

23 May 2018

Final report by the Complaints Commissioner**Complaint number FCA00431***The complaint*

1. On 6 February 2018 you asked me to investigate a complaint about the FCA. I have carefully reviewed the papers sent to me by you and by the regulator. My preliminary report was issued on 29 March 2018. Both you and the FCA have had the opportunity to comment on it and you have also had the opportunity to comment on further information the FCA submitted in response to my preliminary report. My final report takes account of all the comments made.

What the complaint is about

2. On 18 September 2017 you complained to the FCA about the time taken to process your firm's Consumer Credit Licence application and consequent loss of business, worry and stress. The FCA divided your complaint into the following three elements:
 - a. *You are unhappy with the FCA's handling of your firm's application for authorisation. You expected your application to take six months, instead a decision was issued two and half years after submission.*
 - b. *In processing your application, you have found the FCA's communication to be poor.*
 - c. *You also believe the FCA's understanding of your business was lacking and their overall conduct during the authorisation process to be unhelpful.*

What the regulator decided

3. On 2 February 2018 the FCA complaints team told you that it had not upheld Elements 1 and 3 and had partly upheld Element 2.
4. The FCA's complaint response makes the following points (summarised):
 - a. Between receiving your application and approving it, the FCA undertook a review of debt management firms which led to the FCA having wide-ranging concerns about the sector as a whole. This meant applications for authorisation from debt management firms were subject to greater scrutiny.
 - b. At the time it was assessing your application the FCA encountered problems with reviewing the information you provided in a timely manner. This meant that repeat information requests were made to ensure up to date information was assessed. This was a generic problem and not specific to your firm. To avoid this problem, the Authorisations division changed its way of working. Certain cases were prioritised and a virtual team set up to spread the review of individual firm's case files across team members so they would be reviewed promptly after they were provided. Between April and September 2016 this resulted in a period of inactivity on your

application as a decision was made for your case officer to assist on other applications.

- c. Apart from this, your file was being worked on and progressed. The FCA considers that because your firm had interim permission throughout your application process you were able to trade and provide debt management services. The FCA concluded that, whilst it recognised why you were aggrieved with the time taken to process your application, it was not “unnecessarily long” and the FCA was appropriately progressing your application where possible. It did not uphold this element of your complaint
5. However, the FCA went on to partly uphold Element 2 of your complaint (poor communication) because:

...on 23 March 2016, your case officer informed you that they were leaning towards recommending that your application is refused due to concerns such as inadequate assessment of customer circumstances, advice not in best interest of customers, etc. After a brief exchange in the following days about whether you wished to proceed with your application, the next contact you received was on 9 September 2016 where you were told that your application was still under assessment. There was no mention of the concerns they had previously raised nor was there an explanation about whether they were still minded to refuse your application. My expectation after such a delay would have been for the FCA to have provided you with a clear explanation about where your application was in terms of a decision being made and any changes to their approach from their last contact with your firm. I appreciate that due to policy reasons, the FCA is unable to disclose publicly its internal procedures but overall I feel further information could have been provided to you about the processing of your application. Due to the reasons above, I have partially upheld this element. Overall, I am content with the FCA’s communication but I believe they could have provided you greater clarity following the inactivity in the handling of your case.

6. Furthermore, in response to Element 3 of your complaint, the FCA said: *I appreciate from your viewpoint, the delay in issuing a decision and the multiple requests for similar information may have suggested that a lack of care on the FCA’s behalf but these actions were necessary and could not have been avoided.*
7. The complaint response said that overall it believed the FCA’s handling of your application was appropriate, had not been unnecessarily delayed, and that it would not be awarding you any compensation.

Why you are unhappy with the regulator’s decision

8. You are dissatisfied with the FCA’s response because you consider that the information you supplied to the FCA complaints department amounted to substantial evidence that could only result in your complaint being upheld, an apology offered and compensation granted. You believe that the response you have received from the Complaints Team shows that your complaint has not been taken seriously and that the Team has not satisfactorily addressed the issues you highlighted.
9. You are also dissatisfied with the time taken by the FCA to respond to your complaint and its failure to keep you informed or meet its own timescales.

My analysis

Substantive complaint

10. The FCA's complaint response shows that there is no dispute that your application took two and a half years to process. Your authorisation case was opened on 30 January 2015 and closed on 30 June 2017.
11. The current FCA guidance (dated February 2016) states that the FCA will assess Consumer Credit Licence applications within "6 months of receiving a complete application or 12 months of receiving an incomplete application (or six months from when an incomplete application becomes complete)". These are statutory timescales set out in the Financial Services and Markets Act 2000 (FSMA). There is a disagreement between you and the FCA as to whether your application when submitted was complete or incomplete. It is not possible for me to resolve this disagreement under the Complaints Scheme as it relates to the application of FCA rules that would require legal interpretation. However, even if I accepted the FCA's view that the relevant deadline was 29 January 2016, the actual time taken breached the statutory timescales by 18 months.
12. The FCA's own complaint response shows that your case was not one of those prioritised and indeed that it was deliberately put on hold for six months. The FCA therefore clearly failed to meet the statutory timescales in your case, as a result of a conscious decision; nor were you kept informed or provided with any reasons for the delay. I do not accept that the repeat requests for information were "unavoidable". Some of the requests were directly caused by the FCA's own delays. Others were caused by the fact that the FCA was changing its internal requirements as it developed its consumer credit processes. Had your application been processed in a timely manner the need for at least some of these requests might not have arisen.
13. Furthermore, I am not persuaded that the FCA complaint response shows proper regard to the effect on your firm of the delay between April and September 2016. So far as you knew, in March 2016 the FCA was 'minded to refuse' authorisation. This is something that the FCA was entitled to do; however, I accept your argument that this, combined with the FCA's decision to then press 'pause' on your application, left you in limbo. I also accept your argument that, with the information that you did have, the delays were likely to have affected your ability to grow your business, whatever interim permissions you held, even if it was strictly your decision not to trade.
14. In response to my preliminary report the FCA has expressed the view that its admitted delays did not cause your firm financial harm because you continued to trade in line with your intentions and the Interim Permission held allowed you to do so, even after the FCA had verbally communicated that it was minded to refuse the application. The FCA's points in support of this view, and your response, are set out in Annex 1 to this report (redacted in published version of this report).
15. As it happens your application was later granted. I am not clear what policy reasons there are which mean that the FCA was unable to keep you informed or explain the reasons for its failure to meet its own timescales. Having partly upheld this element of your complaint, I am surprised that the FCA complaint response did not go on to discuss the effect on you of this instance of 'poor communication',

- nor the impact on you of a six-month period of deliberate inactivity taken in the context of the overall time to process your application.
16. In my view, the FCA's complaint response was seriously inadequate. It admits to one communications error when an objective assessment of the documents shows that:
 - a. The application was very seriously delayed, as a result of deliberate decisions made by the FCA;
 - b. The FCA staff handling your application did not explain to you what was happening;
 - c. There is no evidence that, either during the application process or in the investigation of the complaint, there was proper regard for the effect of these delays upon the applicant;
 - d. It appears that statutory deadlines were broken as a direct result of the FCA's decisions, but this was not acknowledged in direct communications to firms.
 17. In response to my preliminary report, the FCA requested that I reconsider my analysis. It supplied further information that it says was not uncovered by the Complaints Team's investigation and which meant I did not receive the 'full picture'. I have considered carefully the FCA's response. The FCA's arguments rely upon the fact that the FCA issued some general data bulletins which reported that there were delays in the processing of applications; argue that the FCA was facing conflicting priorities; and seek to demonstrate that the delays had no effect on your business (see Annex 1 – redacted in published version of this report).
 18. The FCA's arguments have not persuaded me to change my conclusions substantially. It is obviously of concern that the FCA has issued a complaint decision that it now acknowledges was inadequate. However, I am more troubled by the FCA's apparent lack of insight into the impact on you of its shortcomings in this case.
 19. In my view you experienced both unreasonable delay and a lack of care by the FCA, amounting to maladministration. Overall, I agree with you that the complaint response, and the subsequent representations made by the FCA, do not appear to have understood or taken your concerns sufficiently seriously. Instead of proposing solutions to the concerns you raised, the FCA's arguments come across as an attempt to explain away the failings identified.
 20. I therefore uphold your substantive complaint and I consider that it would be appropriate for the FCA to apologise to you and to offer you an ex gratia payment. The FCA has already accepted the recommendation in my preliminary report that they should offer to pay you £150 for the poor handling of your complaint, and has offered a further £150 for the poor communication during the handling of your application, but I do not consider that that goes far enough. Even if I were to accept the FCA's arguments in Annex 1 about the effect upon your business (and I am not persuaded), in my view there would still be a case for a more substantial payment to reflect the very poor handling of your application.
 21. In your original complaint you asked the FCA for compensation of £400,500 for lost business arising from the delays in processing your application. In its letter to

you dated 5 October 2017, the FCA told you the following about its approach to compensation:

I will take this into consideration when conducting my investigation however I would like to make you aware Parliament has afforded the FCA immunity from liability in damages, as set out in paragraph 25 of schedule 1ZA to the Financial Services and Markets Act 2000 (as amended), This immunity applies except where it is shown by the claimant that the FCA has acted (or failed to act) in bad faith or if the claimant has shown that the FCA has acted in a way which is incompatible with its obligations under the Human Rights Act 1998.

In considering whether compensation is appropriate under the Complaint Scheme based on a “lack of care”, for example, by the FCA, we would consider whether such a payment would contradict Parliament’s intention when it provided that immunity. We must also consider that ultimately the cost of any compensation payment is borne by financial services firms through their payment of FCA fees, and it is therefore ultimately paid for by consumers.

22. Although this is an accurate statement of the FCA’s legal liability for damages, it is not in my view an answer to assessment of ex gratia payments under the Complaints Scheme. Paragraph 6.6 of the Scheme states that:

6.6 Where it is concluded that a complaint is well founded, the relevant regulator(s) will tell the complainant what they propose to do to remedy the matters complained of. This may include offering the complainant an apology, taking steps to rectify an error or, if appropriate, the offer of a compensatory payment on an ex gratia basis.

The FCA should not use its legal immunity to avoid making any compensatory payments at all under the Complaints Scheme. Modest payments for error, such as maladministration and delay, are clearly envisaged under the Scheme, and are the mark of good practice in complaints handling. I therefore **recommend** that the FCA once again reconsiders its position, in the light of this report, and offers you an apology and an ex gratia payment for the serious delays in the handling of the application and the effect this may have had upon your business.

I have previously indicated to you that payments under the Complaints Scheme are unlikely to be of the size awarded by the courts. In response to my preliminary report the FCA proposed that, “*in light of our findings that Authorisations could have better communicated with [your firm] after it verbally confirmed it was minded to refuse, we feel an additional payment of £150 should be offered to [your firm] to reflect this lack of service*”. This proposal takes no account of my analysis above (substantially unchanged from my preliminary report) and the amount suggested is wholly inadequate. Since you and the FCA remain far apart on this issue, particularly on any loss of income, and in order to assist both parties, it is my view that the starting point for an ex gratia payment should be at least £5000 for the delay and maladministration I have identified, taking into account: the 18-month delay beyond the latest possible statutory deadline of 29 January 2016; the FCA’s decision to take no action on your case for six months; the FCA’s failure to communicate between April and September 2016; the consequent repeat requests

for information; and the distress and inconvenience caused to you. If an agreed resolution on an additional amount to reflect any loss of income cannot be reached I **recommend** that mediation be considered with Annex 1 as the baseline for this.

Complaints handling delays

23. You complained to the FCA on 18 September 2017. The FCA told you that its target date for issuing its decision was 10 November. This was missed due to the complaints handler's illness and you were informed of this by email on 13 November, when you were told you would receive another update in four weeks' time. You replied to this email pointing out that this was considerably beyond the timescale you were expecting and asking to be kept informed of progress.
24. You heard nothing further and asked for an update on 12 December when you received a reply saying that the complaints handler had a spike in his workload and was not in a position to say when the decision would be issued. You heard nothing further and chased again on 3 January 2018. On 4 January you received a reply saying that the investigation was still in progress. On 8 January, the complaints handler raised further questions with the in-house team. The responses received led to further questions being asked of other staff members. You were informed of this by email on 11 January 2018 and told that the aim was for you to receive your decision letter by 16 February. It was in fact sent to you dated 2 February. This letter contained an apology for the complaints handling delays and the frustration caused to you.
25. I have considered whether this apology is sufficient or whether it would be appropriate for the FCA also to offer you a sum for distress and inconvenience caused by the complaints handling delays. I have concluded that this would be appropriate given the lack of activity on your complaint in November and December 2017 and the fact that you had to chase several times for a response. I consider that an appropriate amount would be £150.

My decision

26. I uphold your main complaint. I have concluded that there was unreasonable delay and lack of care amounting to maladministration in the processing of your Consumer Credit Licence application. I have also concluded that the response to your complaint sought to minimise the FCA's failings, and did not properly consider the impact of those delays upon your business. I **recommend** that the FCA offers you an apology for this and an ex gratia payment of at least £5000 in accordance with the provisions of paragraph 6.6 of the Complaints Scheme. I **recommend** that mediation be considered if agreement on quantum for any loss of income cannot be reached between you and the FCA, using Annex 1 as a baseline.
27. I have also upheld your complaint that there were unnecessary complaints handling delays, and I **recommend** that the FCA also offers you £150 for those. I am pleased to note that in response to my preliminary report the FCA has accepted this recommendation.
28. In my preliminary report, I also **recommended** that: *the FCA considers how and why decisions were made that were likely to breach statutory deadlines and have a significant effect on a number of businesses without adequate regard being given to the impact upon those businesses or an adequate explanation being given to them.* In response to my preliminary report the FCA provided me with further

information about its public communications between October 2015 and February 2017, although it recognises that it would have been better to have communicated directly with impacted firms sooner. The FCA also said that my criticisms failed “*to reflect the fact that the FCA had to reconcile conflicting statutory obligations*”, that is, to deal with a very large number of applications within statutory deadlines while also ensuring that each firm meets and will continue to meet the authorisation conditions. I accept that this is the reality. However, in my view, these are essentially resource issues for the FCA; it cannot expect that there will be no consequences of failing to adhere to statutory deadlines, particularly given its admitted failure to communicate directly with firms. I accept that there were public communications on this issue. However, taken as a whole the FCA’s response does not demonstrate an understanding of the effects of delay and poor communication on impacted firms.

29. I therefore **recommend** that the FCA considers how it will in future handle similar situations where it is likely to breach statutory deadlines that will have a significant effect on businesses seeking authorisation and ensure that businesses are provided with adequate communications and explanations that take account of the impact of delay on those businesses.

Antony Townsend

Complaints Commissioner

23 May 2018