

UK: Moving with the times: Proposals to modernise the financial services redress system

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As indicated by Rachel Reeves in her inaugural Mansion House speech as the UK's new Chancellor of the Exchequer, on 15 November 2024, the Financial Conduct Authority (FCA) and the Financial Ombudsman Service (FOS) published a joint Call for Input on Modernising the Redress System.

Other documents published with the Call for Input

Alongside the [Call for Input](#), the following documents were also published:

- A refreshed [Memorandum of Understanding](#) between the FCA and FOS;
- Updated [Terms of Reference](#) of the Wider Implications Framework (WIF); and
- [Feedback](#) on the FCA's consultation to charge claims management companies and other professional representatives (PRs).

The purpose of the Call for Input

When FOS was established in 2001, it was expected to assess 30,000 complaints per year. In contrast, FOS currently assesses over 200,000 cases per year. Large numbers of complaints about the same issue (“mass redress events”) are a key driver of these increased complaints volumes.

Through this Call for Input, the FCA and FOS are keen to explore the issues that these mass redress events create and how they can improve the current redress framework. Their aim is to ensure that:

- Consumers receive appropriate redress when things go wrong.
- Firms identify harm at an early stage, proactively address it, and resolve complaints more effectively themselves, reducing the need for consumers to complain.
- Redress issues can be identified earlier so they can be resolved swiftly and efficiently.
- Communications with consumer and industry stakeholders are improved, making it quicker and easier to flag matters with wider market implications.

The Call for Input makes it clear that an effective redress system is vital for consumer protection, market integrity and competition, as well as the FCA’s secondary objective to facilitate the international competitiveness and growth of the UK economy.

The Call for Input

The Call for Input sets out:

1. The issues which the FCA and FOS seek to address.
2. The options for change to address those issues.
3. How the FCA and FOS can work better with stakeholders to ensure that issues with wider implications are identified as soon as possible.

Chapter 11

(1) The issues which the FCA and FOS seek to address

In the Call for Input, the FCA and FOS set out the issues they seek to address, under two categories: (i) Mass redress events; and (ii) FCA and FOS co-operation.

(i) Mass redress events

Defining mass redress events

Mass redress events impact a large number of consumers across a range of firms and involve significant amounts of redress. There is no definition of a “mass redress event” in the FCA Handbook, but having one could help to enable clearer and earlier identification of such potential events, which may need to be carefully managed before they become systemic.

Operational difficulties for firms and delays for customers

Firms may be unable to deal with complaints within the time-limits specified in DISP because of the high volumes they are experiencing, resulting in large volumes of cases being referred to FOS before firms are able to consider them and also resulting in consumers not receiving responses to complaints within the timelines set out in FCA rules. Further, if high volumes of complaints are upheld by FOS within a short period, firms may find themselves facing significant redress liabilities and, in some circumstances, this may increase the risk of disorderly firm failure.

Operational difficulties for FOS

Although FOS has established casework processes to deal with large numbers of complaints about similar issues, it must consider each complaint individually. Compared to more systematic approaches, such as voluntary or compulsory redress schemes, this may be an inefficient way to deal with mass redress events.

Cases may be referred to FOS because firms have not been able to respond. In these cases, FOS may not have the firm file or the information it needs to assess the complaint. This can result in further delays for consumers. There is then no formal mechanism for cases to be passed back to firms for review, even if one of the limited dismissal grounds in DISP applies.

There is also a risk that the FCA will move forward with a regulatory solution which is different to the outcome FOS may have reached on individual complaints, which leads to inconsistency in the system.

The role of professional representatives

Although the conduct rules for PRs which are regulated by the FCA (the FCA does not regulate all PRs) require PRs to take reasonable steps to investigate the merits of a potential claim before pursuing it, and to make representations which substantiate the basis of the claim (CMCOB 2.1), in

situations of mass redress events, large numbers of complaints are referred to FOS which may not be properly evidenced or substantiated.

(ii) FCA and FOS co-operation

Wider implications issues are not identified early enough

It is imperative that issues with wider implications are identified as early as possible, to allow thought to be given to the most appropriate way to manage risks and issues, before redress events escalate.

A perception among some industry stakeholders of misalignment between the FCA and FOS on the interpretation of certain FCA requirements

The FCA has been moving away from prescriptive rules to more outcomes focused regulation (e.g. the Consumer Duty). This tends to be about broader, higher-level requirements as opposed to prescriptive rules and, as such, requires judgment calls by firms, FOS and the FCA about what actions or omissions may cause harm to consumers and whether consumers are owed redress. The FCA and FOS work closely together to try to ensure they are aligned. For example, where FOS sees evidence of widespread harm and mass claims arising, it raises these cases with the FCA. That said, further changes to the regime may be appropriate, given the shift to outcomes focused regulation.

Chapter 2 2

(2) Options for change

The FCA and FOS set out proposed options to address the issues set out above. These are divided into shorter and longer term options. The shorter term options could be achieved via changes to FCA rules or guidance, or FOS rules. If the FCA and FOS decide to take forward any amendments to rules or guidance following this Call for Input, they will consult publicly. The longer term options might require legislative change.

Stage 1: Shorter term change

Helping firms to identify and proactively address harm

The most effective way to mitigate the risk of a mass redress event is for firms to take prompt, proportionate and proactive action to identify and resolve harm. Under DISP and also under the Consumer Duty (PRIN 2A.2.5R), firms are required when handling complaints to take reasonable steps to identify and remedy any systemic problems.

Further DISP guidance or rules may be needed to help firms effectively identify and proactively address harm, for example by implementing a proactive past business review. The FCA plans to publish a report in Q4 2024 highlighting examples of good practice for firms when using data about its complaints to identify existing harm.

Making sure that firms resolve complaints fairly, reducing the need for consumers and their representatives to refer matters to FOS

The FCA and FOS propose reinstating the two-stage complaints process which was abolished in 2011, pursuant to which firms sent complainants an initial written response within eight weeks of receiving a complaint, and only had to provide a subsequent final response if the complainant indicated - within eight weeks - that they remained dissatisfied. This approach allowed consumers to first appeal a decision to the firm directly, and gave firms an opportunity to review the case, before it went to FOS, thereby reducing the number of cases referred to FOS.

The process was abolished because it was being misused by firms dealing with complaints to an unsatisfactory standard in the first stage on the basis that few consumers would take things further.

However, the FCA is satisfied that this risk is mitigated by the fact that firms must now approach complaints in a way that is compliant with the Consumer Duty – although it is considering whether further appropriate safeguards should be developed

Making sure that firms resolve complaints effectively could reduce the need for consumers and their representatives to escalate matters to a FOS final decision

At present, complainants and firms can request a final decision from FOS where they disagree with the preliminary assessment made by the FOS investigator. However, very few determinations change between preliminary assessment and final decision. The FCA and FOS therefore propose that a final

decision can only be requested in specified circumstances (e.g. when new evidence is submitted, or factual inaccuracies are identified in the preliminary assessment, or there is a novel issue in dispute where there isn't an already established position by FOS).

Making sure that where complainants are represented by a PR, complaints to firms and to FOS are properly evidenced and FOS is the right body to resolve the matter

The FCA and FOS propose that the rules in DISP should include different requirements for complaints brought by PRs. For example, FOS could refuse to accept a complaint from a PR, and allow time to continue ticking for bringing the complaint, if it is not well evidenced. Once the complaint is well evidenced, FOS could accept the complaint and treat the complaint as having been referred to FOS for the purpose of the relevant time limit. Alternatively, the dismissal grounds could be amended to enable FOS to reject complaints collectively without individual consideration where PRs send poorly particularised cases in bulk or if they are not well-evidenced.

Amendments to FOS rules on case fees

In the feedback on its consultation to charge claims management companies and other PRs (see above), FOS announced that (subject to parliamentary and FCA approval) it intends to proceed with its proposal to charge PRs up to £250 to make a complaint, reduced to £75 if the outcome of the complaint is in favour of the complainant. This new fee structure aims to establish a fairer funding model for professionally represented complaints, and ensures that FOS has sufficient resources to resolve complaints quickly.

The FCA and FOS also seek views on whether amendments, if any, to the case fee rules should be considered for mass redress events.

FOS fair and reasonable assessment

Under DISP 3 FOS must consider the merits of individual cases and decide what is "fair and reasonable". In doing this it must take into account relevant law and regulations, relevant regulator's rules, guidance and standards, relevant codes of practice and (where appropriate) what FOS considers to have been good industry practice at the relevant time.

The FCA and FOS are interested to hear views on whether FOS should take other factors into account when deciding what is “fair and reasonable”.

Broadening the dismissal grounds in DISP (rules made by FOS)¹

The FCA and FOS suggest widening the dismissal grounds in DISP 3 to cover, for example, situations where the FCA has decided to implement an industry-wide consumer redress scheme, which may be a better mechanism for dealing with mass redress events. The FCA and FOS also propose that FOS is permitted to dismiss collective groups of complaints by referral to the FCA for consideration for regulatory action, or to law enforcement for a criminal investigation to take place, where these authorities are better placed to resolve the matters in dispute. The FCA and FOS suggest that amending the dismissal grounds could also be linked to the case fee amendments (discussed above), to ensure effective cost recovery in line with the “polluter pays” principle.

Time limits for referring complaints to FOS

Complaints must be referred to FOS within six months from when a firm sends a final response to the complainant. Complaints must also be made to FOS within six years from the event being complained about or, if later, three years from when the customer knew or ought reasonably to have known they had cause to complain. This makes sure that FOS can consider complaints about long term products. However, there is a concern that the absence of a “longstop” creates uncertainty for firms if they are held liable for unsuitable advice provided many years ago. The FCA and FOS seek views on whether the current time limits should be reviewed.

Stage 2: Longer term changes

Improving how the FCA and FOS co-operate on matters with wider implications.

Given FOS is independent of the FCA, a new requirement on FOS to consult the FCA for views, or a new requirement on the FCA to direct FOS to take certain steps in relation to a case, could undermine this independence. That said, the FCA and FOS question whether they could do more to consult each other on cases, and make their views publicly known, in situations where large numbers of complaints on a similar issue are being made, and/or where interpretation of FCA rules is a key issue.

The FCA and FOS also recognise that it may be desirable for FOS to have powers to “stop the clock” and pause the DISP rules on cases with wider implications while the FCA considers matters and until it can provide regulatory input on interpretation of rules. This way, firms and consumers do not expend unnecessary time and resources on cases which may not be upheld. There would need to be set timescales for any pause so FOS can continue to meet its obligations to be a quick and informal alternative to the court process for disputes. This would require further DISP rule changes.

Options to mitigate the impact of mass redress events

When mass redress events occur, it might be appropriate for the FCA to “pause” the complaints handling requirements in DISP while it carries out diagnostic work to assess the extent of harm and consider the best approach to resolve the issue. This will lessen the risk of consumers receiving disorderly, inconsistent and inefficient outcomes to complaints, and large volumes of complaints being referred to FOS. At the moment, the FCA can only either consult on rule changes or make emergency rules without consultation to pause the time-limits for handling complaints (as the FCA did recently for motor finance). The FCA may also need to consider pausing relevant limitation periods to make sure that time limits for consumers to make a complaint to FOS do not expire while the FCA is investigating an issue and considering if regulatory action might be appropriate.

If the FCA decides to take regulatory action, such as implementing an industry-wide redress scheme under section 404 of the Financial Services and Markets Act 2000 (FSMA), it might be appropriate for cases to be passed back to firms and for FOS to not charge a case fee or charge a reduced case fee if no or limited work has been carried out on the case.

Chapter 3 3

(3) Identifying issues, and co-operation between the FCA and FOS

The FOS and FCA also discuss how they can work better with stakeholders to make sure that issues with wider implications are identified as soon as possible.

Identifying redress issues

To make sure it has greater visibility of redress matters at an early stage, the FCA is considering guidance on when and how firms should notify the FCA where a firm has identified a redress issue with significant implications for the firm or the wider market, and whether there should be a threshold for such notification. The FCA is also considering whether clarifying expectations in relation to SUP 15 notifications is appropriate, or if reporting through the regular complaints return would be preferable.

The FCA and FOS suggest that they could also consider changes to require PRs to notify firms, FOS or the FCA about potential systemic issues, before officially registering complaints.

Issues with wider implications

The FCA and FOS consider that a range of factors are relevant when determining if an issue has wider implications or if an event is a mass redress event. These factors may include but are not limited to the number and type of consumers affected, potential redress that may be owed, risk of firm failure and the risk of contagion to other financial services businesses or markets.

The FCA and FOS are interested in hearing views on whether other factors should be taken into account in determining if something has the potential to become a mass redress event.

The current framework for co-operation

The WIF was re-established in 2022 to enable members of the financial services regulatory family (FCA, FOS, the Financial Services Compensation Scheme, The Pensions Regulator and the Money and Pensions Service) to collaborate on issues with wider implications and to avoid the risk of misalignment. The FCA and FOS invite views on how the WIF could be made more effective

The FCA and FOS are keen to explore how they can work better together to identify issues that could have wider impacts. To this end, they have expanded the Memorandum of Understanding between them to reference their increased co-operation obligations and provide more detail on the situations in which they will engage with each other. (See above). The FCA is also considering how it can build on existing mechanisms for engagement with FOS.

Engaging with stakeholders on matters with wider implications

It is important that stakeholders have the opportunity to engage with the redress system. This engagement is a valuable source of intelligence and helps the FCA to make sure that its interventions are targeted effectively.

There are several existing channels for stakeholders to engage with the WIF, and the WIF Terms of Reference have been updated to enhance how the WIF deals with key consumer and industry stakeholders (see above).

The FCA and FOS also recognise that, where it is possible and appropriate, formal or informal consultation plays an important role in helping them build the necessary evidence base for redress events where there will be significant impacts. This includes the FCA's commitment to engagement with industry and consumer groups before a formal consultation when the FCA is considering imposing a consumer redress scheme under section 404 of FSMA.

The FCA and FOS seek views on what other improvements could be made to how they engage and communicate with stakeholders when considering issues with wider implications.

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Next Steps

The Call for Input closes on 30 January 2025. The FCA and FOS will summarise responses and publish next steps in the first half of 2025.

If you have any questions on the Call for Input, or anything raised in this article, please get in touch with one of the contacts listed.

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Commentary

The proposals set out in the Call for Input are a bit of a mixed bag.

While some of the proposals are sensible - such as allowing the complaints process to be paused in situations of a mass redress event to allow the FCA to assess the situation and decide the best way forward, and the introduction of rules which will hold PRs to a higher standard regarding the presentation and evidence of their case - it is difficult to see how other proposals will add anything to the current regulatory framework. For example, throughout the Call for Input, the FCA and FOS are at pains to point out that the most effective way to mitigate the risk of a mass redress event is for firms to identify an issue with significant implications for the firm or the wider market, to notify the FCA of this, and to take prompt and proportionate action. Firms are already subject to notification requirements under the FCA's Principles, and a duty to take reasonable steps to identify and remedy any systemic problems of which they are made aware when handling complaints under the Consumer Duty if they identify poor customer outcomes, so it begs the question what, if any, further requirements could be imposed on firms to seek to achieve this aim. Similarly, while many of the proposals aim to reduce the burden on the FOS, some of them, in turn, increase burdens on firms, such as reinstating the two-stage complaints process and allowing consumers "two bites of the cherry" in respect of complaints to the firm. Firms may also be concerned if any limitations are imposed on their ability to request a final decision from FOS – especially in situations where there is potential for a mass redress event where the firm's views are at odds with the FOS preliminary decision. One further observation is that it is also unclear how any of the proposals will address situations where there is a clear difference of opinion between a firm and the FCA or FOS as to whether there are valid claims.

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References

1. Currently, FOS can only make dismissal rules in a way which is consistent with the requirements of the Alternative Dispute Resolution (ADR) for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (2015 Regulations). The Digital Markets, Competition and Consumers Act 2024 (DMCCA) will, when the ADR chapter of the DMCCA is implemented, repeal the 2015 Regulations and replace these

with the new and updated ADR requirements in the DMCCA. FOS will be exempt from these new requirements. Once the ADR chapter of DMCCA is implemented, FOS will be free to widen the dismissal grounds.

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