

Telephone: 020 7066 9346
Email: enquiries@fs-cp.org.uk

1 March 2022

By email: gc22-01@fca.org.uk

Dear Sir / Madam,

Financial Services Consumer Panel response to GC22/01 – FCA approach to compromises

The Panel welcomes the FCA's decision to develop non-handbook guidance on its approach to assessing compromises proposed by firms with significant liabilities to consumers, in particular redress liabilities. Consumer outcomes should be at the centre of the FCA's approach to this issue and we welcome the FCA's recognition that compromises "that unfairly benefit a firm and its other stakeholders at the expense of consumers are unacceptable".

Our specific responses to the consultation questions are in Annex A below. As detailed in our response there are areas where the Panel would welcome greater clarity on the FCA's approach, including how the FCA will assess whether a firm has fairly balanced the interests of consumers and those of other stakeholders (such as shareholders or company directors), whether a firm has compensated some but not all customers in full, and the impact of the new Consumer Duty and its future requirements on the FCA's assessment of compromises.

Finally, while we believe the guidance will bring greater consistency to the assessment of compromises, we recommend that the FCA makes its activity in this area more readily understandable to complainants seeking redress. This would ensure consumers understand the purpose of the FCA guidance and the outcomes it seeks to achieve.

Yours sincerely,

Wanda Goldwag
Chair, Financial Services Consumer Panel

ANNEX A – Responses to questions

Question 1: Do you agree with our expectations on firms' engagement with the FCA in Chapter 2? If not, why not? Are there any other considerations that would be useful to consider?

We generally agree with the expectations on firms' engagement with the FCA outlined in Chapter 2, however we have several substantive suggestions regarding the information that firms must provide to the FCA for its assessment of compromises and on engagement with other regulators:

- **Financial information** – We believe the FCA should not limit its review to management accounts dating back to 3 months only, as stated in paragraph 16(c)(ii). Management accounts reviewed should cover the full period since the last formal accounts (audited or unaudited) have been filed. This will prevent any further misconduct and provide full transparency for the FCA to consider the proposed compromise. In addition we are concerned that some crucial information of a balance sheet nature may not be documented in management accounts.
- **Information regarding other stakeholder interests** – While we recognise that there will be trade-offs between financial stability, market integrity and consumer protection, we believe market integrity itself is highly dependent on consumer trust in the operation of financial markets and therefore consumer needs should be prioritised when redress liabilities remain unmet in full. We suggest the FCA conducts a robust investigation on payments made, or payments proposed, by a firm to other stakeholders which may have the effect of reducing the available funds for paying consumers who are due redress (for example, payments to shareholders, Directors' bonuses, and other discretionary payments). The Panel is particularly concerned about past instances of firms making significant payments to non-consumer stakeholders in the months or even years prior to entering a compromise, leaving consumers worse off. Stakeholders, including shareholders, should expect to see their rights reduced if a firm is later constrained on the resources available for customers in a compromise. We would welcome claw-back provisions where such payments have been made to the detriment of consumers.
- **Firms' engagement with Financial Services Compensation Scheme (FSCS)**
– While we agree with the assertion in paragraph 23 that firms 'should consider how the proposed compromise might impact any future claims to the FSCS, should the firm be declared in default', the FSCS should be regarded only as a last resort in paying the liabilities of firms. Payment of the full redress amount to consumers should be the priority to support the FCA's consumer protection and market integrity objectives.

Question 2: Do you agree with our approach to assessing a compromise in Chapter 3 and the factors we will consider? If not, why not? Are there any other considerations that would be useful to consider?

While we do not disagree with the factors the FCA will consider in assessing a compromise, we are concerned by the assertion in paragraph 26 regarding firm misconduct. A failure by a firm to pay customers their full redress entitlement should be considered as a factor that undermines market confidence, irrespective of whether such redress liabilities have been caused by serious and/or deliberate misconduct. We do not believe the FCA should differentiate between situations where redress liabilities are caused by firm misconduct and those where no misconduct has been observed but consumers still have a legitimate claim under which redress is due. Where redress is due to consumers and a firm continues to trade, the firm should pay consumers their full redress entitlement.

We also encourage the FCA to consider what actions it would take where a firm fully settles the redress claims of some complainants and, as a result, is forced to enter a compromise, but does not then provide full compensation to consumers that seek redress later on. We believe the FCA's assessment of a compromise should factor in customers' position relative to other customers whose redress claims have been met in full.

Other factors for the FCA to consider incorporating into its approach include:

- **Appointing consumer representative to participate in compromise approval process** – The FCA should consider ordering firms to appoint an independent customer advocate to opine on the design and fairness of proposed compromises before they are approved.
- **New Consumer Duty (NCD)** – In paragraph 24 the FCA states it will assess the compatibility of compromises with its Principles for Businesses, including Principles 6 and 7. Given the FCA has proposed to disapply these Principles where the NCD will apply, we encourage the FCA to consider its approach to compromises in the context of the NCD and ensure its approach does not undermine or conflict with new requirements.
- **Approach to compromises where a firm is part of a group** – We encourage the FCA to consider providing further guidance on its approach where the firm proposing a compromise is part of a larger group. We are concerned that complex company structures may be used to conceal or manipulate financial and other positions, which may create challenges for the FCA in determining if a proposed compromise is appropriate. We believe that where a firm is unable to meet its full responsibilities to provide redress that the FCA should look to the regulated parent company for redress.
- **Emphasis on market confidence** – We believe that emphasising the risks to market confidence where redress liabilities are not fully met, as part of FCA guidance, would likely influence firms who may be considering compromises as well as the types of products or services made available to customers.
- **Periodic review of approach to compromises** – We recommend the FCA undertakes a periodic review of its process for assessing compromises to ensure it remains fit for purpose.

Question 3: Do you agree with the factors we will consider in deciding when to participate in court proceedings in Chapter 4? If not, why not? Are there any other considerations that would be useful to consider?

No comment.

Question 4: Do you have any comments on our use of supervisory tools/regulatory action in respect of compromises in Chapter 5? Are there any other considerations that would be useful to consider?

Where the FCA intervenes to stop a firm proposing a compromise from undertaking regulated activities, it should consider the impact of this on the end consumers of the services being suspended. It is also important that FCA supervisory and regulatory action does not delay the compromise approval process.

Question 5: Do you agree with our proposal that we will consider using our regulatory powers where firms propose compromises in relation to redress liabilities and we are likely to find, or have found, the liabilities were caused by serious or deliberate misconduct by the firm? If not, why not?

We support the FCA's use of its supervisory and regulatory powers where there is evidence of firms, or individuals within these firms, having deliberately avoided their responsibilities and not complied with previous redress awards made against them. This should bring into question the fitness and propriety of those individuals.