

Response to HM Treasury's consultation - FS Sector Strategy: Review of the Financial Ombudsman Service

About the Building Societies Association

The Building Societies Association (BSA) represents all 42 UK building societies, including both mutual-owned banks, as well as 7 of the largest credit unions. Building societies and mutual-owned banks have total assets of almost £650 billion. They hold residential mortgages of over £485 billion, 29% of the total outstanding in the UK. They are also helping 23 million people build their financial resilience, holding over £485 billion of retail deposits, accounting for 23% of all such deposits in the UK. Building societies and mutual-owned banks account for 47% of all cash ISA balances. With all their headquarters outside London, building societies employ around 52,300 full and part-time staff. In addition to digital services, they operate through approximately 1,300 branches, holding a 30% share of branches across the UK.

Executive summary

We welcome the opportunity to respond to HM Treasury's review of the Financial Ombudsman Service (FOS). Our response to this consultation should be read alongside our response to FOS/FCA CP25/22 *Modernising the Redress System*, as both consultations are linked.

Overall, we are pleased with the direction of travel shown in the package of proposed reforms to the FOS. However, there are a number of other important issues that we think would be prudent for the government to address at this juncture. In summary:

- **Fair and Reasonable:** We note the comments that the fair and reasonable "test" is considered to remain valid. However, this was introduced in a world pre-dating both TCF and the Consumer Duty. We would urge the government to carefully consider whether such a wide range remains appropriate in light of the duty, which brings a much clearer focus on customer outcomes than was the case when FSMA was introduced.
- **Challenging FOS decisions:** How can we make it easier for firms to successfully challenge FOS decisions? There is nothing in these proposals that addresses the current imbalance in terms of firms being able to challenge a FOS decision other than through Judicial Review, which is too high a bar given the really low chances of a firm being successful in a JR of the FOS.
- **Precedent/Quasi-regulator:** We are not convinced that what is being proposed here would actually address this fully at a practical level. It's relying instead on engagement between FCA and FOS, which is a good start, but does not deal with the issue that firms are required to have regard to FOS decisions. We've seen examples of firms changing processes and perhaps even changing products or leaving markets entirely as a result of FOS

decisions. We feel that for best impact, this should be explored further as part of this consultation.

- **CMC/Prof Reps:** We believe that in order to fully address the strain placed on the redress system by wider implications cases and potential MRE's the whole landscape of how claims management companies and professional representatives operate and are supervised should be refreshed. A good starting point would be to ensure that there is one regulator for all firms embarking on such activity – the FCA. While we absolutely recognise the positive role that well run and principled firms of this sort can play, some are far from that. In addition to one regulator, could a penalty be imposed on CMC's/other professional reps where they are considered to have acted vexatiously?

Response

Question 1: Do you agree that, where conduct complained of is in scope of FCA rules, compliance with those rules will mean that the FOS is required to find a firm has acted fairly and reasonably?

If, where a firm has complied with FCA rules, the FOS will be required to have found them to have acted fairly and reasonably, it is helpful. On the face of it, this will provide greater certainty for firms.

There are, however, three areas on which we think further thought is required:

- a. How the FOS arrives at the conclusion that a firm has or has not complied with a particular rule.
- b. The role of FCA guidance.
- c. The impact of the ongoing work to simplify the FCA Handbook and focus more on outcomes.

The framing of Question 1 suggests that it is likely to be clear as to whether a firm has complied with a rule. This might indeed be the case when considering a rule such as MCOB 5.4.10 R which says “In providing an *illustration* to a *customer*, a *firm* must explain to the *customer* the importance of reading the *illustration* and understanding it.” In most cases, one would expect that this is something that had either been done or not, and so compliance is more straightforward to evidence.

On the other hand, take MCOB 5.4.18A R and MCOB 5.4.1.18B R, which deal with messages to be given to consumers. These are much more complex and are supplemented by guidance in MCOB 5.4.18C G, which expands on the rules, and without which a different view might be arrived at on whether or not the required messages had in fact been given to the consumer.

The guidance sitting alongside FCA rules, whether located in the Handbook or presented as Non-Handbook Guidance, is already key to how stakeholders (FOS, firms and consumers alike) interpret and apply those rules. The fact that the Handbook already contains such extensive guidance is clear evidence that the

rules themselves are open to interpretation. With that in mind, we think that the proposals could go further and include specific reference to the fact that a firm has clearly taken account of/applied the relevant FCA guidance as being evidence that they have complied with that rule. That should be the case whether the guidance is Handbook or non-Handbook guidance.

The need for some direction on this is more crucial than ever given the FCA's ongoing programme to simplify the Handbook and focus more on consumer outcomes. Implicitly, this suggests that some rules at least may become even more open to interpretation and where that is the case firms and complainants alike will find themselves in a potentially uncertain situation – if rules and guidance are wide enough to be interpreted in different ways by firms they could also be interpreted in different ways by the FOS. This could in turn lead to either continued uncertainty or a greater reliance on the FCA's guidance.

Question 2: Will the aligning of the Fair and Reasonable test with FCA rules still allow the FOS to continue to play its relatively quick and simple role resolving complaints between consumers and businesses?

Our comments in response to Question 1 apply equally here. In addition, it is worth considering the impact on the FCA in terms of record keeping and evidencing the rationale behind a particular piece of regulation in the context of being able to opine on the intent.

Question 3: Do you agree with the proposed approach for dealing with law which may be relevant to a complaint before the FOS?

There are a number of elements to the approach and we look at each in turn.

Provisions in law not made by the FCA:

Where the FCA rules reflect the law or the FCA has issued guidance on how relevant law applies to regulated firms, it makes sense that fair and reasonable conduct should be determined by reference to the FCA's rules and/or guidance. Where the FCA has issued guidance, this seems reasonable.

The question, however, is whether the fact that that FCA consideration had taken place would be sufficiently clear to the FOS when considering the complaint in question. Without a mechanism to ensure that, we think that there is a risk that the FOS simply proceeds on the basis that there has been no such consideration without very clear evidence to the contrary, which might not always be available. Further thought should be given to some questions around this. For example:

- Without specifically stating it, does some existing guidance effectively interpret the application of another law to regulated firms?
- If so, how would the FOS know this?
- Would establishing/ assessing this potentially be an unnecessary draw on their (FOS's) resources?
- Could they simply engage with the regulators to understand whether they had in fact considered the particular law in relation to the rule?

We agree that where the relevant law is not addressed by FCA rules or guidance, the FOS should be able to continue to take into account relevant law in deciding what is fair and reasonable, other than in cases with potentially wider implications.

We are concerned that the proposals indicate that the circumstances in which the FOS would have to refer an issue with potentially wider implications to the FOS are limited to instances where it is "taking into account relevant law". We do not think that that limitation on the requirement is appropriate. Surely, the obligation to refer should exist regardless of the basis on which the FOS is considering a complaint or series of complaints.

Pausing Complaints

The current proposals would allow the FCA to "request" that the FOS pause the handling of complaints affected by an issue with potentially wider implications while it determines an appropriate response. We would like to see this being a requirement on the FOS rather than a request of them.

Referral to the Courts

If the FCA considers that it would be beneficial to refer a wider implications case to the courts to obtain legal certainty on the application of the law, it will be able to do that as a test case. We agree with this. Once they have a ruling the FCA would then decide whether any changes are needed to the rules or guidance, and we think it would be useful to provide further information on areas such as:

- Where changes are needed – how quickly are they made? Will they be consulted on?
- The impact on cases that may have been paused.

Question 4: Do you consider that there are some cases that are not appropriate for the FOS to determine, bearing in mind its purpose as a simple and quick dispute resolution service? How should such cases be dealt with?

We agree with the approach that is proposed in relation to clarification of law and/or regulatory intent in relation to cases that are referred to the FOS, which deals with two primary areas where the role of the FOS needed to be looked at. Beyond that, a mechanism to identify in what circumstances and at what time a particular type of complaint may not be appropriate for FOS determination would be helpful.

The other key area is cases of potentially wider implications, and/or systemic impact that should also be drawn out of FOS jurisdiction.

Question 5: Do you agree that there should be a mechanism for the FOS to seek a view from the FCA when it is making an interpretation of what is required by the FCA's rules?

Yes.

Question 6: Do you agree that parties to a complaint should have the ability to request that the FOS seeks a view from the FCA on interpretation of FCA rules where the FCA has not previously given a view?

We agree that parties to a complaint should have the right to have the FCA give a view on the interpretation of FCA rules where that has not already been given. We think, however, that careful consideration should be given to the proposal that the FOS should be asked to seek a view. The mechanisms around this, and particularly in cases where the FOS is minded to refuse such a request will need to be tightly drafted and provide comfort to all users of the redress system that it is not open to abuse. An alternative might be to have an independent party determine whether or not referral to the FCA on a particular issue is appropriate.

Further, the FCA have yet to consult on the grounds on which another party may request a referral to them on a point of interpretation, per Section 2.25 of their consultation CP25/22. We think this detail is highly important in order to provide certainty as to the effectiveness of the processes surrounding this. The current Annex 5 to the FCA's CP does not cater for this at any point.

Question 7: Do you agree that parties to a complaint should have the ability to request that the FCA considers whether the issues raised by a case have wider implications for consumers and firms?

Yes, but we question:

- a. Why the proposal is that this would only be possible at the stage that the FOS has presented its provisional assessment on determination of a case, and
- b. Why the request is to be made of FOS (per our response to Question 6 above).

There could well be circumstances, prior to determination by the FOS, that it becomes evident earlier in the process that an issue may have wider implications for firms and/or consumers. Should that happen, the process should be devised so as to allow for an earlier request/referral to the FCA to be made.

Question 8: As part of implementing the proposed referral mechanism, do you think there are any issues which should be considered in order to ensure the mechanism works in the interests of all parties to a complaint?

See our comments above.

Question 9: Do you agree that the Chief Ombudsman should have overall authority for determinations made by FOS ombudsmen, and through that authority, should be responsible for ensuring consistent FOS determinations?

We agree that making this clear will be helpful and should help ensure consistency. The reality, however, is that we would expect the FOS currently to be striving to achieve this. While this may bring more focus on this to the holder of the role of Chief Ombudsman (perhaps in a way similar to holders of senior management functions under FCA rules) we are sceptical as to whether this will make a practical difference.

Question 10: What approach to transparency arrangements would provide the most accessible way for consumers and firms to understand what outcomes to expect for particular types of cases that the FOS deals with?

We note that the government is interested in what types of transparency arrangements would be most helpful in allowing consumers and firms to understand what to expect when a case goes to FOS.

We think that the FOS being required to publish 1/4ly thematic guidance on how particular types of case are investigated and how the FOS would expect to see relevant FCA standards applied to such cases could be helpful. The consultation suggests that this could be alongside or instead of individual determinations. We expect our members might want to have access to individual determinations too, so if the general rule is that there is a thematic approach, there should still be a mechanism for firms to access individual determinations. This would be particularly so where there might be emerging wider implications issues.

Reference is also made as to how transparency arrangements can be used to demonstrate that the FOS has worked with the FCA to ensure it has a thorough understanding of relevant FCA standards and how the FCA intends those standards to be followed by firms. We have a number of points on this:

- It has been suggested that guidance documents referred to above could be jointly developed and issued by the FCA and the FOS, or the FOS could be required to seek FCA approval before such guidance documents are published. This could work.
- Another option might be to link this to the reporting from the wider implications group that could demonstrate stats on how often requests had been made and views sought and given. This could also be a good and useful indicator as to how clear or otherwise open to interpretation the rules are.
- Where rules are identified as being unclear, there needs to be a process to allow action to be taken to update the regulations accordingly. Government may wish to consider whether that should be legislated for too, or it would be open to conclude that the FCA having given a view would be sufficient, although (in our view) not ideal. The rules themselves should be the source that firms and consumers look to in determining what is required by regulation.

Question 11: Do you think the package of reforms outlined above, taken together, will be sufficient to address the problems identified by the review and ensure the FOS fulfils its original purpose?

It will go some way toward this, but there are a number of other important issues, set out in our introductory comments above that it would be prudent for government to take steps to address at this juncture. In summary:

1. **Fair and Reasonable:** We note the comments that the fair and reasonable “test” is considered to remain valid. However, this was introduced in a world pre-dating both TCF and the Consumer Duty. We would urge the government to carefully consider whether such a wide range remains appropriate in light of the duty, which brings a much clearer focus on customer outcomes than was the case when FSMA was introduced.

2. **Challenging FOS decisions:** How can we make it easier for firms to successfully challenge FOS decisions? There is nothing in these proposals that addresses the current imbalance in terms of firms being able to challenge a FOS decision other than through Judicial Review, which is too high a bar given the very low chances of a firm being successful in a JR of the FOS.
3. **Precedent/Quasi-regulator:** We are not convinced that what is being proposed here would actually address this fully at a practical level. It's relying instead on engagement between FCA and FOS, which is a good start, but does not deal with the issue that firms are required to have regard to FOS decisions. We've seen examples of firms changing processes and perhaps even changing products or leaving markets entirely as a result of FOS decisions. We feel that for best impact, this should be explored further as part of this consultation.
4. **CMC/Prof Reps:** We believe that in order to fully address the strain placed on the redress system by wider implications cases and potential MRE's the whole landscape of how claims management companies and professional representatives operate and are supervised should be refreshed. A good starting point would be to ensure that there is one regulator for all firms embarking on such activity – the FCA. While we absolutely recognise the positive role that well run and principled firms of this sort can play, some are far from that. In addition to one regulator, could a penalty be imposed on CMC's/other professional reps where they are considered to have acted vexatiously?

Question 12: Taking into account the other reforms proposed in this consultation, do you think that the FOS should be made a subsidiary of the FCA? If so, what are your views on the appropriate institutional arrangements?

We recognise that there are pros (eg management efficiencies/closer exchange of information) and cons (eg perceived compromised independence/implementation issues) to making the FOS a subsidiary of the FCA. We do not consider that the prospect of implementation difficulties should preclude consideration of this possible approach, although in the short term the FCA is already involved in joining with the Payment Systems Regulator, and we believe that that should be allowed time to embed before a further integration is embarked on.

Question 13: Do you agree that 10 years is an appropriate absolute time limit for complainants to bring a complaint to the FOS?

This seems appropriate in the interests of ensuring that FOS is in a position to fulfil its intended purpose and resolved complaints quickly without the risk of having to deal with a high number of historic cases. However, we are concerned that the 10-year period has been plucked from the air rather than being based on analysis of previous complaints. We believe that before that figure is set down in legislation there should be clear evidence that it is appropriate and would deal with the majority of situations based on past experience.

Question 14: Do you agree that the FCA should have the ability to make limited exceptions to this time limit?

The proposal is that a complaint must be brought:

- Within six years from the event complained of
- If later than six years, three years from the date the complainant became aware, or ought reasonably to have become aware, of the event complained of
- Within an absolute limit of no later than 10 years since the event occurred.

On this basis we agree, provided that there are clear parameters around when this would be possible. We would also encourage thought to be given as to whether that decision should be made by the FCA alone or in conjunction with other stakeholders.

Clarity on the definition of "event complained of" is needed. The following comment from one of our members explains why -

"We believe that absolute clarity is essential when defining the "event complained of," particularly in the context of long-term financial products such as loans and mortgages. The term suggests that the relevant date may be the point at which the product was taken out. However, in practice, there are inconsistencies in interpretation. In some cases, firms and the Financial Ombudsman Service (FOS) are advised that, if the product is still active, the relevant date should be the end date of the product, in others, it is considered to be the commencement date.

This variation creates uncertainty for firms, complainants, and the FOS itself. Without a consistent, authoritative definition of what constitutes the "event complained of," there is a risk of inconsistent application of time limits, which undermines the fairness and effectiveness of the redress process. We therefore urge you to provide definitive guidance on this point. Such guidance should set out clearly whether the relevant date is the start, end, or another milestone in the life of the product, and ensure that all parties apply the same approach. This will promote certainty, avoid unnecessary disputes, and support fair outcomes for both consumers and firms."

Question 15: Do you agree that the FCA should have more flexibility, when investigating a potential MRE, to take steps that are designed to avoid disruption and uncertainty for consumers and firms? In addition to the proposals made above, do you think there are other tools for the FCA which should be considered?

We welcome government's desire to ensure that the FCA has the right tools to investigate and declare MREs quickly; to implement a response quickly; and to ensure minimal disruption for firms and consumers.

On that basis, we agree that:

- The FCA should have more flexibility, but we think that needs to be balanced and there needs to be some control/brakes to make sure that the FCA is acting appropriately and in accordance with its statutory obligations. From what we have seen to date, we do not consider this is adequately addressed by the FCA in CP25/22.
- It is not appropriate that the FOS is put in the position of having to deal with challenging complaints that could be part of an MRE, while the FCA is investigating the potential MRE and before the FCA has decided on an appropriate response. We think there also needs to be an acknowledgement

that the FOS could be handling such complaints before the fact of or potential for an MRE is clear.

- The FCA should be able to intervene quickly, and that consultation on necessary rule changes can introduce delay, so there should be scope for the FCA not to consult on rule changes, but subject to there being appropriate checkpoints/things that need to be met in order for them to do away with this requirement. Another option might be for them to agree that this is appropriate in conjunction with another party/parties.
- That it is inadequate to have to rely on powers to "pause" complaints. The FCA should be able to require the pausing of the handling of relevant cases with the FOS where it considers it appropriate to do that.

Question 16: Do you agree that there should be a simpler legal test for the FCA to satisfy in deciding that a section 404 redress scheme is needed to respond quickly and effectively to an MRE?

We agree.

Question 17: Do you agree that the FCA should be able to direct the FOS to handle complaints consistently with relevant redress schemes, or to direct the FOS to pass related complaints back to firms, to be dealt with by those redress schemes?

We agree.