FCA and FOS Call for Input - Modernising the Redress System

https://www.fca.org.uk/publication/call-for-input/call-for-input-modernising-redress-system.pdf

From Transparency Task Force, in an organisational capacity
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For publication

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This response is submitted by me on behalf of the Transparency Task Force (TTF), of which I am an Ambassador and authorised to represent in relation to this matter, in light of my expertise in this topic. TTF is a Certified Social Enterprise that brings together an international community of over 5,000 people who are drawn from all business sectors but have a common concern that financial services need to serve society better.

TTF exists to make an impact, not a profit.

TTF's mission is to promote ongoing reform of the financial services sector.

Introductory Remarks

The Executive Summary gives examples of Mass Redress Events (MREs) such as high-cost credit, packaged bank accounts and Authorised Push Payment (APP) fraud. Section 2 then gives specific details of just two very different MREs: PPI and British Steel Pension Scheme (BSPS). I am disappointed that it does not include any information on the extent of MREs, such as an indication of the overall proportion of new complaints that would be considered to be MREs if, for example, there was a threshold of 100, 1000 or 10,000 'identical' complaints. Understanding the extent of MREs would have been helpful in formulating my response.

Response - Overview

This response focusses on complaints regarding APPFraud in light of both the CRM Code and the new Mandatory Reimbursement Requirement (MRR), and I have taken the Guy Flintham (GF) APPFraud as a case study.

The Guy Flintham fraud was exposed by the FCA in November 2021. There are c.240 victims with Net Losses of c.£10m.

I disagree with the premise that "mass redress events have been precipitated by Professional Representatives (PRs)" (para 1.13)(my emphasis). People deserve redress in the cases of PPI, BSPS and GF because they were victims of mis-selling, mal-administration or APPFraud, and they sought assistance from PRs because the relevant parties in financial services failed to respond appropriately to their complaints.

If all PSPs had responded appropriately to the PPI scandal, creating and implementing fair redress schemes, there would not have been 2million complaints to FOS.

If the banks that had signed the CRM Code had responded in line with the Code in Q1 2022 the victims of the GF fraud would not have had to take complaints to FOS.

The top priorities that must be addressed by PSPs, PRs, FOS and FCA are:

- early identification of potential MREs
- effective case management of MREs

In my experience the APPFraud response systems used by PSPs and FOS focus on individual cases with little or no regard for identical cases being raised by other victims, resulting in delays in the identification of potential MREs. Modern IT and AI systems must be developed to ensure that identical complaints are identified and coordinated at the earliest possible stage.

PRs must be required to, if they don't do so already, identify any complaint that they are submitting where they are also submitting identical complaints on behalf of other complainants.

Paragraph 2.13 states that "The Financial Ombudsman has established casework processes to deal with large numbers of complaints about similar issues." This is not reflected in my dealings with FOS during 2024.

In the GF case I contacted FOS in February 2024 because it was clear to me that there was no effective coordination of the approach being taken by different Investigators. FOS eventually agreed that I could have a zoom conversation with two senior Ombudsmen but their message to me was an adamant insistence that each case was individual and there was no place for anyone outside of FOS to have any conversation with a single person within FOS to discuss FOS's overall approach. I understand that this policy has also been applied to PRs, including members of the legal profession.

It appears that FOS "record" complaints, create a PNX-file and gather information from the relevant PSP without clearly identifying the nature of the complaint and considering if it might be part of an MRE, and they do not coordinate their responses to the complainants.

Paragraph 2.17 recognises a concern that stakeholders currently find it challenging to make representations to the FCA, the Financial Ombudsman and other regulatory family members on issues that may have significant or wider implications. I agree with this statement.

Question 7: What options should we consider to ensure firms are given an appropriate opportunity to resolve complaints fairly before cases are referred to the Financial Ombudsman?

Response to Q7: This response deals specifically with cases of APPFraud.

Section R3(1)(a-d) of the CRM Code sets out a three-stage process:

> Initial response, and ideally a Decision within 15 business days
> Decision within no more than a further 20 b/days (i.e. max of 35 b/days), unless Complaint is "subject to investigation by a statutory body and the outcome might reasonably inform the Firm's decision" in which case, "the Firm may wait for the outcome of the investigation before making a decision." There is no specified time limit on waiting for that outcome.

This three-stage process should avoid the need for victims to make complaints to FOS, at least until after their bank [the Firm] has given them a Decision following the outcome of the investigation by a statutory body, but in this did not happen in the GF case. The process did not work.

When the banks notified the victims of the GF fraud that they were going to wait for the outcome of the investigation by the FCA, some gave the victims the right to take their complaints to FOS, but others didn't. However, whether they were given the right or not, the victims were obliged to take their complaints to FOS within 6 months or FOS would never consider them.

I wrote to the FCA and pointed out that this situation was unhelpful for everyone, not least because it meant that FOS had to respond to complaints which they could not resolve until the FCA investigation was complete, at which point the banks may settle them anyway.

I proposed that:
"All that it needs is for UK Finance, FCA and FOS to agree a short letter that every bank sends to every GF investor telling them, clearly and consistently, that:

- their bank is unable to respond to their complaint at this time
- their bank will contact them as soon as the FCA investigation is complete, advising them that the bank is now reviewing their complaint and will issue a Final Decision Letter within 15 (or 35 days)
- if they do not accept the bank's Final Decision then they will have 6 months from the date of that letter to take their complaint to FOS."

Disappointingly, the FCA was unable to do this.

It then took the FCA a completely unreasonable length of time to undertake their investigation and tell the banks that they were going to prosecute.

So, I suggest that it is perfectly reasonable for Firms to be allowed to "wait" in such circumstances but:

- they, FOS and FCA must make it clear that the victims will have the right to go to FOS, if they need to, when the outcome is known, AND
- the FCA must not take an unreasonable length of time to conclude their investigations.

Further consideration to this question will need to be given in light of the time limits specified in the Mandatory Reimbursement Requirement.

Question 9: What options should be considered to ensure firms and complainants resolve complaints fairly at the earliest opportunity before a final Ombudsman decision is taken?

Response to Q9:

I regret to say that whilst the overall standard of outcomes issue by FOS Investigators have been good, I have experienced a disappointing number of cases where they were clearly wrong, raising two points:

- the need for higher standards of training for Investigators
- the importance of allowing PRs or "McKenzie Friends" to make submissions on behalf of victims who may not be aware of the relevant Codes of Practice (e.g. the CRM Code) or the Mandatory Reimbursement Requirement.

It appears to me that a number of banks, and possibly a number of PRs, challenge Investigator's outcomes because there is no cost penalty in doing so, and this obviously contributes to the excess workload on Ombudsmen. I therefore propose that if banks and PRs refer a complaint to an Ombudsman but do not provide substantive reasons for the referral, and the Ombudsman upholds the Investigator's original findings, then there should be an additional fee payable by the bank or PR.

As part of the review of the work of, and interaction between, Investigators and Ombudsman I believe that consideration must be given to situations where the Investigator upholds a complaint, the bank rejects the Investigator's outcome and Ombudsman then finds in favour of the bank.

I say this because in one very high value case both the Investigator and the Ombudsman agreed that the bank had failed to comply with its obligations, but the Ombudsman then decided to overturn the Investigator's outcome based on nothing more than a speculation of what the complainant "might have done" if the bank had complied with its obligations. I believe that such life-changing decisions should not be left to a single Ombudsman.

Question 10: Should the rules in DISP provide different routes to redress for represented and non-represented complainants with different expectations? If so, what factors should be considered?

Response to Q10: I suggest that this is the wrong question.

The rules in DISP should provide a route to redress for single complaints, irrespective of whether they are submitted by the complainant, a PR or a "McKenzie Friend", with a different route for MREs however they are submitted.

I agree that the rules in DISP should be reviewed to allow FOS to reject multiple complaints submitted by PRs where they are poorly articulated or not well-evidenced.

Question 13: What amendments to the dismissal grounds should be considered when the Government repeals the 2015 Regulations?

Response to Q13:
I reject any suggestion that collective groups of complaints, or MREs, should be considered by the FCA, Police or any other party and not by FOS. FOS may be guided in their decisions by other parties, but the Final Decisions must be theirs for the reasons set out below.

It is readily accepted that 40% of all crime in the UK is economic crime but that less than 2% of police budgets is available to investigate it. This means that most APPFraud will not be investigated by the Police, and even when the Police do prosecute they do not have the power to instruct the banks to reimburse the victims as required under the CRM Code or MRR.

The FCA has the power to investigate both regulatory breaches and criminal activity but, as has been confirmed in recent correspondence in the GF case, they do not have the power to instruct the banks to reimburse victims.

FOS is, as far as I am aware, the only body that has the power to instruct the banks to reimburse victims of APPFraud and they must retain this responsibility irrespective of the scale of the fraud.

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