Complaints Commissioner

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Final report by the Complaints Commissioner

Complaint number 202201614

The complaint

1. Your complaint relates to the Financial Services Authority (FSA) and FCA's supervisory intervention on Interest Rate Hedging Products (IRHPs).

What the complaint is about

2. The FCA has provided the following background to the complaint:

3. 'The Financial Services Authority (FSA) concluded [in 2012] that there had been serious failings in the sale of IRHPs to small businesses since 2001. The FSA decided to pursue a voluntary redress scheme for IRHP mis-selling for the period 2001-2011and negotiated voluntary agreements with nine banks.

4. The FSA announced an initial agreement on the broad terms and features of an IRHP redress scheme (the Scheme) in June 2012, including which types of customers were to be included or not in its scope. Following a pilot exercise, a supplemental agreement adding and/or amending details of the Scheme was agreed and announced on 31 January 2013. From this point onwards the banks, overseen by skilled persons (including major consultancy, audit and law firms) appointed under s.166 of the Financial Services and Markets Act 2000 (FSMA), designed and rolled out policies and procedures to implement the Scheme.

5. The FSA and subsequently the FCA set out how to calculate redress for mis-sales fairly and consistently, which could include cash and/or an alternative hedging product, depending on the circumstances. The banks and skilled persons reviewed the sales against detailed sales standards and criteria set out by the FSA.

6. Following a recommendation by the Treasury Select Committee in June 2015, the FCA committed to conducting a review of its supervisory intervention on

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IRHPs. The start of the review was deferred pending the conclusion of legal action relating to the IRHP Redress Scheme (Holmcroft legal proceedings). At the end of September 2018, the legal proceedings concluded with the handing down of a judgment from the Court of Appeal.'

7. The FCA investigated a number of complaints about its involvement with IRHP, however, it also deferred a number of complaints pending the independent review and the outcome of the legal proceedings described in paragraph 6 above.

8. In the period 2017-2018 a number of affected firms submitted complaints to the Complaints Commissioner, which were reviewed and published on the Office of the Complaints Commissioner's website:

   https://frccommissioner.org.uk/wp-content/uploads/FCA00367-FR-07-03-18-published.pdf

   https://frccommissioner.org.uk/wp-content/uploads/FCA00374-FD-19-09-17.pdf

   https://frccommissioner.org.uk/wp-content/uploads/FCA00353-published-FR-28-11-17.pdf

   https://frccommissioner.org.uk/wp-content/uploads/FCA00269-FR-02-01-18.pdf

   https://frccommissioner.org.uk/wp-content/uploads/FCA00651-FR-20121219-for-publication.pdf

9. The Commissioner concluded that it was appropriate to defer complaints that the FCA has failed to ensure the banks provide appropriate redress to the businesses which suffered loss as a result of IRHP mis-selling until the conclusion of the legal action referred to in paragraph 6 above.

10. In its decision letter to you , the FCA goes on to provide further background as follows: 'In June 2019, a sub-committee of the FCA Board appointed John Swift QC to conduct the review ('The Review' or the 'Swift Review[1]'). The Review considered the FSA and subsequently the FCA's supervisory intervention on IRHP over the period 1 March 2012 to 31 December 2018, as detailed within the Terms of Reference ('the ToR'). The Review was published on 14

[1] https://www.fca.org.uk/publication/corporate/independent-review-of-interest-rate-hedging-products-final-report.pdf

December 2021 and made 21 recommendations to the FCA, which were broadly categorised into 5 topics:

a. General Recommendations;

b. Good regulatory practice in the development and use of voluntary redress schemes;

c. Greater willingness to use statutory powers;

d. Implementation/oversight and the importance of retaining ownership and control over regulatory interventions; and

e. FCA decision-making and processes, including the principles of transparency and regulatory independence.

11. The FCA published its response (‘The FCA Response to the Swift Review’) on 14 December 2021. The FCA largely accepted the recommendations made by John Swift QC and acknowledged shortfalls in processes, governance and record keeping when decisions about the Scheme were made, and a lack of transparency in the development and implementation of the Scheme.

12. The FCA did not agree that the FSA was wrong to confine the scope of the Scheme to non-sophisticated customers. The FCA also did not agree that it should strengthen the oversight role of the Skilled Persons, including as a starting point that they (and not the regulated firm) should be the primary decision-makers.

13. In the FCA Response to the Swift Review the FCA explained that it had concluded that it should not seek to use its powers to require the banks to pay further redress to IRHP customers’.

14. After the publication of the Swift Review, the FCA began to review the complaints which had been deferred pending both the Swift Review and the conclusion of the legal proceedings.

What the regulator decided

15. In 2016-7 the FCA deferred (and the Complaints Commissioner agreed) the following complaint: ‘The FCA has failed to ensure the banks provide

appropriate redress to the businesses which suffered loss as a result of IRHP mis-selling'.

16. In its decision letter dated 12 August 2022 to you, the FCA said it would be addressing this complaint across two allegations which it set out as follows:

Part One

> The FCA has failed to ensure the banks provide appropriate redress to the businesses which suffered loss as a result of IRHP mis-selling.
>
> Part Two
>
> The FCA failed to ensure that the banks who signed up to the IRHP redress scheme achieved consistent outcomes across each firm.

17. The FCA then went on to say that 'Part One is a broad allegation which includes a number of topics covered by the Swift Review. Therefore, we have interpreted the allegation as covering (1) the exclusion of sophisticated customers from the Scheme (2) the FSA's approach of agreeing a voluntary Redress Scheme with the banks (3) the fairness of the outcome the IRHP Redress Scheme delivered for eligible customers, and (4) the FSA/FCA's approach to consequential loss'.

18. The FCA did not uphold Part One and upheld Part Two. The remedy it offered for upholding Part Two was an apology and assurance about strengthening its governance procedures in future. The FCA said 'Please accept my apology, on behalf of the FCA, that consistent outcomes across each firm may not have been achieved in our supervisory intervention of IRHPs. The FCA will, in future, when considering the design of redress interventions, seek to ensure they include arrangements for proportionate reporting and monitoring, by us or others, to ensure that level of consistency.'

Why you are unhappy with the regulator's decision

19. Upon receipt of the FCA decision letter dated 22 August 2022, you referred your complaint to me but you also explained you were continuing correspondence with the FCA. I deferred reviewing your complaint until such a time as your correspondence with the FCA had concluded in order to avoid parallel reviews of your complaint.

20. The FCA replied definitively to you on 9 December 2022 and you wrote back to the FCA one last time on 15 December to express your dissatisfaction. You referred this letter to me.

21. The substance of your complaint appears to be that you are not satisfied with the redress you obtained from your bank, and you also feel that the Swift Review has not been thorough or comprehensive in certain areas.

Preliminary points (if any)

22. I should start by making clear there are a number of limitations upon this Complaints Scheme.

23. First, neither I nor the FCA can deal directly with complaints between customers and the banks. Individual complaints, including claims for redress, are a matter for the FOS, or for the Courts. If you were eligible for a redress offer but were not satisfied with it, your options were to re-approach the Bank, appeal the decision by bringing your case to the FOS, or take legal action. Unfortunately, there are no other options available to you and the Complaints Scheme is not the forum to progress your claim against the your bank.

24. Second, under paragraph 3.4 (e) of the Complaints Scheme, I cannot review the actions of the FOS. I also cannot review the actions of your bank. All I can do is consider the reasonableness of the FCA's response to the deferred element of your complaint.

25. Third, I will not be reopening complaint allegations which were reviewed and determined by my predecessor, or complaints which have been brought to me out of time. I will only review complaints which were deferred by the both the FCA and my predecessor pending the outcome of the Swift Review and the conclusion of legal proceedings unless there is good reason for exceptions.

26. In this report, 'skilled person' and 'independent reviewer' are interchangeable and refer to the same body.

My analysis

27. The FSA and FCA's supervisory intervention on IRHPs have been high profile in nature and included observation and scrutiny from customers, their representatives, government departments, law firms, press, media and

consumer groups. The Swift Review (resulting from the FCA Board commissioning an independent lessons learned review (the Review) into the supervisory intervention on IRHP), offered in depth analysis of the problems which arose. The FCA's own investigation resulted in a further comprehensive analysis of the facts relating to its intervention on IRHPs. I have studied the Swift Review (which covers the period 1 March 2012 to 31 December 2018) and the FCA's investigation report, as well as my predecessor's reports on IRHP complaints. I have not considered it necessary to rehearse all the factual background here.

28. Turning to your specific circumstances, you were in contact with the FCA from 2016 onwards to express your concern with how bank Z was dealing with your consequential loss claim (which it appears was rejected by it) and other matters related to the FCA's involvement with IRHP redress scheme. On 30 March 2017 the FCA formally wrote a decision letter to you addressing the allegations of your complaint. In this letter, the FCA deferred one element of complaint, which is 'FCA has failed to ensure the banks provide appropriate redress to the businesses which suffered loss because of IRHP mis-selling'.

29. Therefore, any other complaints apart from the one above are out of time to refer to me, but in any event, complaints about how your bank dealt with your consequential loss are excluded from the Complaints Scheme.

30. There remains, however, the wider point of whether the FCA ensured that banks provide appropriate redress to businesses which suffered loss because of IRHP mis-selling overall. It was this complaint point which the FCA wrote to you in 2016 and 2017 it would defer and which it has now investigated. I turn to the FCA's review of this complaint.

31. I agree with the FCA that 'This is a broad allegation which includes a number of topics covered by the Swift Review'. In other words, the substance of this complaint is effectively covered by the Swift Review. The FCA said 'John Swift QC conducted a thorough review over the course of two and half years detailing the FSA/FCA's actions or inactions between 2012 and 2018. The review involved interviews with FSA/FCA employees and key stakeholders as well as the analysis of around one million documents. We do not propose to re-

investigate matters covered by his Review and therefore, in determining your complaint we have relied on the facts and matters detailed in the Swift Review as well as the FCA's Response to Mr Swift's findings and recommendations.

32. I agree with the FCA's approach to the complaint. Although I am not bound by the findings of the Swift Review, I consider that I have to strike a balance between a proper consideration of the complaint and not undertaking an exhaustive review of the kind already undertaken by the Swift Review. It is not my intention to investigate afresh matters already investigated in the Swift Review unless there is good reason to do so. Therefore, my approach will also be to rely on the Swift Review, the FCA's response to it, and its response to your complaint. I appreciate you are not happy with my approach because you feel that the findings of the Swift review 'could never be either objective, nor independent, and certainly not exhaustive'. You have stated this is because 'Mr Swift was limited by his ToR (Terms of Reference) which were of course determined for him by the FCA'. You have asked me to review my decision and you say that there are 'indisputable deprivations I and other victims now face on a daily basis as a direct consequence of the failures you now sit in final judgment of'. I am sorry to hear of your situation, however, as I have stated in paragraph 23 above, the Complaint Scheme is not the forum to review your claim against your bank. This is not because of the Swift Review ToR or because I have decided I do not wish to investigate it. It is because it is excluded according to the Financial Services and Markets Act 2000. As to the general question of whether the FCA has failed to ensure the banks provide appropriate redress to the businesses which suffered loss as a result of IRHP mis-selling, it is my view that it is encapsulated within the Swift ToR and the Swift Review has examined it sufficiently so I do not need to go into further detail for the reasons I give above.

33. However, although I agree with the FCA's approach to the complaint in terms of 'methodology' I have reservations about the FCA's assessment of the complaint, the clarity of its decision letter, and some of the conclusions it reaches.

34. I first turn to how the FCA scoped your complaint. The deferred complaint from 2017 was that 'The FCA has failed to ensure the banks provide appropriate

redress to the businesses which suffered loss as a result of IRHP mis-selling'. This appears as Part One in the FCA decision letter. The FCA has pointed out that this is a broad complaint and that it considered it desirable to set out some criteria against which to assess this complaint. As the Swift Report had been published, the FCA relied on it to arbitrarily select certain elements (see paragraph 17) from the four ToR which Swift outlines in his review. These elements are then used as criteria against which to assess the deferred complaint which appears as 'Part One' of the FCA decision letter.

35. The FCA then introduces a further element from one of the ToR as Part Two, namely 'The FCA failed to ensure that the banks who signed up to the IRHP redress scheme achieved consistent outcomes across each firm', and explains that it has addressed your complaint across two allegations [Part One and Part Two]. In doing so, the FCA creates an impression that Part Two was part of the original complaint deferred in 2017; whereas it is not. The effect of this presentation is that complainants are understandably confused over the scope of the complaint as presented in the FCA decision letters in 2022 as it was only Part One which was deferred in 2017.

36. Part of the confusion created with respect to scoping the complaint is connected to the fact the FCA did not write to you with the expanded scope of the complaint (to include the allegations under Part One and the inclusion of Part Two) and therefore you did not have an opportunity to comment on this scope. I have discussed with the FCA in the past the importance of agreeing the scope with complainants before issuing a decision letter, which disappointingly did not happen in this case.

37. A problematic issue in my view with how the FCA has scoped the complaint is that it separates out the issue of 'consistency' as a standalone complaint part from the overall complaint about the appropriateness of the bank's provision of redress.

38. My reading of the Swift Review is that the issue of consistency is dealt with in two phases:

i. The first is about inconsistency between banks with respect to type of redress accepted or not by customers [2]

ii. The second is, as per ToR3[3] :

'Whether overall, the scheme delivered fair and consistent outcomes for SMEs within the scope of the scheme in a proportionate and transparent way, including:

(a) The approach to technical issues, such as but not limited to break cost, contingent liability, application of the sophistication criteria and alternative products as redress (swaps for swaps)

(b) The approach to consequential losses including the appropriateness of guidance given by the FSA, both formal and informal

(c) The treatment of SMEs in financial difficulty or insolvency

(d) Whether the involvement of the skilled persons appointed under s166 FSMA provided adequate assurance that the banks acted fairly in discharging their obligations under the IRHP agreements to achieve consistent outcomes

(e) The extent and effectiveness of the FSA's and later the FCA's oversight of the scheme, including the level of reliance on skilled persons and approach to ensuring consistency across firms and skilled persons

(f) Whether the agreements provided adequate mechanisms to allow SMEs within the scope of the scheme to challenge proposed redress offers

(g) The impact of SMEs' ability to refer their case to the Financial Ombudsman Service before their case has been resolved via the redress scheme

(h) The approach to monitoring firms' progress and the work of the skilled persons, including the production of management information"

39. The Swift Review found inconsistency between banks in terms of eligible customers resulting in either a full tear up or a cap as their redress offer but was unable, on the data available, to reach a conclusion about what this meant. It is possible there are legitimate reasons for the differences but the Swift Review

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[2] Swift Review, Paragraph 3, page 338
[3] Swift Review, Page 337

makes the criticism that the FCA did not carry out a detailed analysis to verify the underlying reasons. I do not think I can go any further on this issue, given the circumstances. I acknowledge the differences but in the absence of any meaningful data to explain them, it is not possible to determine if the inconsistencies with respect to type of redress accepted are justified or not.

40. The Swift Review then provides an evaluation of 40 ii (a) to (h) above in terms of fairness and consistency. The results are a mixed bag. For some of the categories such as 'break costs' it says, 'The approach to break costs under the Scheme therefore appears to have been undertaken appropriately and in a broadly consistent manner'. For other categories, for example skilled persons, the conclusion was that 'appointment of the Skilled Persons alone could not, by itself, give adequate assurance that the banks would act fairly and/or arrive at consistent outcomes'[4]. For some categories, such as consequential loss, there is no comment on the issue of consistency, although there is a finding that the inclusion of consequential loss in the Scheme was right in principle, and its eventual inclusion provided additional redress for a subset of customers, thereby improving the fairness of their specific outcomes.

41. It is clear that there were some aspects as per above where the FCA approach had the potential to lead to some inconsistencies. The Swift Review makes a number of criticisms to the FCA's approach both with respect to 11 (a) to (h) above and in relation to other matters. But in evaluating the overall outcome of Scheme, the Swift review says:

42. 'The large majority of eligible customers obtained redress that met the objective of the Scheme and in all likelihood was 'better' from their perspective than any outcome they could have achieved outside the Scheme. For those customers, despite the reservations expressed by this Review about various elements of the Scheme, the FSA/FCA's intervention was thus of significant direct benefit.

43. That broad conclusion, however, is subject to some serious qualifications. I have made a number of criticisms of the Scheme and of the FSA/FCA's role in its creation and implementation. Cumulatively, these issues may have impacted

[4] Swift Review, paragraph 45 page 355

on the outcomes for customers/clients, rendering the overall outcome less fair than it might otherwise have been'.[5]

44. Therefore, it appears to me that the issue of consistency with respect to ii (a) to (h) above has been factored by the Swift Review into the overall evaluation of the Scheme and is better addressed as one of the allegations of the original deferred complaint. It is not the only issue to attract criticism from the Swift review, nor the only issue where the Swift Review finds significant deficiencies and flaws on the part of the FCA. It seems to me however, that the overall conclusion of the Swift review (that the redress scheme delivered a fair outcome for eligible customers) has factored in these various criticisms.

45. The issue of consistency between banks in terms of type of redress offered/accepted is one which cannot be determined due to lack of data. The Swift Review makes no findings except to criticise the FCA for not analysing the differences more robustly.

46. In summary, my view is that:

    a. There were significant flaws in the FCA's design, implementation and oversight of the redress scheme, some of which the FCA has accepted. Taken in isolation, a considerable number of allegations about the FCA's intervention have the potential to be upheld in their own right, but this does not necessarily mean that the overall complaint is upheld.

    b. The allegation about consistency of outcomes among banks is considered against a number of issues (ii (a) to (h) above) which yield different results. It is not the only matter to attract criticism from the Swift review, nor the only one where the Swift Review finds significant deficiencies and flaws on the part of the FCA. My view is that this allegation is best reviewed alongside the other four allegations under the original complaint 'The FCA has failed to ensure the banks provide appropriate redress to the businesses which suffered loss as a result of IRHP mis-selling' and not, as the FCA has posited, a separate standalone allegation as in Part Two of its decision letter.

[5] Swift Review, Paragraph 72 and 73 page 365

c. It is possible that the overall outcome per claim may have been less fair than it might otherwise have been;

d. There are questions surrounding the consistency across banks in terms of the type of redress offered which cannot be determined on the available data;

e. However, despite these and other criticisms I have no good reason to disagree with the Swift Review conclusion that 'as a whole, the Scheme delivered fair outcomes for those customers within its scope' and 'despite the reservations expressed by this Review about various elements of the Scheme, the FSA/FCA's intervention was thus of significant direct benefit'. I consider this conclusion has factored in the flaws in process arising in (a) and (b) above.

47. In conclusion, I do not think it is reasonable to conclude that the FCA failed to ensure the banks provide appropriate redress to the businesses which suffered loss as a result of IRHP mis-selling and I do not uphold your complaint.

48. I have relied on the Swift Review in my conclusion but unlike the FCA, my view is that the issue of consistency of outcomes among banks excluding the type of redress accepted by customers should not be listed as a separate complaint point. It is one of a number of allegations which can be used to evaluate the overall complaint, which I do not uphold. The allegation about consistency across banks regarding the type of redress accepted by customers is one where the data is insufficient for a determination as to whether this was justified or not, so I cannot determine if the allegation is upheld or not. Due to this, I am of the view that the issue of ex gratia compensation does not arise in either case.

49. *The delay in considering your complaint*: The FCA offered you an ex gratia payment of £100 for the delay in considering your complaint. It explained that some of the delay was due to the complaint being deferred under paragraph 3.7 of the Complaints Scheme because of the Holmcroft legal proceedings and the Independent Review led by John Swift QC. It also apologised for not providing direct updates to you and instead posting updates on an external website, a process which has now changed. I consider the FCA's apology and offer of £100 for the delay in reviewing the deferred complaints appropriate.

My decision

50. For the reasons given above, I have not investigated your complaint about the redress you received (or did not receive) from your bank. I have reviewed the FCA's response to the deferred element of complaint which featured in its decision letter dated 30 March 2017. I understand you are not happy with my approach but I hope you understand the reasons for my decision as outlined above, even if you do not agree with it.

Amerdeep Somal
Complaints Commissioner
6 February 2023