



**The Financial Conduct Authority Consultation Paper CP18/31  
Increasing the award limit for the Financial Ombudsman Service**

**Response by the Intermediary Mortgage Lenders Association**

**December 2018**

## **IMLA**

IMLA is the representative trade body for mortgage lenders who lend wholly or predominantly through intermediaries. Our 42 members include banks, building societies and specialist lenders.

### **General comments**

- The FOS was introduced under FSMA (sections 225 to 234) to provide for “a scheme under which certain disputes may be resolved quickly and with minimum formality by an independent person.” The scheme was extended to small businesses in 2009 and has no doubt provided a valuable service to a number of such complainants. However, the proposal to extend it still further to larger firms takes the scheme into territory for which we believe it was never intended.
- If there is a perception that modestly-sized firms are prevented from taking legal action to resolve disputes, then we suggest that alternative solutions should be explored: we do not consider it appropriate to amend the FOS scheme so that it can accommodate complaints from such firms. The fact that the consultation paper acknowledges that the number of such complaints would likely be a very small proportion of those referred overall indicate that the proposal risks using the scheme to solve a specific issue, rather than a specific and proportionate solution being found to address that issue.
- The Small Claims Court was designed to provide a quick and cost-effective means of redress for individuals and small businesses wishing to recover money owed to them by another person or business. The current proposals risk extending the scope of the FOS such that it exceeds that of the Small Claims Court. We do not think this is appropriate. Para 2.10 of the CP states that businesses with an annual turnover of below £6.5m and gross assets below £5m would be unlikely to have access to sufficient legal and financial management expertise to protect their interest in legal disputes with firms. We are tempted to comment that if businesses are playing in

high-value markets, they should make sure they *can* protect themselves in the event of legal disputes.

- Whilst we do not think it appropriate for the redress limit to be increased as proposed, if it were to be so increased, then it would be preferable that all such cases should be required to be decided by an Ombudsman. Such a requirement would at least ensure that the FOS and the FCA had access to fuller data on these complaints – both upheld and rejected—in the future.
- It is important to retain the principle (FSMA sections 225 to 234) that compensation awarded by the FOS should reflect actual loss: it is not intended to represent any punitive damages (as might be awarded by a court). On occasion the ombudsman may award a sum for distress or inconvenience – but the principle is that the complainant’s position is restored, so far as is possible, to what it would have been had the respondent firm not done or omitted to do whatever is being complained about.

### **Responses to specific questions**

**Q1 Do you agree with our estimate of the volume of high value complaints, including the assumptions we have made? If not, are you able to provide any data to support your view?**

**Q2 Do you agree with our estimate of the value of high value complaints, including the assumptions we have made? If not, are you able to provide any data to support your view?**

**Q3 Do you agree with our assumptions about the volume and value of high value complaints that might be referred to the ombudsman service by newly-eligible SMEs? If not, are you able to provide any data to support your view?**

**Q4 Do you agree with us that, for the reasons given, the number of high value complaints that are not currently made to the ombudsman service because of the award limit is unlikely to be significant? If not, are you able to provide any data to support your view?**

We have no comment on the accuracy of the estimates and assumptions made in questions 1-4. We note that the figure of “approximately” 2,000 complaints each year involving redress over £150,000 represents a very small proportion of (a) all cases referred to the FOS and (b) cases decided by an Ombudsman.

**Q5: Do you agree with our proposal to increase the ombudsman service’s award limit to £350,000 for complaints about acts or omissions by firms on or after 1 April 2019?**

No – we consider the amount to be disproportionately high in relation to the vast majority of cases referred to the FOS – and if it is the case that a small minority of cases involve potential redress sums which are at that level or exceed it – then an alternative procedure should be put in place for such cases.

**Q6: Do you agree with our proposal to automatically adjust, in line with general price inflation, the ombudsman service's award limit for complaints about acts or omissions on or after 1 April 2019 every year from 2020 onwards?**

**Q7: Do you agree that the measure of general price inflation used to automatically adjust the ombudsman service's award limit for complaints about acts or omissions on or after 1 April 2019 should be the CPI?**

**Q8 Do you agree with our proposal for a one-off adjustment, reflecting general price inflation between 2015 and 2019, to the ombudsman service's award for complaints about acts or omissions by firms before 1 April 2019?**

**Q9: Do you agree with our proposal to automatically adjust every year from 2020 onwards, in line with general price inflation, the ombudsman service's award limit for complaints about acts or omissions before 1 April 2019?**

**Q10 Do you agree that the measure of general price inflation used for both the proposed one-off and automatic adjustments to the ombudsman service's award limit for complaints about acts or omissions on or after 1 April 2019 should be the CPI?**

An annual review/adjustment in line with CPI may be sensible, but may need to be over-ridden if costs and levels of redress are judged to have increased at a faster rate. As the CP acknowledges (para 1.7) the original limit was set in 2001 at £100,000 but in 2012 an increase to £150,000 was deemed necessary – and the amount included in 2012 for inflation was deemed to have declined in real terms from 2015.

**Q11: Do you agree with our assessment of the impact of our award limit proposals on the ombudsman service?**

This remains to be seen: it may indeed be the case that the facts of a case will not increase in complexity in proportion to the quantum of the loss suffered by the complainant – but with extension of the FOS's scope to medium-sized firms, we are entering uncharted waters. It may be that the higher-value cases do require more time to investigate and decide – in which case the application of a flat-rate case fee may need future review.

**Q12: Do you agree with our assessment of the impact of our award limit proposals on the professional indemnity insurance market?**

It seems unlikely (at present) that a small firm would be required to pay out the maximum amount of £350,000 on a mortgage/loan complaint – but if the limit were to be set at £350,000, that would surely affect the stance taken by PI insurers – who would want to charge premiums at a level which reflected the insurer's *potential* maximum exposure?

**Q13: Do you have any analysis or evidence to present in relation to how the costs of professional indemnity insurance (PII) might change if the ombudsman service's award limit is raised to £350,000?**

No.

**Q14: Do you agree with our assessment of the impact of our award limit proposals on individual firms?**

At present, no – but it is difficult to anticipate what that impact might be. The CP acknowledges (para 2.20) that high value complaints “relate predominantly to business loans, interest rate hedging products (IRHPs), portfolio management and self-invested personal pensions (SIPPs)” so to that extent we would not expect it to affect mortgage lenders very significantly. Similarly, the Consultation paper notes (para 2.18) that a “significant proportion” of upheld complaints have “unknown” compensation values – because the FOS decision is based on a formula for calculating redress rather than an actual amount. This should not apply to mortgages and loans – where the amount lent and interest charged should be quantifiable. We would not expect significant numbers of mortgage complaints to result in redress rewards in the range of £150,000 – £350,000 – but this has yet to be borne out by time and the FOS’s complaints data.

**Q15 Do you agree with our assessment of the impact of our award limit proposals on the Financial Services Compensation Scheme?**

Again, it is too early to comment on what the impact might be. If there were a significant number of firm failures which resulted in calls on the FSCS to pay out the redress awarded by the FOS, that could impact unfairly on the firms whose levies fund the FSCS.

**Q16 Do you agree with our decision to rule out having different award limits for different types of complaint or complainant? If not, why do you think there should be different limits?**

The CP states (para 3.37) that the FCA has decided to rule out having “different award limits for complaints about different financial products” because “we are not persuaded that, other things equal, complainants should be entitled to different amounts of compensation because of who they are or what they are complaining about.” Surely the underlying principle which should drive what compensation is awarded should be that complainants should receive redress which compensates them fairly and reasonably for the loss/detriment they have suffered loss – it has nothing to do with “who they are or what they are complaining about”.

**Q17 Do you agree with our view that there should be a limit to the amount of compensation the ombudsman service can require firms to pay to complainants? If not, how – if at all – would the ombudsman service’s approach to dispute resolution need to change for it to be able to require firms to pay any amount of compensation?**

Absolutely – there should be a limit – and we consider the proposed limit of £350,000 to be too high and disproportionate given the majority of cases referred to the FOS. The increase appears to have been proposed so that it catches a very small minority of cases – and the CP acknowledges that not even all of those would receive the “full” redress to which they might be considered eligible. The fact that the range of possible amounts has been so stretched indicates that the FOS is being expected or invited to investigate cases on a scale which is well beyond what the scheme was originally intended to accommodate. Rather than seek

to shoe-horn those cases into the existing scheme, we think it would be more appropriate to seek alternatives.

**Q18 Do you agree with our view that the award limits for the ombudsman service and the FSCS should not be aligned?**

There seems to be a slight contradiction here in that the FSCS is designed to safeguard an individual consumer's money up to a limit (currently £85,000 in the case of investments) – but if a consumer chooses to invest a higher sum, the excess will not be covered by the scheme – even though the consumer may be entirely blameless for the loss. Given that the FOS scheme is similarly intended to protect consumers from loss – why should it be so much higher? The current difference between £85,000 and £150,000 is not insignificant – although arguably consumers should be aware of the FSCS limit and avoid over-exposure to any one firm. But the proposed increase to the FOS limit seems completely disproportionate.

**Q19 Do you agree with the costs, benefits and transfers we have identified? If not, please explain why.**

We have no detailed comment to make on these.