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15TH JANUARY 2024

FCA ANNOUNCES MEASURES FOR COMPLAINTS INVOLVING DISCRETIONARY COMMISSION ARRANGEMENTS

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On 11 January 2024 the FCA published changes to the way some car finance complaints are to be handled, specifically those relating to the amount a customer has been charged in interest as a result of Discretionary Commission Arrangements (DCA).
This is where the finance product is sold by a third party acting in the capacity of a Credit Broker, typically a car dealer. The lending organisation would offer a minimum base rate of interest to the credit broker who had the ability to increase the interest rate it would offer to the customer in return for enhanced commissions. In essence, the higher the interest rate sold, the more commission the credit broker would receive.

As part of its work in the car finance sector, the FCA banned Discretionary Commission Arrangements in January 2021, after which there was no relationship between commission received and interest rate.

So why has the FCA now stepped in, some 3 years later? Well, they have published that there has been a high number of complaints from customers about the rate they were charged on such loans that were arranged prior to the 28 January 2021 when the ban took effect. They are concerned that the credit providers (lenders) and those who sold the loans and set the interest rates (brokers / dealers) are rejecting most of these types of complaint insisting that the customer has not lost out and they have not acted unfairly.

Additionally there have been two recent Financial Ombudsman determinations which have overturned previously rejected complaints and have now found in favour of the customer in both cases which are subject to acceptance by the complainant before 10 February 2024.

So, there are two parts to my thoughts;

1. The FCA approach to pre January 2021 car finance complaints, and what this may mean for those involved
2. My thoughts on the two recent FOS determinations and what this offers by way of preparatory information

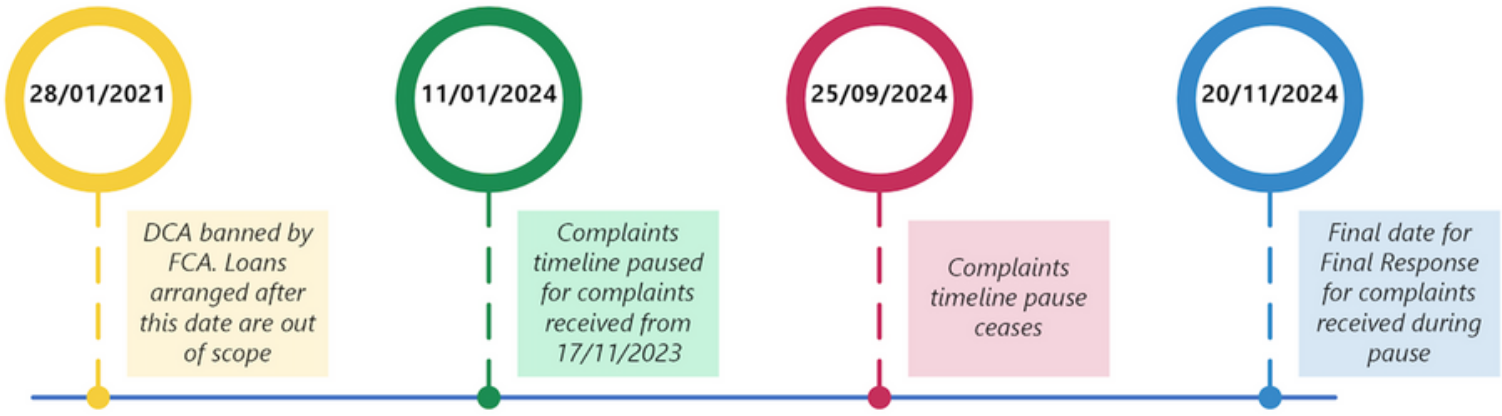
FCA approach to pre January 2021 car finance complaints

The FCA has made a significant decision in introducing a temporary change to the complaints handling rules without consultation. There are two key elements to these temporary changes:

1 For complaints received on or after 17 November 2023 and before 25 November 2024, the FCA have introduced a pause to the standard 8 week deadline for providing a final response, of 37 weeks. It is important to note that this is not a replacement to the 8 week deadline, but a pause. For example if the firm has been with a complaint for 3 weeks on 11 January 2024, the time limit for providing a final response is paused for 37 weeks until 25 September 2024, after which the firm will have a further 5 weeks (taking it to the full 8 weeks) in which to provide a final response.

For complaints received during the 37 week pause, ie after the 11 January 2024, firms will have until 20 November 2024 to provide their final response.

The FCA have indicated that this pause may be extended.



- 28/01/2021 – the ban on DCA schemes in motor finance takes effect. All loans arranged after this date are out of scope. This is a key milestone for firms when beginning to identify impacted account populations
- 11/01/2024 – complaints timeline paused for all complaints received from 17 November 2023, thus still within the statutory 8 weeks investigation period
- 25/09/2024 – complaints timeline pause ends. Complaints that were already in progress before 11/01/2024 now have the remainder of the original 8 weeks remaining in which the firm must issue its final response.
- 20/11/2024 – for complaints received between 11/01/2024 and 25/09/2024 the firm must issue its final response no later than 20/11/2024

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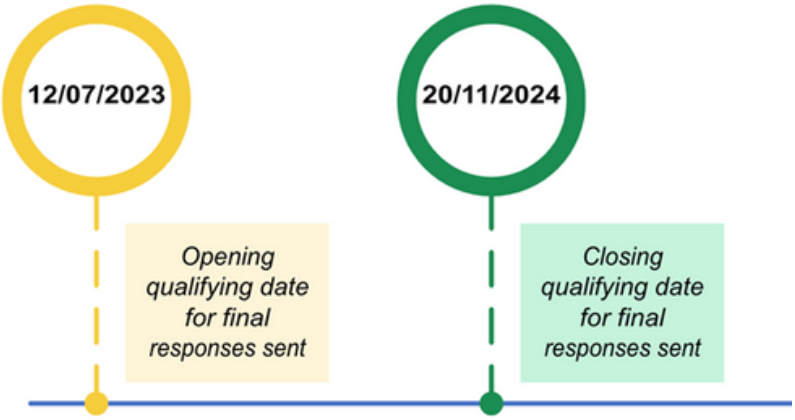
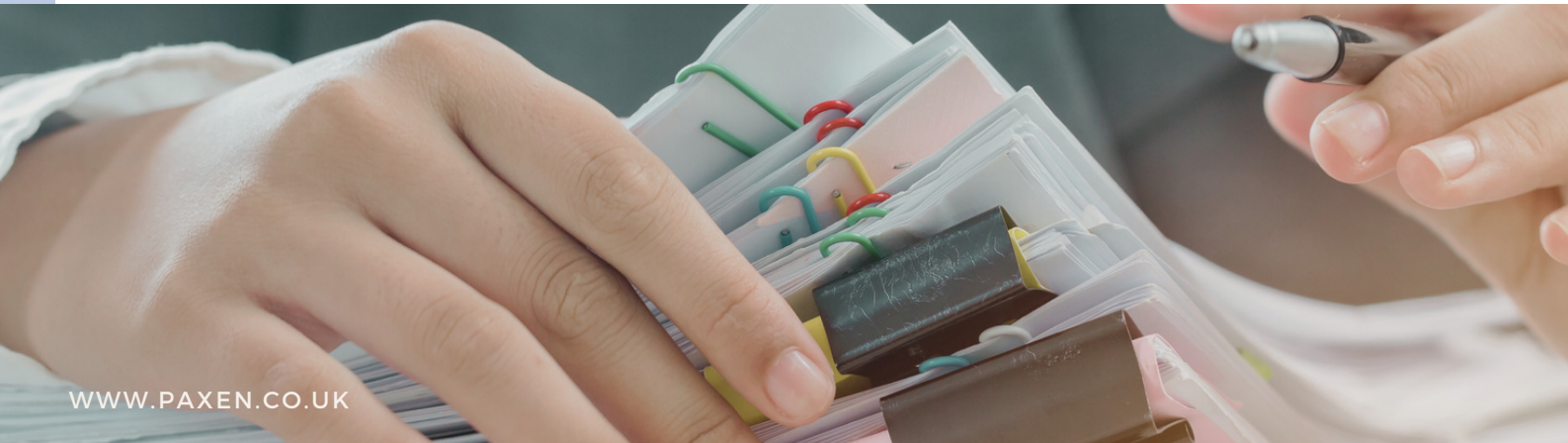
In addition to the pause as above, customers will now also have up to 15 months (as opposed to the usual 6) in which to refer a complaint to the FOS. The extension applies to complaints where a final response was sent between 12 July 2023 and 10 January 2024, or where a firm issues a final response between 11 January 2024 and 20 November 2024.



Complainants who are issued a final response between 12/07/2023 and 20/11/2024 have 15 months in which to refer their complaint to the FOS, rather than the usual 6.

This indicates to me that the FCA are anticipating a surge in the number of such complaints, following the FOS determinations. As such it is crucial for firms to being making preparations.



Recent FOS determinations

As part of the FCA announcement on 11 January 2024 it included two FOS determinations, both of which relate to complaints that were previously rejected by the respective firms, and both now overturned by the FOS, one with Black Horse, the other with Barclays Partner Finance (Clydesdale). I thought it useful to highlight the key points raised in both these determinations, and what expectation this sets for future such complaints (or claims).

a) Firstly on the interest rate. FOS have rejected representations from both respondents that the APR offered was that which represents the 'typical' APR of that time. The FOS have also rejected the argument that it is unreasonable for the borrower to expect to be awarded the minimum interest rate available, as this would not have been an option if DCA arrangements were not in place and the base interest rate would have been nearer to that which was offered anyway.

In both cases the Ombudsman Jeshen Narayanan is basing his determination for redress on the customer being provided the lowest possible rate.

b) The redress awarded is made up of two components being:

- The difference in payments made between the lowest possible rate and the rate offered under the DCA scheme
- 8% simple interest on each overpayment calculated from the date of the payment to the date of settlement

For accounts that are still running, the interest rate is to be adjusted to the equivalent lowest rate as it would have been, or make a payment to that effect to the complainant.

What is interesting in both these cases is, whilst being determined against the credit provider, the determination (and FCA) states in multiple places that it may be appropriate to raise a complaint to the broker as well, being the selling party.

Redress calculations

We have used example figures to give an approximate indication of redress using the determination from FOS.

Example – all figures are approximate and assume loan paid to full term.

Purchase price	£15,000
Deposit	£5,000
Term of loan	60 months
APR charged	8.9%
Monthly payments	£207.10
Base APR	3.5%
Adjusted monthly payments	£181.92
Total 'overpayment'	£1,510.80
Cumulative 8% for each payment made	£396.26
Total overpayment redress due	**£1,907.06**

This is a very specific example of redress calculation. Motor finance comes in many forms (HP, CS, PCP) with each having nuances affecting the redress calculation methodology. It also assumes that redress will be limited to a refund of the overpayments plus 8% simple interest for each monthly overpayment amount for the time elapsed since paid.

Impacted firms

I think the message is clear. It is now time to begin preparations for what will inevitably be a challenging time ahead. I do not think this will be limited to credit providers, far from it, but also dealers, brokers and other interested parties will also be pulled into the frame.

My own thoughts on this are:

- **Credit providers** – are obviously under the spotlight as the firm who has provided the credit at the rate offered, and paid the commission to the broker or dealer

- **Dealers / brokers** – as those who set the interest rate that was offered to the customer, made the sale, and received the commission

- **Appointed Representative Principal Firms** – as those responsible for the conduct of their AR firms, the AR principal should have robust monitoring and oversight in place to ensure good conduct and fair outcomes. Such arrangements as DCAs should have been approved and monitored by the AR Principal, being the entity that assumes regulatory and conduct responsibility for those who operate under its authorisation, and should have clear visibility of all commissions received for regulated activity of its ARs

Suggested next steps

The next steps will largely depend on what type of firm is involved. But the one thing that is clear is that there will be a diverse range of credit agreements included within the scope of DCA complaints.

The FCA are exercising their powers under Section166 of FSMA in which a suitably skilled person will provide a report to the FCA on the matters set out in a notice provided to the firm. It is likely that both dealerships and credit providers will shortly be in receipt of such notices (if not already), and preparation is key.

For all firms it is highly likely that there will be an increase in the level of complaints and claims relating to DCA agreements. As such we would strongly recommend taking the following pro-active actions:

- Undertake a full review of pre January 2021 agreements to identify the population of impacted accounts
- Begin categorising those impacted accounts into agreement type
- Preserve and prepare easy access to the account files and ringfence the impacted population in anticipation of the likely influx of DSAR requests (from both customers and CMCs)
- Identify and preserve data that clarifies and evidences the commission model and rates applied to the population, to avoid assumption or hypothetical calculations being used in the absence of robust data
- Review historic complaints data with a particular emphasis on DCA complaints and outcomes, and any that are with FOS
- Begin a detailed individual file review of all impacted accounts to identify the likely exposure, and to begin ringfencing possible redress funds
- Begin collating detailed MI and data on historic oversight and monitoring activity, KPIs, outcomes, and file checking / call monitoring. This is particularly important to AR Principals who's primary purpose is to take regulatory responsibility for the conduct of the broker / dealer firms operating under their regulatory umbrella
- Begin work in creating and end to end processe that can deal with the anticipated volumes of complaints, from receipt if the complaint through to liaison with the FOS if necessary.

How can we help?

We have a long standing background in the motor finance sector, and have supported some of the UKs largest firms, both dealers and credit providers, with compliance advisory and consulting work in the past decade.

We have supported countless firms in preparations for S166 review work, and have on occasion undertaken the skilled person reviews.

We have access to some of the best and most experienced consultant resource in the UK, specialising in the areas of motor finance, complaints, large scale redress and remediation, resource deployment, and managed service project delivery.

We are offering a free of charge consultation to firms impacted by these recent events, and look forward to speaking with you in due course.

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