

Association of Accounting Technicians response to FCA Consultation on SME access to the Financial Ombudsman Service

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1. Introduction

- 1.1. The Association of Accounting Technicians (AAT) is pleased to have the opportunity to respond to the consultation paper on SME access to the Financial Ombudsman Service, published on 21 January 2018
- 1.2. AAT is submitting this response on behalf of our membership and for the wider public benefit of achieving sound and effective administration of taxes.
- 1.3. AAT has added comment to add value or highlight aspects that need to be considered further.
- 1.4. AAT has focussed on the operational elements of the proposals and has provided opinion on the practicalities of implementing the measures outlined.
- 1.5. Furthermore, the comments reflect the potential impact that the proposed changes would have on SMEs and micro-entities, many of which employ AAT members or would be represented by AAT's 4,250 licensed accountants.

2. Executive summary

- 2.1. **AAT supports the FCA's changes to the definition of complainants.** This relaxation of definitions is clearly in the best interests of justice and equality given it will extend eligibility to a substantially larger pool of SMEs
- 2.2. **The proposals in this consultation could all be made more speedily.** Given there is no suggestion of a new redress system, this is simply changing eligibility criteria, it seems unjust to deny larger SMEs (who have between 10-50 employees) and guarantors, access to justice for a further ten months.
- 2.3. **The current award limit must be increased.** For various reasons set out in 9.1.,9.2 and 9.3, the current award limit of £150,000 should be increased to at least £250,000 as a matter of urgency.
- 2.4. **Awareness of the Financial Ombudsman Service (FOS) needs to be increased.** More should be done to promote awareness and understanding of the FOS by working with credible third parties such as AAT, who have a substantial SME membership.
- 2.5. **The risks of the FOS accepting more complex and high value cases are outweighed by the benefits.** There are limited risks to taking on more high value and complex cases whilst the benefits of providing access to justice to a group who would previously struggle to gain redress are significant.

3. AAT response to the consultation paper

4. Q1. Do you agree with our proposed changes to the definition of an eligible complainant? Are the proposed size thresholds broadly correct or would different thresholds or criteria be more appropriate?

- 4.1. AAT agrees with the definition of an eligible complainant and the proposed size thresholds appear sensible. AAT agrees that larger SMEs are likely to have, the bargaining power and organisational resources and understanding of financial services to protect their interests in disputes with firms. We therefore believe the courts remain the most appropriate place for larger SMEs to resolve financial services disputes.

5. **Q2: Do you agree that all 3 tests (employees, turnover and balance sheet) would need to be met for the Ombudsman to consider an SME a small business?**
- 5.1. Each of the three tests are acceptable and have clearly been derived from informed research. However, AAT believes that requiring all three tests to be met is unnecessarily restrictive and that meeting any one of the three tests independently would be a fairer measure.
- 5.2. A lower threshold will also enable a greater number of SMEs to qualify for assistance and ultimately this should be the aim of changes to eligibility – to make access to justice more widely available.
6. **Q3: Do you agree with our proposal to make guarantors eligible complainants?**
- 6.1. Making guarantors eligible complainants appears to be a sensible means of enabling those who may have given a personal guarantee or security a means of seeking redress where they would otherwise struggle to do so. As a result, AAT agrees with this proposal.
7. **Q4: Do you agree that the changes introducing small businesses as eligible complainants should come into effect on 1 December 2018 and that they should apply only to complaints made to a firm regarding acts or omissions of the firm which occur from 1 December 2018? If not, what transitional period do you consider appropriate?**
- 7.1. AAT notes that changes to staffing levels and other resources may be an issue for the FOS but that these should not be significant given there is no suggestion of a new redress system, the proposed changes are simply changing eligibility criteria. It therefore seems unjust to deny larger SMEs (who have between 10-50 employees) access to justice for a further ten months.
- 7.2. Similarly, some may argue that there is a need for an effective communications campaign in advance of these changes but a few months is unlikely to make much difference and the message, “*we can help now*” rather than “*we can help in six months’ time*” is a more effective message to deliver.
- 7.3. The quicker these changes are made; the more SMEs can be helped.
8. **Q5: Do you agree that the changes introducing guarantors as eligible complainants should come into effect on 1 December 2018 and that they should apply only to complaints made to a firm regarding guarantees or security given on or after 1 December 2018?**
- 8.1. As this is a new category of complainant there may be some justification for delaying until 1 December 2018 but given the numbers are likely to be small (dozens rather than thousands or even hundreds), this seems unnecessary.
- 8.2. As with the timetable for the changes for small businesses, AAT believes these should be introduced more speedily.
- 8.3. Whatever date is finally agreed upon, clearly it makes sense for the eligibility date, for both newly eligible SMEs and for guarantors, to be the same.
9. **Q6: Do you agree with our cost benefit analysis? Are there other costs or benefits we ought to have considered?**
- 9.1. AAT is broadly satisfied with the cost benefit analysis undertaken. However, the current award limit of £150,000 is not sufficient and there are a number of factors that the FCA does not appear to have adequately taken into account in deciding to keep the existing limit in place.
- 9.2. Most notably there is no recognition that whilst the limit has not increased in six years, if it had done so in line with inflation, it would now stand at approximately £175,000.

- 9.3. Furthermore, the FCA's own analysis suggests that around a fifth of all SME disputes are already above the current award limit.¹ It is likely that larger small companies will have larger sums of money at stake and it would therefore seem reasonable that when the FCA permits larger SMEs to make a claim it also increases the award limit to at least £250,000. This would not only take account of the inflationary rises that have not been delivered but by the FCA's own calculations that a limit of £250,000 would open the redress system up to an additional 7% of SMEs².

10. Q7: Do you have any views on how access to redress might be improved for SMEs without the need for changes to legislation, including but not limited to the areas where we have powers to make changes?

- 10.1. As FCA SME Complaints Survey data indicates less than 5% of all SME financial complaints are referred to the Ombudsman, there is clearly much more to be done in terms of raising the profile of FOS and awareness among eligible firms.
- 10.2. Raising SME awareness of the existence of FOS, how and why it operates and its eligibility criteria would therefore seem like a good starting point.
- 10.3. With limited resources for advertising and marketing, working collaboratively with credible third parties would seem like a good means of achieving this e.g. organisations such as the Federation of Small Businesses, Institute of Directors and British Chambers of Commerce, specialist bodies like AAT and high-profile individuals like the Small Business Minister, Shadow Minister and as his own profile grows, the Small Business Commissioner.
- 10.4. 60% of AAT's 140,000 members work for or run their own SME, in addition AAT's 4,250 licensed accountants provide business and accountancy services to more than 400,000 British businesses, most of whom are SMEs and would fall into the below 50 employee's category. AAT would be happy to promote the FOS service to our membership and is confident that other organisations would do likewise.
- 10.5. As stated at 5.1 above, with regard to eligibility, requiring a simple test of either employee numbers, turnover or balance sheet rather than all three combined would improve access to redress.
- 10.6. Likewise, as stated at 9.1 above, increasing the current award limit to £250,000 would also likely lead to improved access.

11. Q8: Without legislative change, do you think the Ombudsman might be an appropriate body to consider a greater share of complex or higher value complaints from SMEs than is implied in our proposals for consultation in Chapter 3? What changes would be needed to make this effective? What risks might this introduce?

- 11.1. AAT notes the various calls for new, alternative SME dispute resolution from a range of organisations such as the Treasury Select Committee and even the FCA itself. However, AAT also notes that this is not within the powers of the FCA and therefore recognises the need for this consultation.
- 11.2. AAT sees no problem in the Ombudsman dealing with "higher value" cases. Indeed, AAT has recommended an increase in the award limit to at least £250,000 (9.1. & 10.6) which would require precisely this.
- 11.3. A more significant change relates to a desire to deal with "complex" cases. This would require quite considerable reform given the history of dealing only with what could be described as "vanilla" cases.
- 11.4. That said, there is undoubtedly a need for this given SMEs face an uphill struggle to obtain justice in relation to complex financial wrongdoing – as the RBS GRG³ complainants would testify.

¹ p22, Consultation on SME access to FOS, Jan. 2018: <https://www.fca.org.uk/publication/consultation/cp18-03.pdf>

² p24, Consultation on SME access to FOS, Jan. 2018: <https://www.fca.org.uk/publication/consultation/cp18-03.pdf>

³ RBS & GRG complaints: <http://www.bbc.co.uk/news/business-42877472>

- 11.5. Firstly, the High Court deals only with the upper end of the spectrum, hearing complex cases worth in excess of £50m and is therefore highly unlikely to be of much help to most SMEs.
- 11.6. For those with claims that currently fall below this threshold but above the FOS threshold, legal expenses can be an issue - in April 2015 court fees rose by up to 600%⁴.
- 11.7. Securing expert legal representation who can take on the banks, insurers and others in the financial services sector is another significant challenge for SMEs. Many legal firms who could help are engaged by large financial services firms through legal advice panels which mean they cannot act for claimants. For example, in 2016 Barclays had a panel of 350 legal firms⁵.
- 11.8. Another benefit of the relatively speedy FOS, especially in complex cases, would be the avoidance of large financial services firms repeated tactic of wearing down SMEs through delay and cost accumulation.
- 11.9. It therefore seems obvious that the FOS system, which can help avoid unnecessary costs, that is relatively speedy and would be open to a wider pool of complainants than was previously the case would be welcome.
- 11.10. The key challenge would be ensuring FOS has a large enough pool of staff who are sufficiently experienced in complex areas e.g. financial benchmarks, debt securities, derivatives etc. and this would probably be the most significant change required.
- 11.11. Risks of undertaking more complex cases would be an increase in the time taken to resolve complaints, the knock-on effect in terms of timeframes for those who have made more straightforward complaints and the overall impact on service levels.
- 11.12. Complex cases do not in themselves mean a longer dispute resolution process and providing additional resources are provided, these risks can be mitigated. Furthermore, those dealing with more straightforward cases are unlikely to be those who are dealing with highly complex issues so again, this is a further mitigation. Finally, complex cases will always remain a very small minority of the FOS caseload and as such the effects on the rest of the organisation are likely to be negligible.
- 11.13. In summary, it would appear that the risks are far outweighed by the benefits.

8. About AAT

- 8.2. AAT is a professional accountancy body with approximately 50,000 full and fellow members and over 90,000 student and affiliate members worldwide. Of the full and fellow members, there are more than 4,250 licensed accountants who provide accountancy and taxation services to over 400,000 British businesses.
- 8.3. AAT is a registered charity whose objectives are to advance public education and promote the study of the practice, theory and techniques of accountancy and the prevention of crime and promotion of the sound administration of the law.

9. Further information

If you have any queries, require any further information or would like to discuss any of the above points in more detail, please contact Phil Hall, AAT Head of Public Affairs & Public Policy at:

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⁴ 600% increase in court fees:

<https://www.theguardian.com/law/2015/mar/04/peers-vote-enhanced-court-fees-access-justice>

⁵ Barclays legal panel of 350 firms:

<https://www.lawgazette.co.uk/practice/barclays-hacks-back-legal-panel/5056134.article>