29/05

Mr. David Lowe
Head of the Secretariat of the Committee on Petitions,
European Parliament
B-1047 Brussels.

Paul Braithwaite,
Secretary to EMAG,
42 Bartholomew Villas
Kentish Town
London NW5 2LL
United Kingdom

6 December 2004

Subject: Petition in respect of the failure of the UK government member state to take responsibility for the full implementation of the Life and non Life Insurance directives, in particular in relation to the regulation of Equitable Life.

Dear Mr Lowe,

As General Secretary of EMAG I am empowered to deliver to you this petition on behalf of EMAG, for the attention of the Committee on Petitions of the European Parliament.

I declare that my principal occupation is as Company Director, that my nationality is British, that my place of residence is as stated at the head of this page.

Yours Sincerely,

P W Braithwaite
7 December 2004

Paul Braithwaite,

for Equitable Members Action Group (EMAG)

1 Introduction

This petition makes reference to the acts of the European Parliament introduced to implement European objectives, and, in particular to the insurance "life" (and "non life") directives.

It particularly points out and highlights the following events and facts:

1. The UK government failed to take the steps required by the European life insurance directives to achieve a required minimum standard of supervision. The UK government allowed and encouraged insurers with their head office in the UK to take advantage of the freedom for trade granted by the presumed implementation of such required standards by all member states;

2. European directives waived any requirement for local regulation of insurance sales when insurance business was placed with a company having its head office in another member state. The waiver assumed that the required European standard of supervision was being applied by the competent authorities in the state of the head office.

3. The UK regulator undermined the single European market in insurance by allowing attractive returns to be offered across Europe by insurance companies with their head offices in the UK under UK–specific legal provisions. This action could not have been permitted if a system of regulation in accordance with the European directives been applied by the UK government.

4. European purchasers of products and services emanating from the UK were not informed that the UK government had not implemented supervisory measures in accordance with the articles of the Third Life directive. But the UK government had failed to organise a proper regulatory regime. Unknown to the investing public, the system used was one that the UK government itself described as a "light touch" regulatory system.

5. Consequential losses occurred when one such UK insurance company, Equitable Life, suddenly revealed its financial weakness. The financial weakness had built up and been hidden by its "lightly regulated" business practice.

6. The competent UK authorities approved of the concealment by Equitable Life of the financial information which would have allowed policyholders and

prospective policyholders to assess for themselves the soundness of the attractive returns being offered by the company.

7. A UK judicial enquiry (The Penrose Report) revealed in March 2004 that the UK government had not been applying strict regulatory control as required by the insurance directives.

8. A large number of elderly Europeans have seen their provisions for retirement ruined by the consequences of the failure of the UK regulator. There are significant numbers of such casualties in Germany, France, Belgium, Spain, and Ireland, all living outside the UK.

9. Forensic accountancy studies showed that the insurance company in question had been able to offer attractive benefits by voting unjustified levels of bonus, unsupported by permissible assets.

10. The UK government body responsible for supervision (HM Treasury) announced to the UK Parliament that it considered that the UK regulatory system, "the system that Ministers and Parliament had intended", had failed. In discussing this fact, it made no reference to required standards under European directives. But the same Parliament had passed local acts, believing them to be in accordance with the European directives.

11. UK legislation in respect of insurance regulation did not give full effect to European law. In particular, the amendments giving effect to the Third Life Directive limited their application to companies carrying on business in the UK. For policyholders outside the UK, e.g. in Germany or Ireland the only feasible route to gaining their rights under European law is to appeal directly to European institutions. The number of such policyholders could be 100,000.

12. UK residents are able to complain to the UK Parliamentary Ombudsman about the failure to regulate in accordance with UK law. Under the Third Life Directive policyholders in other member states must also seek redress from the UK regulator for their losses as policyholders of Equitable Life. But, according to the ombudsman's office **[PO3]** they have no access to the UK Parliamentary Ombudsman. Their only feasible path is to appeal to the European institutions to obtain redress for failures to conform to national implementation of European law. The number of such policyholders could be 100,000.

13. The policyholders suffered prejudice as a result of the inadequate supervisory activities compared with the requirements of the European directives. But the UK government has failed to take the remedial action specified in the Third Life Directive and in European law for those prejudices.

14. The UK government executive refused to acknowledge any regulatory failure other than that "the system had failed", despite the results of judicial and expert studies indicating regulatory failure.

15. The UK regulator supplied incorrect information to the German regulator.

16. Several active policyholder groups across Europe have taken or are taking legal action against the remaining common fund of the Equitable Life as they cannot afford the cost of taking the UK government to court. Because Equitable Life is a mutual organisation these actions harm the remaining policyholders, many of them retired annuitants.

17. Damage has been caused to the European pensions and insurance business through loss of confidence in such services. There is a danger of increasing losses as litigation increases.

18. The ECJ ruled on 19 November 1991 in the case of Francovich, Bonifaci and others v. Italian Republic *"that the principle whereby a State must be liable for loss and damage caused to individuals by breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty."*

19. European parliamentary intervention is needed to remedy the situation.

The petitioners ask the European Parliament to examine the facts, and then to come to the aid of injured policyholders, ex-policyholders and annuitants across Europe. They ask the European Parliament to ensure that European law is upheld, even in the face of the unwillingness of a member state to make full implementation. They ask for action which will cause the UK government to make good the losses caused by its failure to conform to European laws and standards of supervision in the regulation of the Equitable Life Assurance Society.

This petition has been written by EMAG, the Equitable Members' Action Group, in the name of European policyholders, past and present, who have suffered as the result of the lack of adequate regulation.

2 Status of the petitioner, EMAG

EMAG (Equitable Members Action group) is an association of responsible European citizens representing the interests of ALL Equitable Life policyholders – present and past. It was formed more than four years ago, in August 2000, when policyholders first received information on the poor financial state of Equitable Life.

It has commissioned numerous expert reports on the failure in regulation and has provided those reports to UK government investigators. Its work has been referenced in the official journal of the proceedings of the UK Parliament (see section 9 below) and cited extensively by the UK Parliamentary Ombudsman **(PO2)**.

It is supported by voluntary subscription by over 11,000 members.

It has a web site at http:// www.emag.org.uk. The web site is updated weekly. For four years it has been a consistent source of in–depth, balanced and comprehensive information for policyholders throughout Europe.

3 Overview of the facts

(A list of abbreviations used in the petition, with explanations, is provided at the end.)

3.1 The European Union and its objectives

A prime reason for the establishment of the European Union was to remove restrictions on trade throughout Europe.

These restrictions were reduced and often removed by simplification and standardisation of trade administration.

The objective was to increase cross–border trade, economic activity, and employment, while maintaining consumer protection.

A further consideration for the European Parliament in its directives was the objective of the protection of pensioners, the elderly, and disabled.

3.2 Relation of the Life and non Life directives to objectives.

These directives progressively implemented the objectives of the European Union.

They created European convergence of the supervision of life and non life insurance business practice. The First Life directive was issued by the European Parliament in 1979.

In accordance with these legal instructions, the UK government implemented each of the Life and Non Life directives into national law within the prescribed periods, in common with other member states. For the Third life directive, it chose the method of amending existing legislation, leaving certain existing UK–specific provisions in force.

By 1992 the Third Life directive introduced sufficiently strict supervision that it was considered safe by the European Parliament to permit cross border trade without the need for additional national regulation. It was sufficient for a national regulator to advise his counterparts that an insurance company, with head office in his territory was now operating in the local regulator member state.

This freedom of trade was termed "passporting" and regulation was assigned to the member state which held the head office of the insurance business in question.

The rules for supervision of life insurance companies within the 1992 Third Life directive were strict. It was required that each member state's supervisory authority would implement a corresponding level of regulatory control, thus creating a "level playing field" for open business competition.

To reduce trade administration, local regulators therefore accepted that they should not additionally regulate business emanating from other member states.

The safeguard for consumers offered by the Third Life directive requires that policyholders would be informed at every stage of the life of their policy of the options and benefits due. But consumers are not expected to act as financial regulators. The responsibility for ensuring financial soundness of companies offering long–term life and pensions insurance was placed clearly with the regulator in the state of the head office. Each member state is additionally required to prevent or remedy any irregularities prejudicial to policyholders by a company whose head office was in that member state.

3.3 The use of 'passporting' – viz the freedom of European trading – by the UK member state.

The UK government took advantage of the 1992 directive's freedom to trade. It permitted insurance companies with their head office in the UK to market their services throughout Europe.

One such company was "The Equitable Life Assurance Society" (Equitable Life), a large mutual assurance company, which had sold life insurance, investment policies, and

pensions previously in the UK and now started sales throughout Europe from 1993. The bulk (80%) of its business was related to pension provision.

Throughout the 1990s Equitable Life reported attractive returns on its policies, stating that it had a lower cost structure and better investment management than its competitors. It made clear in its publicity material that it was fully regulated by the successive UK regulatory bodies. This gave a sense of security and propriety to European consumers.

The company was very successful and opened offices and companies in Ireland and Germany. It also marketed extensively throughout Europe from its UK Guernsey branch (which served simply as a contact point for business from outside the UK undertaken within the UK).

It had more than 1 million policyholders throughout Europe, with investments totalling £33,000 million at the time of closure of the fund to new business in December 2000. There were around 70,000 policyholders outside the UK, many of them in Germany and Ireland, where Equitable Life had established companies, and in other member states of the EU.

Its customers covered a wide spectrum of client types and its policies were often used as a part of a planned pension provision by Europeans, in particular in Germany and Ireland, as well as in the UK.

3.4 The development of Equitable Life's business.

Between 1956 and 2000, Equitable Life issued a large number of "with profits" policies.

"With profits" policies were specific to the UK insurance market. They were sold on the basis that the insurance company declared annual bonuses but retained some of its profits each year. The retained profits enabled additional non–guaranteed "terminal" bonuses to be paid. Extra assets could be accumulated in the years of good returns to allow the terminal bonuses to be paid even in years when there had been poor returns. This practise was termed "smoothing". The returns to policyholders could be greater than the original commitment even in poor years as the "smoothing fund" would support payment of terminal bonuses. Under this system much of the policyholders returns were at the discretion of the company. For this reason, UK law since 1973, renewed in 1982, had protected the policyholders' reasonable expectations (PRE) of returns on their policies. UK law granted the regulator far–reaching powers of intervention to protect PRE.

The flexibility of the "with–profits" approach and the belief that expected returns were protected by the regulators under UK law were attractive to prospective policyholders throughout Europe. The flexibility and good prospects contrasted with the fact that the original commitment was usually only a subsidiary part of the return on a policy when

held for a long term. The protection of PRE under UK law bridged the gap between commitment and prospects for long–term business.

"Equitable Life" strenuously exploited the gap between commitment and return. It even offered "with–profits annuities" to retiring policyholders. These annuities offered a declining (guaranteed) commitment but appeared to have good prospects of returning an increasing annuity. The good prospects were justified by the fact that equities formed the most significant part of the assets held by the "with–profits" fund of the company. Annuities cannot be moved from one company to another. Therefore those who took out such annuities are now locked into the company.

The policies issued between 1956 and 1988 provided an option of receiving a fixed guaranteed annuity rate at termination (latterly at a rate based upon a discount rate of 7%). These were termed "GAR" policies.

Policies issued after 1988 did not benefit from a guaranteed annuity rate. Nevertheless their assets were pooled with those of the GAR policies, so that, unknown to all new policyholders after 1988, they took on the interest rate risk of the GAR policies.

After 1988 Equitable Life communicated to each individual policyholder annually the accrued terminal bonus on their policy. Equitable Life, alone among UK insurance companies, provided annual statements of policy value including accrued terminal bonus. These amounts corresponded to what was being paid out to maturing policies. The steady annual communication of increasing policy values and the correspondence of those values with what was actually paid to maturing policies established clear expectations in the minds of the policyholders. The policyholders expected that the stated policy values were supported by real assets. They had the right to expect that those assets would be managed prudently and competently.

In 1992, just prior to the implementation of the Third Life directive, current annuity rates fell below the level of the GAR guarantee. This meant that the company had a growing future GAR claim on its bonuses.

Equitable Life, like other UK long–term insurers, had to make extensive annual returns to the regulator. These returns were theoretically available to the consumer. But they were not documents that consumers could be expected to be able to assess. Even the UK regulator failed to detect some of the unwise accounting practices of Equitable Life from its regulatory returns. From 1990 to the present these regulatory returns showed that Equitable Life was not holding any assets as cover for the terminal bonuses which it was announcing to all policy holders. The policyholders had a right to expect that the total of the policy values declared to them would be covered by assets. But the total of policy values almost always exceeded the assets of the company throughout the 1990s, once by as much as 28%.

Equitable Life had told its policyholders that it was allocating bonuses on the basis of

smoothed investment returns. But Equitable Life's approach to smoothing of returns was unsound, and mostly consisted of offering terminal bonuses for which there was inadequate support from admissible assets. During the 1990s the smoothing fund was always in deficit.

This business model, and its deficiencies, were known, or should have been known, to the UK regulator, since they were central to an appreciation of the financial soundness of Equitable Life.

3.5 Developments since the Third Life directive.

The company continued to market its services and expanded into Europe.

Neither Equitable Life nor the UK regulator made any effort to inform existing or prospective policyholders of the deficit of assets in respect of the existing policies and their accrued terminal bonuses. The policyholders were not told that the smoothing approach was unsound. Further, at no time did Equitable Life inform new policyholders that it had made no provision for future GAR claims. The new policyholders had no idea that they were taking on a substantial interest rate risk arising from pre–1988 policies. All this was known, or should have been known to the UK regulator. Instead Equitable Life boosted the confidence of policyholders and prospective policyholders by paying out excessive bonuses. The UK regulatory system did nothing to stop the company paying out excessive returns to maturing policies throughout the 1990s.

Further, the company boosted its claimed asset base in regulatory returns by adopting a practice superficially similar to Zillmerisation. But most of its business was not appropriate for Zillmerisation. Most of the business was not in the form of committed future premiums, but rather in the form of discretionary investment at the policyholder's choice. The UK regulators failed to discover this for many years, until this bogus assets came close to £1 billion.

At the same time the company also increased its asset base in regulatory returns by including as assets future profits implicit in its expansion throughout Europe. The company was voting bonuses in excess of its returns. Therefore these future profits could only have been gained at the expense of policyholders' reasonable expectations of return, which were protected under UK law. The UK regulator repeatedly approved this use of future profits as implicit assets which disguised the financial unsoundness of the company.

In 1999 the company finally used a financial reassurance agreement to augment its assets. Although the terms only offered a loan with maximum balance of £100 million, and although the loan had to be recovered from future profits, the UK regulator allowed a huge sum, over £800 million, to be added to the regulatory assets as a result. After the

closure of the company, the UK regulator admitted that it had made an error in allowing this false asset. Unfortunately, the regulators' error had the effect of disguising the financial unsoundness of the company from the policyholders and prospective policyholders.

The company argued to the UK regulator that it could avoid the interest rate risk attaching to the GAR policies by reducing terminal bonuses to holders of maturing GAR policies. This assumption was finally challenged in the UK courts and, in July 2000, found by the House of Lords to be contrary to the contractual terms of the GAR policies and illegal.

The company therefore had to pay the promised GAR with full terminal bonuses. As it had insufficient surplus assets, it immediately put itself up for sale. The UK regulator incorrectly believed that there was a 99.9% certainty that the company could be sold as a going concern. It allowed the company to continue to advertise and make sales of new policies, paying new premiums into the same with–profits fund.

To maintain business confidence and continue to make sales in Europe outside the UK at a time of growing disquiet in the UK, the company even made press statements that European business outside of the UK bore none of the UK liabilities. This statement later proved to be untrue. In July 2001 Equitable Life sent letters to all policyholders across Europe informing them of the 16% reduction in their overall policy values. It attributed them misleadingly to stock market falls and to a thing called "GAR". Most European policyholders had never heard the term "GAR" before.

The failure to find any buyer for the company indicated with startling clarity the financial unsoundness of the company, the laxity and lack of grip of the UK regulator and the danger to policyholders.

The company was forced to close to new business on 8 December 2000, and to divest itself of its physical assets, administrative systems and sales force, and to make arrangements for the continuation of its administration of policies on grossly unfavourable terms.

After closure to new business, in May 2000, the company commissioned a comprehensive financial review, never released to policyholders (despite repeated requests). As a result of the review, on 16 July 2001 the company declared an across–the–board cut of 16% of the TOTAL value of all pension policies . (At the time an equivalent reduction over a very extended period was made for the annuitants, but this has since been withdrawn in favour of even larger immediate and continuing cuts to their with–profits annuities.)

It was plainly inequitable to cut the values of all policies, new and old, at the same percentage. Many thousands of complaints were made to the UK regulatory authorities.

Furthermore, it was contrary to the protection of policyholders' expectations given under UK law, and used as part of the "with–profits" selling approach.

This large reduction was even made to the capital investments of those European policyholders who had made purchases after the implementation of the Third Life directive under the terms of "passporting". Indeed this reduction was made even to policyholders who had only recently invested in the company, so that they were unable to withdraw their capital investment without substantial loss. Additional "market value adjustments" have been imposed since December 2000, to increase the losses on withdrawal by, on average, a further 10%.

The absence of adequate assets completely altered the prospects of the "with–profits annuitants". The company was forced to transfer its fund to low–risk bonds to ensure that even its minimal commitments could be met. There was no provision for the annuitants' expectation that they were investing in an equity fund, with its prospects of long–term growth. Since September 2003, the "with–profits" fund has held less than 3% in equities with no prospect of that percentage rising. As a result, tens of thousands of European pensioners have already experienced cuts in 2003/4 in excess of 30% in their annuities. They face further declining income according to the weakness of the commitment associated with their policies. Without restitution they have no chance of seeing their reasonable expectations realised.

The policyholders set their expectations according to the sales material and regular communications that they received from the company. The policyholders believed that their expectations were protected by UK law, since additional national provisions are permissible according to the Third Life Directive. The company took advantage of the "passporting" offered by the Third Life Directive to sell these expectations, but the UK government failed to apply the standard of regulation which the Third Life Directive requires.

3.6 Subsequent official investigations

Since the collapse of the company there has been continuing outrage and demand from the policyholders for explanation and redress. At the same time, the wider loss of confidence in the savings industry has contributed to stock market declines and reluctance to invest and save.

There have been three official investigations into the collapse of Equitable Life in the UK: the Baird report by the FSA, the Penrose report by senior judge Lord Penrose, and an investigation by the Parliamentary Ombudsman. A further investigation by the Parliamentary Ombudsman is starting at the present time.

The current regulator (FSA) made its own investigation (Baird report) in October 2001.

Baird found weaknesses in the regulatory process but failed to consider the long-standing financial unsoundness of the company. This investigation only covered the 23 month period from 1st January 1999 to 8 December 2000.

An investigation by the UK Parliamentary Ombudsman into exactly the same short period of regulation before the closure of the company claimed that the UK system "did not allow for the kinds of intervention that the complainants claimed should have happened". This conclusion ignores the fact that UK law provided the regulator with wide powers of intervention to protect the reasonable expectations of the policyholders. The investigation found that there had been no maladministration. But the report of the investigation revealed a great deal of evidence of regulatory failure. The investigation revealed that the UK regulator had no coherent method for the implementation of the UK–specific protections offered to policyholders. It reported that the deficit of admissible assets as against the terminal bonuses voted by the company "did not cause concern" to the regulator's actuarial experts in the Government Actuary's Department (GAD). In this investigation the Parliamentary Ombudsman was not able to investigate the actions of GAD, nor of the "conduct of business" regulator, the Personal Investment Authority (PIA).

The Ombudsman's report was packed with evidence, but poorly thought out and not well argued. It came to be seen by policyholders and Members of Parliament as highly unsatisfactory.

The Parliamentary Ombudsman is an officer of the UK House of Commons. The ombudsman can only investigate maladministration on the basis of a complaint forward by a UK Member of Parliament. EU citizens outside the UK, having no representation in the UK Parliament, have no access to this channel for inquiry and redress.

In August 2001, the UK Treasury commissioned a definitive, very broad investigation by senior Judge Lord Penrose. The terms of reference of this report asked for an authoritative account of what had happened and for the lessons to be learned. It did not invite any assessment of wrong–doing. Lord Penrose's extensive and authoritative report revealed that the company had been financially unsound for many years. It showed that the UK regulator had been aware of the lack of asset cover for the voted terminal bonuses over a long period. It also showed that the regulator had not taken action on this information. Further, the information had been concealed from policyholders. The report revealed that the company had had no coherent approach to smoothing of profits. Instead it had voted bonuses in excess of admissible assets, changing the assumed discount rate as needed to produce the desired results. Equitable Life was able to do this because of the "light touch" which the UK regulator applied to the UK–specific legal protection of expectations. Commenting on the report, a Treasury minister told the UK Parliament that the collapse was the result of "the system that Ministers and Parliament intended". (This remark concealed the difference between the legal acts of a Parliament and the possibly illegal or maladministrative instructions of Ministers). As a consequence no

redress or remedy was offered. Indeed the Minister cynically invited policyholders to bring legal or official complaints against the remaining common fund of the company, which is a mutual organisation.

Following Lord Penrose's revelations, the UK Parliamentary Ombudsman gave further consideration to the question of a new investigation. Under strong pressure from individual Members of the UK Parliament, from EMAG and from policyholders past and present, she decided to carry out another and more far–reaching investigation. This second investigation by the Parliamentary Ombudsman is starting at the present time. It is not expected to report for at least one more year. The UK government has given no commitment to give act upon the recommendations or to accept the conclusions.

The Parliamentary Ombudsman's office is of the preliminary opinion that their investigation cannot cover policyholders who bought their policies from Equitable Life operations in Germany, Ireland, or the Channel Islands. It may even not cover those who bought policies in the UK but are currently resident outside the UK. Further, the Parliamentary Ombudsman cannot consider the extent to which UK legislation complied with EU directives. The Parliamentary Ombudsman has the power to investigate maladministration in government, but has no power to investigate the self–regulatory organisations of the financial services industry such as the PIA. Because of these limits, important aspects of the policyholders' complaint against the UK regulators cannot be considered by the new investigation. In particular, the important issue of claims made at the time of sale of new policies is regarded as a "conduct of business" regulatory responsibility. It is therefore explicitly outside of the Parliamentary Ombudsman's new study.

Over three years have passed since the substantial cuts to policyholder's funds in July 2001. No redress has been made. A large group of European policyholders and pensioners has seen their incomes and prospects severely damaged by the Equitable Life collapse. As yet, there is no prospect of UK government acknowledgement of what happened, much less of redress.

3.7 Investigations by Policyholders

EMAG has commissioned a series of studies by experts.

The eminent academic and expert on pensions, Professor David Blake, was commissioned to write two reports. He characterised the Equitable Life's business as "a Ponzi fund", meaning that unsustainable pyramid–style benefits were being given to maturing policies at the expense of remaining policyholders. He also showed that the effect of the company's guaranteed investment returns (GIRs) to 75% of policyholders would prevent a return to growth of the pooled fund.

Accountants Burgess Hodgson **(BH1, BH2)** provided an analysis of the financial soundness of Equitable Life from the material available in the public record, and showed that the company must have been unsound for many years. Indeed, at the start of the 1990s the excess of voted terminal bonuses over admissible assets reached 28%! The conclusions of this report were entirely vindicated by material released from the company's private "office valuation reports" by Lord Penrose one year later, and also by material reported to the UK Courts in preliminary hearings of the case between the company and its auditors.

Burgess Hodgson has also produced for EMAG a report showing the distribution of losses and recommending a fair approach to redress.

4 The Standard of the Third Life Directive of 1992.

In order to ensure an equal level of supervision across all European member states, each state had to implement the following level of supervision according to the directive:

i. Adequate protection of policyholders;

ii. Powers and means to enable the competent authorities to make detailed enquiries regarding the undertaking's situation and the whole of its business, inter alia by gathering information or requiring the submission of documents concerning its assurance business;

iii. Application of European standards of regulation to all aspects of the legal protection, both Europe–wide and specific to the state of the head office, which were offered to policyholders in the single European market;

iv. On–site inspections adequate to understand the position of the company and verify regulatory returns;

v. Thorough checks on the financial soundness of the company;

vi. Rigorous control of the use of implicit profits to boost regulatory assets;

vii. Rigorous checks on the valuation of all claimed assets;

viii. Supervision to ensure that policyholders were fully informed at each stage of the life of their policies;

ix. Vetting of directors to ensure they were capable in their function;

x. Holding directors accountable in court, if necessary, for their management;

xi. Supplying information to competent authorities in the member state of the commitment,

xii. A system of remedy for any prejudice to policyholders

5. The Failure of UK Regulation Against the European Standard

According to the report of Lord Penrose, and to forensic studies undertaken by EMAG, there were major failings in supervisory function over at least the decade before the closure of the company to new business. The company had consistently voted terminal bonuses in excess of its admissible assets. Lord Penrose says:
(Penrose Chap. 19 para. 49) "By disregarding accrued terminal bonus, the Society was able to over–allocate bonus beyond its available assets at market value, and in particular to make payments on claims that exceeded the relative available assets at the time."
(Penrose Chap 6 para 89) "The effect of the adjustments of July 2001 was to impose on the current participators in the with–profits fund a charge that reflected part of the Society's history of over–allocation between 1987 and July 2001 as well as the residual over–allocation implicit in the policy values of in–force business".
(Penrose Chap. 19 para 58) "The excess of policy values over assets increased until, at 31 December 2000, the un–funded portion of aggregate policy values was about £3billion, of which £1.8billion had crystallised and been lost to the fund through claims. The decision in *Hyman* [the court case in which GAR policyholders were awarded their guaranteed rate on the full sum produced by their premiums and accrued final bonuses], and the additional liability of £1.5billion on top of that erosion of fund value through over–allocation and over–payment made future independence impossible. The attempted sale was inevitable thereafter."
(Penrose Chap. 19 para. 62) "Apart from the absence of a consistently expressed and coherently followed smoothing policy ..... it is hard to reconcile what the inquiry has found with any credible approach to smoothing. ... The Society's pattern of 'smoothing across the peaks' (to borrow Headdon's phrase) did not represent, and could not have represented, a credible approach to smoothing for a mutual espousing the principles the Society did."

(Penrose Chap. 19 para. 82) "The Society was under funded to the extent £4.5billion by the summer of 2001. It had contributed to that position by over–allocation of bonus, reflected in over–payment on claims. Surplus had been generated by an extreme use of actuarial techniques, and applied to support bonuses of all kinds. The question arises as to who knew and how the decisions were taken."

5.1. Details of the failure to implement the regulatory system

5.1.1. Adequate supervision

Adequate supervision is the standard of the European Life directives.

When Equitable Life cut all total policy values by 16% on 16 July 2001 it became clear that that standard had not been met.

Later that year Equitable Life proposed a legal agreement to extinguish the GAR claims in exchange for monetary compensation. This was called the "Equitable Life Scheme of Arrangement". In preparation for this action the company was required to appoint an Independent Actuary to make a report on the state of the company and on the fairness of the scheme to the various classes of policyholders. The Independent Actuary reported to the Court that the fund's assets had been 10% below the total of stated policy values at the end of 2000 (Lord Penrose quotes this figure as 12% from the Equitable Life internal "office valuation"). This was at a point when the UK stock market index was near a peak (FTSE 100 6225). The stock market decline was not more than 4% by the time of the policy value cuts. Further,during that period only 50% of the with–profits fund was held in stocks and shares. The sharp stock market falls came after the policy value cuts (and caused the Society to increase the "Market Value Adjustment" penalties on non–contractually terminating policies). The Penrose Inquiry Report concluded that the 16%, cut coming after a huge nine year rise in the stock market ,was due to irreversible payment of excessive terminal bonuses to maturing policies. Lord Penrose estimated that the fund had lost £1.8 billion, which had contributed to the financial unsoundness of the fund.

Up to that point policyholders had had no means of comparing the total of policy values against the admissible assets. But the regulators had known of the deficit. According to the UK Parliamentary Ombudsman's first report into regulation of Equitable Life:
(PO1, Appendix C 13/1/98) "Equitable ... confirmed that, at 31/12/96, the total face value of policies, including accrued final bonus, was in excess of the value of the assets attributable to the with–profits business. "
(PO1, Appendix C 16/1/98) "GAD [Government Actuary's Department] told Equitable that the above confirmation did not necessarily cause them any concern."

Lord Penrose reviewed the history of commentary on the term "PRE" and the history of communications between Equitable Life and its policyholders and concluded
(Penrose , Chap.14 para. 83 vi) "From 1989, the policyholder could reasonably expect that the annual statement of policy value reflected the build up of a cash fund, subject to the vagaries of the market." This observation also applied to later years until the dispute with GAR policyholders started to become an issue.

(Penrose, Chap. 19 para. 78) "Subject to the terms of communications, policyholders presented with the Society's policy value statements from 1989 had a reasonable expectation that a final bonus would be incorporated into the policy proceeds at maturity, subject to the conditions of the market at the time."

5.1.2. Powers and Means

The Third Life Directive requires that member state governments provide powers and means to their regulators so that they can perform their full functions.

The UK Parliament gave implementation to the Third Life Directive by amending Statutory Instrument under the Insurance Companies Acts 1982 viz. SI1994/1696 (The Insurance Companies (Third Insurance Directive) Regulations 1994) and by reissue of the Regulations issued under that act viz. SI1994/1516 (The Insurance Companies Regulati

ons 1994) SI1994/3132 (Insurance Regulations Amendment) and SI1994/3133 (Insurance Regulations Amendment No2), which laid down the forms of reporting required. The prudential regulator retained the right of intervention to protect the policyholders' reasonable expectations (PRE) in the case of long–term insurance. The powers were available to the regulators, **but only in respect of activities carried on within the United Kingdom.**

There was a further flaw. Each company had to appoint a professionally qualified actuary to advise the Board. Among other matters the Appointed Actuary had to advise the Board on PRE. The Appointed Actuary also had to make a separate regulatory return to the regulators as specified for Schedule 4 of the returns. However, as Lord Penrose reports, **(Penrose, Chapter 15 para 20)** "there was nothing in schedule 4 that would inform the regulators about PRE".

(Penrose, Chap. 19 para. 213, 214, 217) "The need to actively monitor PRE was underlined by the limitations inherent in the regulatory returns system. ... Regulators were never in a position to form a view on the issue, and therefore could not form a view whether the conduct of the Society's business was such that policyholders' reasonable expectations were likely to be fulfilled. .... It was by Ministerial decision that it was resolved, in accordance with GAD's wishes, that PRE would be monitored from the annual regulatory returns. Since no specific provision was made in the returns, at least until 1996, for the provision of any information material to PRE it was left to the appointed actuary to volunteer information on which to judge whether the office was likely to be able to meet PRE. That position did not change materially in 1996."

The position then was that the UK Parliament had retained the protection of policyholders' reasonable expectations under UK law, an attractive safeguard, but Ministers positively rejected European standards of regulation in the detail of the regulations which they laid down for regulatory returns and in their administrative

direction of the regulatory regime. The direction of the administrative function can be seen in the service level agreement (SLA) between HMT and FSA.

Resources, organisation and the will to act are essential means of regulation.

The resources devoted to insurance regulation were described in the FSA's Baird report **(Baird, 2.23.5)**

"To summarise, on 1 January 1999, the total number of staff involved in the prudential regulation of approximately 200 insurance companies (including the staff at GAD but excluding administration and secretarial staff) was less than 35. By way of comparison, there were approximately 135 staff (excluding administrative and secretarial staff) involved in the regulation of approximately 400 authorised UK bank, building societies and UK branches of non–EU institutions. " But the report goes on to say that even this poor situation was an improvement on the situation at the start of the 1990s.

Although the law provided for the protection of PRE (Policyholders' Reasonable Expectations), the organisation seemed to have no coherent approach to this. The UK Parliamentary Ombudsman's first report quoted senior staff:
(PO1, Vol. II para 125)."Officer F said that the concept of policyholders' reasonable expectations was a nebulous one."
(PO1, Vol II para 134) "Officer H had been the supervision manager ..... It was very difficult to define policyholders' reasonable expectations and there was an element of 'recognising it when you saw it'". It is hard to reconcile these remarks with the standards expected of a regulator under the Third Life Directive.

These confused opinions do not agree with the views of policyholders in general nor with the conclusions of Lord Penrose cited above.

The failure of Equitable Life shows that the UK regulators did not have the powers and means "to prevent or remedy any irregularities prejudicial to the interests of the assured persons", as required by the Third Life Directive.

5.1.3. European–wide Standards

The FSA's Baird report contains (section 2.9.1) the following description of the relevant prudential regulatory regime in the UK, given by HM Treasury's (Insurance and Financial Services (IFSD) division:

"The whole essence of regulation was 'freedom with disclosure' . That the substantial amount of information put in the public domain, by contrast to the banking world, allowed the regulator, the analysts, everyone out there to look and see the position. **That as it were allowed a much more relaxed system of regulation than was the case in**

many other countries and that had been so since the twenties or thirties . So that is one part of it. The other part of it . . . is the reliance on the appointed actuary and his statutory responsibilities. He was conceived by the actuarial profession certainly as rather a guardian of PRE and almost, if not in legal terms, almost a trustee of policyholders. So he was a safeguard there to make sure that decisions were taken properly and carefully and with proper regard to contractual liabilities and PRE. You have the professional guidance of the Institute, discipline and all that."

So the UK regulator's policy was "freedom with disclosure". But the disclosure did not extend to information on the deficit of assets against accrued terminal bonuses. The UK regulator knew about this deficit for many years but failed to correct it. Equitable Life maintained an internal "office valuation" which showed the deficit clearly, but the policyholders only learned about it in Lord Penrose's 820 page report in 2004.

Whether this behaviour was in accordance with UK law or not, it does reflect the reality of supervision of the major insurers as practised by the UK government at the time of the collapse of Equitable Life. EMAG has been informed that smaller unit–linked companies, in contrast, were regulated with a much harder touch during the 1990s.

Lord Penrose further adds:
(Penrose, Chap. 19 para. 158) "The approach to regulation was reflected in the resourcing of the DTI insurance division throughout the period. DTI insurance division was ill–equipped to participate in the regulatory process. It had inadequate staff, and those involved at line supervisor level in particular were not qualified to make any significant contribution to the process. Insurance division regulators were fundamentally dependent on GAD for advice on the mathematical reserves, implicit items, technical matters generally, and PRE, and were not individually equipped with specific relevant skills or experience to assess independently the Society's position in these respects. Given the volumes of work to be handled, which extended far beyond the regular scrutiny of returns, higher–grade officers had little opportunity to become involved in routine regulation. HMT's term of responsibility was transitional, and, while preparations for change were put in hand, there was no material change of approach during it, although I note that a need for greater regulatory resource had been identified at that time. For all practical purposes, scrutiny of the actuarial functioning of life offices was in the hands of GAD until the reorganisation under FSA was in place. "

UK law in the period between 1986 and 1st December 2001 distinguished between prudential regulation and "conduct of business" regulation. Under the Financial Services Act 1986, self–regulatory organisations (SROs) funded by the financial services industry were established for various aspects of financial services. After various scandals and widespread dissatisfaction with earlier organisations, the Personal Investment Authority (PIA) was established as the SRO for personal investment services in 1994. The PIA was responsible for regulating the selling of pension policies , such as those of Equitable Life. But the 1973 and 1982 Insurance Companies Acts gave responsibility for

protecting the reasonable expectations of policyholders and prospective policyholders to the prudential regulator. The prudential regulator was at one time DTI, then HMT, then FSA subcontracted from HMT.

The adoption of the Third Life Directive caused amendments to be made to the Insurance Companies Act 1982. Further, it caused the regulations issued under the act to be changed. But we understand that no change in the legal framework of UK "conduct of business" regulation was made as part of the implementation of the Third Life Directive. This is surprising because that directive deals with the information available to the policyholder at the point of commitment.

The two regulators did not want to overlap in their demands for information from insurance companies. But the protection of the reasonable expectations of Equitable Life policyholders and prospective policyholders clearly involved both financial soundness and communication with policyholders. To regulate PRE economically the two regulators should have co-operated closely. They did not. There was little co-ordination, and what there was, was entirely ineffective. It appears that the UK government simply allowed this legal protection to slip between the two regulators. The blame must fall on bad administrative decisions made by Ministers and their advisers. They did not achieve regulation in line with UK law to a European standard.

5.1.4. On-site Inspections

The various reports of visits to Equitable Life by the regulators only mention meetings between the regulators and the Chief Executive or the Appointed Actuary – often the same individual. This is not at all appropriate for a regulatory or audit process, where a sampling inspection and interview at all levels is required to give assurance of correct function. These top level meetings cannot be accepted as implementing the requirements of the European directives.

5.1.5.Thorough Checks on Financial Soundness

Lord Penrose comments on understanding by the DTI (then the regulator) of Equitable Life's financial position as follows
(Penrose Chap. 16 para. 226):
"In response to an enquiry from the NHS (National Health Service) Executive relating to the choice of provider for additional voluntary pension policies for their staff the DTI regulator stated: 'We would say that the company is financially sound. There are no outstanding issues of a material nature pertaining to the DTI's regulation of [the Society or its subsidiaries.]' There is no reason to view the statement as other than honest, and it

is clear that some consideration was given to the reply, but as an honest assessment it reflected the poor understanding of the realistic financial position of the Society that the DTI had in November 1997".

Lord Penrose found that at the time of Equitable Life's closure to new business the regulators' confidence was not well founded:
(Penrose Chap. 18 para. 61) "an impression confirmed by an e-mail that same day from the senior line supervisor: 'In relation to the sale. I don't think you could say it is 100% certain but it must be close to 99.9% The company see a sale as the only option and as far as I can see the only reason it would not go ahead would be if there was no suitable buyer and that appears unlikely' ". (In the event the Society could not be sold. All 17 prospective purchasers who performed due diligence studies on Equitable Life's books withdrew.)
(Penrose Chap. 18 para 116) "Neither FSA nor GAD had sufficient independent knowledge and understanding of the Society's business to justify the confidence that a sale could be achieved, and this should have been reflected in the care with which this decision was taken, and options to mitigate the impact of failure on new contributions were explored."

Lord Penrose directly relates the 16% policy value cuts in July 2001 to the financial unsoundness of the Equitable Life:
(Penrose Chap 18 para 123) "Following the submission of an application for a future profits implicit item of £1.1 billion for 2001 on 28 June the Society requested an emergency meeting with the regulators to follow up a letter Thomson [Chief Executive of Equitable Life] had sent Roberts [a senior regulator] the previous day. Thomson was accompanied by the Financial Director, Charles Bellringer, and by the Appointed Actuary, Peter Nowell. In the letter Thomson acknowledged that policy values exceeded available assets by 10%, and at the meeting he revealed that the current terminal bonus rates were no longer considered sustainable."
(Penrose Chap. 18 para. 130) "There was a further meeting between FSA, led by John Tiner [head of the Insurance division of the FSA at the time – now Chief Executive of FSA], and Thomson and Bellringer. Among issues discussed, the position on top-ups [additional premiums for policies with the advantageous guaranteed annuity rates] was clarified. Allen asked Thomson for his reaction to press comment to the effect that policy values had exceeded fund value for an excessive period. Thomson replied that, in his view, policy values were too high as at end 1999 and that they 'could have been corrected by a 1% reduction in at least some years during the 1990s'. For a normal fund even this divergence need not have been a problem, but the Society had an unusually high proportion of policies approaching maturity."
(Penrose Chap. 18 para. 131) "At the reference date the GAR liabilities had not been resolved. The Society was in a parlous position, **the result of developments over many years which regulation had failed to uncover**." (our emphasis added)

5.1.6. Rigorous Control of the Use of Implicit Profits

Equitable Life was in deficit throughout the 1990s. It declared policy values, including accrued terminal bonus, that were well in excess of its assets and paid claims on policy maturities and surrenders on that basis. It is hard to see how its claim to be in profit could have been taken seriously. Nevertheless, Equitable Life applied for, and was granted the use of future profit implicit items from £600 million in 1996 to £1billion in 1999 and 2000 – even after closure. Without these items Equitable Life could not have met the regulatory solvency requirement at that time.

Lord Penrose described the procedure established in the UK for approving the use of future profits implicit in the regulatory asset calculation:
(Penrose Chap. 7 para. 5,6,8, 12) " Regulation 24 of the 1994 regulations prescribed one of two tests of the availability of credit up to 50% of the full amount of future profits items calculated in the prescribed manner. .... However, section 68 [of the ICA82] conferred a wide discretion, and the regulator required the appointed actuary of the applicant office to support the application by certificate. .... The second part of the certificate was prospective and required the exercise of actuarial judgement. It was focused on the in–force business at the reference date, and looked to the profits that that business might be expected to generate in the future from the release of margins of prudence built into the valuation. It is implicit in the approach to this item that the adoption of a prudently low discount rate of interest in valuing liabilities would have generated a relatively high value for liabilities and understated distributable surplus. The second part of the certificate required the appointed actuary to say that the valuation in fact had that effect. As is discussed in the context of regulation, the Society regularly valued its liabilities on the weakest possible basis..... In an office with predominantly recurrent single premium business, heavily invested in volatile equities, the Regulation 24 computation has no obvious relevance to the realisation in the future of the margins inherent in the current valuation. The second factor certified was likely to be the more critical. .... So far as the inquiry's researches have shown, the second aspect of the certificate was not supported by the kind of extensive or penetrating analysis and projections of future trends that might have been expected."

Lord Penrose concluded:
(Penrose Chap. 19 para.176) "The Society was allowed orders under section 68 for future profits implicit items on what appears to me from the record to have been a mechanistic approach that failed to test the actuary's certification of the availability of the future profits, given the general nature of the Society's predominantly RSP [recurrent single premium] business. The supporting projections were not sought."

Equitable Life's fund failed to meet the policyholders' reasonable expectations. Yet the regulators allowed it to claim bogus reserves on the grounds that it could recover the money in the future, thereby increasing the magnitude of its failure.

5.1.7. Rigorous Checks on All Claimed Reserves

In addition to the use of future profits as implicit assets, Equitable disguised its weakness by including two further misleading items among its reserves: a quasi–Zillmer amount and the sum payable under a reinsurance contract.

Because most of the Society's business was recurrent single premium business, most of the incoming premiums were discretionary. The Zillmer present value of the future proportion of incoming premiums to be taken as the selling commission was strictly quite small. But the Society made a **statistical** projection of future business and capitalised the future commissions upon that. Of course, when confidence failed and the new business did not materialise, the presumed asset was shown to be for the most part bogus.

Lord Penrose concluded:
(Penrose, Chap. 7 para. 20) "On the terms of the regulations, there was no proper basis on which the actuary could have proceeded to Zillmerise recurrent single premium business whatever methodology was available, in my opinion. ... The fundamental condition for Zillmerisation was not met to any material degree". The approach was clear in the 1992 returns but obscured thereafter and not detected by the regulator until 2000.

In addition, in 1999, Equitable Life agreed a re–insurance treaty with ERC (based in Ireland and hence outside the jurisdiction of the UK regulator). The treaty offered protection in the case that the percentage of maturing GAR contracts choosing to take up the GAR benefit exceeded an agreed limit. [Not all policyholders who were entitled to GAR benefit took the GAR benefit. The reasons were sometimes that they were not aware of their rights, sometimes that they preferred alternatives and sometimes that the GAR benefit could only be taken under relatively restrictive terms.] The treaty offered protection up to £100million outstanding at any year end, to be recouped from future profits over the next 3 years. The premium was £400,000 **(PO1 App C 27/4/99)**. The treaty removed about £850million from the reserving requirements. Lord Penrose commented:
(Penrose, Chap. 7 para. 105) "In my view it is at least difficult, if not impossible, to bring this transaction within the scope of Regulation 64."
(Penrose, Chap. 19, para 196) "It would be unusual to treat the un–drawn balance of an overdraft facility as an asset."

Looking at the totality of devices used by Equitable Life to boost its reserves, Lord Penrose commented:

(Penrose Chap. 7 para. 109) "Individually, and in the aggregate, these adjustments removed the regulatory statement of the Society's financial position from the realistic position shown on the office valuation. The Society was able to meet the regulatory requirements by the use of these techniques because, in large part, it was known that regulatory scrutiny was concentrated on the returns and on solvency measured in terms of the regulations, with little, if any, attention to realistic solvency in the context of regulation. The publication of the Society's financial position on the regulatory basis in its returns, assisted in deflecting from the Society the attention that would have followed disclosure to the public of that internal position."

5.1.8. Policyholders Fully Informed

Policyholders could not discover from any public record the gap between total policy values and available assets. The total of policy values for all the policies was not disclosed at any material time. But Equitable Life did maintain a private, internal "office valuation" giving these figures.

Lord Penrose says:

(Penrose , Chap. 6 para 8) "An independent observer, equipped with the information published by the Society in its financial statements and marketing literature, would have believed that if the Society had changed its policy stance on mutuality and put the business on the market, there would have been a successful sale realising a substantial surplus for allocation to policyholders."

(Penrose, Chap. 6 para. 20) "At this stage it is sufficient to note in the case of the office valuation that it continued to reflect the full value of the liabilities as intimated to policyholders, and in addition reflected the full accrued value of the non–guaranteed final bonuses intimated to policyholders."

The regulator was aware of this internal valuation but did not express interest in it.

Neither could policyholders joining after 1988 reasonably have become aware of the interest rate risk that they were running by holding policies in a fund pooled with that of the GAR policyholders. To do so they would have had to investigate the details of policies in the annual regulatory report, a volume of some 400 pages available only on request, poorly structured, jargon–laden and inadequately annotated.

The Third Life Directive does not guarantee to the policyholders or their advisers information about the financial position of the company. **The responsibility for**

ensuring that the provider is financially sound is left to the regulator under European law. The UK regulator completely failed to recognise this principle and continued to fall between the two stools of "freedom with disclosure" and "adequate supervision", neither conforming to European law nor protecting the policyholders adequately.

5.1.9. Vetting of Directors

It appears from Lord Penrose's report that the Board of Equitable Life was not able to exercise real control over the executive management.

(Penrose, Chap. 19 para 89) "None of the non–executive members of the Board had relevant skills or experience of actuarial principles or methodologies over most of the reference period. They were generally experienced in the financial services industry, but specialists, where they had specialist knowledge, in general finance, in investment and banking rather than life assurance. They could not be expected to make independent judgements without specific guidance from the actuaries on and advising the Board. There were executive directors with relevant actuarial qualifications, but little or no relevant experience, and they were in any event inhibited by the terms of professional guidance (which prohibited qualified actuaries who were directors from doing anything to undermine the authority of the appointed actuary.)"

The extraordinary situation of one person being both Appointed Actuary and Chief Executive obtained for 6 critical years at Equitable Life.

(Penrose, Chap. 19 para. 226) "When in March 1991 the Society intimated that Ranson, already appointed actuary [i.e. the professional guardian of the policyholders' interests] would succeed Sherlock as chief executive, the Government Actuary, Chris Daykin, wanted to avoid the situation and Ranson was informed."

(Penrose, Chap. 16 para. 36) "It was preferred that he should remain the appointed actuary for 12–18 months until an in–house replacement was appointed."(Penrose, Chap. 16 para. 63) "In 1992 GAD noted, 'Mr Ranson's position as Principal Executive and Actuary may create problems because there is nobody to blow the whistle when things go wrong.'"

(Penrose, Chap. 19 para. 116) "from 1992 to 1997 he [Roy Ranson] was the chief executive and appointed actuary"

5.1.10. Holding Directors Accountable

The directors of Equitable Life abrogated the responsibilities which they owed to the members, who were also the owners of the business. They allowed one person to hold both the posts of Chief Executive and Appointed Actuary for many years.

Lord Penrose points to characteristic exchanges with the Appointed Actuary at that time: **(Penrose Chap. 9 paras. 189, 190)** "In the early 1990s changes in GN1 [Guidance Note for Appointed Actuaries of the professional society, the Institute and Faculty of Actuaries] required the appointed actuary to discuss with the Board the future financial position of the office. This does not appear to have happened on a regular basis until the later 1990s. In particular there does not appear to have been structured exploration of the future financial position of the Society on different scenarios. A combination of a low capital base, rapid expansion and continuing and potentially onerous guarantees would have made some relatively sophisticated modelling appropriate. There were well–developed stochastic techniques available throughout the 1990s. None was employed.

The extent of actuarial control over liabilities was illustrated late in the reference period. In July 1999 the Society and its legal advisers were engaged in preparations for the continuing *Hyman* litigation. The Society's solicitor commented on the need to establish a "paper trail" in relation to the Society's approach to the determination of surrender values and how this was documented and communicated. Headdon [then Appointed Actuary and Finance Director!] responded that the Board had delegated to him, as the appointed actuary, a unilateral power to determine surrender values..... He asserted that under GN1 surrender values had to be determined by the appointed actuary, though he did not point to any provision that in his view had such an effect."

The directors , included appointed actuaries, failed over an extended period, to preserve financial soundness and protect the policyholders. Yet this failure has not given rise to any corresponding action by the UK government to hold them to account.

5.1.11. Informing other Member States

Lord Penrose reports
(Penrose Chapter 16 para. 215) "On 9 December 1997 the line supervisor [within the DTI, then the regulator] wrote to her German counterparts in response to a query about the Society's financial position:
'Equitable is a mutual insurance company. This means that it is owned by its policyholders and there are no shareholders. Being a member does not involve any obligations other than the obligation to pay the premiums.'
I cannot endorse this view. Equitable was and is an unlimited liability company."

On this point, the UK regulators simply misled their German counterparts.

5.1.12. A System of Remedy

The Third Life Directive requires a remedy of prejudice by the member state. The Financial Secretary to the Treasury admitted to the Parliament that "It was the system that failed", referring to "the system that Ministers and Parliament intended". But on behalf of the UK government she accepted no responsibility. She also cynically encouraged policyholders to seek restitution from the remaining common with–profits fund of the Equitable Life, a mutual organisation.

In European law the UK government is liable for any losses which result from infringements of European law by itself or its agents. We cannot believe that the European institutions would accept the UK regulation of Equitable Life as "adequate protection" for the policyholders according to European standards of regulation. It follows that the liability must lie with the UK government.

5.2. The consequences of the failure to implement the directives by the UK regulator.

There is suffering and loss by policyholders throughout Europe, particularly those already retired and those close to retirement.

There has been serious damage to European principles of free trade by standardisation of regulation.

There is a risk of further destabilisation of European insurance business as litigation continues against the UK insurance company, because UK companies are required to guarantee each other's losses and many of those companies are now also European–wide insurance companies.

In addition there is a perceptible loss of confidence of pension products by the general public with the associated refusal to buy pensions.

6. Attempts by policyholders to obtain the remedies promised under the Third Life directive

During the last three years policyholders have taken all democratic steps to obtain remedy from the UK member state, in accordance to the articles of the Life directives. Yet device after device has been found within the UK's governing systems to delay,

now for more than four years, any resolution and remedy for the injustice that the policyholders have suffered through the failure of successive regulators.

6.1. Complaints to non-UK local regulators

Complaints were made by Europeans outside the UK to their local regulator.

These regulators then referred the complainants to the UK regulator according to the articles in the Third Life directive.

6.2. Complaints to the UK regulator

The UK regulatory authority, in the form of the FSA (Financial Services Authority) rejected all complaints.

In view of the large number of complaints and the pressures from policyholder groups as well as questions posed by other European regulators, the UK regulator, the FSA, set up an internal enquiry staffed by its own personnel, under the leadership of Mr Ronnie Baird, to determine if it had failed during the 23 month period of its supervision immediately prior to the closure of Equitable Life to new business.

It reported on 16th October 2001 that the FSA had not failed its regulatory function.

6.3. Complaints to UK Parliamentary Ombudsman

Acting through their UK Member of Parliament, an unprecedented number, more than 600, UK policyholders demanded an investigation by the Parliamentary Ombudsman (Parliamentary Commissioner for Administration, an officer of the UK Parliament). This avenue was not open to citizens of other member states affected by this matter.

This was started in October 2001 and finally reported on 30 June 2003.

The ombudsman concluded that the prudential regulator had not acted maladministratively.

The ombudsman's first report on Equitable Life is discussed further in section 8.2, below.

Subsequent to the publication of the Penrose report, a second investigation, covering a wider period and with powers to investigate the actions of GAD , is presently starting. This second investigation is not expected to report for at least a year. A report will then be presented to the UK Parliament

In any case it is clear that this second investigation will exclude a large number, perhaps 100,000 policyholders who do not have access to the UK Parliamentary Ombudsman (see Appendix A).

6.4. Complaints to UK Treasury as supreme controller of regulators

Complaints were made to HM Treasury that is responsible for regulation.

In August 2001, HM Treasury set up an inquiry under the control of a senior Scottish judge, Lord Penrose, but gave the purpose of the inquiry as learning from past mistakes. Lord Penrose concluded that his task could not be completed if it was trying to exercise the functions of the Courts and therefore refrained from any conclusions of maladministration, dereliction of duty or fraud. He obtained a great deal of evidence , some of which does support such conclusions.

The inquiry took 30 months to complete and its report **(Penrose)** was presented to the UK Parliament on 8th March 2004.

7. Need for Action by European Institutions

Equitable Life policyholders' losses were crystallised in July 2001.

UK Treasury announced to the UK Parliament in the debate on Lord Penrose's report on 24th March 2004 that it refused to accept that there had been regulatory failure.

The UK Parliamentary Ombudsman has started a second investigation. The UK government has already rejected the evidence of regulatory failure. It is not known whether the UK government will accept a different conclusion if reached by the ombudsman's second investigation. Even if it does accept it is not known whether it will finally compensate those who lost through the consequences of the UK regulators' failure.

Despite being allowed to comment on the draft of Lord Penrose's report, and having their objections set aside by Lord Penrose, the FSA and Equitable Life now seek unreasonably to deny Lord Penrose's central conclusion. That conclusion recognised the payment by Equitable Life of terminal bonuses for which there were no covering admissible assets.

The office of the UK Parliamentary Ombudsman has recognised in a preliminary statement **[PO3]** that a large number of policyholders must be outside their jurisdiction. Firstly, the ombudsman cannot consider whether UK legislation conformed to EU directives. Then, under the UK system, no route to remedy is provided for failures in responsisbilities delegated to non–public or self–regulatory bodies, such as the "conduct of business" regulators, or the FSA after 1 December 2001. Lastly, it is considered at the time of writing, that the UK Parliamentary Ombudsman has no jurisdiction in relation to policies purchased outside the UK or to policyholders permanently resident outside the UK. The officer in charge of the present investigation wrote:

[PO3] "It is my understanding that, while the public bodies responsible for the prudential regulation of ELAS in the period before 1 December 2000 – the DTI, the Treasury and the FSA, advised by GAD – are clearly within the Ombudsman's jurisdiction, those bodies' functions in respect of the prudential regulation of insurance companies generally – and therefore of ELAS specifically – only relate to the activities of ELAS insofar as those acitvities were conducted within the United Kingdom of Great Britain and Northern Ireland. These public bodies had no responsibilities or administrative functions in relation to dependent territories such as the Channel Islands or in other states such as Germany or the Republic or Ireland.

It is also my understanding that, for example, the German financial services supervisory authorities regulate the activities of all insurance business conducted within the Federal Republic of Germany and, again by way of example, I understand that the Guernsey Financial Services Commission is responsible for the prudential regulation of insurance companies operating in the Bailiwick, under the terms of the Insurance Business (Guernsey) Law 1986, as subsequently amended. Such overseas regulatory bodies are not within the Ombudsman's jurisdiction".

Together these observations exclude perhaps 100,000 policyholders from this particular approach to redress. Without the ability to complain to the UK Parliamentary Ombudsman, these excluded policyholders can only appeal to the European Parliament and Commission, to see that European law is enacted into UK statute and implemented by the UK government or redress offered for failure to do so.

In any case, the Parliamentary Ombudsman has no power to investigate the actions of the SRO (the PIA) which implemented the "conduct of business" regulation as it is not a statutory body. As a result her investigation cannot be comprehensive.

A significant number of the victims are elderly and dependent on their income from Equitable Life.

In view of the repeated rejection by senior members of the UK government of responsibility, action groups have formed to seek legal redress. The cost of taking the UK government to court for failure to implement European directives is considered even by

the company's own legal advisers as being prohibitively expensive. Therefore, some groups are moving or have moved to take legal action against the company itself. The costs of these actions will have to be paid for by the common with–profits fund of Equitable Life. This is turn further disadvantages those pensioners who are locked into the company.

There is further loss to the common with–profits fund of Equitable Life from complaints against it to the UK Financial Ombudsman Service (FOS). It is natural that the wealthier and more capable of the policyholders and former policyholders will be the beneficiaries of this atomised approach to justice. The losers will be the remaining policyholders, mostly annuitants.

There is therefore, for all these reasons, an URGENT need for the European Parliament to intervene.

8 Some further background information.

8.1 The form of the UK regulatory authority from 1973 to present

Throughout this period, regulation has been under UK government executive control with the Government Actuary department (GAD) being used as advisers and scrutineers.

The Insurance Companies Acts (1982) were the main reference points to clarify the nature of regulation and included such notions as the legal recognition of policyholders' reasonable expectations (PRE).

Until 5th January 1998, insurance regulation was part of the Department of Trade and Industry (DTI).

On 5th January 1998 regulation was transferred to Her Majesty's Treasury with a transfer of staff from the DTI to the Treasury.

From 1st January 1999, in line with the trend throughout Europe for regulation independent of government, the Treasury contracted out most of its regulatory function to the Financial Services Authority (FSA). There was again a transfer of many of the same regulatory staff.

From 1st December 2001 the FSA took over insurance regulation in its own right. Its annual cost of £220 million is funded directly by the financial services industries. After seeing Lord Penrose's report on Equitable Life the FSA made many changes to

increase the rigour of insurance supervision. It put the "light touch" philosophy behind it. In particular, it specified that life insurers must reserve for accrued terminal bonus.

Throughout this period the Government Actuary's Department (GAD) was contracted as a source of actuarial advice and labour to the regulator. In particular, it carried out the scrutiny of the regulatory returns and accompanied the regulator on regulatory visits.

The various forms of the UK regulator were substantially staffed by the same people during these transfers. They would have, or should have, known about the state of the company's affairs throughout.

8.2 The Parliamentary Ombudsman's First Report

The Parliamentary Ombudsman took two years to study a 23 month period of the operation of the UK regulator, that period from 1999 **(PO1)**.

To make an extrapolation to the whole situation the ombudsman selected a single claimant (Mr Stewart Simpson) as the model. Mr Simpson had invested the consolidated proceeds of several policies, including some from other companies, in an Equitable Life with–profits annuity in June 2000.

The ombudsman claimed that Mr Simpson was a typical purchaser who should have known of company risk and should have consulted professionals.

However, unknown to the ombudsman, who had never interviewed Mr Simpson, Mr Simpson was a professional accountant and financial auditor of 40 years professional standing, who had studied the company's published details and consulted two professional advisers before investing.

The ombudsman stated that a buyer had to beware of UK insurance products and that "caveat emptor" was the model for such a purchase. She insisted that buyers had to make full enquiries as to the company's financial strength, without mentioning the requirement of the Third Life Directive that it was the duty of the regulator to provide adequate protection to the consumer.

Simply put, if a senior accountant and auditor, Mr Simpson, could not, after exhaustive research and study of the accounts, find the risks in the public material provided by the company – who could?

The ombudsman went on to state in her report that there was no maladministration by the UK Prudential regulator nor by the government executive.

She stated that "light touch" was the appropriate approach to regulation according to UK law and that the regulator had therefore fulfilled the requirements of UK law. Yet the

law had been amended by the UK Parliament with the intention of bringing it into conformance with European directives.

Following public outcry against the report, an action for judicial review of the ombudsman's report was lodged by EMAG.

On 29th April 2004 in the High Court, Judge Moses confirmed that there was a case to answer as to the statements and assumptions made by the Ombudsman.

The legal action has now been largely overtaken by the Ombudsman's decision to undertake a further investigation covering a much longer period. The new investigation includes the same period as already covered. By law, the new investigation must leave many policyholders outside its jurisdiction. It cannot consider whether UK legislation conformed to EU directives. The UK government has now arranged that the Government Actuary's Department will be within the scope of the Parliamentary Ombudsman's second investigation, **but the "conduct of business" regulation is still not covered. As a result, the proper exercise of the dual responsibility for prospective policyholders reasonable expectations can still not be fully investigated.**

The long-suffering policyholders have waited for the FSA investigation, then for Lord Penrose's Inquiry to report (over 2 years), then for a further nine months for the ombudsman to decide to investigate again, and must now wait for at least another year for the report of her second and still limited investigation. They still have no undertaking that the UK government will accept the report or act on its conclusions.

Many of the most severely affected are elderly. Naturally, some will have died without restitution during this long drawn-out period of investigations and investigations into investigations.

8.2.1 UK Financial Ombudsman Services ("FOS")

Several thousands of complaints have also been made by Europeans to the UK government's FOS.

As this service is poorly equipped for such a volume of cases it is taking many years to consider and reply to each one. The service is established to address mis-selling to individuals but in the case of Equitable, the complaints are generic in nature – thus rendering the FOS unsuitable as a channel for remedy. Many complaints are over four years old without resolution or remedy. Policyholders have expressed doubts as to the service's adherence to principles of natural justice.

9 Extracts from Hansard in respect of EMAG

Hansard is the official record of proceedings of the UK Parliament.

House of Commons, Westminster Hall debate on Equitable Life.
(Hansard 4 Nov 2003 col 200WH and on)

Dr. Vincent Cable MP (Twickenham):
I congratulate the hon. Member for Croydon, South (Richard Ottaway). I have been involved in all the debates on Equitable Life. The hon. Gentleman has always been present and actively involved, and he has maintained a consistent support for the policyholders. I congratulate him not only on what he said today, but on his consistent interest in this very real problem.

I also congratulate EMAG. The issue is complex and it has dragged on for a long time. It would have been easy for our adversely affected constituents to become demoralised and to lose track of the plot. They and we owe a great deal to EMAG for the way in which it has continued to marshal support and to brief us.

......

Mr. Stephen O'Brien MP (Eddisbury)
It is with no apology that I rely on what Sir Gordon Downey said at the recent annual general meeting of EMAG. I pay an enormous tribute to EMAG for its commitment, energy, diligence and fairness in pursuing the issue over many long years.

....

it is important to recognise that we have the opportunity to examine the application for judicial review, not least because EMAG and some of the individuals involved in it have put together a document of enormous authority and force that details the whole sorry saga. I hope that all Members of Parliament, especially Ministers, will read it with great care and recognise that they need to read it in conjunction with the Penrose report, which we hope––although we have expressed the hope before––will emerge in the not too distant future.

10 Conclusions

There is a wealth of evidence of regulatory failure by the UK government and little evidence to the contrary.

The basis of the refusal by the UK government executive to accept responsibility and remedy the prejudice to European policyholders is the argument that UK Parliament had

not required strict regulation. The UK government has claimed that the UK Parliament had not required strict regulation and had voted to operate a "light touch" regime. This is contrary to the fact that the UK Parliament approved amendments and new regulations to the Insurance Acts on the basis that they would then reflect the strict controls required by the Third Life Directive.

This impasse requires intervention at European Parliamentary level to bring the UK government to book for failure fully to implement the Life and non Life directives.

Issues vital for Europe arise. Can a member state claim at the same time to be in conformance with European directives and yet to take no responsibility for its evident failures to carry out required measures? Can member states seek commercial advantage by attractive national legal provisions which, in truth, are effective only through national laxity in enforcing European consumer protection in the single market?

Current distress by elderly pensioners and policyholders retired or planning for their retirement and the refusal of the UK government to take remedial action may cause wasteful and damaging legal cases .

Four years after the December 2000 closure to new business of Equitable Life, policyholders across Europe are still outraged and without remedy for the lack of "adequate supervision" that European law requires.

While this is continuing the European pensions and insurance industry is suffering a crisis of confidence as is the European citizens' faith in the European Parliament to ensure consumer protection in respect of cross–border and single market purchases.

The European Parliament should act to investigate and to remedy this state of affairs, which is undermining European objectives.

11 References:-

Key	Description	Reference
Baird	FSA review of period of closure of Equitable Life	*Report of the Financial Services Authority on the Review of the Regulation of the Equitable Life Assurance Society from 1 January 1999 to 8 December 2000, which Her Majesty's Government is Submitting as Evidence to the Inquiry Conducted by Lord Penrose,* 16 October 2001, HC 244, The Stationery Office Ltd, London
BH1	First Burgess Hodgson report on over allocation of terminal bonus	*Report on ELAS and the With-Profit Fund 1993-2000*, 26 March 2003, Burgess Hodgson, Canterbury *http://www.emag.org.uk/documents/BH_11_page_report_260303.pdf*
BH2	Burgess Hodgson addendum	Addendum to report on ELAS and the With-Profit Fund 1993-2000, 25 June 2003, Burgess Hodgson, Canterbury http://www.emag.org.uk/documents/addendum.pdf
Blake	Blake report for EMAG	http://www.emag.org.uk/press_releases/dblake.pressrelease.19de01.html
Life3	The Third Life directive (SCAD plus version)	http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=EN&numdoc=31992L0096&model=guichett
Penrose	Penrose report	*Report of the Equitable Life Enquiry,* The Right Honourable Lord Penrose, 8 March 2004, HC290, The Stationery Office Ltd, London http://www.hm-treasury.gov.uk/independent_reviews/penrose_report/indrev_pen_index.cfm
PO1	Parliamentary Ombudsman's first report	*The Prudential Regulation of Equitable Life (2 vols),* 30 June 2003, The Parliamentary Ombudsmans, HC809, The Stationery Office Ltd London http://www.ombudsman.org.uk/pca/document/equitable03/equitable03_part1.pdf
PO2	Parliamentary Ombudsman's second report	*A Further Investigation of the Prudential Regulation of Equitable Life?,* 19 July 2004, The Parliamentary Ombudsman, HC910, The Stationary Office Ltd, London http://www.ombudsman.org.uk/pca/document/par04/par04_index.htm

PO3 attached as Appendix A	Letter to EMAG from UK Parliamentary Ombudsman's Office	2 December 2004, from the officer in charge of the second investigation into the prudential regulation of Equitable Life.

12 Glossary

DTI Department of Trade and Industry – the UK ministry which was the regulator until 1st January 1998.

EMAG Equitable Members' Action Group – author of this petition – an unincorporated association of Equitable Life policyholders and ex–policyholders.

ECJ European Court of Justice – cited here in connection with its Francovitch judgement.

FSA Financial Services Agency – the unified UK financial regulator, funded by the finance industries, having independent oversight of insurance since date N2 (1st December 2001) and subcontracted as regulator from HMT from 1st January 1999 until that date.

FOS Financial Ombudsman Service, the independent ombudsman service associated with the field of action of the FSA, and with funding and steering appointments in the hands of the FSA.

GAD Government Actuary's Department, UK minor department reporting through Treasury ministers and offering actuarial services and advice to government and other clients.

GAR Guaranteed Annuity Rate the guaranteed minimum rate at which an annuity would be offered by the provider on the capital sum available at the maturity of retirement annuity policy.

HMT UK Treasury, insurance regulator from 1st January 1998 until 1st December 1999 with the responsibility subcontracted to the FSA after 1st January 1999.

ICA82 Insurance Companies Acts 1982 – UK legislation, much amended by regulation and statutory instrument since, which governed insurance, including long–term insurance until the full coming into force of the Financial Services and markets Acts on 1st December 2001.

IFSD Insurance and Financial Services Division of HMT (while they were the prudential regulator.

PIA Personal Investment Authority – an SRO responsible for regulating the selling of personal pensions and other personal financial services.

PRE Policyholders' reasonable expectations – the standard of financial adequacy to be protected by regulators in long–term insuance under UK law from 1973 to 1st December 2001.

SLA Service level agreement – contract specifying standards of performance and other contractual terms – here between Treasury and FSA, also between GAD and its regulator clients.

SRO Self–regulatory organisation – organisation formed to regulate an aspect of financial service – under the Securities and Investment Board – as specified by te Financial Services Act 1986 – until the advent of the FSA.

A. Reference PO3: Letter from the office of the UK Parliamentary Ombudsman

THE PARLIAMENTARY **Ombudsman** THE HEALTH SERVICE Ombudsman

Office of the Parliamentary and Health Service Ombudsman

MILLBANK TOWER, MILLBANK, LONDON SW1P 4QP

SWITCHBOARD 020 7217 4051, FAX 020 7217 4160, DIRECT LINE 020 7217 3904

email: equitable.report@ombudsman.gsi.gov.uk

THE EQUITABLE LIFE INVESTIGATION

Paul Braithwaite

General Secretary

EMAG

42 Bartholomew Villas
Kentish Town
London NW5 2LL

2 December 2004

Dear Mr Braithwaite

RE: THE EXTENT OF THE PO EQUITABLE INVESTIGATION IN THE EC

Thank you for your letter dated 30 November 2004.

EMAG has asked the Parliamentary Ombudsman for a determination as to the extent to which her current investigation into the prudential regulation of the Equitable Life Assurance Society (ELAS) will cover the position of those policyholders who purchased their policy or annuity from an overseas branch of the Society, whether such individuals were resident outwith the United Kingdom when they did so or whether they are so resident now. You also seek advice as to the position of those who may have bought ELAS policies in the UK but who are not now resident here.

We have sought legal advice on whether the Ombudsman's jurisdiction extends to such people as a result of a similar query from an individual policyholder who is in this position. This is in order to determine whether the findings and any recommendations the Ombudsman might make at the end of the investigation would cover the 'internationals'.

We hope to receive that advice in the next week. Once we do so, I will provide you with a full, substantive response to your letter.

However, I am able now to make some interim observations about the issues that your letter raises. These relate to the two aspects of the Parliamentary Commissioner Act 1967, which as you know sets out the role, jurisdiction and powers of the Ombudsman, that are relevant to the issues on which we have sought legal advice. However, the observations also relate to the wider issue as to whether any potential petition to EU institutions could be said to duplicate – or be made redundant by – our current investigation.

The Ombudsman's jurisdiction

The issues related to the Ombudsman's jurisdiction are, first, whether in relation to the prudential regulation of 'offshore' ELAS policies it can be said that there are any administrative actions of a body within the Ombudsman's jurisdiction that could be investigated by her and which would thus be covered by this investigation. The second issue is whether those not living in the UK have recourse to the Ombudsman in relation to complaints about the prudential regulation of ELAS.

The answer as to whether those who purchased 'offshore' ELAS policies and/or those who live abroad are covered by the Ombudsman's investigation is dependent on an assessment both as to whether their complaint is about the actions of a body in her jurisdiction and as to whether they are, as non–UK residents, entitled to complain to her at all.

Jurisdiction over the regulation of 'offshore' policies

Section 4(1) and section 5(7) of the 1967 Act provide that the Ombudsman may only consider complaints about the actions of bodies listed in Schedule 2 and in Schedule 4 to the Act where those actions were taken in the exercise of those bodies' administrative functions.

It is my understanding that, while the public bodies responsible for the prudential regulation of ELAS in the period before 1 December 2001 – the DTI, the Treasury and the FSA, advised by GAD – are clearly within the Ombudsman's jurisdiction, those bodies' functions in respect of the prudential regulation of insurance companies generally – and therefore of ELAS specifically – only relate to the activities of ELAS insofar as those activities were conducted within the United Kingdom of Great Britain and Northern Ireland. These public bodies had no responsibilities or administrative functions in relation to dependent territories such as the Channel Islands or in other states such as Germany or the Republic of Ireland.

It is also my understanding that, for example, the German financial services supervisory authorities regulate the activities of all insurance business conducted within the Federal Republic of Germany and, again by way of example, I understand that the Guernsey Financial Services Commission is responsible for the prudential regulation of insurance companies operating in the Bailiwick, under the terms of the Insurance Business (Guernsey) Law 1986, as subsequently amended. Such overseas regulatory bodies are not within the Ombudsman's jurisdiction.

Therefore those with complaints about the prudential regulation of ELAS – or, in territories where such distinctions are not made, with complaints about the regulation of ELAS – in respect of activities by its overseas branches that were

undertaken in territories outwith the UK cannot be covered by the current investigation we are conducting. That is because the actions (or inactions) about which they complain are those of bodies not within the jurisdiction of the Ombudsman. We expect that legal advice will confirm our understanding of this position.

Jurisdiction over complaints from people who live outwith the UK

The position is not so clear with respect to people who live abroad who have complaints about the prudential regulation of ELAS in relation to policies they purchased from ELAS's UK operation. While I can understand how your view arose that the Ombudsman's 'authority is limited to any UK voter who was resident in the UK when he or she purchased their pension policy', it is not the case that the Ombudsman may only consider complaints from UK citizens or voters.

Section 6(4) of the 1967 Act provides that the Ombudsman shall not entertain complaints unless:

- ↔ the person aggrieved is resident in the UK or was so resident at the time of the actions complained about; **or**

- ↔ where their complaint is in relation to rights or obligations which accrued or arose in the United Kingdom.

It is this latter aspect of the Ombudsman's jurisdiction which has exercised us.

It appears to me that those complainants who live abroad now and did so in the period prior to 1 December 2001 when the actions complained about (i.e. the prudential regulation of ELAS) took place cannot be covered by the Ombudsman's investigation unless it is the case that such a complaint about the prudential regulation of ELAS relates to rights or obligations which accrued or arose within the UK.

We do not consider that it is immediately apparent whether this is the case and thus it is a matter for determination after careful consideration. We await legal advice on this matter, as explained above.

The effect of our investigation on your petition

I have not seen the petition to which you refer but I understand that it relates to an allegation that the UK Government did not properly implement the relevant EC Directive and thereby failed in its duty to protect the interests of ELAS policyholders. If that is so, I do not think that your petition duplicates our investigation, for two reasons.

First, the matters to be covered by your petition would appear to be entirely different from those which are the subject of the Ombudsman's investigation, which is focused on determining whether individuals were caused an injustice by maladministration by those UK public bodies responsible for the prudential regulation of ELAS and/or by GAD. Our investigation cannot consider the appropriateness of legislation – those are matters for Parliament alone – and any complaint about whether a public body has broken domestic or EC law are properly matters for the domestic courts or for the appropriate European institutions. As I understand matters, a consideration of this is precisely what your petition seeks to achieve.

Secondly, as explained above, many of the people with complaints about the regulation of ELAS have no recourse to the Ombudsman because the actions they have complained about were either taken by UK public or self–regulatory bodies which are not in the Ombudsman's jurisdiction – such as the conduct of business regulators or those responsible for the prudential regulation of ELAS since 1 December 2001 – or by regulatory or supervisory bodies outwith the UK and thus also not in her jurisdiction. Moreover, the position in relation to many others is dependent on clarification of the legal position as to whether their complaints relate to rights or obligations that can be said to have arisen within the UK. Thus many people's complaints cannot in law be covered by the Ombudsman's current investigation or any findings or recommendations she might make. It is not for me to say whether a petition to the European institutions is the appropriate vehicle to resolve such complaints but there is nothing in our current investigation that could help such people.

I would also, for information, refer you to similar issues we have had to consider in relation to the Ombudsman's decision to investigate complaints about final

salary occupational pension schemes, where some people affected by the matters complained about – and specifically an alleged failure to properly implement EC insolvency law – have taken a 'European' route. A letter was recently sent to all Members of Parliament which explained the basis for the Ombudsman's decision. I can provide you with a copy of that letter if this would be helpful.

Summary

Subject to clarification of the legal position as it affects one particular group – those who are now non–UK residents but who bought ELAS policies from its UK operation – I therefore can confirm your view, if my understanding of your petition's terms is correct, that your petition and our investigation cannot be said to cover the same issues or address the circumstances of entirely the same individuals.

I will write to you again once we have received the legal advice in respect of one aspect of the above. Until then, please do not hesitate to contact me should you require anything further.

Yours sincerely

Iain Ogilvie

Investigation Manager