

The FCA’s proposed financial services consumer duty

Consumer redress 2021



Existing avenues for consumer redress – and a potential expansion to the private right of action

Firms’ complaints handling procedures

- > First port of call for customer complaints. Deal with significant portion of consumer redress claims.
- > Firms must operate complaints process in line with FCA rules.
- > Consumers can consult FOS if they believe their complaint has not been handled properly.

FOS

- > Costs-free alternative to litigation to resolve consumer disputes for individuals and some SMEs.
- > Considers breaches of the law, rules, regulations and codes of practice set by the FCA.
- > Compensation limited to £355,000.

FSCS

- > Statutory compensation scheme for customers of authorised financial services firms.
- > Only available when a firm fails and that firm owes a civil liability to the party claiming.
- > Compensation limited to £85,000 in most cases.

Restitution orders

- > FCA has the power to apply to court for a restitution order following a breach of FCA principles, rules and other specified legislation ([s.382 FSMA](#)) or breaches of Articles 14/15 MAR ([s.383 FSMA](#)).
- > [Section 384 FSMA](#) enables the FCA to order restitution payments where a firm or individual has breached Articles 14/15 MAR.
- > Party in breach must pay an amount the court/FCA feels is “just” given the profit made/loss suffered following the breach.

Redress schemes

- > FCA can require a firm to conduct a **voluntary** past business review and (if necessary) agree with the firm a compensation scheme for customers affected by a breach of the Principles/rules.
- > Under [s.404 FSMA](#), FCA can order a firm to establish and operate a **compulsory** redress scheme where there has been “widespread or regular failure” to comply with FCA obligations and customers have suffered as a result.
- > Section 404 schemes are not widely used compared with voluntary redress schemes.
- > Section 404 schemes are only available where claimants under the scheme would have had a right to bring a civil claim in court.

Private right of action

**Private right of action and the FCA’s proposed consumer duty**

- > [Section 138D FSMA](#) provides a right of action (“PROA”) for private individuals in respect of breaches of all FCA rules (save where the rule itself provides otherwise or the right is excluded by s.138D itself).
- > The PROA cannot be exercised by anyone who suffers loss in the course of carrying out a business.
- > The FCA has suggested it could amend the Handbook so that s.138D would operate to give individuals a PROA where they suffer loss following a breach of the FCA’s Principles, including the proposed new Consumer Principle.
- > The FCA has invited views on whether an expanded PROA could provide a more accessible avenue of redress for consumers.

**How might an expanded PROA impact on the existing redress framework?**

- > An expanded PROA may facilitate more s.404 redress schemes and compensation payments under the FSCS by creating a new civil liability.
- > In relation to s.404, this could allow the FCA to establish industry-wide redress schemes for breaches of the new Consumer Principle, securing redress for consumers in the case of a significant market failure.
- > An expanded PROA would still not cover business customers, such as SMEs and sole traders. Secondary legislation would be required to make this change.

**Potential impact on consumers and firms?**

- > An expanded PROA could provide a “second bite at the cherry” for consumers unhappy with the way in which their claims have been dealt with under existing schemes.
- > However, other forms of redress, including through the FOS or offered voluntarily by firms, often provide a better, quicker outcome for consumers than litigation.
- > An expanded PROA would underline the importance of the FCA’s Principles (including any new Consumer Principle), and act as an incentive to firms to continue to uphold high standards for customers.
- > Firms could become more cautious to avoid perceived litigation risk, restricting competition and innovation.

Contacts



Alison  
Wilson

Partner  
Tel: +44 20 7456 5725  
alison.wilson@linklaters.com



Ben  
Packer

Partner  
Tel: +44 20 7456 2774  
ben.packer@linklaters.com



Clare  
McMullen

Partner  
Tel: +44 20 7456 2129  
clare.mcmullen@linklaters.com



Gavin  
Lewis

Partner  
Tel: +44 20 7456 4209  
gavin.lewis@linklaters.com



Julia  
Dixon

Partner  
Tel: +44 20 7456 4406  
julia.dixon@linklaters.com



Martyn  
Hopper

Partner  
Tel: +44 20 7456 5126  
martyn.hopper@linklaters.com



Nikunj  
Kiri

Partner  
Tel: +44 20 7456 3256  
nikunj.kiri@linklaters.com



Susana  
Cao Miranda

Partner  
Tel: +44 20 7456 5529  
susana.caomiranda@linklaters.com



Elizabeth  
Dowd

Counsel  
Tel: +44 20 7456 3409  
elizabeth.dowd@linklaters.com



Sara  
Cody

Counsel  
Tel: +44 20 7456 3577  
sara.cody@linklaters.com

linklaters.com