



**Consumer
Focus**
Campaigning for a fair deal

Consumer Focus response to the consultation on *Transparency and the Financial Ombudsman Service: publishing decisions – next steps*

December 2011

About Consumer Focus

Consumer Focus is the statutory consumer champion for England, Wales, Scotland and (for postal consumers) Northern Ireland.

We operate across the whole of the economy, persuading businesses, public services and policy-makers to put consumers at the heart of what they do.

Consumer Focus tackles the issues that matter to consumers, and aims to give people a stronger voice. We don't just draw attention to problems – we work with consumers and with a range of organisations to champion creative solutions that make a difference to consumers' lives.

Our response

Consumer Focus welcomes the Financial Ombudsman Service's (FOS) consultation on '*Transparency and the Financial Ombudsman*'. We firmly believe in the merits of using transparency and disclosure as mechanisms to enhance the potential of reputational regulation in the financial services industry.

Consumer Focus strongly supports empowering consumers as set out in the Government strategy paper '*Better choices, better deals*'¹. We believe the Ombudsman should enhance transparency about the nature of its decisions for firms and stakeholders. This should bring clear consumer benefits.

This move will also enhance reforms already undertaken by the FOS to enhance transparency. The Ombudsman has been on a journey to improve transparency since the Hunt Review of 2008. As such we must ensure any changes chime with the processes already in place to enhance transparency.

We would also like the FOS to think more broadly about how it enhances transparency not just for stakeholders but actually for consumers. We believe there is still work to be done on ensuring the six-month firm-specific figures enable consumers to choose products based on a qualitative assessment of firms' commitment to treat their customers fairly.

We are aware that prior to the publication of the complaints figures work was done by the Ombudsman to contextualise the data. The FOS stated:

'If all relevant stakeholders (including industry bodies, consumer bodies and the FSA) can agree amongst themselves how market-share can be measured and published, we are then happy to talk to them about how this could be used to give context to the complaint data we publish.'

¹ <http://bit.ly/u7QR65>

In November 2008 the FOS brought together a group of representatives from industry bodies, consumer bodies and the Financial Services Authority (FSA) – to begin a process to see whether they could agree how market-share can be measured and published. The group failed to produce any clear guidance.

With the new powers in the Financial Services Bill we believe it is time to look at this issue again. We would call for:

- product specific complaints data against firms
- market share data
- FOS to publish meaningful graphs over time to disseminate to inform consumers

The proposals in the current transparency drive are welcome as a starting point to enable firms' behaviour to be held to account openly and to enable intermediaries to highlight issues that concern them. Yet, it is very unlikely that consumers will scan the FOS's website looking at cases. The principle mechanism to engage consumers, rather than intermediaries, would be meaningful graphical representation of complaints figures. To enable consumers to use the FOS data publication in a meaningful way requires much better contextualisation than is currently the case.

These changes would further enhance reputational regulation and allow consumers to start disciplining firms by holding them to account on their past performance when considering buying a future financial product. That, more than anything else, will ensure firms change their behaviour and start treating customers fairly.

Q1. Do you agree with our overall approach? Are there other considerations we should bear in mind, in approaching the publication of our ombudsmen's final decisions?

We broadly agree with the overall approach. It is important that publication adds to the ability of FOS to resolve disputes fairly and does not detract from it.

Publishing full complaint decisions will allow stakeholders such as Consumer Focus to understand what practices the Ombudsman deems fair and the extent to which particular firms are complying with their duties to treat customers fairly. At the moment the information we have in order to understand what issues are causing consumers to go to the Ombudsman is limited to:

- six monthly firm specific complaints data. This shows firms' total number of cases and the uphold rate for the five groups of products – such as credit and banking
- product specific aggregated industry data at the Annual Review. At the moment these categories are very broad, and the information is rarely nuanced enough for us to identify firm-specific issues
- Ombudsman news and case summaries
- technical notes

Full judgements will be a welcome addition to these transparency tools.

Equally, due to section 348 of the Financial Services Markets Act, the FSA is equally unable to inform the general public or ourselves if an investigation is taking place, or even if a decision has made until all appeals are exhausted. This prevents us from adequately identifying where detriment exists. The impact of any changes to section 348 in the forthcoming Financial Services Bill is unknown at this stage.

If firm-specific judgements were available we could more easily make public our concerns about firms' behaviour and highlight any misgivings evident in the judgements. An example of where we have taken action is with Clydesdale Bank mortgages.

In July 2009, Clydesdale Bank revealed it had failed to accurately calculate interest rates for some of its variable and tracker mortgage holders, meaning repayments were set at too low a level. The bank apologised for the error but still sought to recoup the resulting shortfalls by increasing payments. Reports suggest that this might have added over a hundred pounds to some customers' monthly bills.

Clydesdale Bank continued to take these retrospective payments despite clear indications from the FOS that consumers should not be held responsible for errors of this type. FOS publicly clarified its approach in September 2010, leaving no room for confusion².

Instead the bank has continued to levy higher payments and not compensate customers who complained, leaving them with little option but to pursue the issue right up to the Ombudsman. FOS data published showed that in the second half of 2009 complaints from Clydesdale Bank customers about mortgages increased by more than 600 per cent on figures from January to June 2010. Disgruntled Clydesdale Bank mortgage customers who have taken their case to the Ombudsman have had their complaint upheld in 87 per cent of cases, against an industry average of 36 per cent. Customers report receiving thousands of pounds back from the bank after the Ombudsman ruled in their favour.

We were only able to spot Clydesdale's non-compliance by linking the public outcry over the changes, consumer forums where consumers discussed payout from the FOS, the *Ombudsman news* technical note and the FOS six monthly figures. This was a relatively high-profile case but still required significant time and work to compile.

If we could see the Ombudsman's specific judgements on these cases it would have been much easier and quicker for us and other bodies to act. That would have enabled more consumers to gain compensation more quickly and with more confidence. It would also have avoided the situation where less confident consumers settle for less than their due with the bank. Ultimately Clydesdale may have changed its policy if there was unambiguous evidence about FOS decisions.

There may have been many other similar cases less well publicised where consumer groups have not identified and then publicised firms' failure to comply with FOS decisions. In future the publication of judgements will enable consumer groups and others to highlight firm-specific and product-specific failure and encourage consumers to seek redress where it is likely.

As well as empowering consumers to seek redress it is likely to further enhance firms' incentives to move quickly to end any misbehaviour for fear of a negative media profile.

Firms are already aware of decisions that affect them and of the FOS overall interpretation of fairness across its product range, yet consumers and consumer groups are not to the same extent despite the FOS's best efforts. These changes will ensure the information asymmetries between firms' and the consumer are reduced. This will allow for more level playing field where empowered consumers and their representatives can hold firms to account alongside the more formal processes available to the FOS and the regulator under FSA rules.

² Financial Ombudsman Service's Ombudsman News issue 88 (August/September 2010) clarified its approach on mortgage underfunding <http://bit.ly/skeTCK>

Q2. Do you agree that we should *not* publish the *views* of adjudicators – instead limiting the publication of decisions to those made by our ombudsmen?

We agree that standard practice should only require actual decisions, and not informal settlements or adjudicators decisions, to be published. Publishing informal decisions or adjudicators decisions as standard would take too long, be too expensive and potentially undermine a flexible adjudication process. This would not be in the consumer interest.

However the FOS should reserve the right to publish adjudicators' decisions in exceptional circumstances.

There may be cases where important decisions have not reached the Ombudsman level and where a firm continues to display a chronic failure to follow the Ombudsman's rulings in breach of their duties under Treating Consumers Fairly. In these circumstances, the FOS may wish to publish certain adjudicator's decisions to strengthen the power of disclosure and transparency to discipline market participants. Clearly, this would involve a judgement but the FOS should ensure it has the capacity to do this. This is particularly important since just one out of nine cases makes it to a full Ombudsman decision, and for certain products very few cases make it to the highest level.

We note that the majority (62 per cent) of requests for final decisions came from consumers and in eight out of 10 final decisions ombudsmen reached the same basic conclusions as the adjudicators who handled the cases in the earlier stages. This suggests that in most of the published decisions the Ombudsman will be deciding against the consumer. FOS will need to take care that this does not give mis-leading impressions to consumers (eg that it most often agrees with businesses and most consumer claims fail) or to industry, media and others (eg that consumers are usually vexatious, reluctant to settle and demand more than they are entitled to).

If FOS only publishes final decisions it will need to think carefully about how to provide context which addresses these issues. It should also consider publishing views which might help to balance the picture. We believe the existing transparency tools, particularly Ombudsman news and technical notes should note potential biases in the cases published and attempt to rectify any apparent biases identified in published decisions.

Q3. Do you agree that our published reports on cases should not normally be specially commissioned summaries, but the actual determinations made by the ombudsmen (subject to the appropriate safeguards)?

We believe the full decision should be printed and not a summary. Summaries would be very expensive and do little to enhance comprehension. On the contrary, full decisions would allow consumers and representatives a greater understanding of the Ombudsman's decisions and how those affect consumers. Thus, summaries are a clear cost with no real benefits.

Equally there is no need to replicate Ombudsman news. That already provides anonymous summaries where the Ombudsman is attempting to make clear, in summary form, the nature of its decisions on a certain topic. The Ombudsman may wish to think about including selected full judgements in the newsletter in the future if a firm or product is particularly bad to draw attention to the case to stakeholders.

Q4. Overall do you think our proposed approach strikes the right balance between transparency, protecting genuinely confidential information and the costs of implementation?

We strongly agree that consumer identities should not be published and that steps should be taken to ensure they cannot be identified from other facts. Overall the proposed approach seems to strike a reasonable balance.

Q5. Do you think the steps we propose are sufficient to protect consumer identities and personal information – or are there other specific steps we should take?

We agree that consumers' details should not be published. Further information should also be removed if it allows the identity of the consumer to be discovered. We believe the Ombudsman has gone to great lengths to set out an appropriate framework to deal with such cases where further deletions may be necessary.

This approach respects consumers' privacy and is part of maintaining an '*accessible, prompt and informal system of dispute resolution*'. While there is a danger some consumers may be put off initially by fears of their case being published, this approach will ensure that consumers are not discouraged from approaching the FOS, or requesting final decisions. If confidentiality is well respected, fears should reduce over time and will be outweighed by the benefits of publication.

FOS will, however, need to make sure that its communications around the decision to publish, and implementation of confidentiality systems, inspire confidence.

Q6. Do you agree that we should *not* seek to protect the identity of financial businesses? If you disagree, what other steps would you want us to take?

It is critical that firms do not gain the same level of anonymity as consumers. This would go against the entire spirit of the Government agenda, the Financial Services Bill's proposals on disclosure and transparency and the entire ethos of achieving reputational regulation. Without publishing the names of the firms involved the majority of the potential gains from the entire project would be undermined. It would provide only slightly more information than we already receive through the technical notes in Ombudsman news and the already anonymised summaries therein. It is a matter of utmost importance that firms' names are not removed.

As the consultation paper makes clear the threat to the reputation of the firms is a desired public policy goal if their behaviour merits it. As long as the Ombudsman's decisions are rigorous and fair then firms who suffer a reputational hit do not have legitimate reason for preventing publication. Indeed, for offending firms, they can still escape that reputational damage by settling earlier at the initial complaint stage or at the adjudicator. Publication is necessary to incentivise earlier settling and to make the threat to a firm's reputation a real driver in shaping their internal processes.

We also find the threat of claims management companies (CMCs) spurious. The research shows CMCs flourish where there is consumer detriment. The FOS already has a number of ways of making that clear to consumers, stakeholders and regulators. While this project will enhance transparency, it will not revolutionise the redress process, nor provide intelligence of detrimental practices that would not come out in some shape or form. Indeed, if CMCs are able to spot negative practices by one firm in particular their targeting may well enhance consumer redress where merited and further incentivise firms to amend their behaviour more quickly.

Q11. Do you agree with our approach to the timing of publication? If not, when should decisions be published and why?

We agree with the timescales, as set out, of around a week.

Q12. Do you agree with our approach to the form of publication?

We would suggest more thought is given to categorisation, search functionality and ease of use on the publications data. We would consider publishing using several searchable tabs on:

- brands
- products or service
- specific issues

The FOS may wish to think about co-ordinating the publications with its Annual Review categories. It could also add a larger tab to synchronise with the current five groups under which it publishes its six monthly data.

Q13. Do you have any comments on when we should start publication of decisions – and what are your views on past decisions?

We think that publication should start as soon as reasonably possible, assuming that parliament does confirm it is desired. Although we are keen for publication to start as soon as possible, we consider it is more important that it starts well, and so FOS should not rush ahead before it has the necessary procedures fully in place.

We agree that cost makes publication of past decisions unreasonable at this stage.

Q14. Do you agree that we should adopt the same approach across all of our jurisdictions – and specifically do you agree we should cover our voluntary jurisdiction in the same way as our compulsory (FSA/FCA) jurisdiction and our consumer-credit jurisdiction?

Yes.



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