



29 September 2023

Final report by the Complaints Commissioner

Complaint number 202300209

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. You have written extensively to me, and your letter of 15 March 2023 and 13 June 2023 outline your main concerns. I can summarise these broadly under two main headings:
 - a. Element One: You feel you were missold an IRHP by your bank and the IRHP redress scheme (the Scheme) did not provide you with the redress you felt was appropriate. You have tried to present the facts of your case to the FCA but you have been told that it does not review individual cases. You do not agree that the FCA's decision not to look at individual cases is reasonable.
 - b. Element Two: You have highlighted several aspects connected to the Scheme where you feel the FCA's actions are lacking, including but not limited to:
 - i. The FCA's decision to exclude sophisticated customers from the review;
 - ii. The role of the independent person in the Scheme;
 - iii. You query whether the Scheme has achieved its objective of precluding multiple court cases of referrals to the FOS as the Swift Review concluded neither were realistic prospects;

- iv. You do not agree with the FCA's view that 'outcomes were not consistent across banks, the consequence of this does not mean that the redress awarded to consumers was necessarily unfair'.
- v. The FCA continues to refuse to publish its criteria for what constitutes a mis-sale, and indeed has not reported the results of the Scheme by category;
- vi. the FCA hasn't said just how many complaints it has received about the conduct of the Scheme: you feel that if a sufficient number of complaints have been received, it should reopen the review process. You also feel that the FCA should review individual cases in order to determine the success of the Scheme.

Background

3. The FCA has provided the following background to the complaint:
4. '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 2001-2011 and negotiated voluntary agreements with nine banks.
5. 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.
6. 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.

7. Following a recommendation by the Treasury Select Committee in June 2015, the FCA committed to conducting a review of its supervisory intervention on 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.’
8. The FCA investigated several 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.
9. In the period 2017-2018 several 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>
10. 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.
11. The Commissioner also concluded that it was not the role of the FCA or the Commissioner to review complaints against the banks.

12. 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 '). 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 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.
13. 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.
14. 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.
15. 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'.
16. 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.

Preliminary points

17. I should start by making clear there are a number of limitations upon this Complaints Scheme.
18. First, neither I nor the FCA can deal directly with complaints between customers and the banks (that is the role of the Financial Ombudsman Service (FOS)). 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 banks.
19. 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.
20. In this report, 'skilled person' and 'independent reviewer' are interchangeable and refer to the same body.

My analysis

Element One

21. You have referred the details of your case against your bank to me. I should start by saying I have not reviewed these details. I am unable to intervene in your claim against your bank for the reasons given above. It is also not the FCA's role to do so. Therefore I will not be investigating this element of your complaint.
22. You have raised the point that the FCA ought to review your case (and others) in order to determine if the Scheme was successful. I will review this under Element Two below.

Element Two

23. You raise a number of general issues in relation to the FCA's oversight of the Scheme as well as the operation of the Scheme.
24. The FCA provided a detailed response to you in its decision. It also stated that '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.

25. 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.

26. You have raised a number of issues generally about the Scheme which are similar to ones I have reviewed in other complaints. You may find it useful to read some of my previous decisions which cover these issues here:

<https://frccommissioner.org.uk/wp-content/uploads/202201159-Issued-04-January-2023.-Published-19-January-2023.pdf>

<https://frccommissioner.org.uk/wp-content/uploads/202201614-Issued-06-February-2023.-Published-02-March-2023.pdf>

27. My view (also expressed in the reports above more fully) 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 an overall complaint that FCA failed to ensure the banks provide appropriate redress to the businesses which suffered loss as a result of IRHP mis-selling is upheld.

- b. It is possible that the overall outcome per claim may have been less fair than it might otherwise have been;
 - c. There are questions surrounding the consistency across banks in terms of the type of redress offered which cannot be determined on the available data;
28. 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'.
29. 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.
30. I appreciate you may have questions about aspects of the FCA's oversight of the Scheme and the operations of the Scheme itself which remain inadequately answered: some of which is because not all the queries you raise were originally agreed between the FCA and you as part of the scope of the FCA investigation. However, I do not think that any further investigation into the matters you raise connected the Scheme is proportionate given the already extensive investigation of the Swift Review and the FCA. The FCA has accepted that there were failings on its part and has upheld some complaints on these matters. Any further investigation on my part will not have a bearing on your quest for personal redress.
31. I also do not agree with you that it is necessary for the FCA to review the specific claims you or others have against your banks: that was a matter for the independent reviewer.
32. Therefore, I am exercising my discretion not to investigate any further the specific matters you raise related to the FCA's oversight of the Scheme which it has not reviewed. For the avoidance of doubt, my decision will not disadvantage you personally.
33. I do, however, **recommend** in the interests of transparency that the FCA answer your query about how many complaints it has had with respect to its

involvement with the Scheme. The FCA has responded that it has received 250 complaints in total.

My decision

34. I appreciate you remain dissatisfied with my decision, and you have advanced a number of arguments about why it would be preferable for me to review your claim against your bank. I am sorry, but this is not something I can do under the Complaints Scheme. You have pointed out to me the many questions which the Swift Review allegedly left unanswered as well as the many criticisms it made about the FCA. Ultimately, you do not see how, given this, a conclusion can be reached that overall, the scheme was a success. I note your concern, however, my view remains that I have no good reason to go behind or overturn the Swift Review findings for the reasons I give above.

Amerdeep Somal
Complaints Commissioner
29 September 2023