

FS11/2

Financial Ombudsman Service, Financial Services Authority
and the Office of Fair Trading

Consumer complaints (emerging risks and mass claims):

Feedback on DP10/1



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This Feedback Statement reports on the main issues arising from Discussion Paper 10/1, *Consumer complaints (emerging risks and mass claims)*.

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Copies of this Feedback Statement are available to download from our website – www.fsa.gov.uk. Alternatively, paper copies can be obtained by calling the FSA order line: 0845 608 2372.

Acronyms used in this paper

CMCs	Claims Management Companies
CMR	Claims Management Regulator
DISP	FSA's Dispute Resolution Complaints Sourcebook
FCA	Financial Conduct Authority
FSA	Financial Services Authority
FSMA	Financial Services and Markets Act 2000
MoU	Memorandum of Understanding
OFT	Office of Fair Trading
The ombudsman service	Financial Ombudsman Service

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Overview

- 1.1 In March 2010, we (the Financial Services Authority (FSA), the Office of Fair Trading (OFT) and the Financial Ombudsman Service (the ombudsman service)) published Discussion Paper DP10/1, *Consumer complaints (emerging risks and mass claims)*. The DP set out the background on complaints handling in the financial services industry, and outlined the roles of firms, the regulators and the ombudsman service.
- 1.2 The DP included discussion on identifying and managing emerging risks as previously set out in HM Treasury's July 2009 White Paper, *Reforming Financial Markets*.¹
- 1.3 DP10/1 invited discussion on:
- encouraging fair complaints handling by firms;
 - cooperation between the FSA, OFT and the ombudsman service;
 - identifying and managing emerging conduct risks; and
 - dealing with mass claims.
- 1.4 In particular, we proposed the creation of a new Coordination Committee to scan for emerging risks. The committee would identify any risks with the potential to turn into widespread problems, and determine prompt and effective ways of dealing with them, whether through regulatory action or consumer complaints.
- 1.5 We received 25 responses to the DP: 14 from firms; six from trade associations; two from consumer bodies; and three from individuals. A list of non-confidential respondents is set out in Annex 3.
- 1.6 We are grateful to all respondents who gave their views. In light of the feedback we received, we have proceeded with our proposal to establish a new Coordination Committee comprising the FSA, OFT and the ombudsman service. Further detail about the new committee and a summary of responses relating to it are set out in the next chapter.

1 http://webarchive.nationalarchives.gov.uk/20100407010852/http://www.hm-treasury.gov.uk/d/reforming_financial_markets080709.pdf

- 1.7** In this Feedback Statement we also confirm that we will replace the Wider Implications Process. This, and the creation of the Coordination Committee, forms an integral part of our commitment to work together to ensure that there is effective and prompt redress for consumers when things go wrong. To support this, the FSA will continue to pursue a policy of intensive supervision and credible deterrence.
- 1.8** The government has set out its vision for strengthened and formalised coordination and cooperation mechanisms between the ombudsman service and the regulator.² The government proposes to introduce a statutory obligation for the ombudsman service and the Financial Conduct Authority (FCA) to publish and maintain a Memorandum of Understanding (MoU), building on the voluntary MoU already in place between the ombudsman service and the FSA. The MoU will set out how the ombudsman service and the regulator will work together, especially on issues where individual ombudsman service cases could have wider implications.
- 1.9** We will continue to work with trade and consumer bodies, and seek ways to improve our engagement to help source relevant and robust intelligence on emerging issues at an earlier stage.
- 1.10** We will also continue our liaison with the Claims Management Regulator (CMR) which includes the sharing of intelligence. The FSA has recently signed a new MoU with the CMR setting out how the two regulators will work together in areas of common interest.³ We will be publishing a joint statement with the CMR shortly about firms' responsibilities where they receive complaints from Claims Management Companies (CMCs).

Structure of this paper

- 1.11** This Feedback Statement sets out the main points made in response to DP10/1; it explains what actions we have taken as a result, and how these fit the government's agenda for transforming financial services regulation.
- Chapter 2 sets out the role of the new Coordination Committee and how it will operate; and
 - Chapter 3 summarises the key issues raised by respondents to the DP and what actions we have taken or intend to take in response.

² http://www.hm-treasury.gov.uk/d/consult_newfinancial_regulation170211.pdf

³ http://www.fsa.gov.uk/pubs/mou/fsa_cmr.pdf

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Developing stronger coordination between regulators and the ombudsman service

- 2.1 DP10/1 proposed a new Coordination Committee of the FSA, OFT and the ombudsman service that would meet regularly and draw together members of their executive teams.
- 2.2 In this chapter we set out a summary of responses we received to these proposals, our analysis and conclusions.
- 2.3 DP10/1 set out our initial thoughts on the committee's overall role and how it would consider issues before it, particularly in the context of emerging risks and mass claims.
- 2.4 We asked:
- Would such a committee process improve the handling of emerging issues and mass claims?
 - What are the factors that should be taken into account when identifying mass claims?
- 2.5 Most respondents expressed overall support for establishing the committee.
- 2.6 In light of feedback received, we are convinced of the overall benefit of establishing a co-ordination committee along the lines proposed in the DP. As suggested by some respondents, the committee has met twice on a pilot basis in 2010, and once formally in February 2011, to consider its operation and to discuss emerging risks. This will now replace the Wider Implications Process.
- 2.7 The new committee will draw together specialists from the three bodies to spot emerging risks, increasing the ability of the regulators to respond quickly and decisively to threats in

the market, and to give the ombudsman service early sight of the issue. This focus on emerging risks complements the FSA's Consumer Protection Strategy, in particular more intrusive supervision, where firms' business models are scrutinised along with their product design and marketing material to assess whether any single aspect, or indeed the entire operation, poses unacceptable risks to customers or the wider industry.

- 2.8** In November 2010, the government published a summary response⁴ to its July consultation on reforming financial services regulation. This highlighted the importance of effective coordination in the regulation of financial services, in particular between relevant bodies undertaking independent, yet complementary, functions.
- 2.9** In February 2011, HM Treasury published its second consultation on reforming financial services regulation, *A new approach to financial regulation: building a stronger system*.⁵ This set out the government's intention that the FCA will be expected to draw on a wide range of sources of intelligence in identifying risk, including information provided by the ombudsman service. This will be supported by new provisions formalising the cooperation between the FCA and the ombudsman service.
- 2.10** The consultation also sets out that the FCA's role will include undertaking comprehensive risk analysis and research to identify, at an earlier stage, the sources and nature of risks to retail customers.
- 2.11** More generally, cooperation between the ombudsman service and the FCA will be formalised through a statutory requirement to publish and maintain a MoU, and arrangements to ensure that the two bodies are duty-bound to work together, particularly where the issues identified potentially have wider implications.
- 2.12** The creation of a coordination committee focusing on emerging risks supports this approach. The committee has already met three times, including two pilot meetings in the second half of 2010. It will next meet in May 2011.

Our response

Outputs and accountability

We recognise the desire of some respondents for a consistent and clear approach to the handling of mass claims. However, this overlooks the fact that:

- the handling of any issue will be fact specific and proportionate to the actual or potential consumer detriment. We do not believe that it is realistic to set out a definite approach for how issues will be addressed in advance;
- the committee builds on the existing legislative framework for consumer redress. As we set out in the DP, the FSA, the OFT and the ombudsman service

⁴ *A new approach to financial regulation: summary of consultation responses*, HM Treasury, (November 2010) www.hm-treasury.gov.uk/d/summaryofcondocresponses241110.pdf

⁵ www.hm-treasury.gov.uk/d/consult_newfinancial_regulation170211.pdf

have different statutory powers and responsibilities that each must have regard to; and

- the FSA has already published a guidance note on the exercise of its new consumer redress schemes powers under s14 of the Financial Services Act 2010.⁶

Accountability for the course of action adopted by either the FSA, OFT or the ombudsman service in response to information about an emerging risk or in regard to a mass claim rests, as it does now, with each organisation. This includes the extent to which:

- regulators have set a clear timetable for regulatory action, which enables the ombudsman service to put a hold on complaints; and
- in light of the action taken, whether the ombudsman service considers it appropriate to dismiss any complaints it may have about an underlying issue.

Where responsibility for an issue is assumed by one organisation, the usual disciplines around its response will continue to apply. So, for example, where the FSA proposes guidance to clarify its expectations in regard to a particular product, it will consult in accordance with the requirements in FSMA.

To ensure accountability for the committee's effective operation, the committee will review its operations annually and publish its findings.

Operation

The terms of reference set out in Annex 1 detail the committee's operation, including its composition, chair and the frequency of its meetings.

Some respondents have raised concern that the committee will lead the ombudsman service into the regulatory sphere. As set out above, the committee does not alter existing statutory responsibilities. We note that existing legal restrictions on the exchange of information between the FSA, the OFT and the ombudsman service apply to the committee's operations.

Transparency

We agree that transparency has an important role to play in giving stakeholders confidence about the committee's role, operation and outputs. To achieve this, we will publish summary minutes of the committee's meetings. The minutes of the committee's meeting in February 2011 are provided in Annex 2.

⁶ www.fsa.gov.uk/pages/Library/Policy/Guidance/gn10.shtml

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Summary of responses and feedback

Encouraging fair complaints handling by firms

- 3.1** Chapter 3 of the DP focused on the responsibility of firms to handle complaints promptly and fairly, the actions that are underway to improve complaints handling, and how the ombudsman service, FSA and OFT cooperate within the regulatory framework to ensure its effective operation.
- 3.2** There was no clear consensus on what more might be done by firms to improve their complaints handling. Suggestions included:
- developing an appropriate complaints handling culture within firms;
 - industry guidance for smaller firms; and
 - firms with the most complaints to the ombudsman service should pay a higher case fee.
- 3.3** There was some support for more feedback from the ombudsman service to assist firms' complaints handling. Some suggested that the primary lever for encouraging fair complaints handling needed to be robust enforcement action.

Our response

We fed back on the responses received to the questions about the complaints handling rules in September 2010 as part of the joint FSA and ombudsman service consultation (CP10/21) on proposed changes to the Dispute Resolution: Complaints (DISP) Handbook.⁷ The main proposals to improve how firms treat complainants included:

⁷ CP10/21: 'Consumer complaints: The ombudsman award limit and changes to complaints-handling rules' www.fsa.gov.uk/pubs/cp/cp10_21.pdf

- abolishing the two-stage complaints handling process;
- setting out guidance on how firms can meet the requirements to undertake root cause analysis and to take account of ombudsman decisions; and
- requiring firms to nominate a single senior individual to assume overall responsibility for complaints handling.

We intend to give feedback on responses we received to CP10/21 and our conclusions in early May 2011.

Whilst we do not propose to introduce new initiatives on complaints handling rules beyond those proposed in CP10/21, improving the quality of complaints handling continues to be an area of focus for the FSA.

Risk identification and pro-active mitigation by firms

3.4 In the DP we set out our view that it was in firms' own interests to identify and close down issues early.

3.5 Responses from industry included:

- that the FSA should hold an informal dialogue with industry to identify and alert firms to areas of emerging risks, workshops, the development of an 'early warning system';
- industry bodies should play a role in gathering information about emerging risks and in leading engagement with regulators as they will be able to consider issues and themes on a sectoral basis; and
- that regulators' approach to enforcement, in particular the FSA's focus on achieving credible deterrence, should aim to incentivise firms to pro-actively bring forward emerging risks.

Our response

We recognise the difficulties for individual firms (and consumers) in identifying emerging risks. We will engage consumer and trade bodies about what more they can do to act as a conduit for providing intelligence on emerging issues to the FSA and the OFT.

We believe that the coordination committee will provide a vehicle for promoting alignment more effectively between the regulators and the ombudsman service where there are emerging risks and in the handling of mass claims.

Claims management companies

- 3.6 In the DP, we recognised that CMCs can play a role in increasing the speed at which mass claims grow. However, we also said that they are not the only channel for mass claims complaints and they were generally a symptom of mass claims, not the cause of them.
- 3.7 Three industry associations and two firms raised concern about the quality of complaints taken forward on behalf of consumers by CMCs.

Our response

We recognise concern about the quality of services provided by some CMCs to complainants and the impact that CMC activity can have in escalating the number of complaints about an issue.

In our view, the extent to which CMCs can play a role in fuelling mass claims needs to be balanced against the role they can also play in improving access to justice for consumers of financial services. Key to this is the value for money that CMCs offer consumers, given that consumers have access to complaint handling procedures that are free and intended to be easy to use.

The FSA, ombudsman service and OFT closely liaise with the CMR, providing it with intelligence which may suggest failings in the conduct of claims management licensees.

Our joint statement with the CMR will set out firms' responsibilities where they receive complaints from CMCs. It will also provide messages for consumers to help them consider what they should (and should not) take into account when deciding whether to use the services of a CMC.

Annex 1

Coordination Committee terms of reference

Functions

1. The main functions of the Coordination Committee (CC) are to:
 - a) contribute to the identification of emerging risks that have the potential to cause widespread detriment amongst financial services consumers;
 - b) coordinate consideration of whether:
 - emerging risks with the potential to cause widespread detriment should be dealt with through firms' complaints handling and the Financial Ombudsman Service (ombudsman service) or through regulatory intervention by the Office of Fair Trading (OFT) or the Financial Services Authority (FSA);
 - risks that are causing widespread consumer detriment should continue to be dealt with by firms' complaints handling and the ombudsman service or through regulatory intervention by the OFT and FSA;
 - c) promote alignment between the OFT's or the FSA's response to emerging risks and widespread issues and the ombudsman service, with regard to the potential differences between the regulatory approach and how the ombudsman service is required to deal with individual complaints;
 - d) promote alignment in key communications about the positions of the ombudsman service and the FSA or OFT in the handling of emerging risks and widespread issues; and
 - e) contribute to the effective exchange of information between the FSA, OFT, and ombudsman service.

Accountability

2. The committee will publish an annual account of its activities.
3. Accountability for risk identification and whether to intervene in response to an emerging risk or widespread issue rests, depending on jurisdiction, with either the FSA or OFT. The ombudsman service is accountable for handling the complaints it receives. The CC has no formal role in decisions made by either the ombudsman service, the FSA or the OFT and is not responsible for their actions.

Membership

4. Membership of the CC will comprise the FSA's Conduct Risk Division, the Executive Director of the OFT's Markets and Projects Group, and the ombudsman service's Decisions Director. Each member will be accompanied by no more than two other persons. A Director at the FSA will be the chairman.

Secretariat

5. The chairman of the CC will provide a secretary to the committee. The secretary will ensure that proper records of CC meetings and the discharge of its functions are kept. Invited persons will have access to the record of the relevant part of the meeting.

Procedures

6. The CC will meet at regular intervals, at least four times a year. The CC will meet on an urgent basis outside of scheduled meetings if, in the opinion of the member seeking the meeting, it is necessary in order for the committee to fulfil its functions.
7. The CC will invite any person to take part in considerations that are consistent with the discharge of the committee's functions.
8. The CC will make public the issues it has considered. It will also make public the actions taken by the FSA, OFT and ombudsman service where they relate to the committee's considerations.
9. Information sharing within the CC will be subject to the restrictions set out in the memorandums of understanding between the FSA, the OFT and the ombudsman service.

Annex 2:

Minutes of previous Coordination Committee meetings

Published minutes of the meeting of the

FOS, FSA and OFT Co-ordination Committee

25 February 2011

Attendees: Sheila Nicoll (Chair) (FSA)

Christina Sinclair (FSA)

Jamie Bell (FSA)

Jamie Kerr (FSA)

Amir Ghani (FSA)

Tony Boorman (Financial Ombudsman Service)

Jane Hingston (Financial Ombudsman Service)

Annette Lovell (Financial Ombudsman Service)

Clive Maxwell (OFT)

Ray Watson (OFT)

1 Introductions

SN (the Chair) opened the first ‘formal’ meeting of the Committee¹ and new attendees were introduced.

2 Emerging risks

Credit brokerage:

- The Committee considered potential risks relating to credit brokerage and the non-return of fees upon cancellation of a contract by a consumer. The Committee also noted other practices relating to sale and marketing that may be at risk of being ‘unfair’.
- The Committee discussed whether there were comparable trends relating to the brokering of first charge mortgages. The FSA set out where it was in terms of the Mortgage Market Review (MMR) and its consultation on distribution and disclosure.

Adequate explanations and assessment of creditworthiness and affordability:

- The Committee considered potential risks posed by some creditors not being able to meet the requirements of the Consumer Credit Directive, in particular providing key features information pre-sale; and affordability assessments before entering into the contract.

Credit and store cards:

- The Committee considered potential compliance risks of the voluntary agreement between the previous government and credit and store card issuers. The requirement for card issuers to adhere to the terms of the voluntary agreement was incorporated into the Lending Code as of 1 February 2011 and the OFT’s Irresponsible Lending Guidance as of the same date.

Debt freeze/debt waiver products:

- The Committee considered potential risks posed from products being developed which could operate as Payment Protection Insurance (PPI) replacements, in particular ‘debt freeze’ and/or ‘debt waiver’ products.
- There is risk of consumers assuming that such products are regulated on the same basis as PPI, and with the same protections. There may also be insufficient transparency regarding the terms of the product and the associated costs and benefits and any limitations or exclusions.

Peer to peer lending:

- The Committee considered the regulatory context of this form of lending, in particular whether individuals are ‘investors’ or ‘lenders’; and what the status of the platform is?
- Discussions are ongoing, including with other relevant parts of government.

¹ The Committee met twice in 2010 in pilot form.

Exchange Traded Funds (ETFs) and other exchange traded products:

- The Committee considered potential risks relating to ETFs. The FSA has set out some of the risks it has identified and how it intends to mitigate these in its *Retail Conduct Risk Outlook*.

Self-invested personal pensions (SIPPs):

- The Committee considered potential risks posed by the extent to which consumers are being made aware of the costs of SIPPs compared to alternative products, or that advisers are adequately matching the underlying investments and their attitude to risk.

Housing and mortgage market related risks:

- The Committee considered the current status of the housing and mortgage market, and what risks this poses in terms of mortgage related complaints (for example relating to possessions, interest rates and redemption charges etc) to the ombudsman service.

Payday loans:

- The ombudsman service explained that whilst complaints relating to this activity continue to be relatively low overall, there has been a significant increase in the last year. Complaints tend to focus on what happens when the loan is not paid back in time or poor administration by the business.

3 Cases to the ombudsman service

The Committee considered data on new cases to the ombudsman service. PPI cases continue to dominate, accounting for around 45% of all new complaints.

The ombudsman service will be publishing data on new cases and outcomes on financial firms handled during the period of July-December 2010 at the end of February.

4 Retail Conduct Risk Outlook (RCRO)

The FSA confirmed that the RCRO will be published on 28 February. The full document will be published on the library section of the FSA's website.

The Committee had been kept up to date with developments in the RCRO through the autumn of 2010. The list of risks had not materially changed since the last update to the Committee. All of the risks identified are within the FSA's regulatory scope.

The RCRO, together with the *Prudential Risk Outlook* which will be published in March, replaces the previous FSA publication the *Financial Risk Outlook*.

5 Feedback statement to DP 10/1

It was agreed that the Feedback Statement to DP10/1 would be published on 28 March 2011.

6 Reporting and monitoring of risks

The Committee discussed how it should record and monitor the issues it has considered. In particular, what the best way would be for it to track those risks deemed to be high. The Committee's secretariat team agreed to consider this ahead of the next meeting (planned for May 2011) with a view to presenting a draft risk register.

7 A.O.B

There was no other business to discuss.

Annex 3:

List of non-confidential respondents

Aneeta Marde

Gary Urquhart

Adam Samuel

Association of British Insurers

Association of Financial Mutuals

Association of Private Client Investment Managers and Stockbrokers

British Bankers' Association

Building Societies Association

BUPA

Canada Life Ltd

Car Giant

Consumer Focus

Council of Mortgage Lenders

Financial Services Consumer Panel

Investment and Life Assurance Group Limited

Liverpool Victoria

Lloyds Banking Group (Life, Pensions & Investments)

Nationwide Building Society

Prudential plc

The Royal Bank of Scotland Group plc

Zurich Financial Services Group

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