger claims are automatically directed towards the civil court system. The FOS's decision is final, but if the complainant is unhappy, she is still free to go to court to recover the amount via the civil law system if she wishes.

To summarise, ADR and complaints systems support the more formal judicial systems by offering targeted alternatives to court action. In the longer term, it is also quite possible that the work of the new UK body, in developing more detailed management standards for UK parent companies vis-à-vis their foreign subsidiaries and suppliers, could help influence the content of legal obligations for parent companies, for example by providing judges with greater guidance than they have at present as to the appropriate standards of care.

But the relationship works two ways. For their own part, the criminal and civil law systems also play an important supporting role, by supplementing and assisting ADR and complaints mechanisms. They do this in a number of different ways. First, the criminal law system provides a means by which witnesses can be compelled to give evidence (e.g. through the law of contempt) and a system by which regulatory decisions (e.g. enforcement notices, information notices) can be enforced. Where a decision in relation to a complaint is not complied with, this may be punishable as a criminal offence, as is the case with CEHR "action plans", for example, or as contempt of court (e.g. disclosure orders by the ICO). Alternatively, where a financial award has been made (e.g. by an employment tribunal), an unpaid award is treated as a debt, recoverable in the civil courts. The civil court system also provides a possible avenue for appeals (discussed further at para. 3.11 below).

### **3.4 Due process**

Procedures will be needed to ensure that no enforcement action is taken before both sides have had the opportunity to present their side of the story. This includes giving adequate notice of the complaint, proper "discovery" of documents and information relating to the dispute and, in appropriate cases, giving the defendant a chance to comment before adverse information is published (e.g. CEHR procedure for conducting inquiries under the Equality Act) or before enforcement action is taken (e.g. procedure prior to disciplinary action by the FSA under the FSMA).

---

<sup>13</sup> See, for example, *Lubbe v Cape plc* [2000] 4 All ER 286 (HL) 277 and, more recently, the class action launched by London-based PI lawyers Leigh Day & Co against Trafigura. See *Ivory Coast toxic waste disaster claim issued in High Court*, Leigh Day & Co, 10<sup>th</sup> November 2006, <http://www.leighday.co.uk/doc.asp?cat=1021&doc=964>.

### **3.5 Exhaustion of remedies**

Most dispute resolution services are reluctant to consider complaints until all the proper channels have been gone through. For instance, users of the FOS are expected first to have gone through the applicable complaints procedures operated by the financial institution complained of. The position is similar with respect to enforcement of anti-discrimination laws, and also with complaints to the Healthcare Commission with respect to local health services.

In developing proposals for a new body to consider complaints relating to foreign corporate abuse, it would be necessary to consider whether a complainant must have effectively “exhausted his remedies” under the laws of his own state before complaining to the UK authorities.<sup>14</sup> Some might argue that this approach is necessary to ensure that the responsible foreign regulatory authorities are not undermined by the UK mechanism. The better view, however (and the more legally correct) is that a dispute concerning the role of the *parent* company (e.g. its failure to manage group activities satisfactorily) is theoretically distinct from any dispute concerning the regulated activities of its subsidiary, is not an issue that concerns local “host state” regulators, and therefore rules concerning exhaustion of local remedies should not apply.<sup>15</sup>

### **3.6 Costs**

Even if the service is free, some costs are likely to be incurred by the complainant in preparing and presenting his case. Each party is usually expected to bear his or her own costs, unless the ADR body considers that one side has behaved unreasonably (or “vexatiously”) in their conduct of their case, in which case that party can be asked to pay the other party’s costs (e.g. FSMT, employment tribunals).

### **3.7 Legal aid**

For anything other than the simplest of claims, some form of assistance may be necessary to prevent legal costs from becoming a barrier to people exercising their rights. Legal aid is generally not available for the kinds of complaints considered in this report (employment tribunals in Scotland being a possible exception). However, in some cases bespoke legal assistance schemes have been created under an organisation’s founding legislation (e.g. for tribunal hearings under the FSMA). Under the Equality Act, the CEHR has the power to provide legal assistance directly to those seeking to enforce equality rights in the courts. Alternatively, the DCS is a free service offered by the CEHR to help disabled people towards an informal resolution of disputes over access to goods and services.

### **3.8 Parent company liability and the corporate veil**

As discussed above (see paras. 2.2 and 3.1), the UK does not enjoy jurisdiction over foreign companies just because they are owned or controlled by a UK parent. But the UK does enjoy “nationality” and “territorial” jurisdiction over parent companies incorporated in the UK. If the new UK body were to focus on the enforcement of *UK*

---

<sup>14</sup> Note that under international law standards, claimants are not required to go through processes that, because of legal or other defects, offer little or no chance of a proper remedy.

<sup>15</sup> Note that there does not seem to be any requirement for claimants to have “exhausted their remedies” under local law before bringing a claim against a US parent company under the US Alien Tort Claims Statute. See *Sarei v Rio Tinto* 487 F. 3d. 1193, 1223 (9<sup>th</sup> Cir. 2007) (although note that this decision is now pending appeal).

*standards* relating to the management by *UK parent companies* of *UK-based corporate groups* (including supply chains), then the problems extraterritoriality and the “corporate veil” largely (though not entirely) disappear.<sup>16</sup>

However, an important definitional issue still remains. What *connection* is needed between a foreign company and a UK company to be able to bring a complaint in the UK? In other words, which companies will and will not be regarded as part of the corporate “group” for these purposes? Even if the focus is on the UK parent company, it will still be necessary to define, with a reasonable amount of clarity, *which companies and relationships a parent company ought to be responsible for*. For example, where the parent company has invested in a joint venture in another country, what level of shareholding or involvement by the UK parent will bring that joint venture within the scope of UK management standards (and therefore within the scope of a complaints mechanism).

In most legal contexts, corporate groups are defined using a flexible definition of “control”. If the intention in this case is to provide complaint mechanisms for cases of “supply chain abuse” as well as “subsidiary abuse” this definition of “control” will need to cover contractual as well as equity relationships.

### **3.9 Burden and standard of proof**

In most criminal cases the burden is on the prosecution to establish guilt “beyond reasonable doubt”. In most civil cases, the burden is on the claimant to show “on the balance of probabilities” that the defendant is liable. Obviously, the civil standard is less onerous to meet. “Balance of probabilities” is the standard of proof applied by employment tribunals and probably, though less formally and less explicitly, by other dispute resolution mechanisms as well.

However, in many cases it can be difficult for an outsider to prove, even on a “balance of probabilities” test, that a company and/or its directors were negligent in a given case, as this requires access to information about corporate practices, policies and culture that can be difficult to uncover, even with the most generous “discovery”<sup>17</sup> rules. One way around this would be to reverse the burden of proof so that evidence of damage resulting from the operations of a foreign subsidiary or a supplier of a UK company would be treated as *prima facie* evidence that a breach of the legal standard had occurred. The onus would then be on the UK parent company to show that, actually, the damage occurred despite the UK parent’s diligence, and its adherence to the standard (and any related codes of conduct or “best practice” guidelines).

### **3.10 Timeliness of complaints**

The time limit for bringing a complaint to a “quasi-judicial” body like the ICO or the FOS, or for enforcing rights under anti-discrimination laws is typically six months, although for the employment tribunal, a three month time limit applies. The time limit typically begins from the time of an “incident” or from the time the complainant became aware of the circumstances giving rise to the complaint. Time limits are only usually set aside in exceptional cases.

---

<sup>16</sup> See further para. 5.1 below.

<sup>17</sup> “Discovery” refers to the process of exchanging documents and information before a civil trial takes place.

Obviously, in the case of a body designed to hear complaints originating from *outside* the UK (including some of the poorest countries of the world), the time limits for bringing complaints will need to be considerably greater than this. Time would need to be allowed for claimants to try other options (such as approaching local regulatory authorities), even if there is no actual “exhaustion of local remedies” requirement (see further para. 3.5 above).

### **3.11 Appeals**

At some point, the rights and wrongs of the matter have to be finally determined. It is usual, though, to provide some system of appeal or review. Employment tribunal decisions, for instance, can either be reviewed (e.g. where new evidence comes to light) or appealed to the Employment Appeals Tribunal on grounds of mistake in law or unreasonableness.

Rights of appeal are available from other ADR and complaints mechanisms as well. Decisions of the ICO, for instance, can be appealed to the Data Protection Tribunal or the Information Tribunal (depending on which is applicable). Decisions of the FSA (e.g. on disciplinary matters) can be appealed to the FMST on the grounds that a mistake has been made, or the law has been incorrectly applied. Official decisions of the FOS, on the other hand, are final. There is no appeal, but an unsuccessful claimant is free to disregard the claim and commence civil proceedings in the courts if he wishes. Similarly, the decisions of the DCS are binding on the parties, although the process is voluntary. In other words, by agreeing to have their dispute resolved by conciliation, the parties also agree to abide by the result.

### **3.12 EU dimension**

A complication arises by virtue of the UK’s membership of the EU. Care needs to be taken to ensure that the creation of the new body (a) does not conflict with harmonised EU positions on issues like environmental protection, consumer issues and social and employment policy, and (b) does not indirectly result in unilateral trade restrictions, contrary to EU policies on the internal market or external trade (i.e. the “Common Commercial Policy”).

## **Part 4: A new UK institution: two possibilities**

### **Option A: A UK Commission for Business and Human Rights and the Environment**

**Mandate:** To promote greater understanding of the role of business in the achievement of [core labour rights, environmental protection and human rights] worldwide; to monitor the impacts of UK companies abroad (either directly or through subsidiaries and suppliers); and to develop and oversee compliance with codes of best practice relating to the management by UK companies of their global [labour, environmental and human rights] impacts.

**Functions:** to conduct and sponsor research; promote public awareness, promote education and training; provide an information and advisory service; develop, oversee and enforce standards of best management practice; and investigate complaints and resolve disputes about possible breaches of [core labour rights or adverse environmental and human rights] impacts outside the UK.

**Powers:** to investigate and report on allegations of breaches of standards; to compel production of documents and witnesses; to enter into “cooperation” agreements with foreign regulatory authorities; to undertake own research; to commission expert reports; to hear and resolve disputes between individuals and UK companies in accordance with the dispute resolution procedure.

**Dispute resolution procedure:** Complaints to be submitted in writing. Complainants may be entitled to financial assistance, subject to assessment of financial circumstances. Subject of the complaint is notified and asked for comment. Commission will have power to dismiss complaints with no merit or little chance of succeeding. Aim in the first instance will be to achieve a negotiated settlement. Undertakings may be sought as part of settlement. Cases not settled by negotiation within a specified time frame can be referred for panel hearing. Panel to comprise of three Commission members (one with legal background, one with business background and one with civil society background). Parties to call own witnesses, present own case to panel. Informal procedure. Following panel hearing, Commissioner will issue a Decision Notice. A party aggrieved by terms of Decision Notice can apply for review by a Tribunal (on grounds of mistake, unreasonableness, or error of law only) within a limited time period. No appeal from Tribunal Decision, but an unsuccessful claimant will still be entitled to pursue other remedies in the civil courts. Panel hearings to be held in public (unless there is a good reason for privacy, e.g. complainant’s security). Terms of final decision to be made public.

**Possible dispute resolution outcomes:** Financial award (up to a specified limit). Publication of apology and/or explanation. Recommendations. Undertakings.

**Advantages:** *Wide mandate (regulatory, policy-making, investigatory and dispute resolution functions); reliance on dispute resolution rather than public law enforcement mechanisms reduces likelihood of regulatory conflicts with other states; limited use by Commission of investigatory powers as part of dispute resolution function, reduces potential for tension between Commission and foreign regulatory bodies.*

**Disadvantages/potential problems:** *Expensive to resource; potentially complex organisational structure; legal and practical difficulties investigating allegations of overseas abuses (and necessity of reliance on foreign regulatory authorities).*

## **Option B: A Business and Human Rights and Environment Ombudsman Service**

**Mandate:** To help resolve disputes about possible breaches of [core labour rights or adverse environmental and human rights impacts] outside the UK.

**Dispute resolution procedure:** Free service. Complaints to be submitted in writing. Subject of complaint is notified and asked for comment. Initial decision then taken as to whether to refer complaint for investigation. If so, interested foreign regulatory bodies (if any) are contacted and asked for comment, information and/or assistance in verifying claims. Ombudsman's staff review written submissions and interview witnesses from both sides of dispute and draw up settlement proposal. Both sides would have opportunity to comment prior to finalisation of settlement proposal. Undertakings may be sought as part of settlement process. If informal process fails to reach an agreed settlement, ombudsman can be asked to make an official decision. Either party can request a review of an official decision (on limited grounds) but no further rights of appeal. However, an unsuccessful claimant would still be entitled to pursue other remedies in the civil courts.

**Dispute resolution outcomes.** Financial award (up to a specified limit); Orders to publish an apology and/or explanation. Recommendations (n.b. no procedure for enforcement of recommendations, as opposed to orders. But orders would be made public, creating some kind of moral pressure). Recommendations could include suggestion that a higher level of financial compensation be paid. Undertakings (failure to comply with these could either result in a further complaint, or could be enforced in the civil courts).

**Advantages:** *Simple mandate; relatively uncomplicated to administer; reliance on dispute resolution rather than public law enforcement mechanisms reduces likelihood of regulatory conflicts with other states.*

**Disadvantages/potential problems:** *limited mandate; no powers to initiate own investigations; involvement of foreign regulatory bodies a potential complicating factor.*

## Part 5: Conclusions and recommendations

### 5.1 A new body to investigate, sanction and provide remedies for abuses committed by UK companies abroad: Is this a feasible proposition?

Professor John Ruggie, in his recent report to the Human Rights Council, had this to say:-

“States should strengthen judicial capacity to hear complaints and enforce remedies against *all corporations operating or based in their territory*, while also protecting against frivolous claims. States should address obstacles to access to justice, including for foreign plaintiffs – especially where alleged abuses reach the level of widespread and systematic human rights violations”.<sup>18</sup>

An evaluation of the present political appetite for such a new UK body is beyond the scope of this paper. However, based on existing UK practice, the creation of a new body to deal with human rights and environmental problems arising from UK corporate activities abroad is at least a theoretical possibility, provided that the proposed new institution and its underlying regulatory framework:

#### 1) ***Respects international law on extraterritorial jurisdiction***

This is imperative as this UK body would be the first quasi-judicial body in the UK (and probably anywhere in the world) that would explicitly be concerned with activities in foreign jurisdictions that do not have readily identifiable “effects” (e.g. on markets, or on national security interests) within the UK. However, it is argued in this paper that if the powers of the new body were limited to enforcing UK standards for UK parent companies (e.g. requirements that parent companies take all reasonable steps to ensure that their foreign subsidiaries and suppliers comply with minimum standards), then the potential objections, based on “unreasonable extraterritoriality” become much less. Even so, the proposals are still likely to be controversial, and so to avoid accusations of paternalism, or unreasonable interference in the regulatory affairs of other states, any requirements of UK parent companies should be limited to achieving respect, throughout its corporate group and supply chain, for *established and widely-accepted international standards and principles governing corporate activity*, in so far as they can be determined. For the same reasons, the enforcement powers of the new UK body would best be limited to resolving disputes brought before it, rather than imposing penal sanctions on parent companies. This is because assertions of extraterritorial *criminal* jurisdiction (whether “directly” on subsidiaries or “indirectly” through the parent) are generally far more controversial than the exercise of extraterritorial *civil* jurisdiction (i.e. to resolve disputes between private parties).

#### 2) ***Complements the existing UK civil liability system***

The new body should be a useful “add on” to the existing civil liability system, rather than a challenge to it. Campaigners will need a clear idea as to which claims would best be dealt with by the new body and which would best be left to the existing civil liability system. It is suggested in this paper that the area with the most pronounced enforcement gap – and therefore the area where the new body could make the most impact – is in relation to smaller financial claims, or complaints for which an apology, or the desire to see some improvements in performance, were the greater motivating factors behind the claim. Other disputes – complex litigation, multi-party claims,

---

<sup>18</sup> Ruggie, note 3 above, para. 91 (emphasis added).

large-scale class actions involving very large damages claims – would continue to be directed towards the civil courts.

### **3) *Is underpinned by a clear set of standards for UK parent companies***

As the CORE Coalition has correctly identified, the “corporate veil” is presently a huge obstacle for claimants against UK-based multinationals. Although the corporate veil does not provide absolute protection for UK parent companies,<sup>19</sup> courts are still likely to be very careful about how they apply theories of liability for acts of third parties to corporate groups, lest this be seen as opening the way for “group liability” through the back door. In the meantime, parent companies have very little to go on in terms of judicial pronouncements as to what their responsibilities are vis-à-vis the environmental and human rights standards of their foreign subsidiaries and suppliers. Some writers have suggested that the threat of liability may cause parent companies to adopt a “hands-off” policy in relation to their subsidiaries. If this is the case, then this is a problem that a new UK body might usefully redress: by laying down a detailed set of standards for UK parent companies as regards their responsibilities for the environmental and human rights impacts of group operations (and so removing some of the current legal uncertainty) and by creating a complaints mechanism by which those standards could be enforced. As noted above, those standards should refer to, and implement, *established international* standards, even though they would be enforced as a matter of UK law.

---

<sup>19</sup> Parent companies could still be liable for their own negligence, even where the actions or a foreign subsidiary or supplier appears to be the most direct cause (“primary liability”). Alternatively, the parent company could potentially be liable on the basis that the subsidiary or supplier was acting on the parent’s behalf (albeit in only very limited cases) or on the basis that the parent had aided and abetted the breach, or had directed or authorised it in some way.

## Appendix A

### “Quasi-judicial” mechanisms in the UK: five case studies

#### Case study 1: Employment Tribunals<sup>20</sup>

Employment tribunals have been set up in the UK to enable employees to enforce their own employment rights. Complaints that an employee has been discriminated against, or unfairly dismissed may be brought before a tribunal which then has the power, if the claim is successful, to make a financial award, or an order to reinstate the employee, or some other recommendation. Orders are binding on employers and a failure to comply could give rise to an order to pay extra compensation. Orders for financial compensation become a debt that can then be enforced in the UK courts.

Tribunal hearings are designed to be informal and inexpensive. There are no wigs and gowns and claimants are entitled to represent themselves if they wish. Case management hearings are private, but the full panel hearing is public. Witnesses usually appear voluntarily, but a “witness order” can be issued to compel a reluctant witness to appear and give evidence if necessary. Witnesses are asked to swear an oath, meaning that untruthful evidence can give rise to a charge of perjury.

Appeals from tribunal decisions are available, though limited. Parties may be able to request a review of the decision where new evidence has come to light after the tribunal decision has been handed down. Appeals to the Employment Appeal tribunal are available in limited circumstances, on grounds of mistake on law, or that the decision was “unreasonable”.

#### Case study 2: Financial Services Authority, the Financial Services and Markets Tribunal and the Financial Ombudsman Service<sup>21</sup>

The FSA regulates the financial services industry in the UK. It was set up under the Financial Services and Markets Act 2000 (“FSMA”) with a wide mandate that involves not only the investigation and prosecution of complaints about financial services providers, but also the maintenance of a sound financial system, raising of public awareness of financial matters and enhancing consumer confidence. Regulatory priorities are set according to a risk assessment system – the greater the risk posed by an organisation, the more closely they will be regulated.

The FSA has extensive powers of investigation under its founding legislation. It can, for instance, require witnesses to attend interviews and be questioned (on pain of proceedings for contempt of court) and to hand over documents. FSA investigators also have the power to obtain warrants to enter and search premises. Sanctions available to it include withdrawing a company’s authorisation to operate, imposing financial penalties (for market abuse) and applying to court for injunctions or restitution orders. Additionally, the FSA can prosecute criminal offences under the FSMA (such as operating without a proper licence). Certain decisions of the FSA may be appealed to the Financial Services and Markets Tribunal (“FSMT”), such as decisions to discipline firms and individuals for breaches of the relevant legislation. Hearings of the Tribunal are generally in public. Decisions of the FSMT may be set

---

<sup>20</sup> <http://www.employmenttribunals.gov.uk>

<sup>21</sup> <http://www.fsa.gov.uk>; <http://www.financial-ombudsman.org.uk>.

aside where a mistake appears to have been made or where new evidence comes to light. Alternatively, in some circumstances it may be possible to appeal to the Court of Appeal, with the permission of the court.

The office of the FOS was created to help resolve disputes between regulated firms and their customers. The aim of the scheme is to keep proceedings as informal as possible. Generally every effort is made to resolve disputes by letter and over the telephone, without the need for face-to-face meetings. The ombudsman has the power to make awards of financial compensation for financial and other kinds of loss up to specified limits. The ombudsman also has the ability to make recommendations that financial compensation be paid beyond the prescribed limits. In any case, if the complainant is unhappy with the FOS's findings he or she is still free to pursue the matter in the civil courts. On the other hand, the FOS will not normally get involved with disputes that are already (or have already been) the subject of civil proceedings.

### **Case study 3: Equality and Human Rights Commission and the Disability Conciliation Service<sup>22</sup>**

The Commission for Equality and Human Rights ("CEHR") was set up under the Equality Act 2006 and brings the three previous equality commissions - the Equal Opportunities Commission, the Disability Rights Commission and the Commission for Racial Equality – under one roof. The CEHR has a mandate that ranges from policy and advisory work to the promulgation and enforcement of standards. It is required to monitor progress towards achievement of equality goals and to publish reports on the same. Its powers include development of codes of practice to assist with legislative compliance, providing legal assistance to those whose rights may have been affected, bringing test cases to clarify the law and launching inquiries into equality or human rights-related issues. The Commission also has the power to investigate suspected breaches of equality laws. If it has reason to believe that a person has committed a breach of the law, it has the power to obtain undertakings from that person in the form of an "action plan". Once an order has been obtained from the court (effectively ratifying the action plan) it becomes an offence for the person to fail to comply with it. The Commission also has the power to enter into agreements not to enforce a suspected unlawful act in exchange for undertakings from the person or people concerned. In extreme cases, it can apply to the court for an injunction preventing a person from doing something, or engaging in a course of conduct, that may be unlawful under equality legislation

In addition, the Equality Commission has the power to offer conciliation services to those who feel their rights have been violated, as an alternative to court action. For instance, a Disability Conciliation Service ("DCS") is available to help individuals enforce their rights under the Disability Discrimination Act ("DDA"). The process is deliberately informal, and the outcomes sought may include an apology, or agreement to submit to an "access audit", or possibly monetary compensation for financial loss, or injury to feelings. This process is voluntary – it depends on the agreement of both parties. However, a DCS agreement, once achieved, can be enforced in the courts, either as a further DDA claim, or under the law of contract.

---

<sup>22</sup> <http://www.equalityhumanrights.com/en/Pages/default.aspx>; <http://www.dcs-gb.net/>

#### **Case study 4: The Office of the UK Information Commissioner<sup>23</sup>**

The Information Commissioner's Office has a dual role: enforcing access to public information under the Freedom of Information Act 2000 ("FOI") and protecting the privacy of private information under the Data Protection Act 1998 ("DPA"). Its functions include research, education (e.g. educating the public about their rights) promoting best practice (e.g. through guidance for companies) as well as resolving complaints and enforcement of standards.

The ICO has the power to investigate complaints from the public about misuse of data under the DPA. Its investigatory powers include powers of entry and inspection, compliance assessments, enforceable "information notices" (i.e. requests to produce information). On the conclusion of an investigation it has the power to issue enforcement notices or "stop now" orders to companies suspected of breaching data protection legislation and may also prosecute data protection offences itself. However, it has no power to award financial compensation to complainants – this is the responsibility of the courts. Enforcement notices set out the kinds of remedial action required to be undertaken, and failure to comply with the terms of the notice (within specified time limits) is a criminal offence. Alternatively, the ICO can obtain enforceable undertakings from the company concerned. Undertakings and enforcement notices are made public via the ICO's web-site. Companies served with enforcement notices or information notices have the right to appeal to a Data Protection Tribunal.

The ICO also has the power to investigate complaints made by the public about the failure of public authorities to provide access to documents and information that, in that person's view, ought to have been made available under the FOI. Following investigation of the complaint, both parties are issued with a decision notice. The terms of decision notices may be appealed to the Information Tribunal. Failure to comply with a decision notice demanding disclosure of documents can be referred to the courts and can be treated as a contempt of court.

#### **Case study 5: Independent Police Complaints Commission<sup>24</sup>**

The Independent Police Complaints Commission ("IPCC") is a non-departmental public body, funded by the Home Office, but politically independent otherwise. It performs both an investigatory role and a "guardianship" role in relation to standards of conduct by the police. The IPCC's "guardianship" role concerns, broadly, the raising of public confidence in policing. Its functions under this heading include the research and preparation of reports and issuing guidance to police authorities. Its investigatory role concerns specific instances of possible misconduct. As investigators, the IPCC can either respond to specific complaints made by members of the public, or can launch their own inquiries into serious matters, such as allegations of corruption, racism or perverting the course of justice. Inquiries are always initiated in any case of police action that has resulted in death or serious bodily injury to a member of the public. There are wide and flexible rights of standing to bring a complaint to the IPCC which extend, not only to the person directly affected and their close relatives, but also their friends and other witnesses as well.

In most cases, complaints are referred to and then resolved by the local police force concerned. In more serious cases, the IPCC is more directly involved in the

---

<sup>23</sup> <http://www.ico.gov.uk>

<sup>24</sup> <http://www.ipcc.gov.uk>

investigation (i.e. IPCC “managed” or “supervised” cases) and in some rare cases (where the injury has been very serious, or where there is very high public interest) the complaint is investigated by the IPCC’s own team of investigators (i.e. IPCC “independent” investigations). Standards are judged by reference to a Police Code of Conduct. Outcomes of investigations may include an apology or explanation from the police force concerned, an acknowledgement that the police should change or improve their procedures and possibly disciplinary action against particular individuals. Investigation reports may also contain recommendations as to how performance by the police might be improved and how similar situations might be avoided in future. However, these recommendations are not legally enforceable (except for recommendations as to disciplinary action). If the complainant is unhappy with the way a matter has been dealt with by a local police force, there is the possibility of appeal back to the IPCC. In serious cases, the complaint may be passed on to the Crown Prosecution Service, or the Health and Safety Executive, for criminal prosecution. However, the IPCC does not assist with financial claims against the police. These must be pursued elsewhere, and ultimately through the civil courts.

## Appendix B

### List of Abbreviations

ADR	Alternative Dispute Resolution
ASA	Advertising Standards Authority
BCAP	Broadcast Committee of Advertising Practice
CEHR	Commission for Equality and Human Rights
DBERR	Department for Business, Enterprise and Regulatory Reform
DCS	Disability Conciliation Service
DDA	Disability Discrimination Act
DEFRA	Department for the Environment, Food and Rural Affairs
DFID	Department for International Development
DPA	Data Protection Act
EA	Environment Agency
EAT	Employment Appeals Tribunal
ETI	Ethical Trade Initiative
EU	European Union
FOI	Freedom of Information Act
FSA	Financial Services Authority
FSMT	Financial Services and Markets Tribunal
FOS	Financial Ombudsman Service
GSP	Generalised System of Preferences
HSE	Health and Safety Executive
HSO	Health Services Ombudsman
ICO	Information Commissioner's Office
IPCC	Independent Police Complaints Commission
MOU	Memorandum of Understanding
NCP	National Contact Point
OECD	Organisation for Economic Cooperation and Development
OFT	Office of Fair Trading
UN	United Nations
UNSG	United Nations Secretary General
WTO	World Trade Organisation