

MILLS & REEVE

Discretionary Commission Arrangements: The challenges facing the FCA'S review

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Since its review work commenced in January this year, the FCA has faced significant challenges. We consider some key developments below.

The FCA's review

As outlined in our [previous article](#), the FCA is currently undertaking a review of historic practices within the automotive sector whereby some lenders allowed brokers to adjust the interest rates they offered customers for car finance, (known as Discretionary Commission Arrangements (DCAs)). The trigger for the FCA's review can be traced back to two Financial Ombudsman Service (FOS) decisions in which customers were awarded compensation in relation to allegedly unfair commission arrangements under DCAs.

Although it has been emphasised that the two cases were fact-specific, the FOS decisions nonetheless risked opening the floodgates for further complaints. This led the FCA to intervene by using its powers under s.166 of the Financial Services & Markets Act 2000 to undertake a "diagnostic" review of the practices in order to consider (among other matters) whether firms' conduct meant that large numbers of consumers are entitled to redress.

Although the FCA had originally stated that it would provide an update by 24 September 2024, it has recently confirmed that it will not be in a position to set out its next steps until [May 2025](#). The FCA cited as the factors contributing to the delay data analysis issues and its desire to assess the outcome of the judicial review of a FOS decision which upheld a [DCA complaint](#) ahead of publishing its findings.

We consider in more detail below those (and other) issues the FCA review been facing.

Legal challenges to court decisions and FOS findings

An already complicated FCA review is likely to be complicated further by the various proceedings commenced by several firms impacted by recent events.

Challenges to court decisions

There are a number of cases relating to motor finance commission payments which have been consolidated and currently have permission to proceed to the Court of Appeal. Those cases will consider how the law relating to secret and partly-disclosed commissions might apply and will hopefully provide greater clarity on a key question of how and when the existence of commission payments (and their amounts) should be disclosed to consumers.

Challenges to FOS decisions

Earlier this year, Clydesdale Financial Services Limited – trading as Barclays Partner Finance – commenced judicial review proceedings in relation to one of the FOS's decisions. While Barclays is seeking judicial review in respect of one specific FOS decision and not against the wider question of DCAs in general, it's likely that any outcome will play into the broader debate and could have an impact on the FCA's position.

As at May 2024, the FOS had received over 20,000 complaints relating to car finance commissions. While the FOS are continuing to investigate complaints, they have confirmed that they are unlikely to be able to issue decisions until the outcomes of the court cases, the judicial review proceedings and the FCA review are known. This of course creates greater impetus for the FCA to progress its review, but with many relevant proceedings ongoing, and so many moving pieces, that has proven more difficult.

Challenging the FCA?

Given that the FCA review is considering the use of DCAs in motor finance from as far back as 2007 (in circumstances when consumer credit did not fall within the FCA's remit until 1 April 2014) there may well be more challenge to come, this time for the FCA itself. It's worth noting, however, that those who can remember PPI will also recall that arguments about the FCA's jurisdiction met little success.

Size and scale of potential claims

The FCA's Executive Director of Consumers and Competition, Sheldon Mills, has said that 75% of the motor finance agreements between 2007 and 2021 would have involved some form of discretionary commission model (albeit that not all consumers would be entitled to compensation). Early estimates from industry professionals have placed the cost to the industry at between £6bn and £16bn.

For the larger players in the market, that means significant provisions: in its annual results in February, Lloyds Banking Group made a £450m provision for potential pay-outs, with RBC analysts suggesting it could face £2bn of claims. For the smaller players, this may represent a threat to their solvency.

In April this year, the FCA wrote to firms reminding them of the requirement that they maintain adequate financial resources. In particular, the FCA stated that with immediate effect, firms were expected to undertake an assessment of their financial resources to consider whether they are adequate. It advised that the assessment should be forward looking and must consider the risks, and potential liabilities, that firms are exposed to, including any potential redress liabilities that may arise from historic use of DCA arrangements. Although much remains uncertain as the FCA's review work is ongoing, firms must take heed of these warnings.

Motor finance firms' data delivery

Given that the FCA's review work considers DCAs from 2007 onwards, as with its work on PPI, issues with available data present a very real (but unsurprising) challenge. In April, the FCA issued a statement on its progress with the review in which it cited the struggles of many firms to provide the data it needs within a sensible time-frame and, in other cases, noted that some relevant records had not been retained. This was due to a number of factors, including data being stored across multiple systems and firms having already destroyed relevant records. While the FCA has confirmed that it now has the data it needs, no doubt these issues will also present difficulties across the industry in future, as more and more claims and complaints are received.

If you would like to feel better prepared for what the FCA review holds, or believe this review presents a potential issue for your business, please contact Rachel McDonnell or Simon Garbett for more information.

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