

At the end of last month, the Financial Conduct Authority (“FCA”) released a discussion paper concerning its approach to small or medium sized enterprises (“SMEs”) as users of financial services.

As part of this, the FCA seeks industry feedback on whether it should change the rules concerning the jurisdiction of the Financial Ombudsman Service (“FOS”). In the wake of claims over the misselling of interest rate swap products to SMEs, the FCA is concerned that some businesses were too large to refer complaints to the FOS but at the same time lacked sufficient resources to pursue redress claims through the courts.

As things presently stand under FCA rules, only businesses which qualify as “microenterprises” are eligible to complain to the FOS. Microenterprises are defined as businesses which employ fewer than 10 people and have a turnover or annual balance sheet that does not exceed €2,000,000. The FCA asks for feedback on whether those rules should be changed so as to allow more SMEs to be eligible to bring complaints to the FOS.

At the same time, the FCA asks whether, if larger businesses were given access to the FOS, the FOS’ maximum binding money award of £150,000 should also be increased (and if so, should that just be for businesses or for businesses and individuals?). The FCA notes that the sums that businesses might borrow, deposit, insure or invest, are often greater than £150,000, and that some losses suffered in respect of the interest rate swap claims could exceed £150,000.

The FOS already has a very wide jurisdiction to deal with complaints about financial services and covers all FCA authorised firms. It is also very busy, in 2014/2015 the FOS reported that it had taken on just over 330,000 new complaints. There are fears within the industry that, if implemented, the FCA’s proposals could represent yet further “mission creep” for the FOS. A further increase in the FOS financial limit (it went up from £100,000 in 2012) and/or in the number of eligible complainants could mean that the FOS (already perceived by some regulated businesses as offering a fairly rough and ready form of justice) supplants the court as decision maker for higher value and more complex complaints by larger businesses. This is a role that cannot have been intended for it when it started work in 2000.

The FCA has asked for comments on the discussion paper by 18 March 2016, so regulated firms should now think carefully about making their views known to the FCA.

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