

Financial Ombudsman Service (FOS) and Financial Conduct Authority (FCA) Consultation CP26/9: Modernising the Redress System

Submission by the Financial inclusion and Markets Centre (FIMC)

About The Financial Inclusion and Markets Centre

The Financial Inclusion and Markets Centre is a dedicated unit of the Financial Inclusion Centre which focuses on financial services policy and regulation, financial market reform, and evaluating the economic, environmental, and social utility of finance. The new unit also covers work evaluating the impact of developments at the intersection of finance and technology including AI.¹

¹ [About | The Financial Inclusion Centre](#)

Introduction

We are pleased to submit a response to such an important consultation. For further information, please contact Mick McAteer mick.mcateer@inclusioncentre.org.uk

Summary of our submission

- We fully support the goals of ensuring that consumer harm is identified and addressed more effectively, and consumers get access to redress more swiftly. We are also very supportive of FOS initiatives to make the redress system more inclusive and accessible. But, we are very concerned about the potential cumulative impact of the proposals in the recent consultations produced by HMT and FCA/FOS. The combined effect of the proposals is likely to weaken consumer protection, risk compromising the independence of FOS, and undermine the ability of consumers to obtain due redress.
- An independent FOS provides important checks and balances within a tri-partite system of legislators (who determine the overall direction of policy), regulators (who produce rules and guidance that interprets and codifies the high level intent of legislation, and enforces compliance with those requirements), and Ombudsmen schemes which should provide an independent assessment of what is ‘fair and reasonable’ when resolving disputes between consumers and firms. FOS should not be bound, limited, or unduly influenced by, either directly or indirectly, by FCA rules and industry codes of practice and should have the independence to determine what *it* considers to be fair and reasonable *taking into account* FCA rules.
- We have written elsewhere about our concerns regarding the impact of the secondary growth and competitiveness objective, which is becoming a *de facto* primary objective. This risks weakening consumer protection and rights to redress, and compromising the operational independence of the FCA and FOS. The fact that the FCA and FOS write in the joint Foreword that the proposals will help firms ‘to invest, grow and compete’ reinforces our concerns. It should not be the role of regulators and, certainly not Ombudsmen schemes, to help the firms they are supposed to regulate to grow. The regulatory system should be judged on how well it ensures regulated industries serve the interests of the economy and society, not on how well the regulatory system serves the interests of regulated industries. Moreover, FCA and FOS talk about working ‘at pace across the whole of the regulatory system to support the Government’s broader reforms’ throwing into sharp relief how slowly the legislative and regulatory system tends to be in responding to consumer detriment in financial services.
- In our response to previous consultations, we said that unless robust governance measures and safeguards are added, the key proposals in the set of consultations on the fair and reasonableness test, wider implications issues, and mass redress events, and referral mechanisms would give firms and industry lobbies greater opportunities to: i. delay consumer access to redress and/or reduce firms’ liability for redress, ii. influence the direction of financial services policy and regulation eg. on the interpretation of the FCA’s Consumer Duty; and would bring FOS closer within the FCA’s orbit. This would

undermine the concept of an Ombudsman service being separate from regulators and making independent decisions, and weaken the tripartite system of checks and balances.

- We are concerned about the overall tone in this latest consultation. While most of the specific proposals make sense in terms of improving operational efficiency and would be unlikely to undermine consumer access to redress with the right safeguards in place, many of the proposed measures are about enabling the FOS to dismiss complaints from consumers. In other words, these are intended to ‘discipline’ the behaviours of consumers engaging with the redress system. We agree that, within reason, measures should be taken to prevent abuse of the redress system by consumers behaving irresponsibly or unreasonably. Unreasonable and irresponsible behaviours harm other consumers. But, the cumulative effect of these latest proposals would be to tilt the redress system even more in favour of the financial services industry. Yet, there are no corresponding new measures aimed at preventing firms from abusing the redress system.
- Moreover, while it is encouraging that FCA/FOS talk about developing appropriate safeguards and consumer support mechanisms to accompany proposals such as the new registration stage, we will only be able to assess the potential impact of these proposals on consumer access to redress once we see the details of these safeguards and support mechanisms.
- As we set out in our previous consultation response, we think there is a risk that the proposed pre-registration stage could deter consumers, especially vulnerable consumers, from taking a complaint to the FOS or engaging effectively with the process. The proposed approach could end up transferring more of the responsibility for ensuring that a case is presented and managed properly to consumers making the complaints. In other words, a key part of the process could end up more like a ‘self-service’ system rather than a ‘supported-service’ system. If the FCA/FOS insists on this pre-registration stage, and for the supporting information to be more complete at this stage, then the FCA/FOS should either place more responsibility on firms to ensure the correct information is presented to FOS or FOS should ensure there is sufficient support in place and act proactively to help consumers engage with the pre-registration stage.

Response to specific questions

Question 1: Do you agree with the proposed rules to introduce a registration stage (pre-registration and registration stages), as set out in the Appendix? If not, please give evidence or reasons as to why not.

Question 2: Do you agree with the proposal for the Financial Ombudsman to assess whether a case is ready to investigate within the registration stage, recognising that it will develop and publish further supporting guidance to support the rules in due course? If not, please give reasons or evidence as to why not.

Question 3: Do you have any other comments, data, evidence, or suggestions regarding the proposed registration stage?

We fully support FOS efforts that would result in consumer harm being identified and addressed more effectively, and consumers getting access to redress more swiftly. But, this all depends on how measures are implemented and the safeguards put in place to mitigate against unintended consequences.

The FOS aims to ensure that only ‘well-formed, appropriately evidenced complaints’ progress to the chargeable investigation stage. As explained elsewhere, the FCA (and FOS) is under pressure to promote the growth and competitiveness of the finance sector. The FCA continually refers to regulation as a ‘burden’. We are concerned that FOS will come under pressure to apply more stringent standards at this new pre-registration stage to reduce the number of complaints that are investigated. This could result in fewer consumers obtaining due redress.

Therefore, before determining whether a new pre-registration stage would be positive or negative, we would need to see much more detail, with scenarios, on what new standards the FOS would apply to complaints before allowing them to move to the registration stage.

As we set out in our previous consultation response, we think there is a risk that the proposed pre-registration stage could deter consumers, especially vulnerable or less confident, capable consumers, from taking a complaint to the FOS and engaging effectively with the complaints process.

The proposed approach could end up transferring more responsibility for ensuring that a case is presented and managed properly to the consumer making the complaint. In other words, a key part of the process could end up more like a ‘self-service’ system rather than a ‘supported-service’ system. If the FCA/FOS insists on this pre-registration stage, and for the supporting information to be more complete at this stage, then the FCA/FOS should:

- Place more responsibility on firms to ensure the correct information is presented to FOS. Firms will be better placed to have stored relevant information in an accessible

format. Where there are gaps, FCA/FOS should require firms, within reason, to supply the relevant information relating to a contract or financial relationship.

- Ensure there is sufficient pro-active support (human resources, not AI based) in place to help prepare consumers for the pre-registration stage. This is all the more important given the growing number of consumers using AI to help them make financial decisions. We are concerned that many will begin to use AI to help them make complaints to FOS, for example to try to understand their rights and what information to present to FOS. There have been justified concerns raised about the integrity and accuracy of information generated by AI. This could cause consumers to submit flawed or mistakenly argued complaints to FOS which might result in those complaints being rejected. Similarly, we would be concerned if FOS relied too much on AI to screen initial complaints. We have been very supportive of FOS approach to engaging with stakeholders on previous initiatives. Ensuring this pre-registration stage is an enabler of rather than a barrier to access to justice will be crucial. We look forward to FOS engaging with civil society organisations to ensure there is sufficient and appropriate support in place.
- Introduce a new rule that makes it clear that firms: are required to collaborate with FOS and support consumers during the pre-registration process; and must not act in any way with a view to influencing FOS to keep complaints at the pre-registration stage or causing FOS to move complaints at registration stage back to pre-registration stage.

The Guidance in Annex B says that: *The Ombudsman may allocate a complaint from the registered stage to the pre-registered stage where, for example, the Ombudsman considers that the complaint is or may be affected by regulatory action.* It is not clear what specific regulatory actions FOS has in mind. In our response to the previous consultation, we explained that the overall reforms create opportunities for the industry to exert undue influence on the development of policy, enforcement of regulations, and consumers' access to redress through the proposed wider implications issues, mass redress events, and referrals/lead complaints processes.

The inclusion of '*may be affected by regulatory action*' is too wide. Firms and industry trade bodies will have opportunities to pressure the FCA into using regulatory actions to minimise redress bills through the MRE, wider implications, and referrals/lead complaint issues processes.

We would suggest drawing this guidance more tightly. For example, this could say: *The Ombudsman may allocate a complaint from the registered stage to the pre-registered stage where the complaint relates to an issue which the FCA states will be subject to a regulatory action*'.

This Guidance as currently expressed could also lead to consumers obtaining lower redress. For example, in the Motor Finance misselling redress episode, the FCA clearly intervened in favour of the industry to lower the redress bill firms would be exposed to. There is a clear risk that moving cases to the pre-registration stage could ultimately lead to some consumers being treated under a regulatory action and consequently receiving lower levels of redress than might have been available if they had proceeded through the redress system as initially planned. This risk has always been there but it is now heightened due to the growth and competitiveness objective.

If this proposal is to be retained then we would argue that FOS should not be able to unilaterally use this trigger to move complaints back down the process to pre-registration stage. Ideally, FOS should inform consumers affected about the risks associated with their cases being treated as part of a regulatory action and inform them that they have the right to remain in the registration stage.

As covered in our previous response, we are very concerned about the governance around the application of wider implications issues, MREs, referrals/lead complaints, and now the decisions to move cases from registration to pre-registration stage. We recommended the creation of an advisory panel to oversee these cases.

Question 4: Do you agree that the Financial Ombudsman should retain the ability to dismiss complaints that are frivolous or vexatious? If not, please give evidence or reasons as to why not.

Yes, we agree.

Question 5: Do you agree that the Financial Ombudsman should be able to dismiss complaints where complainants have acted vexatiously, abusively or otherwise unreasonably? If not, please give evidence or reasons as to why not.

Yes, we agree. We are very conscious that FOS staff while aiming to act fairly and reasonably can be subject to abuse from complainants who are not satisfied with the outcome. This is not acceptable.

We appreciate that FOS recognises that some complainants are vulnerable or make innocent mistakes and that such mistakes would not mean the complainant would be considered as having acted unreasonably or for material gain.

Question 6: Do you agree that the Financial Ombudsman should be able to dismiss complaints where the respondent has reviewed the subject matter of the complaint in accordance with (a) the regulatory standards for the review of such transactions prevailing at the time of the review; or (b) any formal regulatory requirement, standard or guidance published by the FCA or other regulator in respect of that type of complaint? If not, please give evidence or reasons as to why not.

No, we would be concerned about this proposal without additional safeguards being introduced to ensure that respondents are treating complainants fairly. The FOS does not explain how it would satisfy itself that firms had acted in accordance with (a) and (b) before dismissing complaints. Would FOS just accept a firm's assurance that it had acted in accordance with (a) and (b)? Or would it actually examine whether a firm had done so before dismissing complaints?

We have more fundamental concerns about recent moves to constrain FOS ability to act independently as typified by the statement: *'We do not consider it would be appropriate to take on cases for investigation where a firm has already reviewed the complaint in accordance with any requirements imposed by the relevant regulator. This aligns with feedback from the Government's Review and CFI that we should not act as a regulator.'*

Industry representatives have often accused FOS of acting as a quasi-regulator. It is disappointing to see government and FCA/FOS give credence to this viewpoint. We think this misunderstands the role of an independent Ombudsman as part of the tripartite system of consumer protection.

An independent FOS provides an important check and balance within the system of legislators (who determine the overall intent and direction of policy), regulators (who produce rules and guidance that interprets and codifies the high level intent of legislation, and enforce compliance with those requirements), and Ombudsmen schemes which should provide an independent assessment of what is 'fair and reasonable' when resolving disputes between consumers and firms. It is important to remember that in our tripartite system, FOS should not be not bound, limited or unduly influenced, either directly or indirectly, by FCA policy and should have the independence to determine what *it* considers to be fair and reasonable *taking into account* FCA policy.

If FOS decides to dismiss cases on these grounds and rely solely on FCA standards then it risks becoming an extension of the FCA, part of the regulatory process rather than independent of it, undermining an important check and balance.

Question 7: Do you agree that the Financial Ombudsman should be able to dismiss complaints where, the Financial Ombudsman is satisfied, having considered its responsibilities under s. 404B FSMA, the respondent has reviewed the subject matter of the complaint in accordance with a consumer redress scheme? If not, please give evidence or reasons as to why not.

See Q6, above. The same concerns apply to this proposal.

Question 8: Do you agree that the Financial Ombudsman should be able to bring finality by dismissing complaints where the subject matter of the complaint has previously been considered or excluded under the Financial Ombudsman Service? If not, please give evidence or reasons as to why not.

Question 9: Do you agree with the addition of 'factual' into the existing rule? If not, please give evidence or reasons as to why not.

Yes, in general we agree with the proposals in Questions 8 and 9. The consultation says that there will be clarification that an exception will only apply if the material new evidence relates to facts as opposed to additional 'new' arguments or changes in caselaw or regulations. But, it is worth noting that while material new evidence may reinforce existing arguments, it can support new arguments to back up a complaint. So, the introduction of new arguments should not be a reason for dismissing complaints if new evidence supports new, reasonable, arguments.

Question 10: Do you agree that the Financial Ombudsman should be able to dismiss complaints where the subject matter of the complaint has been dealt with, or is being dealt with, by a comparable complaints scheme, regulatory or law enforcement body or dispute resolution process? If not, please give evidence or reasons as to why not.

In principle, we do agree with this proposal. However, the harm a consumer experiences consist of a number of elements, and not just relate to regulated financial product and services. Therefore, effective resolution may require engagement with a number of schemes and bodies. It is not clear whether this proposal would mean that, if another body was dealing with one part of the overall case, then FOS would be able to dismiss the part of the complaint relating to financial products and services that falls within its remit.

Question 11: Do you agree that the Financial Ombudsman should be able to dismiss complaints where the complaint has been or is the subject of court proceedings? If not, please give evidence or reasons as to why not.

Yes, we agree.

Question 12: Do you agree that the Financial Ombudsman should be able to dismiss complaints that are more appropriate for court, arbitration or another complaint scheme or dispute resolution process? If not, please give evidence or reasons as to why not.

We do not disagree, in principle, with the FOS wanting to dismiss complaints that are better dealt with elsewhere. But, we disagree with the proposal to remove consent from this process. FOS should inform the consumer of the fact that it is minded to dismiss the complaint, explain the consequences, seek consent, and provide the consumer with information on the other avenues.

Question 13: Do you agree with reintroducing a dismissal ground for complaints about employment matters from an employee, or employees, of a respondent? If not, please give evidence or reasons as to why not.

Yes, we agree.

Question 14: Do you agree with reintroducing a dismissal ground for complaints purely about investment performance? If not, please give evidence or reasons as to why not.

Yes, if it is clearly and solely about investment performance. But, care needs to be taken that FOS does not inadvertently dismiss genuine complaints which may be triggered by poor investment performance. For example, a consumer complaining about unforeseen investment volatility or poor investment performance may have been misled into believing that an investment product is low-medium risk or that a particular fund manager is very skilled with the implication that good performance is likely.

This could take on more significance as a result of the introduction of ‘targeted support’. With targeted support, the FCA is weakening consumer protection, by moving the regulatory boundary of responsibility from firms to consumers, to encourage firms to sell greater volumes of higher risk investment products to customers holding low risk deposits. The supposed superior returns available from investment products and investment skills of certain fund managers are likely to play a key role in the selling of these investment products via targeted support.

It is not clear what steps FOS intends to take to check that the complaint, while potentially triggered by investment performance, has an underlying justified cause that should be dealt with by FOS.

Question 15: Do you agree with reintroducing a dismissal ground for complaints relating to a respondent’s discretion under a will or private trust. If not, please give evidence or reasons as to why not.

No comment.

Question 16: Do you agree that the Financial Ombudsman should be able to dismiss complaints where there is more than one eligible complainant, but they have not all consented to the complaint? If not, please give evidence or reasons as to why not.

Yes, we agree. We are very pleased that the FOS has emphasised that where there is evidence of vulnerability such as domestic/economic abuse or coercion, then this discretionary power need not be exercised.

Question 17: Do you agree that the Financial Ombudsman should be able to dismiss complaints for other compelling reasons? If not, please give evidence or reasons as to why not.

Question 18: Do you agree with the examples that are proposed for DISP 3.3.4D G? If not, please give evidence or reasons as to why not.

We agree, in principle, that FOS should be able to dismiss complaints for other compelling reasons. Most of the examples provided seem reasonable. However, the determination of what is reasonable is not necessarily straightforward. Care needs to be taken that this reason for dismissal is not applied too enthusiastically if it is reintroduced.

The second and third examples proposed involve complaints with no reasonable prospect of success, or situations where a fair and reasonable offer is still available. We agree that if there are no reasonable prospects of success then these complaints should be dismissed. The example given of insurance excesses is a fair one. High levels of excesses may be a sign of market failure but that is a regulatory matter not necessarily for FOS.

However, with regards to situations where ‘a fair and reasonable offer is still available’, this is not so straightforward. If this reason is to be reintroduced to dismiss a complaint, it would require FOS to assess whether the offer is indeed fair and reasonable and inform the consumer. Otherwise, consumers would have to rely on the firm’s potentially self-interested views of what is a fair and reasonable offer.

Question 19: Do you think the six examples that are proposed as guidance for other compelling reasons in DISP 3.3.4D G should instead be separate rules in their own right?

We do not have any particular views on this. We would support whatever works best for FOS. Our main concern relates to the interpretation of examples (2) and (3), above.

Question 20: Do you agree with the Financial Ombudsman’s proposed changes to DISP 3 (as set out in the Appendix)? If not, please give evidence or reasons as to why not.

We have no comment on this proposal.

Question 21: Do you agree with the proposed changes to DISP 3.6.4R? If not, please give reasons or evidence as to why not.

No, we strongly disagree with this proposal. This would weaken the independent role of the FOS in the tripartite system described above. It is crucial that FOS is not bound, limited or unduly influenced by, either directly or indirectly, FCA rules and industry codes of practice and should have the independence to determine what *it* considers to be fair and reasonable in the circumstances *taking into account* FCA rules.

If FOS decides to determine what is fair and reasonable on these grounds, and rely on FCA standards, then it risks becoming an extension of the FCA, part of the regulatory process rather than independent of it, undermining an important check and balance.

This marks the end of our submission.

Financial Inclusion and Markets Centre (FIMC)
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