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Consultation Response

Which? response to the joint FCA/FOS consultation on Modernising the Redress System (CP 26/9)

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Summary

- We continue to support the broad objectives of the Financial Ombudsman Service (FOS) and the Financial Conduct Authority (FCA) to improve the efficiency and effectiveness of the FOS in providing simple, impartial and timely redress to consumers when things go wrong. Efforts to date, including the greater and more transparent collaboration between the two organisations, as set out in their Memorandum of Understanding, have been positive first steps.
- However, we are not convinced that all elements of the proposals in this consultation paper will support the achievement of this goal. Instead they may make it harder for consumers, particularly vulnerable consumers, to engage effectively with the FOS. As a result, we see a risk that some of these proposed changes could lead to unintended outcomes for the FOS, such as an increased reliance on consumer representatives such as Claims Management Companies (CMCs).
- We also have concerns that some of the proposals seem to presume broader legislative changes that we do not support and which have not yet been confirmed or subjected to parliamentary scrutiny. In bypassing proper procedure, the proposals risk undermining the existing jurisdiction of the FOS set out in primary legislation.
- Our feedback on the specific proposals set out in this paper are:
 - **Registration stage:** We support, in principle, a registration stage as a way to streamline how the FOS initially engages with complaints. However, the proposed design of this stage may be more likely to act as a barrier to access for consumers than a way to ensure complaints are sufficiently ready for investigation. We ask the FOS to improve and test the design of this

stage to ensure it functions as a genuine efficiency mechanism rather than being an added hurdle for consumers.

- **Dismissal grounds:** We believe the existing dismissal grounds already provide an appropriate threshold for dismissal that balances maintaining operational efficiency with ensuring consumers have fair access to redress. We are particularly concerned that some of the proposed dismissal grounds allow too much discretion in their wording and could result in consumers being blocked from accessing the FOS despite having valid complaints. We ask the FOS to maintain the current dismissal grounds.
- **Other ADR changes:** We are concerned these proposals may affect a consumer's right to a fair hearing. In particular, the requirement to obtain claimant consent before transferring a case to another ADR scheme or to court as a test case, where the complaint is within the FOS's jurisdiction, is a key consumer safeguard and must be maintained. In addition, the current ability of the FOS to treat a case as withdrawn is sufficient for cases where consumers are not engaging with FOS timelines and increasing this to a ground for dismissal, which would permanently prevent a consumer from having the complaint heard by the FOS, is unnecessary. We ask the FOS to reconsider these proposals.
- **Fair and reasonable test:** We support the FOS's ambition to give clarity to firms as to how they will apply their fair and reasonable discretion. However, the proposed changes rely on and try to align with an 'emerging legislative direction' that we do not support and which has not yet been codified. We insist that the FOS must not seek to alter these underlying DISP rules until any potential legislative changes are settled as currently these changes would undermine the existing statutory framework.

General response

Which? welcomes the opportunity to respond to the joint consultation paper by the Financial Conduct Authority (FCA) and the Financial Ombudsman Service (FOS) on Modernising the Redress System. We continue to support the aim to improve the efficiency and effectiveness of the FOS in playing its critical role in providing simple, impartial and timely redress to consumers when things go wrong.

However, we have some concerns that elements of the broader direction set out in this consultation paper may not support this overall goal. Instead they may make it harder for consumers, particularly vulnerable consumers, to engage with the FOS in an effective and accessible way. As a result, rather than increasing the proportion of high quality complaints heard by the FOS, these changes may simply act as a barrier to consumers bringing cases to the FOS. This is not a desirable outcome.

We also see a risk that the proposed changes to the FOS, including restricting its current discretion in how it determines complaints and proposed changes to the dispute resolution process for consumers, may have unintended negative consequences. For example, the FOS may see fewer consumer-led complaints but increased reliance on claims management companies and other representatives to help them navigate the system, undermining the role of the FOS as an accessible alternative to the courts.

Beyond the potential negative impact on consumers, we also have some procedural concerns with this consultation paper.

- **Some of the proposals in this consultation paper appear to pre-empt parliamentary process and presume changes to the FOS's statutory jurisdiction.** We can only engage with these proposals in the context of the current legislative framework. We would need to revisit our views in response to any broader legislative changes. This is because although this consultation talks to an 'emerging legislative direction', in reality, the final outcome of any legislative process, which would be subject to parliamentary scrutiny, is not yet determined. We therefore advise the FOS and FCA to pause progressing with any proposed amendments to rules until any legislative changes are enacted.
- **We are concerned that some of the proposals included in this consultation paper may overreach the FOS's powers to make rules on procedure.** The current legislative framework as set out in paragraph 14 of schedule 17 of the Financial Services and Markets Act 2000 ('FSMA') provides the powers for FOS and FCA to make rules on complaints procedures. However, in accordance with normal public law principles, including considerations in this case around the right to a fair hearing¹, these powers must not be exercised in such a way that is out of scope, procedurally improper or manifestly perverse or unreasonable. Given the likely significant impact these proposed changes may have on consumers' redress, we

¹ Article 6(1) of the European Convention on Human Rights states that '*in the determination of civil rights and obligations...everyone shall have the right to a fair and public hearing by an independent and impartial tribunal*'. Available at: [\[Link\]](#).

are not convinced that the current legislative framework sufficiently allows the FOS and FCA to make these proposed changes. These powers must first be clarified in primary legislation.

- **We do not accept the absence of a cost benefit analysis, justified at paragraph 1.10 by the application of section 138L of FSMA.** There are clear 'costs' to consumers involved in these proposed changes as fewer cases are likely to be properly considered and therefore fewer consumers are likely to get compensation that they would otherwise be entitled to. We insist on a proper cost benefit analysis being conducted for these proposals.
- **The views of consumer representatives have been misrepresented in the feedback given in this consultation.** In our case, for example, our support for any 'registration stage' was only contingent on statutory changes to the 'fair and reasonable' test not proceeding. However it is suggested in the document that consumer groups' concerns were limited to accessibility only. By not also including the conditional nature of our support as a factor raised by consumer groups, the consultation does not accurately reflect the balance of evidence required to make an informed decision. We want to see an accurate representation of consumer group views in future feedback statements by the FCA and FOS.

Responses to specific consultation questions

Proposal 1: Introduction of a new registration stage

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.

We previously supported, in principle, the introduction of a new 'registration stage' as an added efficiency mechanism as long as it was done in a way that would not impact consumers' access to fair and timely redress. However, the previous consultation did not go into detail about how this would work.

Having now seen the drafting of the proposed registration stage, we do see a risk that the pre-registration stage could reduce access to redress for consumers, particularly for vulnerable consumers. This could occur in a number of ways, including:

1. **The pre-registration stage could create extra complexity that deters consumers who lack the bandwidth or digital literacy to navigate larger and/or more complex information requests.** The goal of the registration stage should be the reduction, not the expansion, of complexity and procedural barriers for consumers. Without appropriate consumer safeguards and support, there is a risk that the pre-registration stage does not achieve this. This is especially concerning given that the Independent Assessor's latest report on FOS complaints found that

the largest category of ‘unsatisfactory’ complaints was in relation to FOS not following their own complaint-handling procedures.²

- 2. The pre-registration stage could lead to the inadvertent dismissal of valid complaints, with no right to appeal.** This is because a decision to reject or dismiss a complaint may be made before the substance of a case is properly understood. The broad scope of the dismissal grounds being proposed in this consultation increases this risk. We provide feedback on these proposed grounds later. In addition, the absence of a right of appeal at this stage is concerning, and potentially a breach of the right to a fair hearing³. This can be contrasted, for example, with the position in relation to data protection complaints, which allows for an internal case review and an appeal to a tribunal if the Information Commissioner’s Office refuses to investigate a complaint.

To mitigate these risks, it is important that the FOS, before implementing any version of a registration phase:

- **Thoroughly tests whether the introduction of a registration stage might reduce access to redress for consumers**, particularly vulnerable consumers and if it might, alters the design of the stage to address this. These findings should be set out in a publicly available impact assessment of the proposed changes (including estimates of numbers of consumers negatively impacted) and the equalities assessment should be revisited in light of any findings.
- **Builds in additional consumer safeguards** to ensure any proposed registration stage doesn’t increase complexity or introduce unfairness for consumers by:
 - Ensuring the registration stage involves collaborative assistance by caseworkers to help consumers complete their complaints, rather than a passive ‘wait and see’ approach.
 - Ensuring that consumers in vulnerable circumstances are not penalised for delays in providing documentation.
 - Ensuring the burden is not placed solely, or more than necessary, on the consumer to provide the information necessary to progress through the readiness check. The FOS should also work proactively with the respondent firm to procure relevant documents and information, especially where they require information that should have been retained for regulatory purposes.
 - Instituting an internal appeal (separate from a ‘service complaint’) for any refusal or substantial delay in registering the complaint, which can allow consumers to make representations as to why registration is appropriate.

If implemented, the FOS must also commit to monitoring whether this new stage impacts the conversion rate of initial enquiries to formal investigations, specifically across different demographic and vulnerability markers, and be prepared to adjust the process if negative trends emerge.

² See the Financial Ombudsman Service Independent Assessor’s Annual Report 2024-25, at p.3. Available at: [\[Link\]](#)

³ Article 6(1) of the European Convention on Human Rights. Available at: [\[Link\]](#).

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.

It is critical that consumers have a clear understanding of what information and evidence will be necessary so that their complaint may move from the 'pre-registered' stage to the 'registered stage'. Therefore, we want to ensure that any structured 'readiness check' is supported by clear and transparent consumer-facing information, guidance and support to reduce complexity as much as possible.

Proposal 2: Dismissal grounds

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.

We agree that this ground should be retained.

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.

While we agree that FOS staff have a right to be treated with respect by complainants, our view is that this dismissal ground is currently drafted too wide and is too subjective. In particular, we have concerns around what could be seen to constitute acting 'otherwise unreasonably' and are worried about the unintended consequences that this ground may have for more vulnerable consumers. Specifically, some consumers with vulnerabilities, such as mental health conditions or who are neurodiverse, may display behaviours that could be perceived as 'vexatious' or 'otherwise unreasonable' and their case consequently dismissed, rather than be given additional necessary support.

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.

We disagree with this ground. Under the current statutory framework, the FOS should be deciding cases impartially and independently. In making this suggestion to allow the FOS to only consider whether the respondent has followed regulatory standards, the FOS is pre-empting the parliamentary debate on reform of the applicable legislation.

In addition, we believe that the FOS could only reasonably take a view on this ground after a proper investigation of the complaint and in that scenario, the complaint should be adjudicated rather than dismissed.

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.

We disagree with this ground. Under the current statutory framework, it is the duty of the Ombudsman under section 404B to come to a conclusion on an impartial and independent basis as to what a consumer is entitled to under an applicable redress scheme. Reviewing that a respondent has considered the matter does not meet the threshold of coming to a conclusion on an impartial and independent basis. Therefore, in making this suggestion, the FOS has pre-empted any parliamentary debate on reform to section 404B, a point acknowledged in paragraph 2.56 of the consultation paper.

In addition, we believe that the FOS could only reasonably take a view on this ground after a proper investigation of the complaint and in that scenario, the complaint should be adjudicated rather than dismissed.

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.

We agree that complaints should not be considered again if they have been properly and fairly considered and there are no relevant material changes in circumstances.

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.

We do not agree with the addition of 'factual' into the existing rule as this assessment is too narrow. In deciding what is fair and reasonable in all the circumstances of the case, the FOS is not just examining the facts but also considering their correct application, bearing in mind relevant factors including the law and relevant rules. We do not believe this should change. It would also bring FOS out of line with other mandatory dispute resolution processes.⁴

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.

The FOS should retain its current ability to dismiss complaints where the subject matter of the complaint has already been dealt with by a comparable ADR entity or complaints scheme.

⁴ See, for example, the terms of reference of the Energy Ombudsman, paragraph 7.2 as to when requests to reconsider cases again may or may not be considered. Available at [\[Link\]](#).

We do not agree with the extension of this dismissal ground to cover live investigations. To do so would prevent some consumers from receiving timely redress where it is deserved, particularly where the FOS could make a decision on the balance of probabilities. The existing FOS powers to 'hold' claims pending key decisions by other bodies is sufficient to ensure that the FOS is not required to make a decision without knowing the outcome of other investigations.

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.

We believe that the current powers are adequate, and that the new drafting in 3.3.4C(a) could give too much discretion by the FOS as to what is or is not 'inappropriate' for it to consider that could be exercised unfairly against consumers. This would also remove certainty for consumers. The current equivalent wording is appropriate as it requires that a decision should have been made on the merits by a court.

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 only support the FOS being able to dismiss complaints that are more appropriate for court, arbitration or another complaint scheme or dispute resolution process if the associated requirement to obtain claimant consent is maintained. We strongly disagree with the proposed removal of claimant consent to transfer a case to a court or another dispute resolution body where a complaint falls within the jurisdiction of the FOS. The removal of this key consumer safeguard will actively reduce consumers' access to fair redress and undermine their right to choose where to take their complaint. In particular, if a consumer is forced to pursue redress through the courts they will be subject to high costs, delays and unnecessary stress. This contradicts the fundamental role of the FOS as an alternative to the courts. In addition, this will disproportionately impact vulnerable consumers who may struggle to engage with the formal, adversarial court process. In a similar vein, if consumers are forced to pursue redress through another ombudsman scheme which does not impose a binding judgement on firms then they may not receive their redress.

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.

We do not believe this ground is necessary as complaints of this type could be dismissed under the current 'seriously impair' ground. If the case is not dismissed and if the circumstances of the case disclose that no laws or rules were broken when dealing with a consumer's complaint about investment performance (for example because the consumer duty principles were applied and contractual conditions were fair and transparent), then FOS will feel confident in rejecting the complaint.

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.

We do not believe this ground is necessary as complaints of this type could be dismissed under the current 'seriously impair' ground.

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.

This is an existing power that it is sensible to retain. However, the FOS should ensure appropriate guidance in sensitive cases (such as domestic abuse) or vulnerability so that cases are not dismissed unfairly and inappropriately.

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.

We strongly oppose this dismissal ground as the use of 'other compelling reasons' is too broad and subjective and risks undermining a consumer's right to a fair hearing. The existing provision where dismissals can occur in cases where the operation of FOS may be seriously impaired sets an appropriately high hurdle that should be maintained. This test has been applied by FOS and other statutory ombudsman schemes in a satisfactory way since 2015 and we object to it being downgraded to the potential detriment of individual consumers.

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.

No, because we strongly disagree with the 'other compelling reasons' ground in principle. In addition, the draft guidance in 3.3.4D suggests that this could apply where the complainant has not suffered 'material' financial loss, distress or inconvenience. We are not sure the meaning of 'material' can be applied in a consistent and fair way, and by what standards it should be assessed. Similarly the guidance on dismissal for 'no reasonable prospects of success' is arbitrary and not subject to checks or balances, or appeal rights.

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?

No, as we strongly disagree with these grounds, even as guidance and even more so as standalone rules.

Proposal 3: Other ADR Related Changes

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.

DISP 3.4.1R.

We oppose the removal of the requirement to obtain complainant consent before a complaint can be referred to another complaints scheme, where the complaint is within the jurisdiction of the FOS. Alternative schemes may offer less robust redress than the FOS, for example through non-binding decisions, which may not be in the best interests of the complainant. Therefore it's vital that informed consent is obtained for such a referral.

DISP 3.4.2R.

We oppose the removal of the requirement to obtain complainant consent before a complaint can be referred to a court as a test case. Consumer consent is a critical safeguard to ensure that consumers are not forced into potentially lengthy and costly legal proceedings. We do not think it is sufficient that the Ombudsman may consider whether the complainant is likely to pursue the complaint in court as set out in 3.4.3G.

DISP 3.5.9R(4) and DISP 3.5.15R(2).

We do not agree that the FOS should be able to dismiss a complaint if a complainant fails to supply requested information or fails to comply with a time limit. We believe the FOS's current ability to treat a complaint as withdrawn is sufficient to prevent any ongoing strain on the FOS's resources. It is unfair that consumers should lose the right to make a valid complaint to the FOS because they have not complied with technical hurdles correctly.

Proposal 4: Fair and reasonable test

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.

We agree that there may be opportunities to provide more clarity to firms on how the FOS applies its 'fair and reasonable' discretion. We are therefore supportive of the FOS exploring ways to do this, as long as it also maintains or improves consumers' access to fair redress.

However, this consultation makes clear that these proposed changes have been designed to align with the 'emerging legislative direction' set out by HMT. We firmly disagree with this 'emerging legislative direction' which suggests that wholesale changes to the 'fair and reasonable' test itself are justified and believe the fair and reasonable test should remain unchanged. This is for two reasons:

1. **There is no public evidence that the fair and reasonable test is failing in practice.** The Financial Ombudsman Service (FOS) has historically exercised its discretion sensibly. This is evidenced by the absence of successful judicial reviews

regarding the FOS's use of its 'fair and reasonable' remit. Conversely, this consultation, previous consultations, and additional engagement between Which? and the FOS, FCA and HMT, have provided no empirical evidence or case studies to indicate that the current test is failing.

2. **Making substantial changes to the fair and reasonable test will likely negatively impact consumers' access to redress.** Narrowing the discretion of the FOS to assess what is 'fair and reasonable' will likely mean that there are instances where consumers are denied redress, even where they have been treated unfairly and unreasonably by a firm or otherwise received a poor outcome. We have seen no clear articulation of the impact these proposed changes will likely have on consumers and their access to redress.

Given our disagreement with this 'emerging legislative direction' **and the fact that its final outcome remains uncertain** and still subject to parliamentary scrutiny, we have assessed these reforms strictly within the existing statutory framework. Should the 'emerging legislative direction' be implemented as currently intended, our stance on the proposed changes will require full reconsideration. Our current views are:

- Proposed change 1: Removal of 'good industry practice' as a relevant consideration.
We disagree with this proposal. It is critical that the FOS continue to be able to consider contextual factors, such as good industry practice, in determining what is fair and reasonable in all circumstances of the case. Removing the capacity for the FOS to consider factors such as this could create a rigid, compliance-based approach to redress with the FOS restricted to a narrow interpretation of written rules alone. This could also inadvertently undermine other HMT proposals, such as the new referral power.
- Proposed change 2: Clarifying that only the standards applicable at the time of the act or omission complained of should be taken into account
We recognise industry concerns that DISP 3.6.4R could be interpreted as allowing for the retroactive application of modern standards to historical conduct. While we have seen no current evidence of 'retrospective regulation' occurring, we are supportive of appropriate efforts to provide clarification to firms on how the FOS will apply its discretion.

However, we do not support this proposed change as altering DISP 3.6.4R in this way is not legally appropriate. This is because rules under DISP, in accordance with normal public law principles, must not undermine the overall FOS jurisdiction set out in section 228(2) of FSMA to determine the case by reference to what is in its opinion fair and reasonable in all the circumstances. The new reference in draft 3.6.4.A seeks to restrict what the FOS will take into account in determining the case to an identified act or omission at a specified time, which does not appear to be compatible with section 228(2). Therefore, this sort of clarification should only be made in primary legislation following parliamentary scrutiny.

Notwithstanding our views above, any further pursuit of changes to DISP 3.6 must be accompanied by rigorous, publicly shared impact testing against previous case decisions.

Without this data, it is impossible to determine whether these reforms - at either the DISP or primary legislation level - will restrict consumer access to fair redress. We insist that this analysis is published to provide the transparency necessary for consumers and industry to understand how case outcomes will shift in practice.

About Which?

Which? is the UK's consumer champion, here to make life simpler, fairer and safer for everyone. Our research gets to the heart of consumer issues, our advice is impartial, and our rigorous product tests lead to expert recommendations. We're the independent consumer voice that works with politicians and lawmakers, investigates, holds businesses to account and makes change happen. As an organisation we're not for profit and all for making consumers more powerful.

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