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Three peaks of consumer protection: Part two — intolerable harm

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This is the second article in a series designed to highlight how, across different financial services industries, operational resilience is an essential pathway to meet the requirements of the Consumer Duty and vulnerable customers frameworks.

This article explores the calibration of 'intolerable levels of harm,' which are a key component in the operational resilience framework (see SYSC 15A.2 — concepts of 'intolerable harm' affecting the UK financial system, or the orderly operation of the financial markets, will be considered elsewhere).

Essentials

Operational resilience applies to:

- enhanced scope SMCR firms (e.g., larger asset managers, consumer credit lenders or mortgage lenders, and investment or insurance intermediaries);
- banks;
- designated investment firms (e.g., investment banks);
- building societies;
- Solvency II firms (in short, insurers);
- UK RIEs (investment exchanges); and
- electronic money institutions, payment institutions or registered account information service providers.

A key issue for these firms is how they might calibrate a consumer's recoverability from harm: the operational resilience framework is intended to protect the interests of "any one or more of [a] firm's clients."

Headline position

The Financial Conduct Authority (FCA) has said (see FCA Policy Statement 21/3) that it did not propose to define 'intolerable harm' as it considers that what this constitutes will vary from firm-to-firm and across sectors. But it says that firms should have regard to various factors, including:

- the number and types (such as vulnerability) of consumers adversely affected, and nature of impact
- financial loss to consumers
- financial loss to the firm where this could harm the firm's consumers
- the level of reputational damage where this could harm the firm's consumers
- loss of functionality or access for consumers.

The FCA states that intolerable harm constitutes harm from which consumers cannot easily recover, for example, where a firm is unable to put a client back into a correct financial position or where there have been serious non-financial impacts that cannot be effectively

remedied.

"Intolerable harm is much more severe than inconvenience or harm. For both 'harm' and 'inconvenience' we would expect firms to be able to remediate any disruption so that no ill effects would be felt in the medium-/long-term by clients." [FCA]

The recognition of financial and non-financial loss creates a link to the compensation methodology used by the Financial Ombudsman Service (FOS).

Lessons from FOS

FOS operates pursuant to Part 16 of the Financial Services and Markets Act 2000 (FSMA) so that "certain disputes may be resolved quickly and with minimum formality by an independent person" (s225(1), FSMA).

In essence, all complaints must be "determined by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case" (s228(2) FSMA).

The Dispute Resolution: Complaints sourcebook (DISP) sets out details of FOS' approach.

DISP 3.7.2 provides that a money award may be such amount as the ombudsman considers to be fair compensation for one or more of the following

- financial loss (including consequential or prospective loss); or
- pain and suffering; or
- damage to reputation; or
- distress or inconvenience;

whether or not a court would award compensation.

FOS's website explains its approach to making money awards, including Compensation for distress or inconvenience:

"... we'll consider everything that's happened. If we decide to award compensation, we'll say what level of award would be fair overall to put right the impact a mistake(s) had on you as an individual.

The same mistake could have a different impact on different people. So we might award different amounts in similar cases."

The above point is worth noting when considering issues as to vulnerable customers — see for instance the example at the end of this article.

FOS says that it "may also take into account:

The time you took sorting out a mistake ... The impact on your health ...

Whether there was anything you could have done to reduce the impact of the business's mistake ... sometimes it wouldn't be fair to hold the business responsible for all the resulting effects on you ..."

"An award between £100 and £300 might be fair where there have been repeated small errors, or a larger single mistake, requiring a reasonable effort to sort out. These typically result in an impact that lasts a few days, or even weeks, and cause either some distress, inconvenience, disappointment or loss of expectation"

"An award of over £300 and up to around £750 might be fair where the impact of a mistake has caused considerable distress, upset and worry — and/or significant inconvenience and disruption that needs a lot of extra effort to sort out. Typically, the impact lasts over many weeks or months, but it could also be fair to award in this range if a mistake has a serious short-term impact."

"An award of over £750 and up to around £1,500 could be fair where the impact of a business's mistake has caused substantial distress, upset and worry — even potentially a serious offence or humiliation. There may have been serious disruption to daily life over a sustained period, with the impact felt over many months, sometimes over a year. It could also be fair to award in this range if the business's actions resulted in a substantial short-term impact."

"An award of over £1,500 and up to around £5,000 is appropriate where the mistakes cause sustained distress, potentially affecting someone's health, or severe disruption to daily life typically lasting more than a year. A mistake that has an extremely serious short- term impact could also warrant this level of compensation, but usually you'd expect some ongoing or lasting effects.

Examples at the higher end could include where the effects of the mistake are irreversible or have a lasting impact on someone's health or even resulted in a personal injury."

"Our highest awards, for the most extreme impact we see, go beyond £5,000."

On the basis of the above, it would seem that non-financial intolerable harm would certainly fall within the category of complaints that attract distress or inconvenience compensation in the £1,500 to £5,000 or higher range.

There is also a significant likelihood that complaints which attract distress or inconvenience compensation in the £750 to £1,500 range would also constitute non-financial intolerable harm. FOS gives an example of a recently-bereaved customer who experienced:

- continuing administrative errors and delays by an IFA during the transfer process for an investment portfolio
- this took over a year — when it should have only taken a matter of weeks and the customer had to chase things along and to clarify incorrect information sent to him, including a letter addressed to his late husband asking for a call, all of which caused unnecessary financial hardship.

This example illustrates the interaction of operational resilience and the Consumer Duty (with the latter's rule as to the avoidance of causing harm — see at PRIN 2A.2.8 R) and how firms need to envisage the operational resilience framework's implications for vulnerable customers — in this case, an individual struggling with grief.

While this example did not involve an operational resilience firm, it is worth remembering that FOS determinations (and FCA decision notices) give clear insights as to miscommunications and other customers service failings happening across the financial services markets.

Read part one →
/about/news-media/the-three-peaks-of-customer-protection

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