FOS Investigator Practice and Statutory Fairness

Cover note — how to read this paper

This paper is written as a regulation-grounded analysis of investigator-stage practice at the Financial Ombudsman Service (FOS). It assesses whether the investigator stage is operating consistently with the statutory and regulatory design set by Parliament under the Financial Services and Markets Act 2000 (FSMA) and the FCA Handbook (DISP).

What this is: a procedural and reasoning audit. It focuses on recurring reasoning patterns, language use, and evidential assumptions that may indicate drift from an inquisitorial, fairness-based model.

What this is not: an allegation of bad faith by individual investigators, nor a claim that all cases are mishandled. The concern is structural: small, repeatable reasoning shortcuts can shape outcomes at scale because most complaints end at investigator stage.

How to use it: readers seeking legal/regulatory alignment should start with the FSMA and DISP sections. Readers focused on operational practice should review the mapped failure modes and the compliance checklist. MPs and policy teams may wish to use the scrutiny questions as a ready-made inquiry framework.

When Fairness Becomes Deference

How FOS Investigator Practice Is Drifting from Statute — and How to Restore Alignment

Introduction

The Financial Ombudsman Service (FOS) was established by Parliament as a deliberate alternative to adversarial litigation. Its purpose was not to replicate the courts in simplified form, but to provide an accessible, inquisitorial, and fairness-based mechanism for resolving disputes between consumers and regulated financial institutions.

That design choice was grounded in a clear legislative understanding: consumers and financial firms do not meet on equal terms. Firms possess institutional resources, regulatory expertise, and control over records. Consumers do not. The Ombudsman scheme was therefore constructed to rebalance that inequality, placing responsibility on the decision-maker to investigate actively and to determine outcomes by reference to what is fair and reasonable in all the circumstances, rather than by strict legal proof.

The investigator stage is central to this architecture. It is where the majority of complaints are resolved and where statutory intent must be given practical effect. Yet mounting evidence suggests that investigator practice is drifting away from the inquisitorial, consumer-protective model envisaged by Parliament, and towards a mode of reasoning that is adversarial in effect and institutionally deferential.

This article examines that drift through the lens of FSMA 2000, the FCA Handbook, and DISP, maps specific failures to observable investigator language, and sets out parliamentary scrutiny questions and a compliance checklist capable of restoring alignment with statute.

The Statutory and Regulatory Framework: What Investigators Are Meant to Be Doing

FSMA 2000: Fairness as the Governing Standard

Section 228(2) of the Financial Services and Markets Act 2000 requires that complaints be determined by reference to what the Ombudsman considers to be “fair and reasonable in all the circumstances of the case.”

This is not a rhetorical flourish. It is the constitutional foundation of the scheme. Parliament deliberately rejected a model based on burdens of proof, evidential admissibility, or binary legal liability. Instead, it authorised evaluative judgment, informed by regulatory context, industry standards, and the realities of consumer–firm relationships.

Although the statute refers to “the Ombudsman”, investigator-stage decision-making is not legally or functionally separate from that statutory role. Investigators exercise delegated authority and resolve the overwhelming majority of complaints. If fairness-based reasoning is absent at investigator stage, the scheme is misaligned with FSMA in practice, even if compliant in form.

DISP: The FCA’s Operationalisation of Parliamentary Intent

The FCA’s Dispute Resolution rules (DISP) are not optional guidance. They are the mechanism through which FSMA’s fairness mandate is made operational.

DISP 3.6.1R reiterates the statutory requirement to decide complaints by reference to what is fair and reasonable, without importing adversarial evidential rules.

DISP 3.6.4R requires decision-makers to take into account:

• relevant law and regulations,

• regulators’ rules and guidance,

• industry codes and standards, and

• good industry practice at the time.

This makes clear that fairness is normative and contextual, not merely procedural. Internal firm processes are relevant but never determinative.

DISP 3.5 grants the Ombudsman Service powers to obtain information from firms and to draw conclusions where information is missing or not provided. These powers exist because evidential imbalance is structural, not accidental.

Taken together, FSMA and DISP establish an inquisitorial obligation: investigators must actively investigate, interrogate firm conduct, and resolve uncertainty in a manner consistent with regulatory responsibility and consumer protection.

How Practice Drifts: Failure Modes Mapped to Investigator Wording

Procedural drift rarely announces itself openly. It emerges through language, assumptions, and reasoning patterns. The following failure modes are repeatedly observable at investigator stage and are directly inconsistent with FSMA–DISP logic.

Failure Mode 1: Reintroducing a Burden of Proof on Consumers

Regulatory position:

Neither FSMA nor DISP places a burden of proof on consumers.

Common investigator wording:

“You haven’t demonstrated that this occurred.”

“There’s no evidence to support your recollection.”

“I can’t see anything to show the firm acted unfairly.”

Why this conflicts with FSMA/DISP:

This language imports adversarial logic into a scheme designed to exclude it. The inquiry shifts from what is fair to what the consumer can prove, directly undermining FSMA s.228 and DISP 3.6.1R.

Failure Mode 2: Treating Firm Accounts as the Default Factual Position

Regulatory position:

Firms are regulated entities with documentation obligations; consumers are not.

Common investigator wording:

“The business says it followed its process.”

“I have no reason to doubt the firm’s account.”

“The firm’s explanation seems reasonable.”

Why this conflicts with DISP:

Assertions are treated as evidence. Default credibility is assigned to institutional narratives. This reverses the evidential logic of DISP 3.5, which assumes firms should be able to evidence their conduct and should not benefit from evidential gaps.

Failure Mode 3: Treating Missing Firm Evidence as Neutral

Regulatory position:

DISP empowers FOS to draw conclusions where information is missing.

Common investigator wording:

“There’s insufficient evidence either way.”

“Without the call recording, I can’t be sure.”

“I can’t say what was discussed.”

Why this conflicts with regulatory logic:

Uncertainty is resolved against the consumer, even where the firm was responsible for record-keeping. This rewards poor documentation and undermines regulatory incentives.

Failure Mode 4: Conflating Process Compliance with Fair Outcomes

Regulatory position:

DISP 3.6.4R requires consideration of fairness and good practice, not mere process adherence.

Common investigator wording:

“The firm followed its procedures.”

“The correct process appears to have been applied.”

“The firm acted in line with its policy.”

Why this conflicts with DISP:

Internal process becomes a proxy for fairness. Consumer impact and regulatory context are sidelined.

Failure Mode 5: Opaque or Conclusory Reasoning

Regulatory position:

Procedural fairness requires intelligible reasoning.

Common investigator wording:

“Having considered everything, I don’t think the complaint should be upheld.”

“Overall, I agree with the firm.”

Why this conflicts with inquisitorial justice:

Informality becomes opacity. Consumers cannot understand or challenge conclusions, increasing attrition and undermining access to justice.

Why Investigator-Stage Drift Cannot Be Cured by Escalation

It is sometimes suggested that weaknesses at investigator stage are mitigated by the availability of escalation to an ombudsman. This view misunderstands both the operation of the scheme in practice and the constitutional role of the investigator stage.

In reality, investigator-stage outcomes are effectively final for a substantial proportion of complainants. Escalation requires awareness of the right to challenge, confidence in doing so, and the resilience to continue engaging with a process that many consumers already experience as technical, authoritative, and institutionally weighted. Attrition is therefore not incidental but structural.

Ombudsman intervention corrects only a subset of cases — disproportionately those brought by consumers who are more persistent, confident, or well-resourced. Where procedural drift occurs at investigator stage, it operates invisibly and at scale, shaping redress outcomes without public decisions, without published reasoning, and without effective external scrutiny.

For that reason, consistent misapplication of inquisitorial principles at investigator stage cannot be treated as a minor operational issue. It has systemic consequences for access to justice and for the distribution of redress under a statutory scheme that Parliament intended to function as a genuine alternative to litigation.

Questions MPs Should Ask FOS Leadership

To assess alignment with FSMA and DISP, Parliamentary scrutiny should focus on operational reality:

Burden of Proof

• What guidance exists to prevent investigators from using burden-shifting language?

• How is this monitored and enforced?

Evidential Imbalance

• What training do investigators receive on resolving uncertainty where firms control records?

• Are adverse inferences encouraged where firms cannot evidence their position?

Use of Firm Assertions

• How does FOS ensure process explanations are not treated as evidence of fairness?

Consistency and Quality Assurance

• How often are investigator decisions reviewed where cases do not escalate?

• How frequently do ombudsmen overturn investigator reasoning, and why?

Attrition and Access to Justice

• What proportion of complainants disengage after an adverse investigator view?

• What analysis has been conducted on the role of investigator language in discouraging escalation?

A Compliance Checklist Investigators Should Be Using

To operate consistently with FSMA and DISP, investigators should be able to answer yes to the following before issuing a view:

Investigation

• Have I actively sought and tested evidence, rather than relying on submissions?

• Have I considered why evidence may be missing and who bore responsibility?

Evidential Assessment

• Have I avoided placing a burden of proof on the consumer?

• Have I treated firm assertions as claims requiring scrutiny, not as facts?

Fairness Analysis

• Have I assessed substantive consumer impact, not just process compliance?

• Have I considered industry standards and regulatory expectations at the time?

Reasoning Transparency

• Have I explained why I accept one account over another?

• Could a lay consumer understand my reasoning?

Procedural Justice

• Have I resolved uncertainty fairly, not conveniently?

• Have I avoided adversarial language inconsistent with an inquisitorial scheme?

Conclusion and Parliamentary Accountability

The Financial Ombudsman Service remains a cornerstone of UK consumer protection. But its legitimacy depends on how statutory power is exercised in practice, not on intention alone.

FSMA and DISP establish a clear, fairness-based, inquisitorial model. When investigator practice drifts towards adversarial reasoning, institutional deference, and evidential burden-shifting, that model is hollowed out — often invisibly, and at scale.

Where a statutory scheme systematically operates in a manner inconsistent with its enabling legislation and regulatory framework, Parliamentary scrutiny is not discretionary but constitutionally necessary. The issue raised here is not whether individual decisions are right or wrong, but whether the investigator stage, as a system, continues to give practical effect to the fairness-based model Parliament deliberately chose.

The remedy is not radical reform. It is fidelity to statute: disciplined reasoning, proper treatment of evidential imbalance, and transparent engagement with fairness.

Parliament created an alternative to litigation.

Ensuring that the investigator stage still operates as such is not optional — it is a statutory obligation.