

Chapter 1

General

1.8 Imposing a consumer redress scheme on a firm under section 404F(7) of the Act

Triggers that must be met before the FCA can impose a consumer redress scheme under section 404F(7)

- 1.8.1** **G** Section 404F(7) of the Act empowers the FCA to require a firm "to establish and operate a scheme which corresponds to, or is similar to, a consumer redress scheme" established under section 404 of the Act (see ■ CONRED 1.2 to 1.7).
- 1.8.2** **G** The process by which the FCA may vary the authorisation of a *payment service provider* or *electronic money issuer* is not specifically addressed in this guidance.
- 1.8.3** **G** The relevant triggers for determining whether the FCA can require an *authorised person* with a *permission* to establish and operate a scheme which corresponds to, or is similar to, a *consumer redress scheme* are different to those that apply for an 'industry wide' *consumer redress scheme* established under section 404 of the Act. Rather than considering the test set out in section 404(1) of the Act, the FCA has to consider the relevant legal triggers for varying a *permission* or varying or imposing a *requirement* on a firm (see sections 55H, 55J and 55L of the Act).
- 1.8.4** **G** However, before the FCA varies a firm's *permission* under section 55J(2) of the Act on its own initiative, or imposes a *requirement* on a firm under section 55L of the Act, the FCA must consider whether it would be 'more appropriate' to proceed under the Competition Act 1998. If the FCA considers that it would be more appropriate to proceed under the Competition Act 1998, the FCA must not exercise its powers under sections 55J(2) or 55L of the Act (see section 234K of the Act). In the remainder of this section, it is assumed that the FCA considers that it is able to exercise its powers under the Act rather than under the Competition Act 1998.
- 1.8.5** **G** The FCA may vary a firm's *permission* under section 55J of the Act or impose or vary a *requirement* under section 55L of the Act, on its own initiative, if it appears to the FCA that:
- (1) the firm is failing, or likely to fail, to satisfy the *threshold conditions* for which the FCA is responsible; or

(2) the firm has failed, for at least a year, to carry on a *regulated activity* to which its *permission* relates; or

(3) it is desirable to exercise the power in order to advance one or more of the *FCA's operational objectives*, for example, its *consumer protection* objective of securing an appropriate degree of protection for *consumers*.

1.8.6 **G** Further information about varying a firm's *permission* or varying or imposing *requirements* on the *FCA's* own initiative under section 55J or section 55L of the Act is set out in EG 8.

1.8.7 **G** The *FCA* has no power to accept an application from an *authorised person* to vary its *permission* where the *authorised person* is a *PRA-authorised person* (see sections 55H and 55I of the Act). For all other firms, an *authorised person* with a *permission* can voluntarily apply to the *FCA* to vary its *permission* under section 55H of the Act. The *FCA* may refuse the application if it appears to the *FCA* that it is desirable to do so in order to advance any of its *operational objectives*, for example, its *consumer protection* objective (see section 55H(4) of the Act). The *FCA* also has the power to impose or vary a *requirement* under section 55L of the Act, in order to establish and operate a scheme which corresponds to, or is similar to, a scheme established under section 404 of the Act. However, where the *authorised person* is a *PRA-authorised person* (or is a member of a group which includes a *PRA-authorised person*), the *FCA* must consult the *PRA* (see section 55L(7) of the Act). As with voluntary applications to vary a *permission*, the *FCA* may refuse an application to voluntarily impose, vary or cancel a requirement if it appears to the *FCA* that it is desirable to do so in order to advance any of its *operational objectives* (see section 55L(5) of the Act).

1.8.8 **G** Further information about the voluntary variation of a *permission* or the voluntary imposition or variation of a *requirement* is set out in ■ SUP 6.

Consultation

1.8.9 **G** The decision to require a firm to establish and operate a scheme pursuant to section 404F(7) affects a firm, or a small number of firms, each individually rather than the whole industry or sector of the industry. As with any supervisory or enforcement action it takes against a specific firm, the *FCA* is not obliged to consult before deciding to vary a firm's *permission* or impose or vary a *requirement*.

Circumstances in which the FCA will engage section 404B

1.8.10 **G** As already explained, when determining whether to vary a firm's *permission* under sections 55H or 55J or to impose a *requirement* under section 55L to establish and operate a scheme pursuant to section 404F(7), the *FCA* will need to consider whether the statutory tests referred to in ■ CONRED 1.8.5G (for own initiative action) and ■ CONRED 1.8.7G (where a firm applies voluntarily) have been met. This will often involve a consideration of the *FCA's operational objectives* and, in particular, the *consumer protection* objective. The *FCA* will also consider the regulatory principles in section 3B of the Act and follow the normal principles of administrative law.

- 1.8.11** G This exercise will be undertaken on a case-by-case basis and in the round by looking at all of the proposed terms, including any terms which have been included to make provision corresponding to section 404B (under section 404F(7)(b)). It is important to note that engaging section 404B will not automatically or always advance one or more of the *FCA's operational objectives*, for example its *consumer protection objective*, even if the other terms of the proposed scheme do.
- 1.8.12** G If section 404B is engaged then broadly the *Ombudsman* is normally required to decide a *complaint* referred to the *Financial Ombudsman Service* after the scheme comes into effect on the basis of what, in the opinion of the *Ombudsman*, the determination under the scheme should be (or should have been). This will mean that the *Ombudsman* will not determine the *complaint* by reference to what, in their view, they consider to be fair and reasonable in all the circumstances of the case. To assist the *Financial Ombudsman Service* in identifying relevant cases, firms may be required to draw the scheme to the attention of the *Financial Ombudsman Service* in any individual cases that are referred to it. However, if the firm and the consumer agree that the *complaint* should not be determined by reference to what, in the opinion of the *Ombudsman*, the determination under the *consumer redress scheme* should be or should have been, or if the subject matter of the *complaint* does not fall to be dealt with under the scheme (or part of it does not) then the *Ombudsman* may determine the *complaint* (or that aspect of the *complaint*) in accordance with what they consider to be fair and reasonable in the usual way.
- 1.8.13** G It is likely that many section 404F(7) schemes will be set up because, in the *FCA's* view, it is desirable to advance the *consumer protection objective* of securing an appropriate degree of protection for *consumers*. In determining what is desirable to advance that objective, the *FCA* will have regard to a wide range of factors. Many of these are likely to be interdependent considerations rather than standalone issues. These may include (but are not limited to):
- (1) how many consumers have been (or may be) affected by the act or omission to which the proposed scheme relates. It will normally only be appropriate to consider engaging section 404B where the issue affects a large number of consumers;
 - (2) whether engaging section 404B would result in higher or faster redress for consumers (whether or not they have complained individually) than would otherwise be the case. In other words, the extent of any difference in redress between the proposed scheme and what consumers may receive through the *Financial Ombudsman Service* or the courts;
 - (3) the extent to which the overall effect of the proposed scheme provides a fair and reasonable outcome for individual consumers, having regard to the desired outcome for the group of affected consumers overall; and
 - (4) whether the *Financial Ombudsman Service* has had a material number of *complaints* about the act or omission, has an established approach to dealing with them and the extent to which the proposed scheme aligns with this approach.

Consultation with the Financial Ombudsman Service when the FCA is considering engaging section 404B

- 1.8.14** **G** Where the *FCA* is considering engaging section 404B, it will consult with the *Financial Ombudsman Service* at an early stage and allow time for a fully-considered, written response. The *Financial Ombudsman Service* is in a position to say:
- (1) whether it has already received cases about the particular firm and acts/omissions, whether any cases have been decided and (if so) what the outcomes were;
 - (2) insofar as the acts/omissions are not fact-specific, whether it has previously considered similar cases and has adopted a particular approach;
 - (3) the sorts of *complaints* it can foresee might be made in future by consumers about the firm in relation to the acts/omissions concerned;
 - (4) how the outcomes of cases decided by the *Ombudsman*, or the *Ombudsman's* approach to similar cases, would compare to the outcomes under the proposed scheme; and
 - (5) if the *Financial Ombudsman Service* is likely to encounter any practical issues in implementing the proposed scheme.
- 1.8.15** **G** The *Financial Ombudsman Service* is impartial between *consumers* and firms. The *FCA* will not treat the *Financial Ombudsman Service's* input as a proxy for input on behalf of *consumers*.
- 1.8.16** **G** The *Financial Ombudsman Service* cannot lawfully guarantee how it will decide cases that fall outside the scope of the scheme (e.g. pre-regulation cases or those referred to the *Financial Ombudsman Service* before the scheme came into effect). It may, however, be willing to describe its general approach to such cases.
- Internal process to be followed if the FCA proposes to engage section 404B**
- 1.8.17** **G** Where the proposal is to engage section 404B, the *FCA* will apply the following governance procedure in addition to its usual processes:
- (1) all decisions to engage section 404B will be taken by the *FCA's* Executive Committee or a sub-committee;
 - (2) the Committee/sub-committee will need to be satisfied that there has been adequate consultation internally to ensure full consideration of consumers' interests;
 - (3) the Committee/sub-committee will consider written views from the *Financial Ombudsman Service* before reaching a decision; and
 - (4) if section 404B is engaged, the document outlining the terms of the scheme will be published on the *FCA's* website, either in the *FCA* Register or (with cross-reference from the *FCA* Register) in a register of such schemes.

Challenging a consumer redress scheme imposed under section 404F(7)

- 1.8.18** **G** If the firm has voluntarily applied to establish and operate the scheme, it is unlikely to challenge the *FCA* for accepting its application. If the *FCA* proposes to refuse a firm's application for a section 404F(7) scheme, the *FCA* must give the firm a *warning notice* (section 55X(2)). If, after consideration by the *FCA*'s decision makers, the *FCA* decides to refuse the application, the *FCA* must give the firm a *decision notice* (section 55X(4)). The firm would be able to challenge the *decision notice* by referring the *FCA*'s decision to the Upper Tribunal (section 55Z(3)).
- 1.8.19** **G** If the *consumer redress scheme* was imposed on the *FCA*'s own initiative, the *FCA* must give the firm a *supervisory notice* (section 55Y). The firm would be able to challenge the *supervisory notice* by referring the *FCA*'s decision to the Upper Tribunal (section 55Z(3)). The Tribunal may dismiss the reference or remit the matter to the *FCA* with a direction to reconsider and reach a decision in accordance with the Tribunal's findings (section 133(6) of the *Act*).