

29 March 2023

Final report by the Complaints Commissioner**Complaint number 202201692***The complaint*

1. On 4 January 2023 I issued a final report in relation to a complaint you had previously raised (Ref: 202201169). You then asked me to investigate a second complaint against the FCA in relation to a further decision letter issued to you by it on 26 October 2022.
2. On 1 March 2023 I issued my preliminary report, both you and the FCA have had the opportunity to provide your comments to my preliminary report which I have taken into consideration in this my final report.

What the complaint is about

3. In its decision letter dated 26 October 2022 the FCA described your complaint as follows:

The summary is:

In your letter of 17 August 2022, you explained that you were unhappy with the delays in your applications which you believe were caused by the actions of the supervisory team. These allegations had not been considered in your previous complaint.

Part One

Unreasonable delaying of the firm's Holding Client Money (VOP) application (VOP application)

Part Two

Unreasonable delaying of the firm's Transaction Listing application (Transaction Listing application)

4. The FCA then set out a list of non-exhaustive areas (questions) you had sent it to address.

What the regulator decided

5. The FCA did not uphold your complaint. It set out the following:

Part One

The application took from 6 September 2019 and closed on 27 August 2020. The application was incomplete as further information was needed from the firm to progress the application.

The FCA webpage¹ states:

We process most applications and make decisions well within FSMA's standards – this will be the earlier of:

- 6 months from when we determine the application to be complete
- 12 months of receiving an incomplete application (missing documents or information)

Your case officer will contact you once your application has been assigned. We might ask you for more information, although our forms set out the typical information that we need to see.

Tell us about any relevant dates and we will try to meet them – but leave plenty of time to make your application.

statutory timescales. I say this because the application was incomplete and took under 12 months to resolve.

I have not seen any additional delay that occurred on this application. The processing of the application was slow due to the amount of information needed and provided by your firm, as well as the nature of your firm and your business model.

I understand that you believe the s.165 review in Supervision delayed this application. I would note that the application was

approved on 27 August 2020 which was 13 working days after the feedback from the s.165 review was provided to your firm.

I agree that some of the information shared by Supervision with the Authorisations case officer may have prompted further questions to be asked. However, I believe this is a sign of the FCA working holistically and viewing all the information about a firm and its business model in order to come to a rounded and reasonable view.

The expectation of the FCA is that case officers should be able to identify and assess intelligence in a consistent manner across Authorisations and should make the same judgements when faced with the similar set of facts.

Case officers are encouraged to consider the bigger picture and the framework requires consideration of any intelligence relating to the following: Regulatory Misconduct or Concerns; Whistleblowing report; Refused/Withdrawn; Criminal Convictions; Fitness & Propriety; Conflict of Interest/Close Links; Financial Misconduct; Non-financial Misconduct; Business Model; Systems and Controls; Overt/covert Law Enforcement and Phoenixing.

I believe this was a complex case which required the case officer to consider many different factors.

For the reasons given above I have not upheld this part of your complaint.

Part Two

I appreciate that you may have a different point of view from the FCA regarding the nature of the Product X you wished to promote. However, the team raised some issues with you regarding the structure of the product and the disclosure in the prospectus.

As your application was withdrawn, no outcome was reached although as you are aware the team were minded to refuse the application. It appears to me from the correspondence that the team made you aware of the concerns and these were limited to the prospectus and the structure.

I have reviewed the information requested in the s.165 and can see that it covered a number of areas (Governance and Structure; Investment Decision Making; Compliance Oversight; Business Model; Business Book). The s.165 was not focused on the same issues as the Listing Team's concerns.

Following the review of the documentation provided by your firm, feedback and actions were provided by Supervision to you including the following: Provide us with a copy of the Firm's assessment and monitoring plans on how Firm Y will ensure Product X's compatibility with the needs, characteristics, objectives and risk appetite of Retail Investors (PROD 3.3.9R and PROD 3.3.10).

This action suggests to me that Supervision were providing feedback to your firm to be able to meet the requirements of PROD2 if approval were to be given to the application with Listing Transactions.

I appreciate you may believe there were delays in the processing of the application however I consider that it was reasonable for the Listing Team to take into consideration the other FCA interaction with the firm.

For the reasons given above I have not upheld this part of your complaint.

6. The FCA also answered the 14 additional questions you had set out in your email of 23 August 2022. I have not set the questions and answers out in full in this report.

Why you are unhappy with the regulator's decision.

7. In your letter to our office dated 4 January 2023, you summarised the reasons you disagreed with the outcomes of the FCA's Decision Letter dated 26 October 2022. You set out that you did not consider that following statutory timelines should be the only consideration when considering unreasonable delay. You said that you believed that the FCA had fundamentally misrepresented the events that took place, hiding behind general objectives of the FCA and failing to provide key facts that would assist in decision making. You also set out that you did not agree with the narrow reasoning which you consider is designed to avoid any responsibility for the actions of the Supervision Team in delaying and damaging the Firm and its application from being approved and assessed in a timely manner.
8. You asked me to review the response you had written to the FCA in response to its decision letter which you sent on 9 January 2023. Your letter was detailed and set out your reasons you disagreed with the FCA's decision letter.

Preliminary points (if any)

9. The FCA set out your complaint into Parts One and Two. For the purposes of my report, I will refer to these as Elements One and Two.
10. In the first stage of the Complaints Scheme, the regulator (in this case, the FCA) will investigate any complaint that meets the requirements of the scheme and take whatever action to resolve the matter that they think is appropriate. In the second stage, the Complaints Commissioner will investigate complaints that are referred to them following a stage one investigation where the complainant remains dissatisfied.
11. If a complaint is referred to the Complaints Commissioner before the regulator has had the opportunity to conduct or complete an investigation, the Complaints Commissioner will consider whether it would be desirable to allow the relevant regulator the opportunity to conduct their own stage one investigation.
12. This report will consider the elements that were addressed in the FCA decision letter dated 26 October 2022. If there are any additional elements that you have set out in your correspondence with the FCA and my office that you feel were not addressed in the FCA's two decision letters, these should be directed to the

FCA to have a stage one investigation carried out. In your response to my preliminary report you have set out in relation to this paragraph that you are frustrated that the FCA complaints team refused to investigate the matter properly and that you would consider whether you wish to pursue a third investigation. I note that any further complaint made would only be investigated if the issues raised had not previously been considered in the FCA's previous two decision letters.

13. In your letter to the FCA sent on 9 January 2023 you set out why you disagreed with the FCA's findings in the 26 October 2022 decision letter in relation to the delays on each of the applications and you set out what lines of reasoning you believe should have been used to reach the FCA's judgement. Whilst I have reviewed the points in your letter to the FCA, my findings focus on what I consider to be the central issues, and not all the points raised. This isn't meant as a discourtesy. But the purpose of my decision isn't to address every single point the FCA or you the complainant have raised or to answer every question asked. My role is to consider the evidence presented by them to reach what I think is a fair and reasonable decision based on the facts of the case. As such I my analysis below has consider the central focus of this complaint, being elements one and two.
14. In your response to the FCA's decision letter you have repeated your complaints in relation to the Supervision Team actions in relation to the s.165 review and set out how you feel they impacted the two applications. The actions of the Supervision Team were investigated in your first complaint to the FCA and I also reviewed and considered this element in my first report to you dated 4 January 2023 and found no wrongdoing. In my review of this second complaint, I have reviewed correspondence between case officers and the Supervision Team in relation to these applications and I have not found anything that has led me to change the findings from my previous report. As such this report does not address these repeated complaints and I revert you back to the findings in my first report.

My analysis

Element One

15. This element of your complaint relates to the alleged unreasonable delaying of the VOP application.
16. In its decision letter the FCA set out that the VOP application was processed within the statutory time limit of 12 months, the fact that it took longer than you expected was due to the amount of information needed and provided by your firm and due to the additional questions stemming from the answers to some of the questions your firm provided.
17. I note that you have not disputed that there was no breach of statutory timescales. What you have set out is that under the Complaint Scheme, I am able to investigate complaints about unreasonable delay. In your response to my preliminary report you set out that the 'length of time was not reasonable' You have suggested that the Complaint Scheme itself does not define what an unreasonable delay is and you consider that if the intention had been for statutory timescale to be part of the definition of what constitutes unreasonable delay then it would have been clearly defined under the Scheme.
18. I acknowledge that the Complaint Scheme does not define what an unreasonable delay is, as such in complaints like this one I must consider the relevant regulation and legislation which does prescribe timescales to provide me with guidance on what constitutes unreasonable delays. As such I consider that it was reasonable for the FCA in its review of your complaint to reference the FSMA standards and that in relation to the VOP application it managed to process the application just inside the 12 month period set out. As such it does not appear that there was an unreasonable delay in the application.
19. My consideration of this element and whether there has been an unreasonable delay has also included my review of the information in the FCA's files and the information you have provided to my office. I noted that in your response to my preliminary report you have again highlighted particular events that you say support your position that there was an unreasonable delay. I have also considered the points you made as part of my consideration of this complaint element. From the review of this information, it was apparent that this application was not complete when it was made to the FCA and there were numerous requests for further information and queries to be addressed. You

have indicated that you considered that the case manager communicated to you that your application was complete at the end of January 2020 both on the telephone and by email. Whilst I do not have access to call recordings, I have seen the email you referred to in which the case manager set out that he would get the relevant papers ready to be reviewed for a decision on the Scope of Permission changes he had set out in the email pending receipt of further information he had requested. I appreciate that you feel that this was an indication that the application was complete, however it is my position that an application is not complete until such a time that the final review of the application had been completed.

20. I also noted that during the time that the FCA were reviewing the VOP application there were generally regular updates issued to you. I did note that there were periods where this lapsed which appeared to relate to the start of the Covid pandemic. You have set out that given the ease of working from home in today's modern society, the pandemic 'should not have significantly affected the time taken to provide substantive feedback' and you said that 'the FCA have a duty to remain resilient at all times'. I appreciate your position on this, but whilst it was unfortunate timing in regards to your application, I do consider that the pandemic disrupted a lot of usual business practices and the lapses were therefore an unfortunate and unforeseeable side effect. I believe at the start of the pandemic the majority of organisations were not resilient and as prepared for large scale, long term working from home operations and did not have the relevant infrastructure, practices and procedures in place to transition seamlessly. My hope is that organisations will never be tested in that way again but if they were I do feel most organisations would be better able to transition if faced with a similar situation.
21. You have set out that the 's.165 review delayed the application from its original timeline by 7 months'. This is not apparent to me from my review of the FCA files. Up until around the time of the s.165 review the case officer was liaising with several internal stakeholders not just the Supervision Team. I can see that the application process was seemingly paused from the date the s.165 review commenced in April 2020 and recommenced on 7 August 2020 when the case officer emailed you and informed you that he was able to recommence the

consideration of your firms VOP application. I note that whilst your application was paused the case officer contacted the firm to suggest that the firm might want to withdraw its application whilst the s.165 review continued and reapply once matters became a bit clearer. Whilst I appreciate that this was not progression of the application, I do consider that the case officer was aware of the delays and tried to liaise with the firm in relation to this.

22. I acknowledge that you have set out details that you recall were said to you in telephone conversations with the case officer and the Supervision Team in which they said that the application was delayed due to the s.165 review. I know that you are aware that the call recordings unfortunately are not available and as such I have not been able to conclude what was said in these calls. My investigation of your complaint is paper based, and whilst I understand that you would like me to talk directly with the Supervision Team, I have already investigated the complaint about the Supervision Team and given the time that has elapsed since these events this complaint relates to, I do not consider this a necessary step for my investigations. In your response to my Preliminary Report you have set out detailed reasons why you consider this is a fundamental step required to accurately assess a complaint of this nature. My position on this point has not changed, if you wish for individuals to be questioned in relation to this matter, if you are not happy with the investigations carried out by the Complaints Scheme it is open to you to see if you can pursue your complaints in other forums that might conduct an investigation in the way you feel is necessary to obtain the conclusions you want.
23. I note that in my review of the FCA files I saw that there was regular correspondence sent between the case manager and various internal stakeholders seeking relevant information in relation to various aspects of your application up to and including during the period that the s.165 review was taking place. I do not consider that there were obvious periods of inactivity on your application. In your response to my Preliminary Report you set out that your complaint was not with the case officer but with the Supervision Team. I acknowledge this and again note that my findings in relation to the Supervision Team were set out in my Final Report in relation to your previous complaint.

24. A further point to note is that in my review of the FCA's files I could see that the case manager did appear to be aware of the time factors you raised and the implications the delays would have for your firm. In his correspondence to internal stakeholders, he would request responses to his queries within reasonable timeframes which demonstrates to me that he wanted to keep the matter progressing.
25. In view of the above, following my review and reasoning of what constitutes an unreasonable delay of an application, I have **not upheld** your complaint. I cannot see anything to indicate that the time taken to process the VOP application was unreasonable

Element Two

26. This element relates to the unreasonable delay of the firms Transaction Listing application process. This related to an application to approve a prospectus for securities. This application was handled by a different case officer in a different department.
27. You have set out that you consider that the s.165 review resulted in an unreasonable delay to this application and that it also changed the dynamic between yourselves and the Transaction Listings team.
28. In my review of this element, I can see that this application was indeed paused whilst the s.165 review took place. A letter was sent to you explaining this setting out the reasons why the case officer considered it appropriate to suspend the review of your prospectus application.
29. In your response letter to the FCA's 26 October 2022 decision letter, you set out arguments that:

Firm X plc (the Product X Issuer) is a separate standalone legal entity (and is not regulated) to Firm Y (the Arranger or the Firm).

Article 6 states quite clearly what necessary information is required for a Prospectus to be reviewed and that is focused on the Issuer.

The s165 related to Firm Y and not the Issuer therefore one could argue that the Transactions Listing team had no business

in suspending the Firm X plc prospectus review while the s165 was carried out.

When questioned what 'necessary information' was needed by the Transactions Listing team in calls they could not answer.

Therefore, it could be argued the Transactions Listing team was in breach of Article 20 of ESMA Scrutiny and Approval of the Prospectus by suspending the application review.

30. In its letter to your Firm dated 13 May 2020 explaining the suspension of your application the FCA outlined:

Given the fundamental role of Firm Y in the prospectus application as the Arranger, and its connections with the Issuer, Firm X we are not in a position to be satisfied that the base prospectus contains the necessary information to enable investors to make an informed decision under Article 6 of the Prospectus Regulation until supervisory enquiries have been resolved to the FCA's satisfaction.

31. I consider that this is a reasonable explanation as to why the case officer paused this application. Whilst I acknowledge your point that that the Firms are separate legal entities, I also consider that given both firms were detailed within the prospectus application, it was a reasonable decision to pause the application. Whilst you have identified that Article 6 identifies the information required for a prospectus to be reviewed and is focused on the Issuer (Firm X), it does not eliminate a requirement for the case officer to look into the Arranger identified. The Supervision Team in its enquiries were looking at the activities of Firm Y as well as its governance and structure, investment decision making, compliance oversight and business model of the firm. It is understandable that the case officer of the prospectus application wanted to conduct due diligence of the Firms identified in the prospectus especially where there is an apparent commonality of governance.
32. From the information I have reviewed it does not appear that the s.165 review changed the dynamic between you and the Transactions Listing team. The team discussed concerns with your application before the s.165 review took

place and when the application recommenced after its suspension during the s.165 review you were then issued with a letter informing you that the FCA were minded to refuse your application. The reasons for this were unrelated to the s.165 review and had been articulated to you at the start of the application. In January 2021 Firm X withdrew its application following the receipt of the minded to refuse letter.

33. In your response to my Preliminary Report, you set out that this matter is not as black and white as my preliminary report made out. You explained that sometimes goodwill can make all the difference in issues where different views exist because parties have different levels of experience. You set out that Firm X and yourself and your legal advisors have world leading experience in this field whilst the FCA is lacking in the product expertise in this area. I agree with you that it is not black and white, and you are right to highlight the experience that you have set out that you consider you have, over and above that the FCA has. This strengthens my belief that it was reasonable and appropriate for the case officer to pause the application pending any relevant information being considered and understanding the product area better to ensure that they did not overlook important factors.
34. Having consider the above, it is apparent that the application had issues that were unrelated to the s.165 review and the minded to refuse letter was ultimately going to be issued. I agree that this application was suspended because of the s.165 review. However, I consider that the suspension by the case officer pending any relevant information was reasonable and appropriate and as such I do **not uphold** this element of your complaint.
35. Finally, I note that in your response to my Preliminary Report you asked that if I did not revise my decision that you would ask that I make an additional statement along the lines of the following which are your words:

‘Having said this, I would encourage the FCA in future to take greater consideration of extenuating circumstances and the well being of Firms when determining the length of time is takes to complete applications. And I would encourage the FCA to be

more expeditious in Firm X's future applications given the delays incurred.'

Whilst I have included this statement that you prepared, these are your words and not mine. I note that I always do encourage the FCA to endeavour to improve its practices in all areas of its work, so I am happy to encourage the FCA to give consideration to extenuating circumstances and to the well being of Firms when determining the length of time, it takes to complete applications in the future. However, it is not my role to instruct the FCA on its engagement with specific individual firms, so I am not able to direct it to be more expeditious in future applications of Firm X as you wished me to set out.

My decision

36. This is my final report. For the reasons set out above I have not upheld your complaint elements.
37. In your response to my preliminary report you have set out that since the FCA Supervision Team were not questioned as part of mine or the FCA's investigations, you believe the findings can 'de facto not be complete'. I note your position on this matter, but this is my final report on the elements detailed in this complaint and I consider that my investigation is now complete.
38. Finally, I note that in your response to my preliminary report you also set out that whatever my final decision in relation to this complaint was, you would respectfully maintain that the analysis provided in your letters of 9 January 2023 and 17 August 2020 to the FCA are on the whole an accurate reflection of events, but you do agree that the waiver decision was mainly the result of the issues they identified (however, unreasonable, but which have now been debunked by your current application). You have said that the waiver application appears to be progressing.

Amerdeep Somal
Complaints Commissioner
29 March 2023