EVERSHEDS SUTHERLAND

Horizon scanner
Financial Services
Complaints Handling

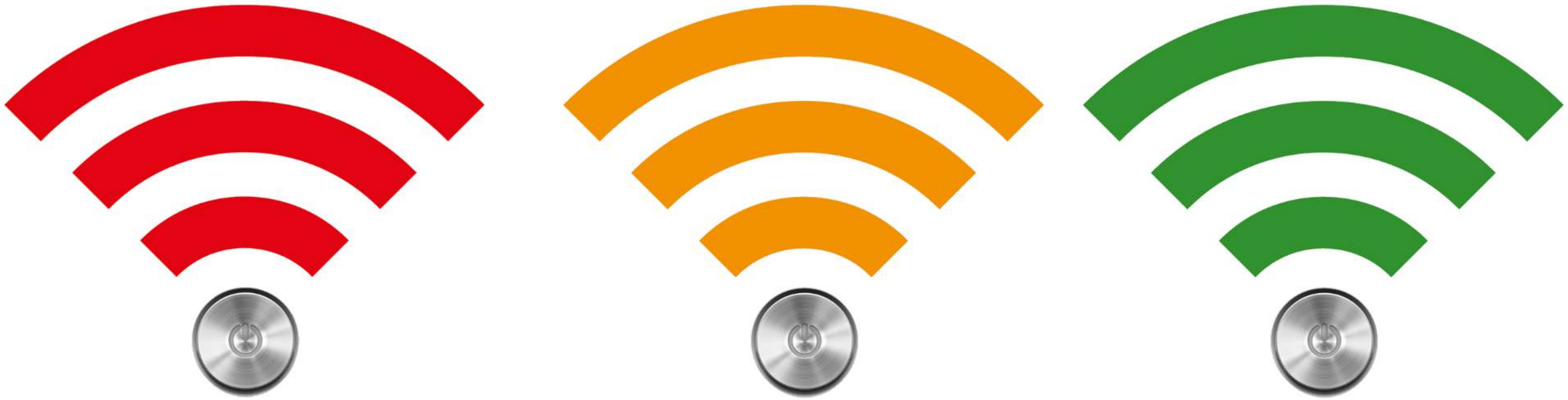
March 2022

RISK RATING

Immediate impact

Short-term impact

On the horizon



Immediate Impact

Legal risk	Links	Action required
Complaints trends FOS has set out what trends it is seeing and expects to see. Headline points include: • fraud and scams complaints continue to dominate • uptick in e-money complaints due to increased online expenditure during the COVID-19 pandemic • high levels of complaints about administration and customer service • more complaints about the new rules on persistent debt in credit cards. There may also be complaints about the potential threat of firms removing credit facilities if consumers do not take steps to start paying off their credit/store card debts more quickly • an expectation of fewer complaints about CMCs with the end of PPI complaints • anticipated increased complaints from SMEs about recoveries as COVID loan repayments fall due. FOS expects mis-selling claims too • more complaints about debt as consumers face financial hardship due to the end of furlough and mortgage payment holidays, higher inflation and energy prices. More consumers could be at risk of vulnerability • anticipation that the new consumer duty, being consulted on by the FCA, could result in complaints about firms, and therefore, increased complaints to FOS.	FOS plans and budget consultation 2022/23 FOS quarterly complaints data	You may find it useful to review the complaints data to assess it against your own complaints and to help predict future areas for complaints/litigation. FOS has also recently published its latest quarterly complaints data. Packaged bank accounts was one of the most complained about financial products in the third quarter of this financial year, but the uphold rate remains low (only 4% were upheld in the consumers' favour). PPI complaints continue to drop following the FCA deadline for making complaints about mis-sold PPI.
COVID-19: Government Lending Schemes The substantial uptake of Government-backed COVID-19 loan schemes and continued economic pressure give rise to a number of issues: • increase in complaints. Complaints have already stemmed from businesses who were not eligible,	Eversheds Sutherland briefing Bloomberg investigation NAO update House of Commons Committee of Public Accounts report	Due to the scale of possible fraud and limited resource, BEIS largely relies on lenders to investigate fraud. The National Audit Office has recommended that by April 2022, BEIS produce a formal strategy for managing BBLS fraud, and measures the performance of each counter-fraud measure, adapting its approach

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whose applications were declined or where lending was delayed or suddenly restricted/closed. • now that repayments for the CBILS and BBLS loan schemes are due, there has been a significant level of default. As of 30 September 2021, data showed that £1.3bn of BBLS loans had been defaulted on. High levels of default will lead to issues in forbearance, collections, recoveries and restructuring as well as crystallisation of fraud issues. The Department for Business, Energy and Industrial Strategy (BEIS) estimated that 37% of Bounce Back Loans (or £17bn) will not be repaid (mostly because the businesses concerned would not survive) and 11% of funds (£4.9bn) would be lost to fraud and error.	Public inquiry	as necessary. Notably, the House of Commons Committee of Public Accounts recently reported that the estimated loss due to fraud and error across all COVID-19 response measures is not known but is expected to be at least £15bn. The Committee has called on the Treasury to confirm how much has been lost to fraud and how much it expects to recover by the end of the financial year. Since March 2021, a new loan scheme (the Recovery Loan Scheme) has been in place which offers loans from £25k to £10m until 30 June 2022, with the Government providing the lender with an 80% guarantee. The Scheme replaces the BBLS and CBILS. The same issues as described in this entry will likely apply. The public inquiry of the Government's handling of COVID-19 is due to start in Spring/Summer 2022.
Business Banking Resolution Service (BBRS) It has now been one year since the BBRS was launched. The BBRS has recently released its third 'Quarterly Insights Report' (January 2022), providing information about its casework since its launch on 15 February 2021 to 31 December 2021. Points of interest include: • the BBRS continues to see new cases registering for the service, with a more balanced split between historical and contemporary cases due to its marketing regime (particularly as external factors come into play, such as the repayment of the Coronavirus Business Interruption Loans) • 57 cases have required a formal eligibility assessment. The most common reason for ineligibility is that the case may be, or may have been, eligible for – or received an outcome from FOS. A fundamental principle is that the	Quarterly Insights Report BBRS PIR	It is too early to evaluate the BBRS' operational effectiveness and so the first half of the PIR will review: • the scope of the operations of the Implementation Steering Group • the nature and scope of the BBRS as set out in the legal architecture • the ability of the BBRS to operate with its independent leadership and governance. The second stage of the PIR will consider the effectiveness of the BBRS and how well it is delivering against its rules and operational plans. The timing of the second stage will be determined in HY1 2022. Separately, businesses have less than one year left to register unresolved historical

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jurisdiction of the BBRS cannot overlap with the jurisdiction of FOS • as of 31 December 2021, the BBRS had 200 open cases and 500 closed cases (this includes cases that have been deregistered). As to determinations, seven cases had closed: one was upheld in full, five were partially upheld and one was not upheld. Five resulted in financial awards and one non-financial award • two cases left the BBRS adjudication process to attempt mediation. The BBRS hopes to report more on this in future reports Separately, the BBRS has started a Post-Implementation Review (PIR) which will be carried out independently. The PIR was agreed in principle ahead of the BBRS' launch and will establish how well the BBRS has delivered the recommendations of the UK Finance response to the 2018 Walker review, into the complaints and alternative dispute resolution landscape for SMEs.		banking complaints with the BBRS as it closes for new complaints on 14 February 2023.
Regulatory family – Wider Implications Framework The FCA, FOS, FSCS, the Pensions Regulator and the Money and Pensions Service have agreed a framework (WIF) for collaboration on matters of common interest to achieve better outcomes for consumers, small businesses and the financial services industry. The WIF will be overseen by a group currently chaired by FOS. It is anticipated that the WIF will be of benefit when there are large numbers of consumers potentially affected by an issue, or because of the amount of redress at stake, or because there is a risk of business failure.	WIF information Terms of Reference	You may wish to review the Terms of Reference. The WIF is intended to provide transparency for stakeholders through the publication of minutes of meetings, an annual review, and a central log of the issues identified. It is hoped that one benefit of the WIF will be greater consistency of approach by the regulators.
Introduction of a cap on the fees of claims management firms (CMCs) The FCA has restricted the fees CMCs charge for managing claims about non-PPI financial products and services through a fee cap in an effort to curb "excessive charging" and save consumers around £9.6m a year. CMCs are now only allowed to charge consumers 30% of their claim, or	FCA update FCA PS21/18	The legal instrument accompanying the Policy Statement contains final rules and guidance and came into force on 1 March 2022. The FCA intends to monitor the cap's effects on the CMC market and consumers through regulatory returns and ongoing supervisory work. If the FCA finds evidence of significant excessive charging, it will review the fee cap

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£420 (whichever is lower) if the redress amount is below £1,500. The system is tiered and the fee will drop to 15% for redress of £50k or above. Whilst the FCA originally proposed to apply the cap on claims that fall within the redress system even if those claims were pursued via litigation (or some other means), it has confirmed that the cap will not apply to activity that relates to litigation if the claim has already been determined or dismissed by the redress system.		and disclosure rules after they have been in force for two years and in later years if it is not achieving its objective.
Future funding of FOS FOS needs to raise additional income in order to deliver queue reduction targets and invest in the service. FOS recently consulted on a budget to generate around £21m in 2022-23, including: • increasing the compulsory jurisdiction levy by £10m to £106m • raising c.£11m by (i) reducing free cases to pre PPI levels from 25 to 3 and (ii) reducing free cases for group firms from 50 to 15 • the case fee of £750 will be maintained.	FOS plans and budget consultation 2022-23	The consultation closed on 31 January 2022 and FOS will adopt its final budget for 2022/23 by 31 March 2022. It is likely that the proposals will be implemented. FOS is also planning to consult on funding for 2023-24. The consultation is due in Q1 2022/23. FOS has stated that unless it takes action in respect of its funding, it will not be financially sustainable by 2024-2025.
FOS – temporary changes to reporting the outcomes of proactively settled complaints The COVID-19 pandemic led to a substantial increase in referral of complaints to FOS and meant that FOS began the financial year 2021/22 with over 90,000 cases awaiting investigation. In a consultation published in October 2021, FOS has considered how it could move faster to resolve complaints. Proposals included targeted intervention to temporarily amend its approach to publishing firm-specific outcome data. The proposals (with some modifications) were implemented in November 2021.	FOS consultation response FOS letter Eversheds Sutherland briefing	FOS has targeted a reduction to 50,000 cases in its 90,000 backlog by the end of this financial year. FOS has said that it has made significant progress and almost half the number of cases are now awaiting allocation to an investigator. Its success in eliminating the backlog quickly will depend on how businesses engage with FOS, including how many cases they agree to settle under the temporary reporting changes. FOS will revert to how it originally recorded the outcomes of complaints from 1 April 2022 onwards. FOS may well consider

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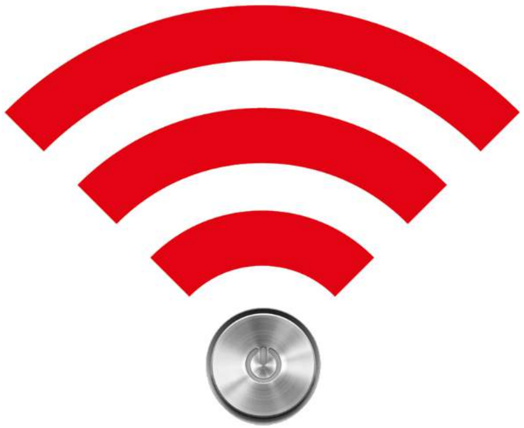
		implementing similar changes in the future if it becomes necessary again.
FOS – diversity, inclusion and wellbeing FOS has published its diversity, inclusion and wellbeing report for 2021. In addition to setting out FOS's own steps to achieving diversity, inclusion and wellbeing, FOS states that it is often asked to consider whether a business unfairly disadvantaged a customer, sometimes in the context of protected characteristics such as age, disability, or race. FOS considers that the broader the range of experiences and perspectives its staff have and feel comfortable sharing, the greater its collective capacity to understand and empathise with complainants who refer complaints to FOS.	FOS report	You may wish to review the report. FOS gives examples in the report of how its approach is enhancing its complaint handling work.



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Authorised Push Payment (APP) fraud The refund process regarding APP fraud is subject to change in the near future, with the PSR consulting and the Government indicating an intention to legislate to put reimbursement on a mandatory footing.	PSR Response PSR PS 21/2 Eversheds Sutherland Briefing	The PSR consultation closed on 14 January 2022. You should monitor closely the PSR's response to the call for views and the measures it intends to take forward. Note that the appeal of the *Philipps v Barclays Bank* decision, which confirmed that the Quincecare duty does not extend to circumstances where a customer knowingly and willingly instructs a payment, albeit as a result of a fraud, was heard on 8 and 9 February 2022. The appeal judgment is awaited. The judgment in *Tecnimont v NatWest* is also due imminently, which may change how the courts approach the duties of financial institutions where they act in the capacity of receiving bank.
Risk of discriminatory policies Financial institutions are increasingly subject to complaints of indirect discrimination in their dealings with customers (which could result in litigation). Given the reputational impact and expense of a discrimination claim (damages are unlimited for discrimination claims), this is an ongoing risk. Claims for indirect discrimination could stem from access (or lack of) to cash and banking services. A Financial Lives 2020 survey found that 10% of adults rely on cash for all or most of their daily purchases, however, due to the long-term decline in the use of cash, many firms have been closing ATMs and branches. The Cash Actions Group recently announced that retail banks and building societies will create an independent body to assess the needs of local communities and direct cash solutions. Further, the FCA and PSR continue to monitor access to cash ahead of future legislation (in July 2021, the Government consulted on legislating to protect access to cash in the long-term).	Eversheds Sutherland briefing FCA/PSR update Government Consultation FOS plans and budget consultation 2022/23	The Government's consultation closed on 23 September 2021 and the Government is due to provide a summary of responses and set out next steps for its work. In the meantime, the FCA's current assessment is that most people have reasonable access to cash. FOS has also noted that whilst the operational problems experienced by firms in the earlier months of the COVID-19 pandemic may have abated, access to cash, digital exclusion and reasonable adjustments may be a feature of complaints in 2022/23. See also the entry above on FOS – diversity, inclusion and wellbeing.
Reform of FOS Oaklin Consulting were appointed to conduct the independent periodic review into FOS and published their	FOS press release FOS Action Plan	By April 2022, FOS intends to have:

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report in December 2021. The report set out 22 recommendations for improvement, which FOS accepted in principle. FOS published an action plan in response to the review, focussing on five key themes: • a new efficient operating model to meet a changing environment • enhanced technology and digital capabilities • boosting engagement with stakeholders and taking a robust and proactive approach to prevent complaints and unfairness arising • developing the current strategy to further enhance FOS • exploring revisions to FOS's funding model to ensure a sustainable future.	FOS letter	• published a refreshed strategy with key milestones • designed a target operating model and be moving towards it • significantly exceeded its original plans to reduce the backlog • designed a digital portal. FOS recently appeared before the Treasury Committee following concern about its Action Plan, budget and backlog of cases. Ahead of its appearance, FOS published a letter containing its response to a series of questions it had received on its Action Plan.
Proposal to shorten complaint response waiting times In 2021, the Government published a consultation paper on reforming competition and consumer policy. Included in the paper was a proposal to shorten complaint waiting times in markets where alternative dispute resolution is mandatory. If taken forward, this could mean that firms have four weeks (instead of eight) to deal with complaints before customers' FOS referral rights kick in. It is considered that it will incentivise firms to deal with problems promptly and allow referrals to FOS more quickly.	Consultation document Eversheds Sutherland briefing	The consultation closed on 1 October 2021 and feedback is currently being analysed. We understand that FOS has considered the proposal. If implemented, the proposal is unlikely to be welcomed by firms and the FOS for the reasons set out in the linked briefing. If the Government proceeds with the proposals, we anticipate that the FCA will consult separately on the proposed change given it will necessitate an amendment to DISP and this should include any transition arrangements.
Consultation on revised complaints scheme for complaints against the regulators In July 2020, the Bank of England, FCA and PRA published a joint consultation paper on complaints against the regulators. The paper included proposals for: making the scheme more user-friendly so as to be more accessible, and providing a more detailed description of the regulator's approach to goodwill payments, to help complainants	Consultation Complaints Commissioner response FCA update	The Complaints Commissioner has expressed a number of observations and reservations about the revised scheme. The Commissioner agreed that the scheme should not be used as an alternative means of 'insurance' for products not covered by FOS or the FSCS, or where a regulator might have done better in supervising a firm, but considered that where a regulator is the sole or principal cause of a complainant's loss, then it should be

Short-term Impact

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understand what they can and cannot expect from the scheme. The regulators consider that the revised scheme will increase efficiency because less time will be spent on explaining the scheme and dealing with misunderstanding, and more time will be spent investigating the merits of complaints. However, the changes are unlikely to mean that the outcomes to complaints will be any different – it is anticipated that outcomes will be broadly consistent with current practice.		presumed that the relevant regulator will compensate in full. The consultation closed on 12 October 2020. It is anticipated that the policy statement and revised complaints scheme will be published by the end of April 2022.
Irresponsible and unaffordable lending Irresponsible lending is an area that may lead to complaints and litigation (e.g. s.140A unfair relationship claims), particularly in the current climate. There is a risk of regulatory action for firms that get it wrong. Whilst most relevant to high-cost short-term lending, increasingly complaints are being made about other products such as credit and store cards where credit limits are increased with limited further affordability checks being carried out. There has been some inconsistency around the application of time bar by FOS, particularly on the three year rule.	FCA's findings Eversheds Sutherland briefing Woolard Review	You may wish to consider the recommendations made to the FCA Board in the unsecured credit market as set out in the Woolard Review. You may also be interested to review the recent High Court decision following the sanction hearing in respect of the Scheme of Arrangement proposed by Amigo Loans Limited (ALL). The scheme was principally intended to compromise the claims of customers and guarantors in respect of claims against ALL arising from unaffordable and unsustainable lending complaints and fees owed to the FOS for handling such complaints. ALL has confirmed it will not appeal the judgment. In contrast, a Scheme of Arrangement for Provident Personal Credit Limited was sanctioned recently. One key difference between the schemes was that ALL was proposing to continue to trade post-Scheme, whilst Provident was not.

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Debt Respite Scheme (Breathing Space) and Statutory Debt Repayment Plan (SDRP) The Debt Respite Scheme gives someone with 'problem debts' the right to legal protections from their creditors, including protection from enforcement action for 60 days and a suspension on interest and charges. There are also protections for those receiving mental health crisis treatment. The Regulations came into force on 4 May 2021 (with some exceptions). Separately, the SDRP will enable a person in problem debt to repay creditors to a manageable timetable, with legal protection from further action for the duration of their plan. The Government intends to implement the SDRP over a longer timeframe (2024).	The Regulations The Commentary - individual insolvency Statistics Eversheds Sutherland briefing	Monitor the use of the Breathing Space scheme. The SDRP is due to come into force before 1 May 2024. It is understood that draft regulations will be consulted on in Q1 2022 with the intention of laying down final regulations at the end of 2022.
FCA ban on discretionary commission models - more complaints and litigation? Discretionary commission models which incentivise car dealers and brokers to raise customers' financing costs have been banned since 28 January 2021. The ban has already led to an increase in complaints regarding the use of such models in the past and may result in litigation.	Eversheds Sutherland Briefing PS20/8	A published decision from FOS on the topic is awaited. Small numbers of claims have been issued against firms where customers argue that the discretionary commission was not disclosed, or led to a "mis-sale" seeking relief under the unfair relationship provisions, a breach of fiduciary duty, and breaches of CONC. The most recent interaction from FOS related to the Court of Appeal's judgment in *Wood v Commercial Business Limited and Pengelly v Business Mortgage Finance 4 Plc* issued on 31 March 2021. FOS invited firms to provide comments about how they consider the judgment relates to motor commission complaints.
FOS strategic priorities FOS has three strategic priorities for the next five years (to 2025): • enhancing its service • preventing complaints and unfairness arising	FOS annual report FOS "Taking us to 2025" strategy FOS strategic plans and budget	You should continue to consider your complaints policies and processes against FOS's strategic priorities.

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• building an organisation with the capabilities it needs for the future. FOS considers that too many complaints come to it to resolve and that there needs to be much greater focus on best practice in customer service, whilst also ensuring customers have clarity about the products and services they use. FOS also considers that when complaints arise, they need to be dealt with more effectively by the business at source. FOS has called on the FCA and firms to play their part.		
'Buy now, pay later' (BNPL) – potential for complaints to FOS and Section 75 redress On 2 February 2021, the Government announced its intention to bring unregulated interest-free BNPL products into regulation given the potential risk of consumer detriment. A consultation was launched in October 2021 and subject to the outcome, consumers using BNPL products may be able to refer complaints to FOS in the future and claim refunds under Section 75 of the Consumer Credit Act 1974.	FCA guidance Government consultation	The Government consultation closed on 6 January 2022 and further news is awaited. Also see the entry on FCA guidance on 'buy now, pay later' contract terms in our Financial Services Regulatory Investigations and Enforcement horizon scanner report.
Greenwashing of products and services The growing appetite for sustainable investing has led to concerns about 'greenwashing' – that is, making false or misleading claims about environmental practices, performance or products. There is an obvious risk that such products could be mis-sold and this could lead to an increase in consumer claims via FOS and/or litigation.	Eversheds Sutherland ESG hub for Financial Services	Where green products are developed and sold, ensure that rigorous processes are in place regarding product design, consumer communications and monitoring of product outcomes to limit the potential for complaints and litigation to arise. Also see the climate-related disclosures entry in our Financial Services Regulatory Investigations and Enforcement horizon scanning report.
Rules extending SME access to FOS In 2019, the scope of FOS was extended to permit small and medium-sized enterprise access to FOS. The FCA had planned to start a post-implementation review of the rules, however it decided to delay the review because the COVID-19 pandemic has had a significant effect on SMEs and the full impact is not yet known.	FCA update PS18/24	The FCA is due to reassess the position by April 2023 and will include upcoming developments with SME complaints within the scope of review. The FCA will also engage with FOS on its insights from current handling of SME complaints.

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