

Guidance note

No. 10 (2010)

Date of coming into effect: 23 July 2010

Consumer Redress Schemes

A. Introduction

Q1: What is the purpose of this guidance note?

- 1.1 This guidance note is relevant to **authorised persons** and **payment service providers**. It uses “firm” to refer to all such persons.
- 1.2 The guidance note explains the power in s. 404 of the Financial Services and Markets Act 2000 (“FSMA”) which enables the FSA to make rules requiring firms to establish and operate consumer redress schemes.

Q2: What is a consumer redress scheme?

- 2.1 A **consumer redress scheme** is a set of rules under which a firm is required to take one or more of the following steps:
 - investigate whether, on or after a specific date, it has failed to comply with particular requirements that are applicable to an activity it has been carrying on;
 - determine whether the failure has caused (or may cause) loss or damage to consumers;
 - determine what the redress should be in respect of the failure; and
 - make the redress to the consumers.

B. Process for making a consumer redress scheme

Q3: Will the FSA have to consult before it makes a consumer redress scheme?

- 3.1 The power in s. 404 of FSMA is a rule-making power. Rules made by the FSA under this power will be subject to a **formal public consultation**, including a cost-benefit analysis. The consultation paper will fully and clearly explain the rules of the scheme and set out the sources of evidence upon which the scheme is based. The consultation period will usually be 3 months long.

Although there is an exception from the FSA consultation requirements for cases where the FSA considers that the delay would be prejudicial to the interests of consumers, this is very unlikely to be applicable in relation to consumer redress schemes. This is because the importance of consulting to ensure a scheme is appropriate and workable in practice would be likely to outweigh any prejudice that delay from the consultation process may bring.

- 3.2 The FSA must have regard to any representations made to it during the consultation process. The FSA will issue a statement following the consultation which will explain how the FSA has taken these into account in formulating the final rules. A further cost-benefit analysis will be provided if the final rules differ significantly from the consultation draft. In addition, an explanation of any differences between the rules consulted on and the final rules made will be provided.
- 3.3 All FSA rules are made by the FSA Board. The Treasury appoints the FSA Board and the majority of Board members are non-executive.

Q4: What steps will the FSA take prior to issuing a formal consultation?

- 4.1 The FSA will actively seek to engage in discussions with the industry and consumer groups about the issue. This process will assist in the consideration of all the available options and, if it is ultimately decided to pursue a scheme in order to address the issue, will ensure the FSA has a clear understanding of the issues that will need to be addressed in the formal consultation.
- 4.2 This means that the particular nature of the issue in relation to which a scheme is proposed will already be visible to key stakeholders. In addition, the issue may have already been publicised more widely through comment and action by the FSA (e.g. the FSA may have published the findings of thematic projects, mystery shopping exercises or enforcement actions).
- 4.3 The FSA will also consult with the Financial Services Practitioner Panel, the Smaller Businesses Practitioner Panel, the Financial Services Consumer Panel, the Financial Services Compensation Scheme (“the FSCS”) and the Financial Ombudsman Service (“the ombudsman service”) before issuing a formal consultation.

C. Trigger for making a consumer redress scheme

Q5: What is the trigger that must be met before the FSA can make a consumer redress scheme?

- 5.1 The trigger is set out in s. 404(1) of FSMA. It provides that the power can be used if:
- (a) it appears to the FSA that there may have been a **widespread or regular failure** by relevant firms to comply with requirements applicable to the carrying on by them of any activity;

- (b) it appears to the FSA that, as a result, consumers have suffered (or may suffer) loss or damage in respect of which, if they brought legal proceedings, **a remedy or relief would be available** in the proceedings; and
- (c) the FSA considers that it is **desirable** to make rules for the purpose of securing that redress is made to consumers in respect of the failure (having regard to the other ways in which consumers may obtain redress).

5.2 The three elements of the trigger are expanded upon in Q6-Q8 below.

Q6: When is a failure “widespread or regular”?

- 6.1 There is no further explanation in FSMA of what is meant by “widespread or regular”.
- 6.2 In the FSA’s view, **“widespread”** failure is concerned with the number of firms that have failed to comply with the requirements compared to the number of firms involved in the particular activity. It is unlikely that a failure confined to a particular firm or a small number of firms (relative to the total number of firms involved in the activity) would be enough. In other words, there must be evidence of failure widely across the particular sector. This does not mean that the FSA will need to have specific evidence of failure by each of this widespread number of firms. The FSA will be entitled to extrapolate reasonably from the evidence it has so as to determine whether the failure appears to be “widespread”.
- 6.3 **“Regular”** failure would seem to be concerned with failure that was recurring on the part of particular authorised persons, even if it was not widespread amongst the sector. So the number of firms involved would not need to be as great as above, but there would need to be recurring failure by those involved. FSMA provides other powers to deal with failure by a small number of firms (e.g. own initiative variation of permission, restitution orders etc.) and the FSA will need to consider which power is most appropriate in such circumstances.
- 6.4 The FSA will only proceed if it has robust evidence to support its view that it appears there may have been a widespread or regular failure. **Sources of evidence** which the FSA might use and extrapolate from include the results of the FSA’s thematic work, enforcement investigations, mystery shopping, complaints to the FSA or to firms or to the ombudsman service, information from consumer groups and skilled persons reports.

Q7: What sort of failures can be dealt with under a consumer redress scheme?

- 7.1 The requirements that can be included in a consumer redress scheme include both **FSA rules and the general law** (e.g. the tort of negligence or the Unfair Terms in Consumer Contracts Regulations 1999 - see s. 404F(3) of FSMA).

- 7.2 The failures that the FSA can take into account in deciding if the trigger is satisfied are those where, as a result of the failure, consumers have suffered (or may suffer) loss or damage in respect of which, if they brought legal proceedings, a remedy or relief would be available in the proceedings (see s. 404(1)(b) of FSMA). The relevance of the “may suffer” wording is that it makes clear that schemes may cover cases where loss is foreseeable, but may not yet have crystallised (e.g. pensions mis-selling cases where the loss may not crystallise until retirement).
- 7.3 The FSA will be able to give examples of things done or omitted to be done that are to be regarded as constituting a failure to comply with a requirement. However, the FSA can only give examples that have been, or would be, held by a court or tribunal to constitute a failure (see s. 404A(2) of FSMA).
- 7.4 So in other words, the s. 404 power is limited so that **the only failures a scheme can address are those that a court or tribunal would find to have been failures at the time the activities were carried on** (rather than a subjective assessment by the FSA of the reasonableness of a firm’s actions). Consumers will not need to have actually brought such an action for the FSA to be able to make a scheme.
- 7.5 Deciding whether a particular act or omission constitutes a failure will necessarily involve the FSA interpreting its rules and the general law. If the law is unclear in a particular area, the FSA will have two broad options available to it. It may decide to either:
- **not develop a scheme**, having regard to the other ways in which consumers can seek redress, including through the courts; or
 - take steps to **clarify the law**.
- 7.6 The FSA will **seek an opinion from a Queens Counsel** for any scheme it proposes. If stakeholders disagree with the FSA’s interpretation of the law as expressed in the draft scheme rules, they will be able to say so during the consultation process. Any representations made will be carefully considered by the FSA as set out in Q3.
- 7.7 In addition, the FSA has the **option of seeking a court declaration** to clarify the law (the bank charges test case, which the FSA supported with a waiver of its rules on complaint-handling, is an example of this sort of approach).
- 7.8 The process of interpreting what the FSA’s rules require will involve the usual process of analysing relevant surrounding materials (e.g. consultation papers) as is the practice when interpreting any piece of legislation. Other FSA rules and guidance may also be relevant to interpreting what a particular rule requires. The FSA’s rules are given a purposive interpretation (see GEN 2.2.1R). The purpose of a rule is gathered from the text of the rule itself and its context among other relevant rules.
- 7.9 The FSA will **not be able to impose higher requirements** on firms **retrospectively**. The requirements to be applied by the FSA will be those in

force at the time of the relevant act or omission, not current or later requirements.

7.10 Finally, consumer redress schemes cannot be used to require redress in relation to those failures in respect of which a consumer would not have a **right of action in court**. A consumer redress scheme could not, therefore, be used to require redress for:

- breaches of the FSA’s Principles for Business (the FSA’s rules currently provide that breaches of the Principles do not give rise to a right of action in court under s. 150 of FSMA – a change to this would be subject to the FSMA consultation requirements in the usual way);
- breaches of any other FSA rules where the right of action under s. 150 of FSMA has been switched off in the rules (e.g. the rules in the SYSC module of the FSA Handbook);
- departure from FSA guidance; or
- non-compliance with any non-binding code of practice (e.g. industry guidance confirmed by the FSA).

7.11 The fact that a consumer redress scheme cannot be used to require redress in relation to breaches of the FSA’s Principles would not prohibit a consideration of the Principles for the purposes of interpreting one of the FSA’s more detailed rules. This is because the FSA thinks that a court would also take into account surrounding legislative provisions when seeking to interpret a particular piece of law. However, this does not mean that the scheme could be based on the Principles – there always needs to be a breach of a legally-actionable requirement.

Q8: What will the FSA take into account when considering whether it is “desirable” to make a consumer redress scheme?

8.1 The FSA will be required to make an **objective, evidence-based judgment** on the overall appropriateness of a consumer redress scheme as a remedial tool. Cost-benefit analysis is likely to be a key part of this decision. An important characteristic of a consumer redress scheme is that it can ensure consumers obtain redress without the FSA having first to identify every individual firm specifically involved. Cost-benefit analysis will necessarily rely in part upon the FSA’s judgment as to how widespread or regular the failure is.

8.2 A comparison of the advantages and disadvantages of a consumer redress scheme against other available tools will form part of the decision making process. FSMA provides a range of other tools (e.g. own initiative variation of permission, restitution orders etc.).

8.3 As a public body, the FSA will also have regard to general administrative law principles such as **proportionality and reasonableness**. For example, the extent to which firms have already provided redress will be a factor that the FSA will have regard to (e.g. following enforcement action or the implementation of a voluntary industry redress scheme). See also Q17.

- 8.4 Finally, the **FSA's objectives** (particularly its consumer protection, market confidence and financial stability objectives), together with the **Principles of Good Regulation**, will also be relevant. For example, FSMA requires the FSA to have regard to the principle that a burden or restriction which is imposed on a person should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction.

D. Scope of a consumer redress scheme

Q9: What financial services can a consumer redress scheme apply to?

- 9.1 A consumer redress scheme can secure redress for consumers of services provided by:
- authorised persons in carrying on regulated activities;
 - authorised persons in carrying on a consumer credit business in connection with the accepting of deposits;
 - authorised persons in communicating, or approving the communications by others of, invitations or inducements to engage in investment activity;
 - authorised persons who are investment firms, or credit institutions, in providing relevant ancillary services;
 - persons acting as appointed representatives; and
 - payment service providers in providing payment services (see s. 404E(2) of FSMA).
- 9.2 A scheme could apply to all authorised persons or payment service providers or to a specified description of authorised person or payment service provider. Given that a scheme can apply to authorised persons, it could also apply to incoming EEA firms that are authorised under Schedule 3 to FSMA. However, the FSA would need to consider on a case-by-case basis the extent to which this was both practicable and appropriate (bearing in mind the division of responsibilities between home and host state regulators under the various EU Directives that apply to financial services firms).
- 9.3 The FSA will be able to determine, on reasonable grounds, how to characterise the particular activity that a scheme applies to. This will enable the FSA to ensure that a scheme is **appropriately focused** (e.g. a scheme could be limited to activities carried on in relation to particular products or in particular sectors of the market in question, during specified periods of time). It is possible that a scheme could be combined with the use of other regulatory tools (i.e. a package of measures would be put in place to ensure an issue was addressed comprehensively). Should this be the case the FSA will set out clearly in its consultation paper how the different elements of the package inter-relate.
- 9.4 Where the financial services to which a scheme applies are those provided by authorised persons in carrying on regulated activities, the limitation to "regulated activities" means that **a consumer redress scheme cannot apply to services that were provided before the activity in question became regulated by the FSA** (e.g. the start date of a scheme applying to general

insurance mediation could not be earlier than 14 January 2005 (the commencement of regulation of general insurance mediation)).

- 9.5 That said, it would be possible for the Treasury by order to widen the type of financial services that a consumer redress scheme can apply to in order to encompass the pre-FSA regulation activities (see s. 404G of FSMA).

Q10: Which consumers can be covered by a consumer redress scheme?

- 10.1 For the purposes of a scheme, a consumer can be any person who has used, or may have contemplated using, any of the financial services listed in Q9 (see s. 404E(1) of FSMA). As such, the s. 404 power **is not limited to retail customers** only.
- 10.2 That said, a consumer redress scheme can only be used to secure redress for consumers who have a legal cause of action. In some cases, the cause of action is limited to private persons in any event. For example, rights of action in respect of breaches of FSA rules are, generally, limited to private persons and the Unfair Terms in Consumer Contracts Regulations 1999 are limited to individuals acting outside their trade or profession. In contrast, claims for misrepresentation can be brought under the general law by all types of legal person.
- 10.3 In addition, the FSA may choose to focus a scheme on retail customers, having regard in particular to the fact that they tend to have less experience and expertise. However, the FSA will also have regard to the fact that many retail customers are also investors in or beneficiaries of funds and pension schemes which may themselves have suffered loss from the failure. It may be that the inclusion of such funds or pension schemes amongst those to whom redress ought to be given will bring benefit to the underlying retail customers.
- 10.4 The s. 404 power **could be used in relation to non-UK consumers** if they are protected by the underlying law (e.g. some FSA rules apply to UK firms doing business in another EEA State).
- 10.5 The fact that a consumer **“who may have contemplated using”** a relevant financial service can be covered by a consumer redress scheme is unlikely to catch many cases in practice. One example might be where there has been widespread discrimination – the s. 404 power could be used to ensure redress for consumers who were unlawfully denied access to a financial service contrary to any relevant equality legislation. All the restrictions and evidence requirements explained in this guidance note would apply equally to any scheme developed in this sort of area.
- 10.6 The Treasury may by order widen (or cut back) the type of consumers that a consumer redress scheme can apply to (see s. 404G of FSMA).

Q11: Once a scheme is in place, will it apply to other situations?

- 11.1 The limits of a scheme's application will be clearly defined within the scheme rules and a scheme will only bind those firms to which it applies. Firms who are unsure whether or not a scheme applies to their activities are encouraged to raise the issue with their supervisor in the normal way.
- 11.2 It is possible that the approach taken by the FSA in a particular scheme could influence its approach to other situations and the FSA will aim to be consistent in its regulatory approach where possible.
- 11.3 For example, the FSA could put in place a scheme in relation to unfair variation terms in mortgage contracts. The underlying reasons for the FSA's decision that a variation term in a mortgage contract is unfair could potentially apply to a variation term in an insurance contract that fell outside the scope of the scheme. However, the Unfair Terms in Consumer Contracts Regulations 1999 expressly state that all the circumstances attending the conclusion of the contract must be taken into account when assessing the unfairness of a contractual term. Therefore, if the FSA wanted to take action in relation to the term in the insurance contract using its other regulatory powers, it would need to ensure that it had considered all the relevant issues separately to those considered as part of the scheme for mortgage contracts.

E. Operation of a consumer redress scheme

Q12: How will firms be required to investigate cases under a consumer redress scheme?

- 12.1 Firms will be responsible for investigating individual cases, within the framework set out by the FSA. The FSA will have a **number of options** when formulating a scheme. For example, the FSA could:
- require firms to undertake a proactive file review of all cases falling within the period covered by the scheme;
 - require firms to contact their customers individually to ask whether they wish their cases to be investigated under the scheme and only investigate the cases of those customers who opt-in;
 - require firms to publicise the existence of the scheme (e.g. through newspaper advertisements) and only investigate the cases of those customers who opt-in; or
 - publicise the existence of the scheme through an FSA publicity campaign and require firms to investigate the cases of those customers who subsequently opt-in.
- 12.2 It would also be possible to require a **combination** of these methods within a scheme (e.g. for different types of case). The choice of investigation method would be one of the issues on which the FSA would consult and perform cost-benefit analysis. In doing so, the FSA will have particular regard to the likely effectiveness of consumer contact exercises.

- 12.3 In the event that a scheme required consumers to “opt-in” by a specified date, the FSA would explain how to deal with customers who nevertheless contacted firms after that date.
- 12.3 In some cases, the FSA (or someone acting on its behalf) will carry out the investigation under the scheme instead of the relevant firm (see s. 404A(1)(k) of FSMA). The FSA may require this in relation to, for example, a firm which was refusing to operate a scheme. A further example is provided in Q13 in relation to formerly authorised persons.
- 12.4 The FSA will be mindful of issues relating to **professional indemnity insurance** when making rules in this area. For example, the FSA is aware that certain policies prohibit admissions of liability without the written consent of the insurer.

Q13: What if a firm is no longer authorised by the FSA or has transferred its business to another firm?

- 13.1 The FSA has a number of options for dealing with firms that have **ceased to be authorised**. For example:
- **Where the firm continues to exist and still has assets**, the scheme could still apply to that firm (see s. 404F(5)(a) of FSMA). Alternatively, the scheme rules could provide for the FSA itself (or a third party acting on its behalf) to investigate the cases of formerly authorised persons.
 - **Where the firm has ceased to exist, cannot readily be traced or has no assets**, the FSCS could declare the firm in default. See Q29 for details of how the FSCS will deal with cases that fall within a scheme.
- 13.2 Where there has been a **transfer of business**, the FSA can apply the scheme to the successor firm if it has assumed liability (e.g. where there has been a transfer of a banking business under Part VII of FSMA or a firm is otherwise legally liable for the failures of another firm - see s. 404F(5)(b) of FSMA). Where the successor firm has no legal liability for the failures, the scheme itself could not apply to the successor firm (and so redress would need to be obtained through the options set out above). It may be the case, however, that the successor firm has access to information that may assist in the investigation of formerly authorised persons and the FSA will be mindful of this.
- 13.3 In these sorts of cases it would be for either the FSA, the third party acting on its behalf, the FSCS or the successor firm (as relevant) to contact affected consumers. The FSA and the FSCS will work together closely to ensure all relevant firms are captured.

Q14: What else will the FSA want to include in the rules of a consumer redress scheme?

- 14.1 Section 404A of FSMA sets out an illustrative list of particular matters that the FSA may cover in the rules of a scheme.
- 14.2 One of the most important areas where the FSA may be likely to make rules is to set out **examples of things done or omitted to be done** that are to be regarded as constituting a failure to comply with a requirement (see s. 404A(1)(b) of FSMA). However, as explained in Q7, the FSA can only give examples that have been, or would be, held by a court or tribunal to constitute a failure.
- 14.3 Giving examples that are clear and sufficiently comprehensive will be an area that the FSA pays particular attention to, both in its work leading up to a consultation and during the consultation process itself. The FSA will work with relevant stakeholders to ensure the final scheme rules give examples which provide clarity and certainty as to how a firm is expected to operate under the scheme.
- 14.4 Another important area is that the FSA will be able to set out **matters to be taken into account**, or steps to be taken, by firms for the purpose of:
- assessing evidence as to a failure to comply with a requirement; or
 - determining whether such a failure has caused (or may cause) loss or damage to consumers (see s. 404A(1)(c) of FSMA).

Again the FSA will only be able to do this if the matters set out have been, or would be, taken into account by a court or tribunal for the purpose mentioned. In particular, the FSA cannot disregard the normal legal rules on causation or remoteness of loss.

- 14.5 A third significant area relates to **the period under review**. The scheme rules will specify a start date (referred to as the “specified date” in s. 404(3) of FSMA) and most likely also an end date (see s. 404A(1)(f) of FSMA) for the activities/sales to be reviewed. This will limit the scope of a firm’s investigations under a scheme.
- 14.6 A fourth area that could be covered in scheme rules is the **content of a firm’s communication to consumers about the outcome of their investigation** under a scheme. Detailing the content of the communications that consumers can expect to receive will ensure consistency across firms and clarity for consumers. It will also be of benefit to firms should complaints subsequently be made to the ombudsman service. This is because a comprehensive communication may make it apparent to the ombudsman service at the outset that a firm has undertaken its investigation in accordance with the scheme. As such, the FSA will consult the ombudsman service on the content of such communications (see Q23).

- 14.7 Fifth, the scheme rules would be able to **require firms to provide information to the FSA** (e.g. information about how they are conducting their investigations under the scheme, how many consumers have opted to have their cases reviewed etc.).

Q15: What if gaps in the rules of a particular scheme come to light during the period in which the scheme is running?

- 15.1 The FSA will monitor schemes whilst they are running. If it became apparent during the operation of a scheme that it would be desirable for the scheme rules to cover other issues (e.g. if firms or consumer groups informed the FSA that it would be helpful if further examples of failures pursuant to s. 404A(1)(b) of FSMA were given), the FSA would be able to **amend the rules** accordingly. Any such amendments would be subject to the usual consultation process as set out in Q3.
- 15.2 Alternatively, the FSA could give general or individual guidance to firms on issues that arise during the operation of a scheme. General guidance would also be subject to the consultation process.

Q16: What types of redress can a firm be required to make under a consumer redress scheme?

- 16.1 The FSA is able to set out in scheme rules the kinds of redress that are to be made to consumers. The only kinds of redress the FSA can secure in this way are those which it considers to be **just** (see s. 404A(4) and s. 404F(1) of FSMA). For example, instead of providing cash compensation, the FSA could require firms to top-up pensions or offer to alter the terms of a contract.
- 16.2 That said, the FSA is required to have regard to the nature and extent of the losses or damage in question (see s. 404A(5) of FSMA) and so will take into account the type of relief that a court would grant.
- 16.3 Redress made under a consumer redress scheme may include **interest** (see s. 404F(1) of FSMA). Decisions in relation to the rate of interest and the basis for calculation will be made on a scheme-by-scheme basis and will be subject to the consultation process.
- 16.4 A consumer redress scheme **cannot extend normal limitation periods**. Under the Limitation Act 1980, the general position regarding time limits for bringing a claim is as follows:
- 6 years from the event for claims in contract and claims in tort concerning non-latent damages; and
 - 3 years from actual or constructive awareness for claims in tort concerning latent damages until 15 years from the event at which point (for most cases) the right to claim expires irrespective of any awareness considerations.

Note that this is only a summary of the position and the legislation itself should be consulted when determining the limitation period applicable to any particular case.

- 16.5 Firms may only be required to make redress to consumers who are within the limitation period for bringing their case to court at the time the FSA makes the rules (see s. 404(8) of FSMA). In other words, once a scheme has been made the ‘clock will stop’ on the relevant limitation period. For example, if a scheme began in July 2010 and the limitation period for a consumer to take their case to court would have expired in September 2010, the firm would still need to deal with the consumer’s case under the scheme, even if it did not investigate that consumer’s particular case until, say, November 2010.
- 16.6 The FSA will endeavour to provide as much direction as possible in the scheme rules as to how redress is to be calculated (e.g. by setting out a formula or other methodology) in order to assist both firms and the ombudsman service.
- 16.7 The s. 404 power does not remove a consumer’s right to take a case to the courts. However, any redress received in court proceedings would be discounted from compensation payable under a consumer redress scheme and vice versa. Scheme rules would also deal with the situation where a consumer had previously received redress from the ombudsman service.

Q17: Can firms apply for a waiver or modification of the scheme rules?

- 17.1 Yes. For example, if a firm believes that it has already provided redress to relevant customers through a voluntary past business review it can apply to the FSA for a waiver from, or modification of, the rules in the usual way (see s. 148 of FSMA).
- 17.2 The FSA may not give a waiver or modification unless it is satisfied that:
- (1) compliance by the firm with the rules, or with the rules as unmodified, would be unduly burdensome, or would not achieve the purpose for which the rules were made; and
 - (2) the waiver would not result in undue risk to persons whose interests the rules are intended to protect.
- 17.3 The FSA may impose conditions on a waiver or modification (e.g. additional reporting requirements).

Q18: Will firms still have to deal with complaints in the usual way when a consumer redress scheme is in place?

- 18.1 No. To avoid the risk of potential overlaps between firms’ complaints handling requirements under the FSA Handbook and the operation of any consumer redress scheme, the FSA proposes (subject to consultation on changes to DISP) to **switch off** the complaints resolution, time limit, recording

and reporting rules **in relation to complaints where the subject matter falls to be dealt with (or has been dealt with) under a consumer redress scheme**. Complaints which fall outside the scope of a scheme will continue to be subject to the complaints handling requirements in the usual way.

- 18.2 The FSA will also consider whether it is appropriate to grant a waiver or modification of the complaints handling rules whilst a scheme is being consulted on. As set out in Q17, the FSA may impose conditions on a waiver or modification (e.g. conditions relating to handling complaints from complainants who claim to be in financial difficulty).

Q19: What if a firm doesn't comply with the scheme rules?

- 19.1 The FSA has a variety of tools to require a firm to comply with a scheme. For example, the FSA will be able to take **disciplinary action** if a firm is failing to operate a scheme properly (see Part 14 and s. 404C of FSMA). The FSA is also able to take over the conduct of the investigation required under the scheme, or appoint a third party to do so (see s. 404A(1)(k) of FSMA).

Q20: How will the existence of a scheme be publicised?

- 20.1 The FSA will apply its Code of Practice on Regulatory Transparency when considering whether, when and how to publicise a scheme (see Annex 4 of CP09/21, *Transparency as a regulatory tool and the publication of complaints data*, at http://www.fsa.gov.uk/pubs/cp/cp09_21.pdf). The FSA has a presumption in favour of transparency as a regulatory tool where each of the Code's principles is met. Each scheme will be considered in light of these principles.
- 20.2 As set out in Q4, the FSA would be likely to publicise the work it has been doing in the run up to the launch of a formal consultation paper. The consultation paper itself will be **available on the FSA's website**.
- 20.3 Assuming the scheme rules are made following consultation, the final rules will also be available on the FSA's website. The rules will set out clearly the type of firms and activities to which the scheme applies. The information available on the website will enable third parties such as consumer groups to disseminate information about the scheme.
- 20.4 The FSA will also be able to go further than this in appropriate cases and run its own **publicity campaign**. This might include newspaper or radio advertisements designed to increase awareness of the scheme amongst consumers. Such advertisements would aim to make clear the scope of the scheme (e.g. the types of products and services the scheme covers) and any action that consumers need to take (e.g. the extent to which they need to contact their firm directly or whether their case will automatically be investigated by the firm without the need for any action on their part).
- 20.5 In addition, the FSA has the option to include in the scheme rules a requirement on firms to publicise the scheme themselves.

- 20.6 In considering whether to publish the names of individual firms that are subject to a scheme, the FSA will also have regard to the Code, and in particular confidentiality restrictions, the extent to which naming firms will enable consumers to make informed judgments (e.g. it may not always be possible to ensure that the list of firms subject to a scheme is exhaustive), as well as relevancy and timeliness (e.g. the extent to which consumers will be made aware of the firms involved in a scheme through any customer contact exercise prescribed in the scheme).

F. Role of the Financial Ombudsman Service and the Financial Services Compensation Scheme

Q21: How will the ombudsman service deal with complaints that are covered by a consumer redress scheme?

21.1 Complaints about:

- an act or omission of a firm where the subject matter of the complaint falls to be dealt with (or has been dealt with) under a consumer redress scheme;
- a determination made by a firm under a consumer redress scheme; or
- a failure by a firm to make a determination under a consumer redress scheme

will all fall within the compulsory jurisdiction of the ombudsman service (see s. 404B(11) of FSMA).

21.2 There are four key scenarios which will involve the ombudsman service dealing with complaints about issues that fall, or may fall, within the scope of a consumer redress scheme:

- **First, where the ombudsman service receives complaints while a scheme is operating that fall within its scope but the time limit for the firm to deal with cases under the scheme has not expired.** In this situation, the ombudsman service proposes (subject to consultation on changes to DISP) to refer the complaint back to the firm to be dealt with in accordance with the scheme.
- **Second, where the ombudsman service receives complaints about the outcome of a firm's investigation under a scheme.**

If the ombudsman service considers that the firm has reviewed the subject matter of the complaint and issued a "redress determination" in accordance with the scheme, it is proposed (subject to consultation on changes to DISP) that the ombudsman service may dismiss the complaint without considering its merits (see Q22). An example would be where the scheme provides for one standard form of redress and the firm has offered the required redress but the consumer is dissatisfied with the form of redress provided for by the scheme.

In other cases the ombudsman service may have to consider the merits. However, the ombudsman service will determine the complaint by reference to what, in the opinion of the ombudsman service, the determination under the scheme should be or should have been, rather than by reference to what is 'fair and reasonable' (in other words, whether or not the firm did what the redress scheme required it to do - see s. 404B(4) of FSMA).

Examples would be where:

- the firm does not offer redress and the consumer claims that (under the terms of the scheme) the firm should have done so; or
 - the scheme provides for different forms of redress depending on the circumstances of the case, the firm has offered one form of redress and the consumer claims that (under the terms of the scheme) the firm should have offered another form of redress.
- **Third, where the ombudsman service receives a complaint once a scheme has ceased to operate.** This situation would cover cases such as where a firm had failed to undertake or complete an investigation under a scheme within the period in which it was operating. In this scenario, the ombudsman service would be required to deal with complaints by applying the scheme.
 - **Fourth, where the ombudsman service receives complaints or is considering complaints when the FSA is consulting on a scheme, but the scheme is not yet in place.** A scheme must be established by the FSA in accordance with the FSA's rule-making processes, including consultation and cost-benefit analysis. Publicity in the run-up to formal consultation may lead to a rapid rise in the number of complaints to the ombudsman service about the issue in question. Alternatively, the ombudsman service may already have received a number of complaints about the issue for which a scheme is being developed to address.

In these situations, the ombudsman service will consider whether or not to place a hold on those complaints that may fall within the scope of the scheme (in line with normal operational practice). In the event of the scheme being made, the ombudsman service would be able to refer the relevant complaints back to the firm to be dealt with in accordance with the scheme. If a scheme was not made, the ombudsman service would deal with the complaints in the usual manner.

Q22: Will the ombudsman service dismiss a complaint if it determines that a firm has correctly followed a scheme?

- 22.1 The FSA and the ombudsman service propose consulting on changes to DISP to make clear the circumstances in which the ombudsman service may dismiss a complaint which has been reviewed in accordance with the terms of a scheme. The changes envisaged read across from the current approach. They include:

- a requirement that firms subject to a scheme provide a “**redress determination**” (akin to a final response); and
- adding to the dismissal rules in DISP 3.3, so that the ombudsman service may dismiss a complaint if it considers that the firm has reviewed the subject matter of the complaint and issued a redress determination in accordance with the terms of the scheme.

Q23: When will the ombudsman service charge a case fee?

- 23.1 The FSA proposes consulting on changes to DISP to make clear the circumstances in which the ombudsman service will not charge a case fee in respect of a complaint which has been reviewed in accordance with the terms of a consumer redress scheme.
- 23.2 The change envisaged will **read across from the current approach to case fees**. The FSA proposes to amend the definition of chargeable case, so that the ombudsman service will not charge a case fee where it considers it apparent from the complaint, when it is received, and from any redress determination issued by the firm, that the complaint should not proceed (and the ombudsman service has dismissed the complaint accordingly under DISP 3.3 (see Q22)).
- 23.3 If it is not apparent to the ombudsman service from the complaint when it is received, and from any redress determination issued by the firm, that the complaint should not proceed, it will have to consider the matter and a case fee will be chargeable (even if the complaint is later dismissed under DISP 3.3). It will therefore be in firms’ interests to ensure that a redress determination clearly sets out the outcome of their investigation under the scheme and the basis for it (see Q14).

Q24: Will the usual ombudsman service time limits apply?

- 24.1 It is proposed that (subject to consultation on changes to DISP) similar time limits will apply to complaints to the ombudsman service about the outcome of a firm’s investigation under a scheme as currently apply in relation to complaints to the ombudsman service.
- 24.2 As set out in Q22, the FSA proposes incorporating into DISP the concept of a “redress determination”. Such a document would be akin to the “final response” document that firms are required to produce in response to complaints. As such, consumers would have **six months** from receiving a redress determination from a firm in which to complain to the ombudsman service. If a firm has failed to provide a redress determination (e.g. because it omitted to deal with a particular consumer’s case under the scheme), consumers would have **six or three years** to complain to the ombudsman service (in accordance with the existing standard time limits in DISP 2.8).

Q25: Will the usual ombudsman service awards etc. apply?

- 25.1 Where a consumer redress scheme is in place, **money awards and directions** will reflect what, in the opinion of the Ombudsman, the outcome of the firm's investigation should be (or should have been) under the scheme (see s. 404B(5) and s. 404B(8) of FSMA).
- 25.2 In relation to **interest**, this will be payable on any amount that is not paid by the date for payment specified in the money award (see s. 404B(7) of FSMA).
- 25.3 The **cap** on the maximum money award the Ombudsman can make will also apply in relation to consumer redress schemes (see s. 404B(5) of FSMA). As is usual practice, the Ombudsman will be able to recommend that the firm pay a larger amount than the cap (but this will not be binding on firms in any way). This does not mean that the Ombudsman can recommend a larger amount than should be paid under the scheme.

Q26: What about firm-by-firm past business reviews – how will the ombudsman service deal with complaints in this situation?

- 26.1 If appropriate, a past business review by a firm that has been agreed with or imposed by the FSA may interact with the ombudsman service in the same way as a consumer redress scheme.
- 26.2 This is because the FSA is able to **vary the permission** of an authorised person (or the authorisation of a payment service provider) in order to impose requirements on the firm, either on the application of the firm or on the FSA's own initiative. If such a requirement concerns the establishment and operation of a scheme which corresponds to, or is similar to, a consumer redress scheme, provision can also be made so that the ombudsman service will deal with complaints in the same way as explained in Q21-Q25 above. See s. 404F(7) of FSMA.
- 26.3 If a firm had fairly reached a voluntary settlement with its consumers on a full and final basis, the ombudsman service would not look to re-open this.

Q27: What if the FSA grants a waiver of the scheme rules to a particular firm - how will the ombudsman service deal with complaints in this situation?

- 27.1 If a firm is granted a waiver of the scheme rules as a whole (see Q17), any complaints to the ombudsman service will not be dealt with in the manner set out in Q21-Q25 above. The ombudsman service will apply its **usual approach** to dealing with such complaints.

Q28: What will the ombudsman service do if failures by firms span the period before and after an activity became regulated by the FSA?

- 28.1 In this situation, FSMA would require the ombudsman service to decide complaints within the scope of a scheme by applying the scheme (s. 404B of

FSMA) and complaints outside the scope of a scheme on the basis of its usual approach (s. 228 of FSMA). However, as explained in Q9, if this was a particular issue in relation to one particular scheme, it would be possible for the Treasury by order to widen the type of financial services that a consumer redress scheme can apply to in order to encompass the pre-FSA regulation activities (see s. 404G of FSMA).

Q29: Will the FSCS follow a consumer redress scheme?

- 29.1 Yes. It is proposed that (subject to consultation on changes to COMP) the FSCS will consider claims that fall within the scope of a consumer redress scheme **in accordance with the scheme**. However, in line with the existing provisions in respect of pensions review cases (see COMP 12.4.6R), the FSCS would have discretion to depart from the terms of the scheme where it considered it essential in order to provide the claimant with fair compensation. An example would be the FSCS paying compensation in cash rather than augmenting a consumer's current pension plan (as the FSCS is not in a position to advise the consumer to set up a new, or amend an existing, pension plan in the way that a firm may be able to).
- 29.2 The FSCS's limits on the amount of compensation it can pay in the event of a claim will continue to apply.

G. Challenging a consumer redress scheme

Q30: How can a consumer redress scheme be challenged?

- 30.1 Any person (e.g. firms, consumers or their representatives) may **apply to the Upper Tribunal** for a review of any rules made (see s. 404D of FSMA).
- 30.2 The Upper Tribunal is **independent** of the FSA. Its usual role in relation to financial services is to hear references arising from decision or supervisory notices issued by the FSA. However, it has also been given a special role in relation to consumer redress schemes.
- 30.3 The judge presiding at consumer redress scheme proceedings in the Upper Tribunal will be **a judge of the High Court, the Court of Appeal or Court of Session** (or such other person as may be agreed by the Lord Chief Justice, the Lord President or the Lord Chief Justice of Northern Ireland and the Senior President of Tribunals). See s. 404D(12) of FSMA.

Q31: How will the Upper Tribunal deal with consumer redress scheme cases?

- 31.1 The general rule is that, in determining an application, the Upper Tribunal will apply the principles applicable on an application for **judicial review** (see s. 404D(5) of FSMA). Therefore, in relation to issues such as:
- whether the FSA has acted within its powers;
 - whether the FSA has followed a fair process;
 - whether the FSA has specified kinds of redress that are “just”; and

- whether the operational aspects of the scheme are unreasonable (e.g. the amount of time in which firms are given to conduct an investigation);

the Upper Tribunal will consider factors such as whether the FSA has acted irrationally or unreasonably and whether the FSA has taken into account all relevant factors and no irrelevant factors.

31.2 However, in relation to two particular aspects of a consumer redress scheme, the Upper Tribunal will be able to conduct a full merits review to **consider whether the FSA's interpretation of the law was correct** (see s. 404D(6) and (7) of FSMA). These two aspects are:

- any examples that the FSA has set out of things done, or omitted to be done, that are to be regarded as constituting a failure to comply with a requirement; and
- any matters to be taken into account, or steps to be taken, that the FSA has set out for the purposes of:
 - assessing evidence as to a failure to comply with a requirement; or
 - determining whether such a failure has caused (or may cause) loss or damage to consumers.

31.3 In relation to these two aspects, the FSA is restricted to what a court or tribunal would do (as explained in Q7 and Q14). As such, the Upper Tribunal's role will be to check whether the FSA came to the correct view.

Q32: What is the procedure in the Upper Tribunal?

32.1 The detailed rules that govern the practice and procedure to be followed in the Upper Tribunal are available on the Tribunals Service website (<http://www.tribunals.gov.uk/index.htm>) and are subject to periodic revision.

32.2 Particular points to note are that applications for permission to bring proceedings must be made promptly and **no later than 3 months** after the date of the decision, action or omission to which the application relates. The Upper Tribunal will then go on to decide whether to give or refuse permission. If permission is given, the Tribunal will proceed to make a decision. If the tribunal refuses to grant permission, it is possible for the applicant to appeal to the Court of Appeal.

32.3 The Upper Tribunal may make a decision with or without a hearing. Unless the Upper Tribunal directs otherwise, **all hearings must be held in public**.

32.4 It is possible for an application to name an **interested party** to the proceedings. Alternatively, it is possible for the Upper Tribunal to give a direction adding a party as an interested party.

32.5 Each party and, with the permission of the Upper Tribunal, any other person, may:

- submit evidence (except at the hearing of an application for permission);

- make representations at any hearing which they are entitled to attend; and
- make written representations in relation to a decision to be made without a hearing.

Q33: What are the possible outcomes of an application to the Upper Tribunal?

33.1 The Tribunal may:

- **dismiss** the application (so that the scheme rules will stand); or
- make an order **quashing** any rules made under s. 404 or any provision of those rules (see s. 404D(2) of FSMA).

33.2 The Upper Tribunal may also award damages to the applicant (see s. 404D(10) of FSMA).

33.3 It is possible to **appeal** an Upper Tribunal decision to the Court of Appeal on a point of law.

H. Commencement, duration and status

Q34: What is the status of this guidance note?

34.1 This guidance note:

- (a) was made on 22 July 2010; and
- (b) comes into force on 23 July 2010.

34.2 It has the same status, and may be relied on to the same extent, as other general guidance given by the FSA. This is explained in Chapter 6 of the Reader's Guide to the FSA's Handbook of Rules and Guidance.

34.3 It will remain in force until further notice.

34.4 The guidance is given under section 157 of FSMA.