

03 October 2022

Final report by the Complaints Commissioner**Complaint number 202201145***The complaint*

1. On 12 July 2022 you asked me to review a complaint about the FCA.

What the complaint is about

2. The FCA summarised your complaint as follows:

You are unhappy that the FCA is not intervening with the Ombudsman Service (Ombudsman) in relation to them using their power under section 234D of the Financial Services and Markets Act 2000 (FSMA). To resolve your complaint you are asking that the FCA intervenes and asks the Ombudsman to use its powers to refer the conduct of Firm X to the FCA.

What the regulator decided

3. The FCA excluded your complaint and said the following: 'Your complaint relates to the actions, or inactions, of the Financial Ombudsman Service and is excluded from being considered under the Complaints Scheme, as set out in paragraph 3.4(e).'
4. Although it excluded your complaint, the FCA Complaints Team said it had reviewed the correspondence on file and that 'the FOS has told the FCA that the decision of whether to refer a complaint under section s.234D of FSMC (otherwise known as a 'super complaint') is ultimately decided by their Board. It needs to be satisfied that all of the conditions set out under s.234D are met. The conditions set are at a high level and given the close working relationship between the Financial Ombudsman and FCA, the necessity for this type of referral to be raised is very rare'.
5. Also, that 'The ombudsman service already shares information with the FCA on a regular basis; we have a duty to do so, arising from the unique insight our role

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gives, and we take this role in supporting the FCA seriously. Given this regular, structured exchange that already happens, we hope it will not be necessary for us to use the power under section 234D'.

6. Supervision Hub associates had told you previously that your concerns about Firm X would be passed to the relevant supervisors but that you may not be told what action, if any, has been taken.

Why you are unhappy with the regulator's decision

7. You have written to me extensively. I summarise the main elements of your complaint as follows:
 - a. 'The bottom line here is the FCA cannot simply say that it is for the FOS to assess whether the s234D conditions are met – the current situation is ethically wrong. 99+% of customers are being ignored and I respectfully request, on behalf of our group, and for the 000's of customers due compensation, that the FCA intervenes and instigates a formal review that will hopefully, finally, ensure a fair outcome for all'. (Element One)
 - b. You are of the view that the FOS will not consider the fairness of a term – only whether that term is being complied with. However, you feel that the terms of Firm X are unfair. (Element Two)
 - c. You do not believe that Firm X is not complying with guidance when it varies the APR on its loan book. You say that it is not clear what criteria Firm X uses to vary its APR. (Element Three)

Preliminary points (if any)

8. You have provided your correspondence and opinion on matters in discussion with other bodies such as the Information Commissioner's Office, the Office of Fair Trading, the Financial Ombudsman Service and others. Under the Complaints Scheme to which I and the regulators operate to, I cannot review this correspondence as it is not within my remit to do so. I can only investigate complaints against the regulators.

My analysis

9. In my view, the FCA is right to say to you that it is up to the FOS to decide whether to refer a 'super complaint' to the FCA for the reasons it gives, and therefore I agree Element One of your complaint is excluded.
10. You have told me you want me to explain further why this element of your complaint is excluded. I reiterate that complaints about the actions, or inactions, of the FOS are excluded from being considered under the Complaints Scheme, as set out in paragraph 3.4(e). The FOS is operationally independent of the FCA. The statutory framework (s234D of FSMA) provides for referrals to the FCA in circumstances where the FOS is of the view that there had been regular failures on the part of an FCA authorised firm. However, it is up to the FOS to decide when to refer.
11. This does not, however, preclude you from raising your own complaint with the FCA. You have outlined your concerns in Element Two and Three above, but these two elements did not form part of your complaint to the FCA.
12. I suggest you refer matters related to Element Two and Three(i.e. the allegation that Firm X has unfair terms for consumers and the allegation that Firm X is not applying the terms of APR according to rules and guidance) to the FCA for an initial review. This is because under the Complaints Scheme it is desirable for the regulator to do its own investigation in the first instance as that is usually the best way of resolving matters. If you are not satisfied with the outcome, you may refer it back to me for a further, independent review.

Amerdeep Somal
Complaints Commissioner
03 October 2022