

Final report by the Complaints Commissioner dated 2nd October 2017

Complaint number FCA00117

The complaint

1. On 6th November 2015, you first approached me alleging that the Financial Conduct Authority (FCA) was failing properly to supervise payment institutions, (in particular their advertising material) and that the FCA had rejected your complaint. Following discussions between my office and the FCA, in February 2016 the FCA accepted that it should have investigated the complaint, and took it back to do so.
2. On 21st November 2016, the FCA issued its decision letter on the complaint. Following further prolonged discussions and exchanges between you and the FCA, on 29th August 2017 you asked me to investigate your complaint.
3. I have carefully reviewed the papers sent to me by you and by the regulator. I have also considered the points you made to me in your letter of 29th September 2017, in response to my preliminary report.

What the complaint is about

4. The background to your complaint was set out in the FCA's decision letter of 21st November 2016 as follows:

On 5 February 2015, you sent a letter to the Payment Services team mailbox. In the letter, you stated you wished to draw the FCA's attention to a number of practices by authorised firms in the Payment Services industry which you believe were misleading to consumers and materially damaging to your business.

You logged a formal complaint with the FCA in June 2015. You alleged that the FCA had not acted on the information you had provided. Our initial investigation found that FCA Supervision had considered the information that you had provided to find out more about the issue and had taken steps to understand it in more detail. We therefore did not uphold this element of your complaint. We did, however, uphold the element relating to your communications with the Payment Services team as we found that there had been delays in responding.

You challenged our decision not to uphold your complaint about FCA Supervision. During our communications with the Complaints Commissioner, it became clear that you had been in direct contact with [an officer of the FCA], and had been provided with information that we had not been made aware of during our investigation. As a result of this new information your complaint was re-investigated and we upheld your allegation of failure by Supervision. It had become clear that Supervision could not have taken appropriate action due to the fact that they were under the mistaken impression that your concerns were outside of the FCA's regulatory remit. Supervision agreed to liaise with you directly on the matters relating to the Payment Services Directive to see if and how these issues could be resolved.

5. The decision letter went on to deal with your complaint that, after the FCA had determined that it did have jurisdiction over the matters which you had raised, the

FCA failed to take adequate steps. In summary, the seven main elements of your complaint were:

- a. The FCA failed to take substantive or decisive action to stop misleading advertising;
- b. The FCA had incorrectly tried to push responsibility to the Advertising Standards Authority;
- c. The FCA (unlike the Competition and Markets Authority) failed to take your allegations of anti-competitive behaviour seriously;
- d. The FCA should not have advised you that the matters about which you complained were for their Financial Promotions Team, since in your view they were symptomatic of non-compliance which raised questions of misconduct and authorisation;
- e. You received conflicting information about the speed with which the FCA could act in this matter, and about the retrospective sanctions which might be available;
- f. A number of your emails were either not acknowledged, or responded to inadequately;
- g. You were unhappy with the conduct of a particular member of the FCA's staff.

What the regulator decided

6. The FCA upheld element f above, and apologised for three occurrences of failure to respond. It did not uphold the other elements of your complaint, on the grounds that, once the FCA had corrected the original error about jurisdiction, it had taken a number of steps to address the problems which you had drawn to its attention, and some of its actions were continuing. The FCA also said that it had worked closely with the Advertising Standards Authority; it had looked at the question of anti-competitive behaviour properly, but had determined that action on that was not warranted for the time being; the Financial Promotions Team had properly played a key role in the matter but had worked with colleagues in supervision and enforcement; and that the information on speed and retrospective sanctions had been correct.

Why you are unhappy with the regulator's decision

7. In your letter of 29th August 2017 to me, you say:

The only action that the FCA has taken in the last 18 months is a handful of weakly-worded and ineffectual emails and announcements which have simply been ignored by the firms concerned. The latest email of 31 July is in much the same vein and has also had no effect whatsoever. It is clear that the FCA has no intention of changing its behaviour, and its overriding aim appears to be to avoid taking regulatory action by obfuscating, delaying, and diverting attention to changes in future rule-making powers.

In addition, this latest announcement strongly implies that firms which comply now will be able to continue to operate in the industry without retrospective redress or punishment from the FCA. I do not accept that this is effective regulation.

Preliminary points

8. As is clear from this summary, your complaint has a long and complex history. In normal circumstances, I would simply review the FCA's decision letter, and the events leading up to it. However, since your complaint encompasses what you see as the FCA's failure to take action *since* the decision letter, and since that is clearly a continuation of the matters which gave rise to the original complaint, I have proposed, and you and the FCA have agreed, that I should review all the events from February 2015 to August 2017.
9. Secondly, in your letter of 29th September, you emphasised that the matter which you wished me to consider was the FCA's alleged failure to take sufficient regulatory action "to have those practices which disadvantage consumers stopped so that my and other compliant firms can compete fairly". I have, nonetheless, also covered the complaint process points in this report, since it is important that shortcomings in complaints handling are properly reported upon.

My analysis

10. You have already received an apology from the FCA for the initial mishandling of the information which you supplied in February 2015. I have looked carefully at the records of what happened. I would add two things to what has already been said.
11. The first is that the mishandling of the information is suggestive of a tendency – on which I have commented before – for the FCA to look for jurisdictional reasons not to act, rather than to start with an assessment of whether there is a problem which needs to be confronted. It was only after I posed some questions to the FCA in 2015 that it revised its view.
12. The second is that the record shows that the processing of the information which you supplied was muddled – the information was split up, and passed from team to team, and the initial decisions not to act were not entirely driven by jurisdictional questions. It is not clear that anyone properly grasped the import of what you were supplying. That was, of course, rectified subsequently, but it illustrates the dangers in a large regulatory organisation that information and responsibilities become fragmented.
13. I turn now to what happened *after* the FCA had acknowledged that it did have jurisdiction and needed to address the issues which you had raised. The first thing I should say is that there was considerable activity from spring 2016 onwards. The decision letter of 21st November 2016 described this in some detail.
14. While some of the material which I have seen is confidential, since it relates to the possibility of regulatory action, the key points which I would highlight are:
 - a. An all-firms email in May 2016 highlighting the FCA's concerns about the misleading use of currency converter tools and other promotional material, with a warning that the FCA was monitoring the issue and would take regulatory action for non-compliance;
 - b. A review carried out in the summer 2016 to test compliance;
 - c. An update in August 2016, reporting that the FCA was targeting certain firms which appeared not to be complying;

- d. Engagement with the Competition and Markets Authority, the Advertising Standards Authority, and the key trade bodies;
 - e. A personal update to you from the Chief Executive of the FCA in August 2016 and again in August 2017;
 - f. Proposals with HM Treasury to extend the FCA's conduct rule-making powers in relation to firms covered by the Payment Services Directive;
 - g. Continued monitoring and consideration of regulatory action.
15. I am also satisfied, from the records which I have examined, that appropriate regulatory action is being considered and, where possible and justified, pursued.

My decision

16. It is clear that the FCA's initial response to the information which you supplied was inadequate, and that there were some shortcomings in responses to correspondence. You have already received an apology for that. I have added some comments in paragraphs 11 and 12 above.
17. In essence, your continuing complaint against the FCA is that the steps which it has taken may be welcome, but they are insufficient, both because they have not eliminated the behaviour which you referred to the FCA, and because retrospective action is required for some of the behaviours to which you have drawn attention.
18. It is a matter of judgement whether or not the FCA could and should take further action, but it is not for this Complaints Scheme to second-guess regulatory decisions. I recognise that you feel strongly that action on authorisations or other sanctions is required. You say that

I have given the FCA more than enough time to bring an outcome to the complaint by stopping the practices. I emphasise, more than two years later It has singularly failed to do so.

19. Having looked at the documents (including the confidential material) with care, is that I am satisfied that the FCA has conscientiously addressed this issue, and is continuing to do so. I note also that you have received a considerable amount of explanatory material from the FCA. While you clearly believe that the FCA should have taken stronger action more quickly, I do not consider that the FCA has failed to respond to your concerns.
20. I note that you say that you consider that if the FCA does not take further regulatory action, that would be grounds for Judicial Review. That is a matter for the courts, not for this Scheme.
21. In all the circumstances, I do not uphold your complaint. The matters which you have raised are matters of considerable importance, but I am satisfied that the FCA's response has not been unreasonable.

Antony Townsend

2nd October 2017