

# Creating a funding model for the future: A Discussion Paper

Building Societies Association  
Feedback

Restricted  
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# Introduction

The BSA welcomes the opportunity to respond on behalf of its members to the FOS's discussion paper on creating a funding model for the future. It is helpful and encouraging that the FOS is seeking views at this stage in advance of its formal consultation.

We agree that there is scope to build on the existing principles, and expand on those in response to Question 1 below.

However, as we have consistently pointed out<sup>1</sup>, in our view the FOS is not currently meeting its existing funding principles in two critical aspects:

- That the Service should be fair, and
- That costs should be broadly proportionate, with the businesses which generate the most work paying the most for the service.

If the proposals that are ultimately brought forward address these issues and achieve a fair and proportionate system, we would welcome that, although we do consider that there are a number of fundamental points that the FOS needs to bear in mind in considering and putting any proposals forward.

We have been concerned for a number of years about the unfair and disproportionate impact of the FOS's move to achieve a 50/50 funding split of case fees/levy. Far from encouraging good behaviour on the part of firms this, in conjunction with the current construct of the FCA's fee blocks, means that smaller firms and those with low numbers of complaints (which accounts for the vast majority of our members) find themselves subsidising the poor behaviours of others.

We commend any potential changes that would result in a model reflecting what appears to us to be the fair principle of "polluter pays", and which is sadly lacking in the current approach to funding. However, we would also like to see those proposals go far enough to in some way address the extent to which that principle has already been eroded over the past 4 years. That short period has seen the levy rise from £24m in 2018 to its current level of approximately £106m, with the then 85/15 split of fees/levy moving to its current 56/44 level bringing a disproportionate cost to smaller firms and those with low complaints volumes.

With that in mind, we think it important that the FOS's future consultation:

- Fully considers the rationale for continuing to progress towards a 50/50 split,
- Considers whether that is fair now, and will remain fair in conjunction with its new proposals, and
- Acknowledges and quantifies the additional amounts paid through the levy versus case fees over the past 4 years as well as the benefit and potential impact (if any) of the proposed changes on that.

## Key points

Aside from the above, our key points are as follows:

1. In determining its funding model for the future, it is time for the FOS (in conjunction with the FCA) to address the inequity and disproportionate impact that the current ratio of fee/levy funding has on smaller firms and those with fewer complaints.

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<sup>1</sup> See our [response](#) to the FOS's 2019 consultation on future funding

2. We would welcome any proposals that collectively would see the principle of “polluter pays” reflected in the funding of the Service.
3. In extending its funding principles, the FOS should take care to ensure that it does not stray beyond the bounds of its statutory remit.
4. Much more detail is required in a number of areas in order for future consultation to be meaningful. That is especially the case in relation to proposals around recovery of overheads, refining any additional factors on which the model would be based, and differentiation of case fees according to stage reached.

## Response to questions

### ***Q1: Do you agree with how we suggest building on our current principles and are there any other factors we should take into account?***

We have the following comments in relation to the proposed additional factors on which the model should be based:

**Recovery of Costs so as not to run a deficit:** We agree that this is sensible at point of principle. We would, however, welcome more information from the FOS as part of the next consultation on what it would cost to achieve, over what time period and the short and long term financial impact on firms of doing so. There is, however, an argument that there is no issue in a service provider such as the FOS running a deficit reflective of the peaks and troughs of the volume of complaints with which it is dealing.

**Costs reflect type of complaint:** Greater granularity on what is actually meant by this would be needed. If it means that the fees charged for more complex cases to an individual firm against which the complaint has been brought would be higher, then that seems appropriate. The length of time taken to resolve a complex pensions-related complaint, for example, should be reflected in the fee charged. The question, however, is who would pay for it and how? What mechanism would be adopted to do this? If, due to the operation of the FCA’s existing fee blocks this ultimately meant that firms with less complex products and services were effectively bankrolling more complex complaints, that moves even further away from the polluter pays principle. It would risk being inconsistent with the existing principles around fairness and proportionality, as well as being at odds with the proposed new principle regarding adoption of positive behaviour by firms.

**Encourage firms to adopt positive behaviour with consumers, follow published guidance and resolve complaints fairly and quickly:** We find it hard to link what the FOS does with its funding model as a means to achieve this. Rather, we suggest that the introduction of the new Consumer Duty in 2023 should focus firms’ minds on this. That should serve to change behaviour that may need changing, so why look to the principles behind the funding model to do that? Further, we would be concerned that adopting a principle of this nature goes beyond FOS’s statutory remit in Part XVI and Schedule 17 of the Financial Services & Markets Act 2000.

**Supported by data and evidence:** We agree that this makes sense, but surely this is not or ought not to be something new, and arguably it ought not to need to be expressed as part of the funding principles. If, however, it leads to increased transparency for users of the service and is reported on publicly, then this may have benefit and we would support it.

## ***Q2: Do you agree with our option of changing the CJ Levy to recover fixed overheads?***

This section feels very incomplete, and talks about proposals without the associated information that would be needed for firms to be able to respond to this aspect of the Discussion Paper in a meaningful way. We reserve our position on this until, as the paper suggests, this is consulted on in the autumn.

That said, and on the basis of what we have seen to date, in general terms we do not agree with the option of recovering fixed overheads on the basis of what is presented in the discussion paper as:

- Without corresponding fee block changes it has the potential to put an undue burden on smaller firms, and
- It is potentially therefore at odds with the principle of polluter pays, and
- The principles/points being considered are far too vague at present to give a meaningful view of what this might look like in the future.

Were these matters to be addressed fully at consultation stage, we may be more supportive, but we cannot offer support on the basis of what we have seen to date. We think that expecting smaller firms, whose use of the service is more limited, to contribute to this is inappropriate. In conjunction with the FCA, the FOS could look to adopt a proportionate approach here. Perhaps that could be achieved, in the absence of any other options, by ensuring it is only the firms with larger volumes (perhaps of more complex cases) that pay for the infrastructure costs.

We have the following more specific concerns/questions:

- More detail should be provided in relation to what constitutes support functions, IT and property. Without that being clear, and there being clear accountability at FOS for decisions taken in relation to these matters, firms could ultimately find themselves paying for any mismanagement of the service.
- We do not see how simply funding FOS's fixed overheads will "provide confidence to firms that we are effectively managing our cost base". If FOS's infrastructure as well as personnel is being funded by firms, how and by whom will the FOS be held to account as to how those funds are invested or spent? How will firms be assured that the service is being effectively managed? We think that if that is to be taken forward there is a case for current oversight mechanisms to be reviewed.
- Turning to the comment that in making such a change, the CJ levy could increase over and above the current £106m, with an expectation that that would reduce over time. We would remind the FOS that the £106m figure is already circa £10m above what it has been in order to fund the FOS's transformation programme, so already placing an increased burden on smaller firms. In that respect, please see our comments throughout this response, which advocate a more proportionate and fair approach to how the CJ levy is applied.

## ***Q3: Do you agree with our proposal for simplifying the VJ levy?***

In principle, yes, this seems a sensible idea. We do, however, question why, if firms subject to the CJ are being asked to contribute to the FOS's infrastructure costs, those firms using the VJ should not also do so. This does not seem equitable, and in putting forward proposals later in the year, we would ask the FOS to consider this as an option. We appreciate it would likely amount to a very small amount, but if the overall levy is to increase then making this adjustment feels a fairer approach.

***Q4: Should we retain our single, flat case fee or do you support a differentiated case fee model?***

We are supportive of a differentiated approach in principle, although whether this is actually achieved or even achievable depends on the overall structure of the CJ and the FCA fee blocks.

We agree that adopting a differentiated approach to fees has the potential to ensure that a financial business pays the costs of their complaints, but are less convinced that it would encourage more constructive engagement from firms. If these are, as is suggested the overarching aims in introducing a new approach, we consider it important that the FOS has:

- Clear metrics to measure the success or otherwise of the changes in meeting those aims
- A stated position on whether, if its aims are not met, it will revert to the previous model.

***Q5: Do you agree that we should charge different case fees according to the stage the case has reached before it is resolved? Do you consider that this would create any unhelpful incentives?***

We are supportive of this approach in principle, subject to the FOS providing more detail on how it might operate in practice and the level of fee charged in respect of each stage.

In terms of any unhelpful incentives, these could well be influenced by the level of fees charged, as well as how/who pays them, so that should be borne in mind when these are set. The consultation refers to the fact that as fees are only designed to cover the service's costs, there would be no incentive for the FOS to "push complaints to the final decision stage". While we appreciate that, we think that whether this turns out to be the case should be monitored against the statistics shown on page 9 of the discussion paper. If the proportion indicates a significant shift, this may indicate that the system is not in fact working as intended, and a review may be required.

In any case, we consider that a review of the success or otherwise of the proposals should be undertaken against clear and pre-defined indicators, and reported back to users of the service and other interested parties.

***Q6: Do you agree that we should vary case fees according to the type of product the complaint relates to? If you agree, do you think we should also introduce fees that are chargeable according to case stage?***

We agree that varying case fees according to product (and introducing fees chargeable according to case stage) seems sensible from a fees perspective. Without changes to the levy and how that is generated, however, then this only partially addresses the issue of firms that have few and simple complaints effectively subsidising those firms with greater volumes and complexity of complaints.

***Q7: Do you agree with reducing the margin of 15% to 5% and removing the free case allowance in group fee account arrangements?***

While we would welcome this direction of travel in principle, this issue does not impact the majority of our membership.

***Q8: Do you agree that an initial fee at conversion will protect us and levy payers from the risk of not recovering costs for completed work?***

We agree that this would be one outcome from a protection perspective, although we do see some potential risks that would need to be carefully monitored and managed:

- Further “weaponising” of the case fee by CMCs and law firms operating in a similar space.
- Cases stagnating, and thus consumers being disadvantaged, while the FOS waits for a firm to make payment in order for the case to proceed.
- Were a firm to receive high volumes of complaints either directly from consumers (less likely) or from CMCs/law firms, depending on the level of fee charged, that could impact a firm’s cashflow.

***Q9: Do you agree that a time limit of 12 months to claim for overpayment of fees provides firms with a sufficient opportunity to make any claim for repayment?***

Some of our members consider that this is not sufficient time.

***Q10: Do you agree that we should include the data that results from any new fee structure as part of the quarterly report we publish on our website?***

Yes.

***Q11: Do you have evidence to demonstrate problematic behaviours from CMCs and do you think a charge from the Financial Ombudsman Service would prevent them?***

As a trade body, we ourselves have no direct evidence of this. We would suggest that the reason that the FOS is not seeing more evidence of frivolous or vexatious claims may to some extent be because firms are dealing with these themselves and they are not making it to the FOS.

Our members, however, continue to report:

- Generic complaints not just from CMCs, but also from solicitors firms acting in this area.
- Increasing concern at the number of CMCs whose business has been transferred to law firms, thus bypassing the more robust supervision of the FCA to what is, in our experience, a much less robust approach from the Solicitors Regulation Authority.
- CMC firms failing to take account of previous FOS decisions. For example, in their continued use of “audit” reports, which the FOS has discounted in a number of prior decisions.

If the FOS were to have the ability to charge a fee, this could have a positive effect in discouraging such behaviour. We would also, however, urge the FOS to raise concerns with the relevant regulator, whether that be the FCA, the SRA or the Bar Standards Board.

We understand the concern that introduction of a fee to a professional firm to bring a complaint might be passed on to the consumer. However, a mechanism could be introduced whereby that is not permitted, and if the case ultimately proceeds, the firm in question is required to reimburse the professional firm.

***Q12: Would you like us to consider introducing differentiated fees based on complexity in future? How should complexity be defined and how could fees based on complexity be applied more effectively?***

We think that this is something that should be considered. In terms of defining what is considered to be complex, we think that the factors listed in the discussion paper are all relevant and could be adapted to fit a wide definition of what constitutes a complex case. We feel that ensuring that the FOS is not restricted in deciding what is complex will be important.

We do not consider that the amount at stake should influence complexity. It ought not to be relevant. A very straightforward case could foreseeably involve a large sum of money. Also, the fact that another party has legal or other representation ought not of itself to create complexity. On the contrary, in many cases, having external representation may be helpful.

***Q13: Would you like us to consider offering discounts for cases resolved in batches in future, or do you think that fees based on the stage a complaint reaches would have the same impact? What would be an appropriate maximum number of complaints to form a batch?***

Adopting a discounted approach for resolution of batches would seem appropriate. The devil would be in the detail of how that would operate.

For example:

- Elsewhere in the Discussion Paper, the FOS talks about only covering its costs. Would discounted fees in such cases reflect that principle, and if so, then depending on volume one could see a scenario where firms that had behaved inappropriately did not feel such a great financial impact, which could in turn impact their propensity to adopt “good behaviour” in the future.
- Would the level of discount vary according to overall volume of complaints in a particular batch?

We support in principle the idea of defining a batch on the basis of total cases and applying a threshold to that.

***Q14: Would you like us to introduce supplementary fees for firms which are uncooperative and how do you define “uncooperative”?***

Although we can see some potential benefit in this, we have concluded that the introduction of something so subjective as being “uncooperative” to charging a fee has the potential to lead to dispute and thus become time-consuming for all involved. It may increase complexity and in fact add to the overall costs of the service unless there is a crystal clear definition of what

constitutes being uncooperative. We find it hard to see how the necessary levels of clarity could be achieved, unless it was to tangible and readily measurable factors. These could include:

- Failure to respond fully to a request for information within a defined time period.
- Failure to respond to repeated (would need to be defined) requests for the same information.

However, even with these sorts of measures which are on the face of it reasonably clear, there may be particular circumstances that mean it has not been possible to get hold of certain information and so an element of discretion may need to be allowed in charging fees or not, which would seem to defeat the purpose.

***Q15: Do you agree that these options should not be taken forward or should we reconsider any of them – and if so, why?***

We think there could be merit in introducing a tiered fee unless the inequity created by the current fee block arrangements and proportion of funding generated by levy rather than by fee is addressed by some other means.



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We fulfil two key roles. We provide our members with information to help them run their businesses. We also represent their interests to audiences including the Financial Conduct Authority, Prudential Regulation Authority and other regulators, the Government and Parliament, the Bank of England, the media and other opinion formers, and the general public.

Our members have total assets of over £477 billion, and account for 23% of the UK mortgage market and 18% of the UK savings market.