

Chapter 1

General

1.4 Scope of a consumer redress scheme

The services that a consumer redress scheme can apply to

1.4.1

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In accordance with section 404E(2) of the *Act*, a *consumer redress scheme* can secure redress for consumers of services provided by:

- (1) *authorised persons* in carrying on *regulated activities*;
- (2) *authorised persons* in carrying on a consumer credit business in connection with the accepting of deposits (insofar as section 404E relates to, or applies for the purposes of, anything done under the *Act* concerning things done (or not done) before 1 April 2014);
- (3) *authorised persons* in communicating, or approving the communications by others of, invitations or inducements:
 - (a) to engage in investment activity; or
 - (b) to enter into or offer to enter into an agreement the making or performance of which by either party constitutes a *controlled claims management activity*.
- (4) *authorised persons* who are *investment firms*, or *credit institutions*, in providing relevant ancillary services;
- (5) *persons* acting as *appointed representatives*;
- (6) *payment service providers* in providing *payment services*; and
- (7) *electronic money issuers* in issuing *electronic money*.

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A *consumer redress scheme* could apply to all *authorised persons*, *electronic money issuers* or *payment service providers* or to a specified description of *authorised person*, *electronic money issuer* or *payment service provider*. This means the *FCA* could create a scheme that applied to a named list of firms.

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The *FCA* will be able to determine, on reasonable grounds, how to characterise the particular activity that a scheme applies to. This will enable the *FCA* to ensure that a scheme is appropriately focused (e.g. limited to activities carried on in relation to particular products or sectors of the market in question, during specified periods of time). It is possible that a scheme could be combined with the use of other regulatory tools (i.e. a package of measures would be put in place to ensure an issue was addressed

comprehensively). Should this be the case, the *FCA* will clearly set out in its consultation paper how the different elements of the package inter-relate.

1.4.4 **G** Where the services to which a scheme applies are those provided by *authorised persons* in carrying on *regulated activities*, the limitation to '*regulated activities*' means that a *consumer redress scheme* cannot apply to services that were provided before the activity in question first became regulated by the *FSA* or *FCA* (e.g. the start date of a scheme applying to general insurance mediation could not be earlier than 14 January 2005, which was the commencement of regulation of general insurance mediation).

1.4.5 **G** That said, it would be possible for the Treasury by order to widen the type of services that a *consumer redress scheme* can cover in order to encompass pre-regulation activities (see section 404G of the *Act*).

Consumers that can be covered by a consumer redress scheme

1.4.6 **G** (1) For the purposes of a scheme, a consumer can be any person:

- (a) who has used, or may have contemplated using, any of the services listed in section 404E(2) of the *Act* (see CONRED 1.4.1G);
- (b) who has relevant rights or interests in relation to any of those services; or
- (c) in respect of whom a person carries on the *regulated activity* of *seeking out, referrals and identification of claims or potential claims* whether that activity, as carried on by that person, is a *regulated activity* or is, by reason of an exclusion provided for under the *Regulated Activities Order* or the *Act*, not a *regulated activity*.

(2) As such, the section 404 power is not limited to retail customers only.

1.4.7 **G** That said, a *consumer redress scheme* can only be used to secure redress for consumers who have a legal cause of action. In some cases, the cause of action is limited to private persons in any event. For example, rights of action in respect of breaches of *FCA rules* are generally limited to *private persons*, and the *Unfair Terms Regulations* are limited to individuals acting outside their trade, business or profession. In contrast, claims for misrepresentation can be brought under the general law by all types of *person*.

1.4.8 **G** In addition, the *FCA* may choose to focus a scheme on retail customers, having regard in particular to the fact that they tend to have less experience and expertise. However, the *FCA* will also have regard to the fact that many retail customers are also investors in, or beneficiaries of, funds and pension schemes which may have incurred loss from the failure. It may be that the inclusion of such funds or pension schemes amongst those to whom redress ought to be given will bring benefit to the underlying retail customers.

1.4.9 **G** The section 404 power could be used in relation to non-UK consumers if they are protected by the underlying law.

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The fact that a consumer “who may have contemplated using” a relevant service can be covered by a *consumer redress scheme* is unlikely to catch many cases in practice. One example of a case where it might be used is where there has been widespread discrimination: the section 404 power could be used to ensure redress for consumers who were unlawfully denied access to a service contrary to any relevant equality legislation. All the restrictions and evidence requirements explained in ■ CONRED 1 would apply equally to any scheme developed in this sort of area.
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The Treasury may by order widen (or cut back) the type of consumers that a *consumer redress scheme* can cover (see section 404G of the Act).

Applicability of a scheme to other situations

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The limits of a *consumer redress scheme’s* application will be clearly defined within the scheme *rules* and a scheme will only bind those firms to which it applies. Firms that are unsure whether or not a scheme applies to their activities are encouraged to raise the issue with their supervisory contact in the normal way.
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It is possible that the approach taken by the *FCA* in a particular scheme could influence its approach to other situations. The *FCA* will aim to be consistent in its regulatory approach where possible.
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For example, the *FCA* could put in place a scheme in relation to unfair variation terms in *regulated mortgage contracts*. The underlying reasons for the *FCA’s* decision that a variation term in a *regulated mortgage contract* is unfair could potentially apply to a variation term in an insurance contract that fell outside the scope of the scheme. However, the *Unfair Terms Regulations* expressly state that all the circumstances attending the conclusion of the contract must be taken into account when assessing the unfairness of a contractual term. Therefore, if the *FCA* wanted to take action in relation to the term in the insurance contract using its other regulatory powers, it would need to ensure that it had considered all the relevant issues separately to those considered as part of the scheme for *regulated mortgage contracts*.