

10 May 2024

**Final report by the Complaints Commissioner****Complaint number 202300751***The complaint*

1. On 30 January 2024 you asked me to review a complaint about the Financial Conduct Authority (FCA). I have excluded some elements of your complaint, and not upheld others. I explain why below.
2. By way of background, you have explained that you have an account with NS&I and that were having difficulties logging into the account with two factor authentication over a prolonged period of time. You complained to the firm and then to the FOS and HM Treasury but you were dissatisfied with the outcome of your complaints.
3. You wrote about your dissatisfaction to the Chief Executive (CEO) of the FCA on 29 August 2023 outlining the matters above and requesting that the FCA take regulatory action against NS&I and if NS&I couldn't rectify the issue you complain of, to compel NS&I to roll back to a previous version of its software where the problem did not occur.
4. On 6 September 2023 the FCA Case Executive Unit (ECU) which deals with correspondence on behalf of the FCA CEO wrote to you to explain that:

“NS&I is not regulated by the Financial Conduct Authority and, therefore, I am afraid we're not able to help you with your concerns about how it operates.

As you mention in your letter, NS&I is a government department and an Executive Agency of the Chancellor of the Exchequer. The way its products are structured is governed by legislation specific to NS&I, rather than rules set and overseen by the FCA. You may wish to contact

HM Treasury again if you are dissatisfied with the response you have received so far.

As you know, NS&I is covered by the Financial Ombudsman Service and I am sorry that you are unhappy with its investigation into your own complaint. However, the Ombudsman operates independently from the FCA under its own rules and we have no powers to intervene in the decisions it makes in individual complaints”.

5. You were not satisfied with this response and replied to the FCA on 12 September 2023 to say that in your view “ in substance” NS&I is regulated by the FCA, because “NS&I holds itself to be complaint with FCA regulations....the Treasury requires it to be complaint and the FCA reports into the Treasury via the Economic Secretary..” you believe the FCA ought to be looking into the issue of the two factor authentication glitch at NS&I for this reason.
6. You also say that the FOS has not followed FCA regulations and good practice and as the “FCA oversees in substance the activities of the FOS, this is an issue for you, the FCA”.
7. The matter was then referred to the FCA Complaints team which issued a decision letter on your complaint on 8 November 2023.

*What the regulator decided*

8. The FCA did not uphold your complaint. It said that NS&I has a dual status as both an Executive Agency and Non-Ministerial Department and is accountable to parliament. The way their products are structured and managed is governed by legislation specific to NS&I, rather than rules set and overseen by the FCA. It further said:

“ECU were correct in informing you that NS&I is not authorised or registered with the FCA. NS&I is operating under an exclusion and is exempt from the provisions of Payment Service Regulations 2017 in accordance with Regulation 3 and do not require authorisation by the FCA to provide payment services set out in Schedule 1 Part 1 of the Payment Service Regulations.

NS&I are backed by HM Treasury, and they seek to incorporate best practice principles relating to FCA-regulated financial institutions into its processes where it's appropriate and proportionate to do so on a voluntary basis.

As you previously stated, all regulated firms must follow our rules as set out in the FCA Handbook, however, as NS&I isn't a regulated firm, it's outside of our remit to assist you with your concerns about how NS&I operates.

ECU were also correct in informing you that the Financial Ombudsman operates independently from the FCA under its own rules, and we have no powers to intervene in the decisions it makes on individual complaints”.

*Why you are unhappy with the regulator's decision*

9. You referred the complaint to me on 30 January 2024. You say that:
  - a. NS&I is implying it is regulated by the FCA when in fact it is not; and that the Financial Services and Markets Act (FSMA) 2000 prohibits the carrying out of regulated activities unless the person carrying them out is authorised or exempt. You do not see how NS&I is exempt.
  - b. You feel the FOS reached the wrong decision in your case, and that it is meant to report breaches of the law to the FCA.
  - c. You also complain about HM Treasury's response to your complaint.
  - d. You say that you doubt my independence in reviewing your complaint given that I am appointed by HM Treasury and we are funded by the FCA.

*Preliminary points (if any)*

10. The independence of my office is provided for by Parliament as set out in the Financial Services and Markets Act 2012 (as amended by the Financial Services and Markets Act 2023) which for example, provides that “The Treasury must appoint an independent person (“the investigator”) to be responsible for the conduct of investigations in accordance with the complaints scheme”. The legislation goes on to provide that the terms on which I am appointed must be such that in the opinion of the Treasury are reasonably designed to secure -:
  - a) that the investigator will be free at all times to act independently of the regulators; and b) that complaints will be investigated under the complaints

scheme without favouring the regulators.” I am also obliged to prepare an annual report which the Treasury must lay before Parliament.

11. Under the complaint scheme I can only review complaints about the FCA. I can not review complaints about other institutions, such as NS&I, HM Treasury or the FOS.

*My analysis*

12. You have said to me that you feel NS&I is implying that it is FCA regulated. That is not an allegation which you made to the FCA and therefore the FCA has not reviewed it. Under the Complaint Scheme it is the usual practice that complaints which have not been investigated by the FCA in the first instance are referred back to the regulator for an initial review as that is usually the best way to resolve matters. I have seen no evidence that the NS&I is implying that it is regulated by the FCA on its website, and you have not provided any evidence. If you have other information on this matter I suggest you refer it to the FCA for its review.
13. I understand that you have felt frustrated in trying to resolve the issue with NS&I regarding two factor authentication, and I take your point that you allege that this is an issue which has affected many customers over a substantial period of time. However, the FCA is correct that it does not oversee the NS&I and can not look into this matter for you. I do not agree with your reasons and conclusion that “in substance” or otherwise the FCA regulates NS&I. It does not. Therefore I do not uphold your complaint. The NS&I will be able to provide you with information about which legislation it is governed by, so I suggest you ask it: it is not appropriate for me to discuss more about the NS&I arrangements with you as it falls outside the remit of the Complaints Scheme.
14. The FCA is also correct that it can not review the FOS decision on your complaint. It seems to me that you believe NS&I has breached FCA regulations and when you reported this to the FOS, it made a decision on your complaint which you also felt breached FCA regulations. I understand that this is your view, however, the FOS is operationally independent of the FCA so it makes its own judgements about whether firms have breached regulations or not. I understand you are unhappy with the FOS decision because you feel it has

misapplied FCA rules, but that is also not something the FCA can not get involved in, in the usual course of business. The FOS does report statistical aggregate data to the FCA, but not individual complaints and their outcomes.

15. There is the added complication here that as NS&I is not regulated by the FCA, it is questionable that the FOS reports in any way to the FCA on any matters related to the NS&I to the FCA. The FCA has confirmed it has not received any closed complaints data from the FOS related to NS&I. It says this may be because the FOS only reports data to the FCA on regulated firms.

*My decision*

16. For the reasons above, I do not uphold your complaint.

Rachel Kent

Complaints Commissioner

10 May 2024