

Chapter 1

General



1.3 Trigger for making a consumer redress scheme

1.3.1	<div>G</div> <div><p>The trigger is set out in section 404(1) of the Act. It states that the power can be used if:</p><ul style="list-style-type: none">(1) it appears to the FCA that there may have been a widespread or regular failure by relevant firms to comply with requirements applicable to the carrying on by them of any activity;(2) it appears to the FCA that, as a result, consumers have suffered (or may suffer) loss or damage in respect of which, if they brought legal proceedings, a remedy or relief would be available in the proceedings; and(3) the FCA considers that it is desirable to make <i>rules</i> for the purpose of securing that redress is made to consumers in respect of the failure (having regard to the other ways in which consumers may obtain redress).</div>
1.3.2	<div>G</div> <div><p>Meaning of “widespread or regular” failure</p><p>There is no further explanation in the Act of what is meant by “widespread or regular”. The FCA’s view is that the phrase is primarily directed at the volume of failings that have occurred. However, we do not think the test is subject to further precise definition. Rather, we think the test is a matter for regulatory judgement, to be interpreted in the round with reference to all the relevant evidence.</p></div>
1.3.3	<div>G</div> <div><p>The FCA will not need to have specific evidence of failure by each of the firms subject to the scheme. The FCA will be entitled to extrapolate reasonably from the evidence it has to determine whether the failure appears to be “widespread or regular”.</p></div>
1.3.4	<div>G</div> <div><p>Section 404(1)(a) of the Act refers to “failure...to comply with requirements”. The reference to “requirements” rather than “requirement” means that there does not have to be evidence of widespread or regular failure for each requirement covered by a scheme. Rather, the failure may exist in relation to different requirements affecting the same type of activity.</p></div>
1.3.5	<div>G</div> <div><p>The FCA will only proceed if it has robust evidence to support its view that it appears there may have been a widespread or regular failure. Sources of evidence which the FCA might use and extrapolate from include the results</p></div>

of the *FCA*’s thematic work, enforcement investigations, mystery shopping, complaints to the *FCA*, firms or to the *Financial Ombudsman Service*, and information from consumer groups and reports from *skilled persons*.

1.3.6 G However, it is important to understand that the purpose of section 404(1)(a) is to require the *FCA* to establish whether there may have been a widespread or regular failure. The purpose is not to prove that all or most relevant firms have failed (or may have failed) to comply with requirements in respect of all or most relevant consumers.

Failures that can be dealt with under a consumer redress scheme
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1.3.7 G The requirements that can be included in a *consumer redress scheme* include both *FCA rules* and the general law (e.g. the tort of negligence or the *Unfair Terms Regulations* – see section 404F(3) and (4) of the *Act*).

1.3.8 G The failures that the *FCA* can take into account in deciding if the trigger is satisfied are those where, as a result of the failure, consumers have suffered (or may suffer) loss or damage in respect of which, if they brought legal proceedings, a remedy or relief would be available in the proceedings (see section 404(1)(b) of the *Act*). The relevance of the “may suffer” wording is that it makes clear that schemes may cover cases where loss is foreseeable but may not yet have crystallised (e.g. pensions mis-selling cases where the loss may not crystallise until retirement).

1.3.9 G The *FCA* will be able to give examples of things done or omitted to be done that are to be regarded as constituting a failure to comply with a requirement. However, the *FCA* can only give examples that have been, or would be, held by a court or tribunal to constitute a failure (see section 404A(2) of the *Act*).

1.3.10 G So in other words, the section 404 power is limited so that the only failures a *consumer redress scheme* can address are those that a court or tribunal would find to have been failures at the time the activities were carried on. Consumers will not need to have actually brought an action forward for the *FCA* to be able to make a scheme.

1.3.11 G Deciding whether a particular act or omission constitutes a failure will necessarily involve the *FCA* interpreting its *rules* and the general law. If the law is unclear in a particular area, the *FCA* will have two broad options available to it. It may decide either:

(1) not to develop a scheme, having regard to the other ways in which consumers can seek redress, including through the courts; or

(2) to take steps to clarify the law.

1.3.12 G The *FCA* will seek an opinion from a Queen’s Counsel for any *consumer redress scheme* it proposes in relation to the question of whether the failures proposed to be addressed by a scheme are those that a court or tribunal

- would find to constitute as failures to comply with a requirement. If stakeholders disagree with the *FCA's* interpretation of the law as expressed in the draft scheme *rules*, they will be able to say so during the consultation process. Any representations made will be carefully considered by the *FCA* as set out in ■ CONRED 1.2.
- 1.3.13** G In addition, the *FCA* has the option of seeking a court declaration to clarify the law (the bank charges test case brought by the Office of Fair Trading which the *FCA* supported with a *waiver* of certain *DISP rules* is an example of this sort of approach).
- 1.3.14** G The process of interpreting what the *FCA's rules* require will involve the usual process of analysing relevant surrounding materials (e.g. consultation papers) as is the practice when interpreting any piece of legislation. Other *FCA rules* and *guidance* may also be relevant to interpreting what a particular *rule* requires. The *FCA's rules* are given a purposive interpretation (see ■ GEN 2.2.1R). The purpose of a *rule* is gathered predominantly from the text of the *rule* itself as well as its context among other relevant *rules*.
- 1.3.15** G The *FCA* will not be able to impose higher requirements on firms retrospectively. The requirements to be applied by the *FCA* will be those in force at the time of the relevant act or omission, not current or later requirements.
- 1.3.16** G *Consumer redress schemes* can only be used to require redress in relation to those failures in respect of which a remedy or relief would be available in legal proceedings. A *consumer redress scheme* could not, therefore, be used to require redress for:
- (1) breaches of the *Principles* (*FCA rules* currently provide that breaches of the *Principles* do not give rise to a right of action in court under section 138D of the *Act* – a change to this would be subject to the consultation requirements under the *Act* in the usual way); or
 - (2) breaches of any other *FCA rules* where the right of action under section 138D of the *Act* has been switched off in the *rules* (e.g. the *rules* in the *SYSC* sourcebook); or
 - (3) departure from *FCA guidance*; or
 - (4) non-compliance with any non-binding code of practice (e.g. industry guidance confirmed by the *FCA*).
- 1.3.17** G The fact that a *consumer redress scheme* cannot be used to require redress in relation to breaches of the *Principles* would not prohibit a consideration of the *Principles* for the purposes of interpreting one of the *FCA's* more detailed *rules*. This is because the *FCA* believes that a court would also take into account surrounding legislative provisions when seeking to interpret a particular piece of law. However, this does not mean that the scheme could be based on the *Principles*: there always needs to be a legally-actionable failure.

1.3.18 G Finally, it is necessary that the loss or damage which was suffered (or may be suffered) is as a result of the failure. As part of this, the *FCA* will need to consider whether any indirect or consequential loss is recoverable under the applicable law.

‘Desirability’ of making a consumer redress scheme.....

1.3.19 G The *FCA* will be required to make an objective, evidence-based judgement on the overall appropriateness of a *consumer redress scheme* as a remedial tool. Cost benefit analysis (CBA) is likely to be a key part of this decision. An important characteristic of a *consumer redress scheme* is that it can ensure consumers obtain redress without the *FCA* having to first identify every individual firm specifically involved. CBA will necessarily rely in part upon the *FCA*’s judgement as to how widespread or regular the failure is.

1.3.20 G A comparison of the advantages and disadvantages of a *consumer redress scheme* against other available tools will form part of the decision-making process. The *Act* provides a range of other tools (e.g. imposition of requirements on a firm under section 55L to take remedial action in respect of past conduct) and the *FCA* will need to consider which power is most appropriate in the circumstances.

1.3.21 G As a public body, the *FCA* will also have regard to general administrative law principles such as proportionality and reasonableness. For example, the extent to which firms have already provided redress will be a factor to which the *FCA* will have regard (e.g. following enforcement action or the implementation of a voluntary industry redress scheme). See also ■ CONRED 1.5.25G.

1.3.22 G Lastly, the *FCA*’s *operational objectives* (particularly its *consumer protection objective*), together with the regulatory principles in section 3B of the *Act*, will also be relevant. For example, the *Act* requires the *FCA* to have regard to the principle that a burden or restriction which is imposed on a person should be proportionate to the benefits, considered in general terms, which are expected to result from the imposition of that burden or restriction.