

# FOS Consultation on Charging Claims Management Companies & other professional representatives

BSA Response

Restricted  
2 July 2024

# Background

The Building Societies Association (BSA) represents all 42 building societies, as well as 7 larger credit unions. Building societies serve almost 26 million consumers across the UK and have total assets of over £500 billion. Together with their subsidiaries, they have helped over 3.6 million families and individuals to buy a home with mortgages totalling over £370 billion, representing 23% of total mortgage balances outstanding in the UK.

We welcome the Financial Ombudsman Service's (FOS's) consultation on the potential to charge fees to Claims Management Companies and other professional representatives.

Whilst recognising the value to consumers that can be derived from consumers engaging reputable CMCs or other representation, particularly in complex matters, we believe that this consultation is long overdue. Some of the stark facts and statistics laid out in the consultation serve to emphasise that there is a need for change.

The BSA strongly supports the principle of charging a fee to CMCs.

Throughout our response, unless otherwise indicated, when we use the term CMC we are referring to both Claims Management Companies and other professional representatives.

## Summary Response

### BSA Support for the Proposals:

The BSA **supports the principles behind the proposals**, subject to our further comments below on some of the detail. We are pleased that the intention is that these proposals are rolled out and implemented alongside SRA

plans to introduce similar measures in relation to the entities it regulates.

For a number of years our members have been telling us (and FOS) that:

- They have experienced the poor behaviours observed in your Consultation Paper.
- They have seen “countless” examples of CMCs submitting (and then escalating) templated complaints. These complaints:
  - Reveal no or very little due diligence on the part of the CMC (beyond simply establishing the existing of a product holding with the firm, typically through a DSAR), and
  - Ultimately yield no or very few uphold decisions.

These behaviours serve to occupy FOS's resources, as well as those of our member firms. That in turn must only serve to reduce the speed and / or resource available to deal with more considered (and typically bespoke) complaints.

We therefore agree that a different approach is required to address these behaviours.

As you will see, from the following sections, our primary issues centre around three main areas:

1. Some of the detail contained in the proposed fee arrangements.
2. Consumer Engagement.
3. Transparency.

### 1. Proposed Fee Arrangements:

***The BSA is very supportive of the principle of charging CMCs a fee. However, we believe that:***

- ***The proposed fee should be more aligned to that charged to firms.***
- ***FOS's fee should not increase as a result of these proposals.***
- ***CMCs should not receive free cases.***

***We do not agree that the proposed fee should be significantly less than that charged to firms.*** This is because:

- If FOS is keeping the flat fee model *the simplest thing to do would be to charge the fee to the business if the case is upheld and to the CMC if it is not.* That would provide a significant incentive for CMCs to only send FOS cases which are likely to be upheld and will stop the “weaponisation” of case fees by CMCs threatening to send cases to FOS to incur the case fee for the business.
- *It is not entirely clear why the FOS has chosen a fee of £250 as opposed to one equal to or more aligned with the amount charged to the firm in respect of which the complaint is made.* The Consultation references the polluter pays principle. To only charge CMCs £250, and of that to reimburse only £175 to the firm being complained of, means that that firm is still effectively subsidising the activity of the CMC. We would encourage you to *provide further information on this, including what alternative figures have been considered and your projections as to what additional income this will derive for FOS.*

***We do not agree that the FOS’s fee should increase*** as a result of this proposed mechanism. Under the current proposals the FOS would stand to be paid more (£75) for dealing with a case.

The reality as we see it is that CMCs actually save the FOS money in handling complaints if they do it well – it’s more efficient to deal with a professional CMC than lots of individual consumers.

***We do not agree that CMCs should get free cases.*** Businesses get free cases on the basis that they are already contributing via the levy – CMCs are not.

## **Consumer & 3<sup>rd</sup> Party Engagement:**

***FOS must develop, share, finalise and move forward with its engagement plans with clear pace and purpose.***

We consider it fundamental to the success of the proposals that FOS presses forward at pace with its plans to improve how it reaches out to consumers. In particular, we believe it remains vitally important to take all necessary steps to ensure that those who don’t need to use a CMC or other representative are made aware of:

- The fact that they don’t need to do so, and
- Some of the startling statistics around the lack of success rates where such firms are used.

With that in mind, we consider it essential that those plans are finalised quickly, and are clearly aligned with other 3<sup>rd</sup> parties’ messaging where that is appropriate.

## **Transparency:**

Page 10 of the consultation identifies some of the challenges that the FOS faces because of the behaviour of some CMCs. We are interested to learn more about ***how FOS will monitor and demonstrate*** that the introduction of the fees arrangements has or has not impacted these issues. If it does not, ***is the FOS committed to looking again at this and engaging with others to look at other ways that these issues might be addressed?***

It would be helpful if, over time, the FOS would ***publish details of any change in the statistics*** and volumes of submissions from CMCs that it references in the consultation. For instance, the introduction to the consultation states that 20% of cases referred to the FOS over the last 2 years are from professional CMCs. Should that profile change over time, we might expect to see a reduction in fees for firms in conjunction with the introduction of fees for CMCs.

# Responses to FOS's Questions

This section includes responses to the questions raised in the consultation, and also to two further questions raised by the FOS in subsequent email correspondence.

In relation to the questions contained in the email correspondence, the BSA received 7 responses, from a range of sizes and types of member. These are set out (on a non-attributable basis) at the end of this section.

## **Do you consider a case fee level of £250 payable by CMCs and other professional representatives to be fair and appropriate? If not, please state what fee level you believe would be fair with clear evidence to support this.**

Please see our comment immediately above. We are not clear on how the £250 fee has been arrived at. Against that backdrop, and in the absence of more information, we believe that the fee should be better aligned to the cost to the firm being complained of.

*More information from FOS would be helpful on a number of areas:*

- *Detail behind the rationale for the proposed £250 fee.*
- *How FOS will monitor and report on any future behavioural changes from CMCs as a result of these proposals being implemented.*
- *Any additional action that FOS may consider/be considering should the proposed changes (if implemented) fail to address the issues identified in the consultation.*

Absent the level of detail to allow us to make a more informed judgement, if the average cost of handling a complaint is £710 (which the consultation states was the case in 2023/24), in a case where the complaint is

not upheld, why should the firm being complained of bear the brunt of that cost?

We believe that it would be fairer, and better reflect the polluter pays principle, to devise a mechanism whereby *if a CMC-brought complaint is not upheld in favour of the complainant, then the CMC should bear the cost of that, and not the firm being complained of.*

Whatever the ultimate fee amount is, it will be *important for FOS to keep that figure under review and promptly consider adjustments* in the event that it does not achieve the desired outcomes from CMCs.

In addition to the present proposal, we would encourage FOS to *provide for enhanced fees (i.e. greater sum than £250 per case) to be levied on those CMCs who actively and repeatedly engage in unreasonable behaviour*, such as continuing to escalate templated and poorly escalated complaints despite prior warnings.

Finally, in conjunction with these proposals, we believe it is crucial to their success and incumbent on FOS (and others) to ensure that *consumers who are contemplating instructing CMCs are fully informed of the limited benefits to doing so* in most complaints (as evidenced by the data within your Consultation Paper). Receiving clear messaging to this effect from a trusted and independent body, such as FOS, would be very impactful for consumers.

We encourage you to reflect and emphasise this message in your communication plans, and to *engage where possible and appropriate with other 3<sup>rd</sup> parties such as the FCA to ensure that a strong and consistent message is delivered to consumers*. We believe that this will become even more important with the advent of mandatory fraud reimbursement later this year.

**What is your view on our proposed fee charging mechanism, where the £250 maximum fee level for CMCs and other professional representatives is reduced by £175 where the case outcome reached is in favour of the complainant?**

Subject to our comments above, we are supportive of the application of such a mechanism, given the desire to ensure that CMCs undertake more due diligence and consideration before escalating complaints to FOS. In essence, such an approach should lead to a reduction in the number of frivolous complaints, and serves to better balance the interests of both complainants and respondents.

We support the intent to only reduce the maximum fee when the outcome is in favour of the complainant. However, the proposed reduction (effectively 70% of the initial fee) is a very significant one and *it would be helpful, again, if you could explain in more detail how this figure has been arrived at and what alternative options were considered.*

We are particularly keen to understand if *you have considered, or are willing to consider, similarly incentivising respondent firms by reducing the case fees they pay in respect of proactively settled complaints (i.e. following escalation and prior to a FOS investigation).*

**What is your view on our service retaining £75 from CMCs and other professional representatives in any event? Do you think this should be higher or lower? Please give clear reasons and evidence.**

This feels appropriate in a world where the average cost was the £710 as was the case in 2023/24 and also if the fee charged to firms remains at £650.

Should either of those change, though, we think that that fee should also be reviewed.

Logically, however, one might argue that if the FOS cost is £710, the amount should be £60 (as opposed to £75) as things stand. Whether that “admin fee” is £75 or £60, the *FOS should consider whether the £650 fee charged to firms could be reduced accordingly.*

**What is your view on the case fee to CMCs and other professional representatives being chargeable when they refer the case to our service? Do you think there is another stage in our process where charging a fee would be appropriate? What is your evidence for this?**

We completely agree that this is the right time to charge the fee, if that is what is meant by the fee “becoming chargeable”.

We consider that a fee levied and paid at the point of referral, and subject to a subsequent refund in the event of an uphold, is the most logical and practical method of administering the fee. It fits with the initial resource expenditure for case assessment.

Charging at later stages, such as post-assessment or post-resolution, could foreseeably complicate the process, delay the cost recovery and may open the gates for CMCs to find different ways in avoiding paid the fee. Therefore, we consider that the referral stage is ideal for ensuring timely fee collection.

We have identified a number of potential problems if the fee is not paid until after the outcome. These include:

- The risk that adopting this approach may not in practice lead to reduced volume of complaints reaching FOS via CMCs.
- The risk of non-payment from a CMC, CMC insolvency and / or phoenixing if large/mass volumes on the same/a variation of an issue are submitted, the fee is not paid up front, and the

complaint is not determined in favour of the claimant. Could we see CMC's place themselves in administration or otherwise disappear to avoid the fee? Who would bear the cost of that? Would it be FOS, or the financial services firm (through not getting the reduced fee themselves)?

Additionally, and while we think it unlikely, the proposed fee charging arrangements could create a perverse incentive whereby if a firm being complained of thought a case unlikely to be upheld in their favour if it went to FOS, for that firm to encourage a claimant to use a CMC in order that they are charged the reduced amount of £475 under the proposals. The *FOS may wish to give some further consideration to this.*

**Do you agree with our proposed approach to group charging of respondent firms? If not, what alternative method would you suggest?**

Yes.

That said, we also believe that *FOS should consider the circumstances where CMCs engage more actively with certain lenders, but with higher than expected losses* (therefore a higher volume of reduced fees from £650 to £475). In such a scenario, the potential for the 5% tolerance to be breached is likely to increase and it would be *useful to understand how this might affect FOS's ability to confidently forecast future group fees and also manage high levels of refunds* to firms affected.

Additionally, while generally supportive, one of our members has pointed out that an alternative solution could be a tiered system based on the volume of complaints handled by each firm, ensuring proportionality in fees. However, the same member acknowledges that this might complicate the fee calculation and collection method.

**Do you support our proposed method for the late payment of case fees? If not, what alternative solution would you propose?**

Broadly, yes.

However, one of our members has pointed out that in order to minimise, and ideally avoid, FOS having to incur resources on debt collection activity, instead of permitting (and then penalising) late payment by CMCs, payment of the £250 fee could be a pre-requisite for the complaint to progress and/or for the CMC continuing to act on that complaint.

In conjunction with that approach, it would be important to ensure that CMCs are prohibited from later charging customers for complaints they initially submitted and then had to withdraw from due to non-payment. We set out some more general concerns with possible evasion on the part of some CMCs below.

Another member agrees that the proposed method for late payment of case fees should include reasonable penalties to discourage delays. They suggest that an alternative solution could be to implement a structured penalty system (e.g. incremental increases in fees) to further encourage prompt payment.

**What further measures could we implement to improve our service, accessibility and public awareness for all our customers? Please provide any supporting evidence.**

We agree that charities, friends and families (pro bono) should not be charged under the proposals.

Enhancing digital accessibility, such as a user-friendly online portal, could improve service efficiency more generally.

Regular public awareness campaigns, informative webinars, and educational

materials about the complaint process could also enhance understanding.

**What implementation considerations should we take into account if we proceed with our proposals? Please support your answer with factual evidence where possible.**

The BSA agrees that the risks the FOS have identified to date would be mitigated by the factors set out on page 21 of the consultation. It is particularly good to see the position that the FCA is taking in relation to removing the risk that this any charge is passed on to the consumer, as far as FCA-regulated CMCs are concerned, at least.

Continued engagement with all interested parties throughout implementation and beyond will be key to the success of any proposals implemented following this consultation.

We would also *urge FOS to recognise, and take action to mitigate, the risks arising from reactive CMCs behaviours*. In particular:

- Our members consider that there is a significant risk that certain CMCs will seek to avoid the fee levy by escalating complaints prior to the date of the levy's introduction. We would therefore encourage FOS to consider applying the levy based on the date the CMC initially contracted with the customer to bring the complaint, rather than the later date on which the complaint is escalated to FOS.
- We expect some CMCs will look for opportunities to pass the case fee onto their clients. We do not believe this would be permitted under the FCA and FCA fee capping rules in cases where CMCs are already charging the maximum permitted fee, but we would encourage FOS to:
  - Liaise with the FCA and SRA to rule out the risk of PRs doing so by adjusting their fee models, and

- Encourage the FCA and SRA to otherwise make clear in their public pronouncements that the case fee cannot be passed onto consumers in any circumstances.

- We expect that over time some CMCs will look for opportunities to evade the case fee altogether. This could, for example, be achieved through the complaint being brought in the complainant's name and with the CMC's involvement "hidden" in the background, or through CMCs converting to alternative business structures outside the scope of the fee model. We would encourage both FOS and the FCA to be cognisant of such evasion attempts and to continue to listen to, and act on, firm feedback where they (or we on their behalf) report such behaviour.

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The Building Societies Association (BSA) is the voice of the UK's building societies and also represents a number of credit unions.

We fulfil two key roles. We provide our members with information to help them run their businesses. We also represent their interests to audiences including the Financial Conduct Authority, Prudential Regulation Authority and other regulators, the Government and Parliament, the Bank of England, the media and other opinion formers, and the general public.

Our building society members have total assets of over £507 billion, and account for 23% of the UK mortgage market and 19% of the UK cash savings market. Within this, societies account for 40% of all cash ISA balances.