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Introduction

The decision of the Backbench Business Committee to arrange a full debate on FSA operations on the afternoon of 29th November 2010 is a long overdue assertion of the rights of the House of Commons over the great Leviathan that lurks in Canary Wharf. This is not a debate on a technical, regulatory issue: it is ultimately about the most fundamental question raised by the constitutional vandalism of New Labour – can the power and privilege of Parliament be maintained and restored?

New Labour was a deviation from the tradition of the Labour Party. Before the election, many Labour MPs, in common with many Labour voters, had realised that New Labour represented a departure from Labour's previous unwavering commitment to freedom and personal liberty. Churchill's infamous Gestapo gibe proved a boomerang loaded with high explosive when he threw it at Clement Attlee precisely because the country knew that Labour was deeply committed to a Parliamentary constitution. The FSA was created by gangsters that had hijacked the Labour party. The departure of the gangsters enables Labour to recover its Parliamentary tradition and a consensus has emerged on the need to strengthen Parliament – building on the work of a former Labour MP, Dr Tony Wright, who was denied office under New Labour despite his evident superiority to many who were advanced.

Under its highly political chairman – one the last survivors of New Labour - the FSA is in effect now running its own economic policy. The FSA is making it far more attractive for banks to finance credit cards and high risk gambling on the markets than lend at low rates to firms seeking to invest and families seeking to acquire a modest home. This threatens to undermine the policy of the elected government which is to keep interest rates down to make investment attractive.

Unsurprisingly, the FSA has acquired some of the least attractive habits of the old Soviet nomenklatura and on occasion come to resemble nothing so much as the Stasi. It has a very comfortable relationship with a number of big firms and consulting operations that provide employment to FSA staff. The latest issue of Private Eye (Slicker - In the City) once again exposes the complete failure of the 'Fundamentally Supine Authority' to take action

The creation of the FSA as a state within a state is an affront to this country's Parliamentary constitution. The FSA can levy taxes, make law and impose punishments. It has found ways of evading the restraints that the Financial Services & Markets Act 2010 attempted to impose by establishing an independent tribunal. It has threatened individuals with ruin but denied them an effective right of recourse to their MPs. Parliament needs to reassert control over this state within a state.

against those whose incompetence in running the banks has cost the country billions.¹ Regulated firms are compelled to give lucrative contracts to consulting firms that employ former FSA staff – and to allow the consultants on contract paid for by the firms to have private discussions with FSA staff as to what reports they are to write.

When the FSA's chief executive appears before the Treasury Committee, appropriately deferential noises are made. The reality is different. The FSA was created by Gordon Brown as a state within a state, a very different animal from anything that had gone before where there was always a minister who could be held responsible. Under the previous regulatory statute, initially the DTI and later the Treasury was always able to resume control of financial regulation and insurance regulation remained part of the DTI. The FSA is a constitutional innovation, and the thrust of this paper is that smooth words from a smoothy chairman disguise a monstrous constitutional aberration created by a regime that despised Parliament.

States within states increasingly display the vices we associate with the Soviet nomenklatura in the Brezhnev years and the Stasi – thorough, comprehensive nastiness, feathering of their own nest, declining effectiveness, increasing subordination to powerful outside interests matched by vicious playground bullying. We are seeing this all of this with the FSA.

The tip of an iceberg

The flood of emails to MPs from irate IFAs is the tip of a singularly ill-concealed iceberg. As under any regime armed with arbitrary powers, many of the oppressed are silent through fear or expediency. Unlike many others who fear that protest will cost them their livelihood, many IFAs have decided that they have nothing to lose. There are many more who feel as the IFAs do but have not yet dared to speak out.

Although as we shall see the priority must be for Parliament is to recover control over a part of the executive state, earning one's living and pursuing one's profession is an important freedom in any society. Denying that opportunity is not a trivial matter, and even on the FSA's own estimates, the RDR will cause many thousands to lose their livelihood. The debate is important because the treatment of IFAs throws a bright light on one unpleasant aspect of the un-Parliamentary creature that has established itself in Canary Wharf.

¹ The difference between 'New' Labour and proper Labour is vividly illustrated by James Callaghan's appointment of his predecessor to carry out an enquiry into the City, aimed at boosting the flow of funds into investment; in contrast Mr Blair is now a prominent figure in a financial firm. The FSA is still protecting the people New Labour lauded as national heroes and regarded their self-enrichment at the expense of those who deposited their savings with them as a matter for 'intense relaxation.'

So the debate should not be seen as one on a technical issue, concerned with financial services. The FSA is using powers given to it by Parliament, but most unusually there is no Parliamentary control over the FSA's ability to make law. The debate on the FSA and IFAs is a debate over whether a part of government should, without specific Parliamentary approval, terminate the livelihood of many thousands of Her Majesty's subjects. I use this old fashioned language to make a specific point: in this kingdom the relationship between government and governed is largely based on a convention that we will obey the government provided that it acts with the consent of Parliament. The FSA violates that convention not just with respect to IFAs but the generality of both providers and users of financial services.

Part 1 of this paper explores the constitutional issue. Its main purpose is to show MPs who regard financial services legislation as a technical matter outside their field of expertise that the Financial Services & Markets Act 2000 calls into question the ability of the House of Commons to supervise the executive.

Most of the evils that have been brought about by the FSA are a direct consequence of Parliament agreeing to abdicate its role of scrutiny and supervision over the FSA. A re-assertion of Parliamentary control is a necessary condition for successful reform.

Part 1 concludes with some comments on the FSA's use of lobbyists.

Part 2 discusses FSA policy to deny its intended prey the opportunity to raise their treatment with their MPs.

Part 3 is a comment on the RDR ('Retail Distribution Review') itself and the IFA sector.

Part 4 sets out some areas where the FSA and FOS have grossly exceeded their brief – in the case of FOS by running the operation in an entirely different way from that described to the Committee of the House that examined the relevant legislation; in the case of the FSA both by misuse of powers and going without any consent of Parliament well beyond anything contemplated when the original legislation was debated.

Part 1: The Constitutional Dimension - the absence of Parliamentary legitimacy

HMRC collects taxes that the Commons have approved. Most regulators implement rules that a Minister has signed off. Some regulations have been approved by both Houses and there is at least in principle scope for either House to veto others. Probably not one in 1000 – perhaps not one in 10000 of the electorate – could describe how our Parliamentary constitution works in detail, but everyone understands the principle that in this country law is made by Parliament. The FSA is very unusual – IPSA is one of the few other examples – of an unelected body that a determined Parliament cannot bring to heel. In other cases

where a large degree of autonomy has been granted – for example to the OFT and Competition Commission – ministers have retained the ultimate right to override the Quango.

Not so many years ago, one could have stopped here. Case made. If the FSA's successor is to command public confidence it must be brought under Parliamentary control.

Today it is necessary to set out the arguments, if only because so many MPs seem to have become frightened of asserting Parliament's right to legislate and supervise the government in all its manifestations and their own rights as individual members to question and to challenge. I notice that one MP has said that only the FSA can alter the RDR. That may be a correct interpretation of the present unconstitutional statute, but it is a depressingly wrong statement of the constitutional position. It may call for a display of bloody mindedness but at the end of the day if Parliament wants something changed then it ultimately has the power to insist.

An excursion: Parliament really does matter

The expenses scandal shows how highly Parliament is valued

The value that this country attaches to Parliament - although not some of its members - was demonstrated by the expenses scandal. Although the expenses rules and the conduct of some members were indefensible, internationally this was far from atypical – politicians across the world usually seem to do pretty well for themselves. At home civil servants have had their perks, generals their gardeners, and so on. Councillors do not do badly. Well documented cases of MEPs' excesses had produced only resigned groans. Why then the massive detonation when the Telegraph revealed what was being claimed? Why a row over MPs? The only credible answer is the immense public respect for the institution of Parliament. To the charges of greed and peculation that could be made against many others was added the charge of betraying the country by taking advantage of the high honour of being a Member of Parliament. The anger seemed general – but come the election, large number of

The intense lobbying by IFAs is an illustration of how ordinary people in this country still think that Parliament really matters.

In recent years the self-esteem of MPs has been eroded by the media, a government determined to prevent proper Parliamentary scrutiny and most recently by IPSA. MPs should disregard all of these and focus on the approval of their voters.

The unambiguous evidence of the general election – when the people of this country voted most sitting MPs did much better than their party's new candidates - is that voters trust MPs who do their job.

incumbent MPs had no problems at all and assiduous sitting Members proved hard to dislodge. Voters valued their Parliament and 'good constituency members' found that their constituents noticed their service.

In England Parliament has been the guarantor of liberty

England is the only nation than can plausibly claim to trace one of its legislative chambers back a thousand years and the other seven centuries. For most of that period England has had a Parliamentary constitution. In *The Vindication of the English Constitution* Disraeli identified the reign of Henry VI as the point at which England became a fully fledged Parliamentary constitution – the old system of petitioning disappeared and only Parliament could legislate. The king was presented with Bills that he could accept or reject but only in their entirety (page 89). Of course a king could have a Bill presented – but both Houses had to give their consent and both could amend. The power of Parliament declined drastically under the Tudors. Disraeli suggested that one reason was Henry VIII's habit of executing any MP who opposed him (page 90/91). But Henry was more subtle – he reorganised the constitution so that each estate (Lords Temporal, Lords Spiritual and the Commons) was led by his nominee². But even at their most despotic the Tudors did not dare to replace Parliamentary legislation by government by decree. When at the end of the sixteenth century the Jesuit Robert Parsons set out proposals for the perfect reformation of England, he started with the premise that Parliament was the fount of all laws. He proposed reform of the Commons by establishing free elections, abolition of rotten boroughs and representation of major towns and giving control of Parliamentary time to a committee headed by the Speaker. This became in time the accepted agenda – even if it has taken 400 years to create a business committee. In England, Parliament is the central institution and Cromwell's brief experiment with military rule died with him.

It was the House of Commons that in May 1940 removed from office a Prime Minister whom it judged inadequate to the task of defeating Hitler and sustained until victory the Prime Minister who won the war. We have recently gone through a period of decline in the power of Parliament, very

What do Mehemet Ali, on time Pasha of Egypt and Harriet Harman have in common?

similar to that under the Tudors. An over-mighty executive was allowed to dominate the Commons and fix the rules of procedure, just as the Tudors dominated their Parliaments. In *The Vindication*, (pages 102 to 106), Disraeli described the creation of a Parliament by Mehemet Ali, Pasha of Egypt, in 1831. The upper house comprised the chief officers of the capital; the lower 'the most respectable of the provincial population'. 'To prevent inconvenience', Mehemet Ali decided to elect them all himself. The lower house was

² Until the 1530s, when the Lords assembled the senior Archbishop (Canterbury unless York was a cardinal) sat on the King's right, next to the throne. Henry VIII changed that – he created the modern layout of the Lords with the throne elevated above the Peers. And he created the office of Vicar General which he gave to Thomas Cromwell – so not only were the bishops made to sit apart from and below the throne, they were headed by a layman, the Vicar General. The Lords Temporal previously headed by the senior Duke were headed by the chief ministers.

permitted to propose, but not debate; the upper to debate but not vote. Mehemet Ali's ghost must have enjoyed Harriet Harman's leadership of the House.

Since 2008, the House of Commons has re-asserted its authority. A new Speaker has repeatedly forced ministers to attend the House and answer questions on policies that they had impertinently pre-announced on the Today Programme. A large number of questions are again answered every day. Dr Tony Wright led a Committee that proposed radical change. The last Parliament agreed to the election of select committees but the government whips prevented a resolution setting up a Backbench Committee to take control of part of the timetable. In Opposition Sir George Young committed an incoming Conservative government to create the Backbench Business Committee and, to the surprise of those who had only the standards of the outgoing regime to judge by, his promise was promptly implemented once he became Leader of the House. The Coalition Agreement undertook to build on this reform by creating a full Business Committee. And the Backbench Business Committee has happily fulfilled the worst fears of Sir Humphrey Appleby. It is providing time for the Commons to make ministers listen to somebody other than Sir Humphrey.

An important debate

The debate on 29th November will be the first opportunity the House has had to look at the monstrous Leviathan since its creation in 1997. More importantly, this event demonstrates how the Commons has been regaining control since the election.

The Backbench Business Committee was initially reluctant to arrange this debate because there had been a half hour debate in Westminster Hall on 20th October 2010 on the treatment of IFAs. The minister who replied had infuriated IFAs with the following immortal words: "The current minimum financial adviser qualification is at the same level as a Diploma in Shift Management offered by McDonald's". MPs were bombarded with complaints and the Backbench Business Committee accepted that the case for a full debate was made.

What a contrast with the situation when Harriet Harman decided what MPs would be allowed to debate.

On 2 June 2010 Mr James Paice initiated a debate in Westminster Hall. Colleagues, namely Dr Andrew Murrison, Nick Herbert and Ed Vaizey, were allocated two minutes each, an unusual event. In addition, Eric Pickles and Sir Paul Beresford intervened. They had an appalling story to tell of how a senior manager of HBOS had used his position to force small firms to employ his favoured consultant, Quayside.

Mr Paice more than made good his promise: *'As I shall show, Lynden Scourfield was responsible for making what may or may not have been poor financial positions into impossible ones, and in doing so probably enriched himself and others.'*

Mr Paice also had this to say *'This allegation follows other stories that Mr. Scourfield was benefiting from being, as the bank said, "overly supportive", including, I am afraid, lurid stories of prostitutes being paid for from the funds of Quayside clients. I am well aware that a number of these allegations cannot be substantiated to any great degree, but to be clear I have not repeated many further allegations for which I could find no evidence at all, but which might still have some substance.'*

How did the Minister respond? *'The debate has raised issues and allegations that require full examination of the evidence, and I am happy to pass on any evidence that is not already available to the FSA. If appropriate, I am also happy for the FSA to refer matters to the police.I shall ensure that the FSA writes to the hon. Gentleman, and we will write to other hon. Members when we have some responses.'*

This was the best that Ian Pearson could do – a man who had won a constituency at a by-election and held onto it with comfortable majorities for three general elections, winning golden opinions from constituents for his fight for the local hospital. No wonder he gave up the fight in 2010, a broken man, having been forced to regurgitate such tripe in defence the then PM's protégé, Lord Turner. One can only hope that when Brown and Harman had them cut off, Ian Pearson was allowed anaesthetic.

If a junior minister under Mrs Thatcher had responded to such allegations by merely saying – as Ian Pearson did – that he would get the SIB (Securities and Investment Board, FSA's predecessor) to write to senior and experienced MPs raising such serious allegations, that junior minister would have been returned to the backbenches. But under Gordon Brown it was not for ministers to insist that the great Lord Turner should, as our American cousins put it, 'get his ass into gear.'

There was nothing more that MPs could do under the previous regime – there was no mechanism for moving a specific motion in the Chamber.

After the implementation of the Wright report, MPs who are unhappy with the reply they received from a minister in a Westminster Hall debate have persuaded the Backbench Business Committee to grant a full debate in the Chamber. This is a horrible experience for the FSA. But it is very good for Parliament.

The FSA – a re-creation of Tudor tyranny

It is a frequently voiced criticism of Mr Blair that he wasted the big majority he won in 1997. This is not a criticism that can be made of his deputy. Gordon Brown famously displayed the ruthlessness of Henry VIII to any junior colleague who dared disagree with him. He was not able to have dissidents executed, but he ruthlessly used the technique of exclusion. In *A Man for All Seasons* when More refused to do a Henry wished, he is treated as a pariah by the

The FSA was the first institution Gordon Brown established on the model of the Star Chamber. IPSA was the last example of a law maker armed with the power to inflict severe sanctions without any Parliamentary process.

court and the boatmen refuse to take him back to Chelsea from Hampton Court. Jonathan Powell must have known just what More suffered when he fell out with Brown.

We now know that Mr Brown's treatment of those he saw as his enemies in the Labour Party was part of a much deeper psychological problem –*dementia dictatoris*. This manifested itself not just in treatment of colleagues. He followed his exemplar Henry VIII in establishing and developing an impressive array of devices to assert his personal control and destroy the constitutional structures that had shown a potential to deliver constitutional government and when restored were actually to do so. The FSA and IPSA have a precedent in Henry's Star Chamber. Henry executed MPs who opposed him – IPSA merely proposed to use the media to humiliate its victims long before they can obtain a court hearing.

The FSA was created by fiat of Gordon Brown in 1997. It promptly acquired – by agreements of questionable legal validity and log before the Commons had consented to legislation – the powers of exiting regulators. The legislation that gave it its proper statutory basis, the Financial Services & Markets Act (FSMA), only received the Royal Assent in 2000. The predecessor regulators had come into operation in 1988, two years *after* Royal Assent to the Financial Services Act 1986. Just like Henry VIII Gordon Brown hijacked existing institutions and perverted them to exclude and even undermine Parliament. This is not to deny that many of the provisions of FSMA were a distinct improvement over the earlier arrangements – just as many of Henry VIII's acts greatly strengthened England - but the virtues of FSMA are greatly outweighed by the vices of its creation.

The end of political economy?

It is unsurprising that the use of such powers has caused deep resentment among those regulated by the FSA. They are also damaging to the people as a whole, just as the Tudor economic institutions (sales of monopolies etc.) proved to be. As Adam Smith and Hayek predicted, the use of such powers in the economic sphere has had deleterious consequences.

The FSA has proved to be an economic disaster for the country and its policies now threaten our social cohesion. One cause is the absence of political and Parliamentary control.

The lowest central bank lending rate in history should be stimulating a rapid expansion of industry. In the 1930s, when Neville Chamberlain maintained a 2% rate, the British economy grew by 4% a year as cheap money allowed the growth of what were then new industries – especially electrical goods and cars. There is no shortage of entrepreneurs who could and would grow new businesses and expand existing ones in what should be an even more favourable monetary conditions (0.5% lending rate and a competitive exchange rate) but growth is lacklustre. Why? Because the FSA has imposed regulations on lenders that makes it very attractive to operate credit card businesses charging 20% plus per cent but all but impossible to provide finance for industry and commerce at 5%, let alone the 2% to 3% one would expect from a 0.5% central bank lending rate. The FSA is also blocking loans to

young couples wanting to buy their first homes and young families wanting to move to a modest house. At least to those who are not blessed with parents and grand parents able to hand over the odd £50,000.

Against this, dirigists argue that the ballooning of public spending, with an inevitably huge deficit if anything happened (as it has) to diminish revenue, coupled with the huge growth of bank lending, has made most of the measures taken by the regulators unavoidable and it does not matter who makes the rules. What matters is that 'sound' technical rules are made to prevent another crash.

There is a via media between the free market position and the dirigist position.

From 1950 until 1999 – notwithstanding well documented failings – there had been an impressive spread of ownership, rise in incomes and employment and a growth in prosperity unparalleled in our history. A reasonable person might argue that a major reason for the social progress that was made in this half century was that economic decisions that prevented a free market were ultimately taken by ministers accountable to Parliament and not by unaccountable 'experts'. Politicians wanted both growth and to see the electorate as a whole benefit from growth, and all things considered they did not do a bad job in the second half of the twentieth century.

The reign of independent 'experts' has been less happy. The explosion in public spending and debt took place after economic decision taking was substantially removed from political and ultimately Parliamentary control. The decisions of independent 'experts' largely got us into our present mess.

There is a social dimension to this. The Coalition's spending decisions have received intense scrutiny. Changes to child benefit can only be implemented if there is a majority in the Commons. The FSA's rules that have the effect of denying young couples a home unless Daddy and Mummy can write a cheque for £50,000 cannot be challenged. The Commons could force the MoD to increase the strength of the RAF against a possible threat. It can do nothing to stop the FSA doing imposing rules that ensure credit cards are more rewarding than lending to SMEs – a policy that threatens to destroy more jobs than the Luftwaffe managed.

The FSA has its defenders – Mr Anthony Hilton has argued in the City pages of the Standard that FSA restrictions on mortgage lending were desirable to protect consumers on 24th November 2010. He made good points, but did not address the central point I am making: the rules should be made under some form of Parliamentary control. Anonymous apparatchniks – comfortably shielded like the old Soviet nomenklatura from what they inflict on ordinary people – should not be allowed to determine that only wealthy families should be able to access the funds needed to buy homes for their children. If the system were controlled by Ministers accountable to Parliament we might have rules that provided

for responsible lending but ensured the system allowed the children of, say, nurses or teachers to acquire their own homes. The FSA policy is to confine home ownership to, for instance, children of lawyers and GPs.

The independent regulator is an import from other constitutional systems – notably federal states. *The Vindication's* most convincing arguments are directed against importing institutions rather than relying on what we would call organic growth of established institutions. If Disraeli were still alive and produced a new edition of *The Vindication* in 2010, to the catalogue of catastrophes brought about by attempt to import into the British constitution of law making bodies not subject to Parliamentary control.

The creation of this independent regulator has not shielded politicians from blame when things go wrong. Lord Turner, the chairman of the FSA, defended the FSA for allowing the banks to run amok by pointing to the political climate in which the FSA operated. His argument was that the independent regulators really should not be blamed – it was politically impossible for them to close the bar just as the party got exciting.

Politicians have been more responsible economic managers than independent experts. When they had the final responsibility politicians may occasionally have made errors of judgment but nobody who looks at the successive squeezes of Selwyn Lloyd, Roy Jenkins, Denis Healey, Geoffrey Howe, John Major, Norman Lamont and Ken Clarke could for one minute think that any of these chancellors lacked the courage to take painful decisions.

Experience with an 'independent' regulator of bank credit growth after 1997 on Lord Turner's admission shows that it failed to take the necessary decisions. On past form, if politicians had been responsible for taking decisions in this area they would have acted responsibly and conscientiously. As it was, with Gordon Brown telling everyone that he had abolished bust, and the independent FSA not doing its job to control the banks, politicians were led into a false sense of complacency that everything was all right and in any event they were no longer responsible. Disraeli's pamphlet, written 170 years ago, allows us to see just how disastrous Gordon Brown's import was bound to be.

The mortal sin of cowardice

In late 1914, the great Jesuit controversialist Fr Bernard Vaughan wrote a vigorous defence of Britain going to war in 1914. He had no truck with those who were unwilling to take necessary decisions to secure the defence of the nation – such a failure, he argued, constituted the mortal sin of cowardice. He rightly warned those in positions of authority who know that the economic and financial policy being pursued was disastrous but were too frightened of losing votes to act that they put their immortal souls in jeopardy. It is a striking feature of churches today that whilst there has been plenty of

The FSA makes political cowardice too easy

condemnation of greed, few have told politicians to look to their role as leaders – a conspicuous exception to this being the Cardinal Archbishop of Edinburgh.

Anyone who adopted the approach of Fr Vaughan or the Cardinal would not throw all the blame for our recent financial disasters onto Mr Gordon Brown's abdication of responsibility to manage the economy or the party that so supinely supported him. The Conservative Opposition failed in its duty to oppose. With a few honourable exceptions, the most important of whom is Mr Peter Lilley, although Andrew Tyrie, Michael Fallon, Howard Flight and Tim

Loughton deserve honourable mention, the majority of the Parliamentary party and shadow cabinet collaborated in passing the disastrous legislation. Had Mr Lilley remained shadow chancellor perhaps the opposition would have done its duty. A low point was reached when the Shadow Cabinet – from which Mr Lilley had been ejected - allowed the Government to carry the Bill over.

David Cameron and George Osborne were only elected in 2010 so had no role in the shameful assistance the Conservative front bench gave the passage of FSMA in the previous Parliament.

It would be pleasant to say that Mr Cameron and Mr Osborne were entirely innocent of collaboration. Sadly in the run up to the 2010 election, the Conservatives succumbed to temptation. Included in 'the wash-up' was a piece of legislation, now the Financial Services Act 2010, which gave the FSA the objective of maintaining financial stability. Press reports state the chief executive of the FSA, Mr Hector Sants, told the Treasury Committee on 23rd November this year that the FSA should not have had this objective. It would have been generally convenient if he had said this when it might have given the Opposition the backbone to veto an ill considered piece of legislation. But Mr Sants, alas, only found his way to voice his thoughts after the demise of Mr Brown. So those of us who voiced doubts about the legislation were told 'it is politically impossible to block what will be presented as a piece of consumer legislation.' Faced with a veritable flood of legislative proposals, and dire warnings of political consequences if they did veto the Financial Services Bill, it may well be that Mr Cameron and Mr Osborne relied on advice that there was no real reason to object to the reduced Bill – they can hardly be expected to have read every measure. But they cannot escape some of the blame, even if the FSA was – with its usual contempt for Parliament - already behaving as if it had such powers. Their advisors in this matter of course do not have their reasonable defence 'I was badly advised'. It would be both just and expedient for the Prime Minister to take Machiavelli's advice to a prince who has fallen into disfavour with his people: execute your minister, and invite the people to see how you are revenged on their behalf on the man who did them such wrong.

It will be interesting to see what happens if MPs seek to assert the rights of the Commons to control the great Leviathan of Canary Wharf. Ministers will be advised that their lives will be made very difficult if they resume control over financial regulation. 'Minister, you will

have to defend decisions in the Commons. Worse still – you may have to argue the case for new rules to sceptical MPs. Leave it all to us.’ Lord Turner and his kind enjoy wielding power without responsibility – in Kipling’s great phrase, given to his cousin Baldwin, ‘the prerogative of the harlot throughout the ages.’ They will fight for their power and resist any attempt to subordinate them to Ministers and through them to Parliament.

Corruption and the revolving door

There is a revolving door between the FSA and the regulated. FSA staff often move to positions in larger firms, trade associations and consultancies – and there is some traffic the other way.

The FSA has considerable patronage – and under S166 of FSMA can require firms to employ consultants. The FSA has to approve the consultants and often provides regulated firms with a choice of consultancies. It is not entirely surprising that the FSA recommends consultancy firms that employ former FSA staff. It recently rejected a request from a regulated firm to use a consultant who had visited the firm and made an examination on the work to be done in favour of a consulting operation that had never visited the firm that it was to advise, had not been shown by the firm correspondence with the FSA, but employed former FSA employees. The junior official who made the decision explained that she could find no evidence that the consultant who had properly scoped the project had experience of Collective Investment Schemes. If she had asked she would have been given the name of one her colleagues who had indicated that the FSA might wish to use the consultant to facilitate a without prejudice negotiation to settle a problem with a CIS. There is a distinct feel of FSA employees taking good care to support and sustain firms that might in due course employ them. We are reminded of the parable of the unjust steward.

It is also by no mean unknown for consulting operations employing former FSA employees to approach firms that have issues with the FSA. It would be interesting to know how they acquired their marketing list.

This problem is not unique to the FSA. Similar concerns arise when former ministers and civil servants take highly paid positions with companies with whom they had had official dealings, but at least there are some rules. It may be said that what appear to be going on with the FSA is pretty small. The alternative – and harsh – view is that such conduct is corrupt and incompatible with high standards that are required in public life.

Bringing the FSA or the new regulators under closer Parliamentary control would create pressure for probity. Most MPs make significant financial sacrifices to serve the public. They are unlikely to take a relaxed attitude to those who improperly use public office to secure personal benefit or form a mafia with the aim of collective enrichment.

At present there seems less scope for corruption with people coming in through the revolving door. The problem here is different – talk to anyone in financial services and they will tell you that the FSA is recruiting those weeded out by banks and investment businesses because they had proved themselves incompetent in assessing loan applications.. In some cases the complaint is a generalised one – but in one case a senior non-exec was apoplectic to discover the managers who had caused heavy losses by failure to check the credit worthiness of borrowers and test the economic viability of business plans had found a comfortable berth on the good ship FSA. A probable side effect of bringing so many people responsible for the ‘over supportive’ lending policies of some bank is to make bringing charges of negligence under FSA Statement of Principle 2 against the directors who presided over the destruction of their banks that much harder.

The use of lobbyists

The traditional channel for communication between MPs and public servants has been through a minister. This establishes a clear responsibility and if a minister relies on a civil servant when he or she signs off a letter or written answer and the answer turns out to be wrong, the minister is embarrassed. The advent of the select committee has meant that officials give direct evidence, but this is in a formal hearing, minutes are taken and ministers can and do intervene if they feel this is called for.

In contrast the FSA and a number of similar bodies use lobbyists and some have ‘directors of communication’ rather than simple press officers. These ‘directors of communication’ are often employed lobbyists.

There are two problems with this. The first is the lack of accountability – if a minister misinforms an MP, the MP knows who to kick. If a Minister misinforms the House then that Minister is likely to have to come to the House, apologise and correct the information. This process is supervised by the Speaker. But if some anonymous lobbyist whispers in an MP’s ear there is no similar constraint. Because the whole communication is secret, it is far less likely that an error will be detected than if a minister gives a duff answer in Hansard.

The second problem with lobbyists is that they hunt as a pack. There has always been a tendency for groups to form and share information – in Whitehall, in the City, in politics. But lobbying involves money in the form of direct payment – a source of corruption that other informal groups often resist. There are many reasons why individuals lie – but money means lobbyists have a direct incentives to lie. And when the FSA uses lobbyists who also serve firms the problem is intensified. As lobbying costs money it gives an undue opportunity for the rich and the powerful to shape policy to suit their own interest rather than the common good.

IFAs cannot afford lobbyists. It is sometimes suggested that trade associations can fill the gap. As the Treasury Committee recently rather cruelly revealed these are populated by professional fixers who decide when to repeat members’ concerns. This again creates a

comfortable, private club where 'we' can sort out difficulties. 'They' are of course excluded. And 'we' can find that a certain compliance with the rich and powerful brings all manner of good things. Unfortunately, from what the former chief executive of AIFA told me, it appears that in opposition professional fixers (e.g. said chief executive) were given easy access to policy groups while 'ordinary' people excluded from the policy making process.

For years big financial service firms have used lobbyists and employed in house lobbyists to influence government and MPs. Involvement with the FSA often gives such people an edge. Naturally the process is directed towards benefiting the well resourced firm. This would be bad enough if it were limited to pressing for policy changes. On occasion lobbyists have set out to destroy smaller competitors. They still do – but alleging this is of course a quick way to find oneself silenced by a gagging injunction. So we have to make do with older examples and remember that the leopard does not change its spots.

Some years ago, when MPs were still permitted to take consultancy positions with major firms and speak on matters directly related to their outside employer's business in the House, a firm called Knight Williams started to make substantial inroads into a lucrative part of the savings market. This firm was eventually destroyed after an MP retained by one of its competitors had alleged in the House that it was disreputable.

When the dust settled it turned out that the liquidator was able to settle all claims by investors and their assignees for the sum that had been set aside for claims in recent annual accounts. The FSA's Regulatory Decisions Committee then approved the former managing director to act as a director and chief executive of an IFA, having heard a QC argue against such approval.

Why had this happened? Big competitors had engaged in lobbying of the regulators and MPs and a constant feed of criticism to the media.

Two MPs took a prominent role in this process. Both were bamboozled by the firms that retained them.

One was retained by a large insurance company. The then chief executive of the company's lobbyist later told me 'the only time X (the MP) earned his retainer was when he attacked Knight Williams'. The other MP was retained by a bank. He attacked Knight Williams in the House. He stated that his bank was not a competitor. Strange that as a director of the bank's fund management arm had told a director of Knight Williams that KW was 'the strongest independent competitor we have – and a more powerful competitor than most other banks and life offices.' At the next Conservative Party conference, I found myself chatting at a drinks party to a member of that Bank's 'corporate affairs' team. Taking advantage of her slightly relaxed state, I turned the topic of conversation to the role of retained MPs and before too long she let slip confirmation of what I had suspected – 'we

were terribly embarrassed when Y (the MP) attacked Knight Williams in the House – we thought he would only talk to ministers and MPs in private.’

This sort of thing is not limited to attacks on individual companies. As concern over pension mis-selling mounted in the ‘90s, and the question of regulation of advisors was opened up with the establishment of the PIA, lobbyists from major insurance companies set out to brief MPs that pension mis-selling was all the fault of IFAs. In due

The FSA’s use of lobbyists is inappropriate for a public body – and encourages firms to use lobbyists to mislead MPs for commercial gain.

course the PIA board was given an analysis that showed that the overwhelming majority of pension transfers had been effected not by IFAs but by the sales forces of the big life offices – the very people who had encouraged their lobbyists to tell MPs that IFAs were at fault and had used their funding of an all party group to promulgate this lie. Fortunately this information leaked – those Members with long memories may relish the story. The then chief executive of the PIA was Colette Bowe. She had first become a public figure when it was revealed that as press officer to the Trade and Industry Secretary Leon Brittan she had leaked advice from the law officers to the press during the Westland affair. This grave impropriety occasioned the resignation of Leon Brittan – one of the last occasions on which a Minister honourably has taken full responsibility for an official’s error. In due course Colette Bowe was handed the job of chief executive of the PIA. When figures escaped from the PIA Board she exploded with rage at ‘a gross breach of confidence.’ Unkind persons were heard to mutter about ‘hypocrisy’.

While MPs may no longer take retainers, nothing has been done to restrain lobbyists from whispering untruths or half truths into their ears. Understandably IFAs are worried that they will not receive a fair hearing. Hence the determination to get their message across loud and clear.

And the involvement of the FSA in lobbying should be a cause of great concern. Some years back, when I ran Justice in Financial Services, a noisy pressure group focussed on ensuring that individual and small firms should be able to obtain a fair hearing, I was astonished to learn that the FSA was engaging a lobbying firm to ‘deal with your campaign for Sir Michael Richardson’. My informant was quite clear that the brief was to discredit and disgrace me. I appreciate that the FSA’s brief may have been misinterpreted, but even if it had been, what is a public body doing paying lobbyists?

I have some reason, I should add, to believe that the story was correct. Justice in Financial Services had some discussions with a number of leading City law firms about establishing a service for individuals whose actions might come under scrutiny. The big firms acted for the corporates, and as lawyers they were conscious that there was always going to be the potential for a conflict of interest between a corporate and its employee in any enforcement case as the FSA had power to inflict penalties on both. The law firms involved thought that

there would be benefit in JIFS running a service to support employees in obtaining their own advice from Barristers, using the direct access scheme. The employee would always have an independent barrister to give advice and if necessary appear before the Tribunal but there would be no need for extra solicitors. When this idea was discussed with the FSA, the FSA's response was immediate and unequivocal. It would strongly oppose any such arrangement and any law firm considering supporting Justice in Financial Services should consider the interest of its clients.

This is the mindset of the Stasi.

Part 2: the FSA and access to Parliament

There are stories that the FSA has on occasion told an individual that he may not go to his MP. If this has happened, it is not part of the current standard operating procedures of the FSA. If an actual case is identified, clearly a serious issue of Parliamentary Privilege arises. However, as a recent case shows, the FSA's standard procedure may not be substantially different from direct prohibition of contact with an MP. So an issue of privilege arises.

On 28th October 2010 the FSA demanded that a firm hand over documents and the director attend for interview. The firm was not authorised or regulated by the FSA – the FSA was pursuing an investigation into a possible breach of the General Prohibition. The firm that received the demand had a service contract with a firm that was selling land. The FSA advised the director to come with a lawyer but refused to cover the costs of a lawyer.

The director concerned went to see Counsel and was advised that the FSA had very great powers under FSMA. The courts would only interfere if the FSA exceeded them or failed to comply with some specific requirement. The director explained that if he complied with the FSA's demands his firm and indeed he himself would face almost certain ruin. Counsel observed that the FSA's paperwork was defective and that until the FSA put this right the director had grounds for not complying with the FSA's demands – but the FSA could easily put this right. Counsel suggested that the director approach his MP as the way the system should work is that the courts prevent a public body acting unlawfully but policy was really a matter for Parliament – and the starting point was the constituency Member.

On 11th November 2010 the director sent an email to the FSA making these points and asking that the FSA confirm that its prohibition on communication with third parties did not prevent him approaching his MP. On 12th November at 0925, the FSA replied, stating that he was able to approach his MP, but demanding that he hand over documents by 1700

When the FSA emails a constituent 'We are happy for you to consult with your MP at any time, however, we are not prepared to delay our investigation to permit you to do so' it is rather like a judge saying 'you are free to appeal the sentence of death but you hang at 8 o'clock tomorrow'

hours that day. The email contained these words: [Please note the deadline for your provision of information remains 5pm today.](#) Counsel was not immediately available to advise and this did not allow time to contact the MP. So the director replied by email timed at 1334 that the FSA's behaviour was outrageous. At 1422, the FSA gave time to consult counsel but wrote: [We are happy for you to consult with your MP at any time, however, we are not prepared to delay our investigation to permit you to do so.](#)

So although the FSA has not told an individual 'we forbid you from approaching your MP' – which would appear a clear breach of Privilege – its refusal to allow time for an MP to consider the case and approach the FSA or Ministers on behalf of a constituent has in practice the same effect as 'we forbid you from approaching your MP'. Arguably '[we are not prepared to delay our investigation to permit you to do so](#)' is a substantive breach of Privilege.

I would add that there is no obvious urgency in this case that might justify the FSA in acting before discussing the situation with the MP. A senior FSA official signed a document authorising the investigation of the firm in question in early September and the FSA did nothing for seven weeks.

MPs might consider that the FSA's conduct needs to be examined to determine whether a process clearly intended to render access to MPs ineffective is as much a breach of Privilege as a straightforward ban on approaching MPs.

Part 3: the RDR

The RDR is the retail distribution review. Most MPs' eyes glaze over – quite understandably – at the intricacies of FSA regulation. This is one reason why the FSA uses rather than English Martian as its working language (as one of its senior officials once foolishly admitted)– if FSA papers were translated into English, Parliament would have no difficulty in grasping what was going on and stopping it.

The original justification for regulation of advice and the rest of the distribution process was to protect honest savers from being made fools of. The Gower report – the charter document for regulation – was emphatic that regulators should not seek to protect fools from their folly.

Restructuring the entire retail end of the financial services sector is a long way from Gower's thinking. Although MPs who took an interest in the technicalities always understood that the FSA's actions would have an impact on the economics and structure of the industry, I do not think that anybody in the Committee that considered the Financial Service & Markets Bill thought that they were creating an authority that would re-shape the Financial Services Industry in the way in which successive ministers of health have re-shaped the NHS.

So the first question the House might to ask is whether this extraordinary use of powers granted for another purpose is proper.

The luckless Mark Hoban

Iain Macleod once rejected advice from his civil servants with the comment ‘I have no desire to be tarred and feathered in Palace Yard.’

One has instinctive sympathy for a junior minister forced to defend the actions of a creature of a previous administration – especially when the basic concept was so forcefully attacked by an exceptionally well qualified shadow chancellor in the person of Mr Peter Lilley. Dr Vincent Cable also voiced his concern over the danger to liberty. Such cogent opposition in the House sticks in the collective mind of MPs. Although over a decade has passed, thanks to Mr Lilley and Dr Cable, the Conservative and Liberal Democrat Parties share an instinctive distrust of the FSA.

The Macdonalds gaffe

Mr Hoban made his position worse by foolishly repeating a line the FSA had given him comparing IFAs with Macdonalds’ employees. This was a cheap gibe at many thousands of individuals who have collectively done a huge amount for their clients. No minister should have said this, and if a senior cabinet minister had done such a thing one might have expected a resignation. But Mr Hoban is an inexperienced junior minister and should be given an opportunity to redeem himself. If he apologises, he may be pleasantly surprised at how well that is received.

This is particularly so as the line was in fact fed to him by the FSA. The FSA knew exactly what it was doing – it manipulated a junior minister into voicing its contempt for part of the regulated community. The FSA has, as we have noted, expensive lobbyists. Lord Turner is primarily a politician who experienced the joys of belonging to all three major parties before attaching himself to Mr Brown who elevated him, recognising his usefulness. One wag on hearing of his title observed ‘If I need to translate ‘arse licking’ into Gaelic I’ll know where to look.’

Did Lord Turner actually approve of the Macdonalds jibe that has landed the unhappy Mark Hoban in it? Even if he did not, it tells us a good deal about the culture he has created that his subordinates should have thus manipulated a minister of the crown. The FSA’s mistake was to fail to appreciate the magnitude of the reforms that the Coalition – in the person of Sir George Young – has already made. Harriet Harman would have dismissed demands for a full debate with the contempt that would have won her the gratitude of the FSA. Natasha Engel and her colleagues on the Backbench Business Committee have reacted rather differently.

However one does have to question whether Mr Hoban either fully grasps what is at issue here – a fundamental question of justice – or whether he has the authority to persuade cabinet ministers of the magnitude of the reforms that have to be made to the regulatory system. It is greatly to be hoped that a cabinet minister will either reply to the debate or at least attend.

Justice

The RDR raises a number of difficult questions about what is the just thing to do. What is it that consumers are entitled to expect? What obligations are created? Do people have a right to earn their living in their chosen profession? How far should the state interfere? Good answers to these questions will almost always be susceptible to being prefaced with 'It is fair that...' or 'it is just that...'

There are competing accounts of justice. These were highly visible in earlier decades – major political arguments have developed from differing approaches to justice. For over 700 years England has accepted the decision of Parliament as to which of the competing claims should be enforced by law. Parliament may have been subservient at some times and dominant at others – but only Cromwell attempted to dispense with the form of enactment of laws by and with the consent of the Lords Spiritual and Temporal and the Commons in Parliament assembled and that experiment did not last long.

We now have a controversy over what is just – both for IFAs and consumers – and ultimately Parliament needs to decide.

Of course the protection of consumers is very important – and Adam Smith was entirely right in his belief that producers conspire to raise prices or otherwise disadvantage them. But producers have their rights as well – as Hobbes observed without law there would be no commerce because the fruits thereof would be uncertain; Adam Smith also observed that it is not to the benevolence of the butcher, baker and brewer that we owe our dinner but their self-interest.

In one sense, Parliament is necessary a champion of consumers – for if it did not provide a framework of law there would be no 'consumers' because there could be no commerce so nothing would be offered for them to consume. In another sense, it necessarily is a consumer champion, because it has to ensure that they are not exploited. But in exactly the same way that Parliament is the champion of consumers it must also be the champion of producers. For they need to know that they will be rewarded for their production.

If Parliament is to act as it should and secure the common good, it has to avoid championing one side against the other and ask what is just, what is true. If no consensus emerges then what the majority votes for in divisions will provide an answer – but of course not an infallible and certainly not a final answer as a future Parliament might reach a different decision on what the common good requires.

Mr Hoban or whoever replies to the debate needs to get to grips with this. Deciding the content of the Common Good cannot be delegated to the FSA. If a minister tries to defend the indefensible, he deserves to be tarred and feathered.

Consumer issues

In any system – market or statist or even a religious community – human beings will always be tempted to feather their own nests. The RDR is presented as addressing abuses in the financial services sector.

Nobody would deny that there are some problems – as is inevitable in a fallen world. Emails from IFAs that I have seen suggest that in the totality of advice, the number of IFAs abusing the system is small and the impact small. The Treasury Committee probed some of the evidence and this is probably the right way to approach the question. However it is important to recognise that if one asks IFAs' clients what they think they are in general very much more sympathetic than clients of banks. Also only a small part of FOS's work is taken up by complaints about IFAs that get to FOS and far lower proportion of complaints against IFAs are upheld than those made against banks.

The RDR is going to be expensive. Quite how expensive is again a matter of some argument (mainly because it is difficult to work out compliance costs that will fall on firms and ultimately consumers). One of the defence buffs will be able to tell the House what defence capability that money would pay for – which would be a way of putting the RDR into perspective.

A second argument – one that appear to have been produced rather late in the day, perhaps because the argument based commission bias is looking weak – is that the RDR will reduce the costs charged back to investors. There is a problem in this area in that charges are dangerously high especially on low risk, low return products, but it is quite hard to see how the RDR contributes – except perhaps by making it worse.

Without the information needed for a full analysis it is impossible to be sure but the IFAs seem to have made a reasonable case for questioning whether the RDR will benefit consumers.

A bias towards the rich

The RDR will undoubtedly have the effect of skewing the provision of independent advice towards the well off. The banks will be given a clear run at the rest of the country – and the FSA is going to allow less well qualified bank advisers to be incentivised to push bank products with a state backed consumer education body trying to fill any gap created by the withdrawal of IFA advice.

One might defend such an approach by arguments similar to those used by the Labour Party to defend universal child benefit etc. This is not a ridiculous approach and the legislation needed to implement it was nodded through in the wash up.

Does Parliament want a state within a state to operate a social policy that protects the rich but leaves the rest of us dependent on banks that have captured the state within a state?

But it does not sit very well with the Coalition's approach and in particular the 'Big Society'. The project is being financed by the FSA's tax raising powers. It has thus avoided the scrutiny that has been applied to that part of state spending funded by taxes raised under Finance Acts.

The right to pursue one's profession

IFAs have argued that the RDR conflicts with a right to pursue one's profession. Both the English and Scottish courts have upheld such a general right, and Article 1 of Protocol 1 of the European Convention on Human Rights incorporates such a right.

The FSA's argument appears to be that it is essential to raise the level of tested knowledge. If the FSA can sustain its case, the IFAs' argument is weakened. But in a free society it is surely necessary that the FSA make its case and under a parliamentary constitution the FSA should not be allowed by *fiat* to force many thousands of our fellow citizens to abandon their livelihood. If this were being done by Order subject to Negative Resolution, the debate on the 29th November would doubtless lead to a vote to annul the Order.

There are two additional points that greatly weaken the FSA case:

1. It is not imposing high level requirements on advisers employed by bank and other institutions. It seems quite acceptable to the FSA that 'ordinary people' get advised by individuals who lack the qualifications needed to advise those who live in the wealthy social milieu populated by senior IFA staff.
2. The FSA has introduced rules (which of course it does without any opportunity for either House to object) that effectively prevent IFAs acting as GPs do when they refer a patient to a specialist and referring clients to specialist advisers who understand complex or risky products. If an introduction is made, the FSA requires the specialist effectively to repeat much work done by the introducing IFA rather than allow the introducer IFA to give the basic facts about the client to the specialist. If the FSA had more sensible rules on introducing or referring clients the need for every IFA to have specialist qualifications would evaporate. We might wonder whether – given the limits of the human brain – it is sensible to try to create a cadre of super-specialists capable of advising on everything. If your GP thought you might have cancer or a heart problem would you prefer treatment by the GP or a specialist in one discipline?

The explosion of rage over the RDR shows why root and branch reform of financial regulation is essential, with the restoration of Parliamentary control a priority.

Part 4: The FSA's power grab

The regulators have used the FSMA to acquire powers that the various committees that scrutinised the legislation never contemplated. The regulators have also been skilful in getting round the main constraints that Parliament imposed – the right to have a full

hearing of any enforcement case before an independent tribunal without being at risk of being ordered to pay costs and an apparently fair process before the Financial Ombudsman Service to resolve consumer complaints.

FOS disregards Parliament

This Committee was promised that if either side to a dispute over advice or some other similar matter asked, the FOS would hold a public hearing at which evidence would be taken and witnesses cross-examined. This is exactly what happens in the small claims court or an employment tribunal. On 30 November 1999 Miss Melanie Johnson MP, Economic Secretary to the Treasury, said to the House of Commons committee considering the Financial Services and Markets Bill in relation to a proposed amendments to what has now become section 228 and Schedule 17 of the Act,

The FOS has treated with contempt the assurances given to the Commons Standing Committee that considered the Financial Services & Markets Bill.

It is perfectly possible to operate the [FOS] scheme effectively while also protecting the parties' ECHR rights. Firms and complainants that bring disputes to the ombudsman will be able to exercise their right to a fair and public hearing. ... Article 6(1) stipulates that in the determination of civil rights and obligations, everyone is entitled to a fair and public hearing by an independent and impartial tribunal. The scheme will provide for a hearing to be held if one is requested by a party to the complaint. We do not believe that the scheme will be legalistic. We expect the right to a fair hearing to be exercised frequently.

The reality, however, is that FOS hardly ever permits an oral hearing. This was revealed by Mr Tony Boorman, FOS Principal Ombudsman and Decisions Director at a seminar convened by the Council on Tribunals on the subject "The Use and Value of Oral Hearings in the Administrative Justice System" He said that FOS would allow a hearing in only 1 out of 10,000 cases. The report records him saying:-

What about hearings? Because processes are so flexible oral hearings can be held, but chances are very slim. Only 1 oral hearing for every 10,000 cases.

In what circumstances? A hearing, though exceptional, would be held if it was thought that a case would be particularly hard fought. In some circumstances it might be better for the FOS to have a hearing in-house as opposed to letting the matter go on judicial review to the Administrative Court.

May also decide, off own bat, that a hearing would assist with identifying facts of case or making a judgment about the reliability of the evidence that is being presented.

Until the advent of the Backbench Business Committee and the other Wright reforms creatures like Boorman could get away with casual disregard for what Parliament was promised. Having got their legislation, they could behave like some tinpot dictator.

FSMA expressly provides that FOS awards that have been recorded in a register are enforceable by a simple court procedure. But this is what Lord Justice Rix said in an Appeal Court judgment:

Finally, I would like to say something about the matter of the FOS “register”. This has been the subject of written submissions, but has not figured in oral argument, no doubt because the parties appreciated that it would not affect the outcome of this appeal. Nevertheless, it remains the case that the Act’s Schedule 17, at para 16, in providing for the enforcement of an ombudsman’s money award in the county courts of England and Wales and by similar means in Northern Ireland and Scotland speaks of such an award “which has been registered in accordance with scheme rules”. Thus it is a statutory requirement that the scheme rules provide for the registration of money awards. Accordingly, DISP 3.9.15 R requires the Ombudsman to keep a register: “The *Ombudsman* must maintain a register of each money award and direction made.” In referring to directions, the scheme rules go beyond the statute. FOS seeks to comply with its rule by keeping an internal data base. It is not available to public inspection. I have my doubts as to whether such an internal data base amounts to a “register” properly so called. A register is an official list or record. It may be that it can be kept in any form, but I suspect that it needs to be open to public inspection. Since we have not heard oral argument on this matter, I merely refer to this point in passing. (Emphasis added).

Appeal Court Judges do not place such comments on record unless they believe that something needs to be said. . So here we have clear evidence that FOS is not doing what Parliament required.

And, we may add, who benefits from this act of defiance by FOS? Why, our old friends the banks. Any register would be a damning record of their appalling record in failing properly to deal with complaints. It is clearly more important for FOS and the FSA – which is the master of FOS and has admitted such publicly – to protect bankers than it is to obey the law. Of course Parliament does not have generous, well paid jobs with large expense accounts to offer those who run the FSA and FOS when they move on. A mischievous thought – perhaps the pensions of employees of the FSA and FOS should be covered by the Treasury but only after each pension was approved by Affirmative Resolution of both Houses.

Misuse of Section 166

Section 166 of the Act provides that the FSA can require a firm to appoint a skilled person to provide a report. In principle this seems a very good idea – much better to give firms a helping hand than punish them.

Unfortunately Section 166 has been abused. Lawyers acting for firms are very concerned that the FSA has decided to force firms to pay a large sum for a S166 report rather than seek to impose a fine. This avoids the inconvenience for the FSA of having to allow the firm to present a defence to an independent tribunal. A S166 requirement can only be challenged by judicial review. We are talking about sums of up to £100,000.

The FSA is also on occasion using the S166 procedure as a substitute for appointing investigators under its enforcement powers. In some S166 notices the FSA requires the skilled person to discuss progress with it – despite the fact that the report is for the firm and paid for by the firm. On one notice, the FSA required firms being put forward to meet an FSA employee for interview. It is of course reasonable for the FSA to check that a skilled person is indeed skilled. It is improper for the FSA to seek to appoint a skilled person that will write the report the FSA wants.

Further evidence that the FSA is misusing the process arises from – I accept – largely anecdotal evidence that when skilled persons submit reports that contain conclusions the FSA did not want (e.g. this firm is giving suitable advice to its clients) the FSA responds by rubbishing the report.

There is also evidence that the FSA will require firms to appoint consultancies employing former FSA staff even though those consultancies have taken no steps to scope the project in preference to firms that do not employ former FSA staff and have scoped the project. When the scoping reveals that FSA supervision staff have made serious allegations but that there is no obvious evidence to support them, this suggests not so much corruption as a Stasi like system at work.

This misbehaviour seems to be confined to one part of the FSA, supervision. There is anecdotal evidence that supervisory staff have passed over cases where skilled persons have disagreed with them to the enforcement division, the enforcement division has been less than impressed with the allegation made by the colleagues in supervision. In which case we may also be looking at a turf war between the enforcement teams and supervision.

The investigative process

The FSA has powers to investigate anyone – not just regulated firms and approved persons.

The relevant sections of FSMA are very clumsily drafted – section 177 in particular is very odd. It was probably intended to protect third parties compelled to give evidence from having something they said under compulsion when the FSA was investigating somebody else used in a prosecution (e.g. being an accessory to, say, money laundering) against them. This would have been a perfectly sensible provision to include. The section also seems to have been intended to allow somebody who lies still to be prosecuted but only for that. But what is actually achieved is to make it impossible to produce anything that is said in an

interview to support a prosecution for telling lie in that interview. This is bizarre and one can only assume the drafting is at fault.

More worryingly, it seems that Parliament intended that before launching an investigation into a third party the FSA (which means a senior member of staff) had to sign off a memorandum showing a reason for the investigation. I have seen some memoranda but none of them actually show any sort of reason – they just repeat twice a statement that the FSA believes there may have been a breach of a long list of provisions.

These powers are heavy powers – individuals outside the regulated system can be forced to incur heavy costs (city lawyers have charges over £7500 for support for an interview lasting 3 hours) and may be asked to do something (e.g. hand over confidential papers) that will lead to the destruction of their livelihood because a client will sack them for complying with the FSA.

Any reasonable person will accept that this is a tricky area and most (although not all) FSA personnel working in this area are sensitive to the potential problems use of their powers might cause innocent individuals. One difficulty is that competitors make allegations that are false – not always maliciously – and the FSA feels it has to investigate.

The expansion of FSA investigations to cover property sales in particular adds greatly to the need for investigative powers to be subject to proper control. There must be some mechanism for independent review of a demand that might destroy an individual's livelihood before that individual is compelled to comply – obviously subject to some mechanism to allow the FSA to act very quickly if it can show reason.

I include this matter because it is a case in this area that gave rise to the section 2 – the FSA denying access to Parliament.