



Bar Council response to the Claims Management Regulation – Consultation: Cutting the costs for consumers – Financial Claims consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Ministry of Justice consultation paper entitled ‘Claims Management Regulation – Consultation: Cutting the costs for consumers – Financial Claims’.¹

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar’s high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. The Bar Council has not undertaken independent research into the fees charged by Claims Management Companies (CMCs) and our comments are based on the evidence in the consultation paper.

5. The reason that CMCs have imposed a financial burden on lenders is because those lenders did not deal with their customers fairly. The Bar Council supports the aims of protecting consumers from high charges and reducing the level of speculative claims and nuisance advertising. However Payment Protection Insurance (PPI) and Packaged Bank Account (PBA) claims have arisen because of unlawful practices in relation to which consumers are entitled to redress. A fair balance needs therefore to be struck between

¹ Ministry of Justice (2016) Claims Management Regulation – Consultation: Cutting the costs for consumers – Financial Claims. Available at: <https://consult.justice.gov.uk/digital-communications/cutting-costs-for-consumers-financial-claims>

promoting consumers' rights and ensuring their protection. Too great a restriction on fees will drive CMCs out of business and limit consumers' access to compensation to which they are properly entitled. Similarly an unduly restrictive cap on costs risks impairing the quality of representation available to consumers.

6. There is a market for the services CMCs offer and a market rate of 25% to 30% of the damages in cases worth less than £2,000. The evidence does not demonstrate that that rate is excessive. The Bar Council is not convinced that a compelling case has been made for the imposition of a rate at all. If it has then either the rate set by the market itself should be adopted or further, robust research should be undertaken into what a fair and viable rate is.

7. The inclusion of VAT in any cap not only operates to lower the amount of return to the CMCs but also introduces unnecessary uncertainty into their calculations as VAT may be subject to variation after an agreement is entered into but before a bill is rendered. Combining this uncertainty with a cap on the amount that CMCs can charge, reduces the attraction of this business to CMCs. This will make it more difficult for consumers to find representation of quality.

8. The Bar Council has not identified a need to consider further fee controls in other regulated claim sectors but it repeats the view that the current regime for Damages-Based Agreements (DBAs) is not fit for purpose. The DBA regulations should be reviewed generally so that DBAs can become an effective vehicle for consumers making claims.

PPI / PBA Claims Only

Question 1. Do you have any comments regarding the proposals to implement:

- **A cap of 15% (Inc. VAT) of the net amount of the final compensation awarded with a single lender, where any final compensation amounts to less than £2,000?**
- **A cap of £300 for the total net value of relevant claims awarded with a single lender that amount to more than £2,000?**
- **A maximum cancellation fee of £300 where a consumer cancels their contract after the 14 day 'cooling off' period and providing an itemised bill to that consumer?**
- **A ban on any charges being imposed on consumers where there is no relationship or relevant policy between the consumer and a lender?**
- **A ban on receiving or making payment for referring or introducing a consumer to a third party?**

9. It is unclear what is meant by the reference to the "net" amount of the final compensation awarded. Further clarification is required as to how exactly this sum is constituted and how it differs from the gross sum of damages awarded to a claimant.

10. There is no evidence within the consultation paper as to the effect of the proposed intervention to impose a cap of 15% for claims worth less than £2,000. A cap at that level would restrict fees to 50%-60% of the current general rate. In most sectors that would result in a destruction of the market. That is not understood to be the intention behind the consultation. The Bar Council is not convinced that a compelling case has been made for the imposition of

a rate at all. If it has then either the rate set by the market itself should be adopted or further, robust research should be undertaken into what a fair and viable rate is.

11. For similar reasons the Bar Council queries the rationale for a cap of £300 on claims worth more than £2,000. Claims of this type are said to range vastly in value and complexity. Such a cap creates a perverse incentive for CMCs to reject complex and/or valuable claims. This in turn undermines the rights of those who have the most to lose.

12. The Bar Council queries the rationale for a fixed cancellation fee of £300. The objection is to the existence of a single figure, rather than the principle which it appears to represent. In the context of the Ministry of Justice's present consultation, a cancellation fee of £300 is equivalent to the highest level of costs which a CMC can expect to recover from any client with a PPI or PBA claim. In principle it seems fair that a CMC should be able to recover its full fees where a client terminates their relationship at the last possible moment. If, however, the level of recoverable costs is raised as suggested, then the figure of £300 is arbitrary and unfair as it does not reflect the value of the work done by the CMC prior to the termination of its agreement with the client.

13. The inclusion of VAT in any cap is problematic. It lowers the amount of return to CMCs and introduces unnecessary uncertainty into calculations as VAT may be subject to variation after an agreement is entered into but before a bill is rendered.

14. Where there is no relationship or relevant policy between a consumer and lender it is agreed that it would be appropriate to impose a ban on charges by the CMC. It is appreciated that there is an incentive for CMCs to engage in 'fishing expeditions'. We agree that CMCs should not be able to profit by targeting unwary consumers. The costs of investigation can properly be seen as an investment on the part of the CMC. This is particularly because CMCs appear to target consumers with the offer of investigation, and since minimal work is required to investigate the existence of a relationship.

15. The Bar Council makes the additional comment that the advertisement of CMCs' services is problematic. Consumers are targeted with an offer of 'free' money, rather than with an offer to claim sums to which they are entitled. This may well contribute to a general unwillingness to 'shop around', and to consumers' willingness to accept higher charges from CMCs. The regulator may wish to consider how CMCs' advertisements could be more appropriately formulated to ensure that consumers are better educated regarding their rights and the remedies available to them.

PPI / PBA Claims – Alternative Considerations

Question 2. Do you have any comments regarding the consideration of alternative proposals to implement:

- **A cap of 10% (Inc. VAT) of the net amount of the final compensation awarded with a single lender, where any final compensation amounts to less than £2,000?**
- **A cap of £200 for the total net value of relevant claims awarded with a single lender that amount to more than £2,000?**
- **A maximum cancellation fee of £200 where a consumer cancels their contract after the 14 day ‘cooling off’ period and providing an itemised bill to that consumer?**

16. The Bar Council’s answers reflect those to question 1 above.

Other Financial Claims (excluding PPI/PBA claims)

Question 3. Do you have any comments regarding the proposed cap of 25% (Inc. VAT) of any final compensation awarded for other claims in the financial claims sector?

17. It is unclear what is meant by the reference to the “net” amount of the final compensation awarded. Further clarification is required as to how exactly this sum is constituted and how it differs from the gross sum of damages awarded to a claimant.

18. The inclusion of VAT in any cap is problematic. It lowers the amount of return to CMCs and introduces unnecessary uncertainty into calculations as VAT may be subject to variation after an agreement is entered into but before a bill is rendered.

19. There is no evidence within the consultation paper as to whether a cap at the level of 25% is appropriate for all other claims in the financial claims sector. The fact that that is the current precedent set by DBA regulations for personal injury matters should not be taken as an indication that it is the appropriate figure for a wide variety of other claims in a different sector. No case is made for the need to set a rate in relation to these claims. Were there to be a compelling case, then, either the rate set by the market itself should be accepted or further, robust research should be undertaken into what a fair and viable rate is.

All Financial Claims

Question 4. Do you have any comments in relation to the proposed ban on upfront fees charged to consumers for any financial claim? Please provide views on any particular risks or benefits to the industry or consumers in relation to these questions. We would also welcome any general views or suggested amendments with supporting evidence where appropriate.

20. The Bar Council supports the proposed ban on upfront fees charged to consumers for any financial claim in which payment is sought as a percentage of the eventual recovery.

General Analysis and Rationale

Question 5. In relation to the analysis and rationale set out regarding these proposals, is there any information that has not been taken into account that should have been?

21. The Bar Council has not undertaken independent research into the fees charged by CMCs and our comments are based on the evidence in the consultation paper.

Impact Assessment

Question 6. Do you have any evidence relating to the total volume of claims made by CMCs?

22. No.

Question 7. Do you have any evidence relating to the average amount of consumer redress per case?

23. No.

Question 8. Do you have any evidence on the number of cancellations which occur for work completed after a 14 day “cooling off period”?

24. No.

Question 9. Do you have any evidence on how much a reduction in ‘nuisance’ calls will benefit lenders and/or the Financial Ombudsman?

25. No.

Question 10. Do you have any evidence on how much a reduction in ‘speculative’ claims would save lenders and/or the Financial Ombudsman?

26. No.

Other Regulated Claims Management Sectors

Question 20. Is there a need to consider further fee controls in other regulated claims sectors such as Personal Injury or Employment in future? Please provide information to support a case for the proposed restrictions to be widened or, alternatively, remain focused within the financial claims sector alone.

27. The Bar Council has not identified a need for consider further fee controls in other regulated claim sectors but it repeats the view that the current regime for Damage Based Agreements is not fit for purpose. The DBA regulations should be reviewed generally so that DBAs can become an effective vehicle for consumers making claims.

**Bar Council
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