# Responding to the Treasury's FOS Review

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1. The Treasury is seeking input from stakeholders on its Review of the Financial Ombudsman Service (FOS). The Consultation closes on 8 October 2025.

2. The Treasury proposals are welcome and should be enthusiastically supported. This article is aimed at creditor stakeholders which are preparing responses to the Consultation. For the reasons set out below, I suggest that, if the Treasury is to achieve its stated aims, it should go further in curbing the inconsistencies between the approach of FOS and that of the courts and FCA.

Consistency with the FCA's approach

3. Business needs certainty. If the regulators fail to provide it, the resultant increase in the cost of borrowing in the UK will continue to be a drag on economic growth.

4. The Treasury proposals aim to bring FOS decisions in line with what it variously described as the FCA's "*approach*" to, or "*intent*" for, its rules. This could usefully be clarified: the Treasury can more effectively curb inconsistencies if FOS decisions are brought in line with the approach actually *"taken"* by the FCA, and how the rules have been *"applied in practice"*. If the FCA is aware of a potential systemic issue within a firm or sector, but has not yet considered that it merits pursuit, or has decided that the breach is too technical to merit sanction, FOS should not be able to outflank the FCA, override its assessment, and determine that it is fair and reasonable, by reason of the non-compliance in question, to make an award against the firm.

5. The distinction could have very real consequences for firms. In order to obtain authorisation, a firm will have provided the FCA with details of the customer journey and copies of the agreements it will use. For example, it will have disclosed the procedures it uses to assess whether a customer can afford to repay credit, and all documentation related to that activity, so that the FCA can determine how a member of the firm's staff would carry out that function. Further, the FCA frequently undertake research, with which firms are obliged to co-operate. Minor technical breaches will be everyday occurrences, but only the FCA has sufficient information to determine whether it is appropriate for sanctions to be imposed for non-compliance.

Trigger for seeking the FCA's view

6. The Treasury proposes that a party to a complaint can request the FCA's view on interpretation if there is *"ambiguity or room for interpretation in how relevant rules should apply to the types of issues raised by the complaint"*. I suggest that it could usefully be made clear that "how rules apply" includes whether a remedy is imposed, and if so the quantification of that remedy. A further ground could also be added: if the FCA has previously considered this type of issue in factual scenarios comparable to those raised in the complaint, it should disclose this, setting out what if any remedy it imposed. In order to achieve consistency, FOS must be precluded from taking a different approach. Also, if such issues are currently under consideration by the FCA, FOS should be required to await the FCA's conclusions.

Issues with wider implication

7. The Treasury states: *"the subject matter of a complaint may raise issues that could have wider implications for other consumers and/or firms. The government has concluded that dealing with wider implications issues is a regulatory responsibility, and that the FCA should be fully responsible for considering whether a wider implications issue exists and what the regulatory response to such an issue should be. …The process for a party to request a referral to the FCA, and the grounds that a party will need to meet to demonstrate that a referral is needed, will be set out by the FCA in its Handbook."*

8. The danger posed by FOS can be illustrated by its approach to affordability complaints. Claims Management Companies routinely allege that loans to individuals have been made without adequate assessment of affordability. The sheer number of such complaints upheld has devastated some sectors. The basis for these claims is now set out in CONC 5.2A. This

states that a firm mustn't grant credit without proper regard to an assessment which considers the *ability* of the customers to repay without significant adverse impact on the customer's financial situation. I suggest that the FCA's grounds are broad enough to allow referral in relation to approaches such as the following:

(i) if a sub prime customer makes repeat borrowings, or rolls over credit, FOS routinely decides that the lending must have been unaffordable, and this should have put the lender on notice of the inability of the Claimant to repay. FOS does so without any attempt to make findings of fact as to the Claimant's actual income and non-discretionary expenditure at the date of the loan. Frequently, FOS treat repeat borrowing as almost establishing a presumption of non-affordability, even if the real reason is that the borrower is prodigal. A referral to the FCA or the courts would, we hope, make it clear that repeat borrowing may be explained by the customer diverting a cash surplus to purchase of luxuries, such as entertainment or holidays. Determination of likely income and expenditure is crucial to establish breach of CONC affordability rules.

(ii) FOS generally disregards the customer's dishonesty. The bigger the fraud, the more FOS allows the fraudsters to benefit personally by allowing them to have the credit entirely interest free. Routinely, if customers obtain loans by falsifying details of their income or expenditure, this has no impact on the award made: the standard template FOS decision states*: "Whilst the borrower is responsible for providing truthful information, the lender should have asked for evidence of the correct amount."* Redress is ordered because the lender has not turned sleuth. FOS holds that responsibility rests on the lender for failing to investigate further. A referral to the FCA or the courts would, we hope, make it clear that, whilst fraud by the customer would not protect the lender from FCA penalties for failure to seek sufficient documentary evidence, it would, in the absence of extreme extenuating circumstances, be a significant impediment to an award to the fraudster of redress or damages under CCA s140A.

Limitation

9. DISP 2.8.2R states that FOS cannot consider a complaint referred to it more than: (a) six years after the event complained of; or (if later) (b) three years from the date on which the complainant became aware (or ought reasonably to have become aware) that he had "cause for complaint". The Treasury review paraphrases "aware that he had cause for complaint" as "*aware of the event complained of*". However, this is not how FOS has interpreted it. Again, I turn to affordability complaints to illustrate the problem: FOS assumes that the public are not aware that the lender had a duty to assess affordability, and therefore time will continue to run, indefinitely.

10. The Treasury proposes introducing a long stop provision: an absolute limit of no later than 10 years since the event occurred. This is welcome. I have an additional proposal: that the FCA amend DISP 2.8.2 to what appears to be the Treasury intention – replacing "cause for complaint" with "event complained of". Parliament and the courts have long realised that it is impracticable to set a limitation period by reference to knowledge of the law.

Enforcement of FCA Guidance

11. The Treasury Review states: *"The adaptation of the Fair and Reasonable test will mean that fair and reasonable conduct should be determined by reference to the FCA's rules and/or guidance*".

12. The distinction between Rules and Guidance in the FCA Handbook is that only Rules can be enforced by the customer. As the FCA explains in its Reader's Guide:

> *Rules …Most rules create binding obligations on firms. If a firm contravenes such rules, it may be subject to enforcement action and action for damages.*
>
> *Guidance is mainly used to: • explain the implications of other provisions • indicate possible means of compliance, or • recommend a particular course of action or arrangement. Guidance is not binding and need not be followed to achieve compliance with the relevant rule or requirement. However, if a person acts in accordance with general guidance in circumstances contemplated by that guidance, we will treat that person as having complied with the rule or requirement to which that guidance relates.*

13. There can therefore be no such thing as "non-compliance" with Guidance, yet FOS bases some of its decisions on a failure to follow it. This allows customers to enforce Guidance indirectly, thereby circumventing the restrictions placed by the FCA. DISP should therefore be amended to state that FOS cannot hold conduct to be unfair or unreasonable by reference to FCA Guidance.

Continue to publish individual FOS decisions

14. Question 10 of the Consultation asks whether a quarterly thematic guidance published by FOS should replace the requirement to publish individual FOS decisions, or sit alongside it. I suggest that firms respond that it should do the latter. The current resource may be large but it is easily searchable. To better forecast outcomes, we need to see the factual matrix of decisions actually made.

Making FOS a subsidiary of the FCA

15. Question 12 asks if FOS should be made a subsidiary of the FCA. I suggest that this would greatly assist in achieving the Treasury's aims of consistency in approach. The FCA is generally perceived as independent: merging two will not significantly diminish the public's perception of impartiality.

16. A fundamental problem currently faced by FOS is that its workload is cyclical, depending on the volume of complaints generated by decisions it publicises in lead complaints. Almost half its funding comes from case fees. FOS benefits financially the more complaints it garners. Unless it takes steps to increase the pool of consumers whose complaints will be upheld, it faces periodic mass redundancies. This generates a very clear and entirely unacceptable conflict of interest. If FOS were part of the FCA, the potency of this conflict would be significantly diminished.

Conclusions

17. I therefore suggest that stakeholders respond "yes" to questions 1 to 7, 9, and 13 to 14 in the Consultation, but make the proposals outlined above in response to questions 8, 10 and 11.