



FCA CP 18 3 SME ACCESS TO FOS

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MAJOR POINTS

1. The FCA's proposals are of interest to us as many ICAEW members provide business support to small and medium sized enterprises (SMEs). ICAEW's Business Advice Service (<http://www.businessadvice.service.com/>) provides resources SMEs and connects them with Chartered Accountants for free initial advice sessions. Over 10,000 small businesses per year use this service.
2. We support the proposals to help SMEs resolve disputes with financial services firms and seek redress. Overall we think the extension of the Ombudsman, a free service for those making a complaint, will help to address the 'balance of power' between the two parties (financial institutions and SMEs) by reducing the barriers to taking action. Access to the Ombudsman is important for individual SMEs that feel they have been subject to inappropriate behaviour, particularly as they might be in difficult financial circumstances at the time. Therefore, additional avenues for redress are likely to be welcomed by these smaller entities. Such enterprises would benefit from additional avenues for redress where they feel they have a case against their lender.
3. We think it is helpful to provide access to the Ombudsman for more than 80% of the approximately 200,000 SMEs who are not currently eligible.
4. Whilst dispute resolution and redress are important, prevention is often better than cure. We recognise that since the financial crisis the FCA has put significant effort into improving culture and conduct in financial services, notably through the Senior Managers and Certification Regime (SMCR). The SMCR establishes a clear expectation and duty that senior managers will do the right thing, building on initiatives to instil appropriate culture that institutions had themselves already been developing internally. The regime has the support and sanctions in place to expect to generally enhance standards of conduct while providing a benchmark to more easily call out outlying bad behaviour.

DETAILED QUESTIONS

Q1: Do you agree with our proposed changes to the definition of an eligible complainant? Are the proposed size thresholds broadly correct or would different thresholds or criteria be more appropriate?

1. We broadly agree with the proposals to change the definition of an eligible complainant so that slightly larger firms can use the Ombudsman.
2. Currently micro businesses are already eligible to complain to the Ombudsman. Micro enterprises have fewer than 10 employees and either turnover or a balance sheet of no more than €2m. There are more than 5.4 million such businesses in the UK, which comprise over 95% of the country's enterprises.
3. Small and medium sized enterprises (SMEs) are businesses employing under 250 staff, or with an annual turnover of under €50m. The FCA proposes three new criteria which will include more firms:
 - annual turnover below £6.5m,
 - an annual balance sheet total smaller than £5m, and
 - fewer than 50 employees.
4. The FCA proposals would extend the ombudsman to a further 160,000 SMEs (small firms), although larger, medium-sized businesses would still be excluded. There is a

strong case for supporting small businesses that naturally lack the resources to pursue cases against their lender through the courts themselves. It may be that extending access to the Ombudsman is the most cost effective and proportionate way of providing greater opportunities for recourse for small businesses. The uphold rates for insurance and banking complaints at 26% and 52% for micro enterprises suggest there is merit in an extension and it would help to deliver better outcomes.

5. We note that previously the FCA used slightly different criteria when it looked at client sophistication re interest rate swap mis-selling.

<https://www.fca.org.uk/publication/archive/fsa-irs-flowchart.pdf>

6. The FCA should reflect on the appropriateness of tests used previously. They may better reflect the gap between the capabilities and resources that financial institutions assume SMEs have, and their actual financial and legal expertise.

Q2: Do you agree that all 3 tests (employees, turnover and balance sheet) would need to be met for the Ombudsman to consider an SME a small business?

7. In the absence of clearer data it is difficult to make a judgement about whether the tests should be cumulative (i.e. all three should be met) or whether they should each operate as independent threshold tests; where either one of them would trigger eligibility.
8. The FCA's forthcoming policy statement should shed light on the data and the Venn diagram between these three respective criteria. We note that the Companies Act refers to two out of three requirements being met. A similar approach might be adopted by the FCA for consistency.
9. Whilst in the past turnover has been a key determinant of whether a firm elected to use legal advice (paragraph 3.31 & 3.35) this may not always be the case going forward and as new business models emerge.

Q3: Do you agree with our proposal to make guarantors eligible complainants?

10. Capturing guarantors would help to capture those vulnerable to harm who may also lack the financial capability to understand the complexity and risks related to the services provide by the financial institution. We welcome the FCA's proposals to look beyond 'micro-enterprises' and 'consumers' as currently defined in DISP.
11. The UK is a service based economy and the sector contributes around 80% of GDP. For these business provision of collateral is particularly important as they tend to have fewer assets. We are therefore supportive of measures to help small business get the support they need and the avenues for redress where required.

Q4: Do you agree that the changes introducing small businesses as eligible complainants should come into effect on 1 December 2018 and that they should apply only to complaints made to a firm regarding acts or omissions of the firm which occur from 1 December 2018? If not, what transitional period do you consider appropriate?

12. We think the changes should apply from the 31 March 2019. This would give financial institutions time to make the appropriate changes where necessary.

Q5: Do you agree that the changes introducing guarantors as eligible complainants should come into effect on 1 December 2018 and that they should apply only to complaints made to a firm regarding guarantees or security given on or after 1 December 2018?

13. We think the changes should apply from the 31 March 2019.

Q6: Do you agree with our cost benefit analysis? Are there other costs or benefits we ought to have considered?

14. We have no comment on the FCA's cost benefit analysis.

Q7: Do you have any views on how access to redress might be improved for SMEs without the need for changes to legislation, including but not limited to the areas where we have powers to make changes?

15. We agree with the FCA proposals as drafted.

16. We are supportive of a voluntary industry code. Our response to the Treasury committee sets out why we think this would help.

<https://www.icaew.com/-/media/corporate/files/technical/icaew-representations/2018/icaew-rep-41-18-treasury-committee---sme-finance-inquiry.ashx>

Q8: Without legislative change, do you think the Ombudsman might be an appropriate body to consider a greater share of complex or higher value complaints from SMEs than is implied in our proposals for consultation in Chapter 3? What changes would be needed to make this effective? What risks might this introduce?

17. We agree a change to the award limit would have a material and detrimental impact on costs, the supply of financial services and timeliness. The current award limit acts in a balanced and measured way and therefore should be unchanged.