

12 January 2022

Final report by the Complaints Commissioner**Complaint number FCA001519***The complaint*

1. On 5 November 2021 you asked me to investigate a complaint about the FCA in connection to FSA and FCA's oversight, supervision and regulation of Keydata Investment Services Ltd (Keydata) and related matters.

What the complaint is about

2. Your complaint is about the FSA and FCA's oversight, supervision and regulation of Keydata and related matters. I investigated a complaint from you on these matters and issued my Final Report on 31 March 2021 (<https://frccommissioner.org.uk/wp-content/uploads/FCA00814-Publication-FR-Issued-31-03-2021-Published-4-5-2021.pdf>, to which the FCA responded <https://www.fca.org.uk/publication/corporate/response-complaints-commissioner-207194404.pdf>)
3. In my Final Report (FCA00814) I expressed the view that although the FCA's Decision Letter did set out some broader conclusions about the FSA's supervision of Keydata, it had failed to demonstrate that it has given your complaint the careful and detailed consideration that you were entitled to expect after such a long wait. I said this because I could not be certain that some of the letters you had written to the FCA highlighting specific issues had been responded to by the FCA, and it accepted this. The FCA agreed to write to you separately on the points you had raised.
4. Further correspondence in respect of these issues ensued between you and the FCA, by letters, emails and telephone calls. During this process, the FCA answered some of your points through letters, and decided to open a new complaint on some, but not all the issues under the discussion. It issued its

FCA001519

decision letter to you on 10 September 2021. You wrote to me on 5 November 2021 to say that it was somewhat 'bizarre' the FCA had chosen to open a new complaint, but given it had done so, you would refer it to me with your comments. I am reviewing this new complaint under the current reference FCA001519.

5. You also wrote to me and stated that you disagreed with various aspects of a letter the FCA sent to you on 24 August 2021 and that you were waiting for information from the FCA on questions you raised during a telephone call with a member of staff on 20 September in which you requested information on how the FSA checked that the SLS Bonds and Lifemark Bonds complied with the 'E.U. Prospective Directive'. I suggested in my preliminary report that you should raise a complaint with the FCA first about this matter. Shortly after I issued my preliminary report the FCA wrote to you, on 22 December 2021 and copied me, with its response. It addressed your concerns above and said:

In paragraphs 3-5 of the Preliminary Report, the Commissioner has commented on your concern that you continue to have unanswered questions from various correspondences sent to the Complaints team since 2009. I confirm that this letter provides our final response on all requests for information or other questions you have posed to date to the Complaints Team, and there is not any further information or clarification we consider we are able to provide to you in relation to your questions.

What the regulator decided

6. The FCA investigated your complaint under four parts (Appendix 1).

Why you are unhappy with the regulator's decision and my analysis

7. You have written an extensive letter to me explaining why you disagree with the regulator's decision. I can summarise your points as follows, after which I give my analysis:
8. You have expressed the view that the 'system' is flawed if it allowed firms and individuals to become automatically regulated by the FSA in December 2001

under statutory transfer provisions that did not require any assessment to be undertaken. (Element One)

9. I appreciate you are frustrated, and whilst there may be a genuine debate to be had about whether the legislation in 2001 could have been better, that is not a matter for the Complaints Scheme. The FCA is correct to tell you that its predecessor complied with existing regulations at a time when it was being formed as a completely new entity to take over financial services regulation from a number of disparate bodies. For this reason, I agree with the FCA not to uphold your complaint that the FSA authorisation process of Keydata was flawed in 2001, and I consider your dissatisfaction with the legislation at the time to be excluded under the Complaints Scheme.
10. The FCA did not investigate your allegations 'the actions of the FSA in dealing with Keydata 'harmed the reputation of the UK financial system' and that they 'caused expense to member firms of the FSCS who were levied in order to pay compensation to Keydata investors', on the basis you were not directly affected and therefore not eligible to make this complaint. You do not believe the way you have phrased your complaint makes it ineligible under the Scheme; and that you are also affected because your loss of confidence in the regulatory system has reduced your appetite for investing; and your management charges in investments you hold have risen in order to pay for the increase in the FSCS levy needed to compensate Keydata investors. (Element Two)
11. To be eligible to make a complaint you do need to have been directly affected by the actions of the FCA. You have told me you are directly affected as you have lost your investment with Keydata. I am sorry about this, but I do not think it is sufficient reason for you to be eligible to make a complaint under the Scheme for the cost of the FSCS levy rising for member firms. The FSCS exists to compensate eligible investors when firms fail, and its levy is a factor in the financial services. You have told me that the FSCS paid out 4.5 times of the amount of its annual levy to Keydata investors and therefore you infer its levy to member firms rose due to this. Keydata is one of many firms the FSCS dealt with and you have provided no evidence to support your claim that FSCS levies have risen solely for it to compensate Keydata investors. In any event, complaints about the FSCS are excluded from the Complaints Scheme.

12. The FCA did not uphold your complaint that it had 'let fraud happen at Keydata' on the basis that there has never been confirmed evidence of 'fraud' taking place at the firm, although it did admit that there had been wrongdoing and 'Part of the failure to supervise was the failure to identify and rectify wrongdoing being carried out by the firm'. The FCA said the 'Upper Tribunal expressly did not consider the issue of fraud, and stated (paragraph 522), 'It is thus, we find, unnecessary for us to make any finding as to whether any person was engaged in fraud.' 'You have said to me that you consider the upper Tribunal did not consider the issue of fraud because the FCA 'as a prosecutor, failed to bring the issue of fraud before the Tribunal', which is why it was not considered. You consider fraud took place because of what you allege are multiple breaches of contract between Keydata and its investors. (Element Three)
13. Your interpretation of the 'breach of contract' between Keydata and its investors is that fraud did occur and you have quoted section 3 of the Fraud Act 2006 in support of this. There was wrongdoing at Keydata and that the FCA has accepted responsibility in failing to supervise and rectify this wrongdoing. The FCA has told the court there is no evidence that fraud occurred and that the Upper Tribunal expressly stated that it did not make a finding with respect to fraud.
14. Under the Complaints Scheme, I am unable to make a ruling on points of law. It would be up to the courts to determine if fraud occurred according to section 3 of the Fraud Act 2006. I cannot investigate this element of your complaint.
15. You have said there is a misunderstanding about the recovery in connection with your losses, but you cannot categorically state what was said during a call on 30 August 2017 because the FCA has not provided you with copy of the call but that you have not been compensated for the majority of your losses in an investment you made with Keydata in December 2005 in the 'SLS' bonds. You were, however, compensated for the investment in Lifemark bonds by the FSCS. (Element Four)
16. I note your comments. You have clarified the potential misunderstanding which arose. In response to my preliminary report, you stated that you have asked the FCA for a number of recordings from June 2020 onwards which it has not

provided and you have asked me to investigate. This is a new complaint which the FCA has not investigated and which was not part of your complaint to me on 5 November 2021. I suggest you write to the FCA asking for the particular recordings you believe exist and which you would like to receive.

17. You do not accept or understand why the FCA chose to disregard my recommendation for an ex gratia payment in report FCA00814 and reduce it to £1,250. (Element Five)
18. I note your disagreement with the FCA's position on matters raised in report FCA00814, but that case is now closed and I will not review elements from FCA00814 which I have already concluded on.
19. You make several concluding remarks expressing your frustration at the length of time it has taken for the FCA to review your original complaint. You feel it is hiding behind confidentiality restrictions and therefore you are still 'in the dark' about certain actions and events which took place, and you feel that FCA authorisation of a firm may give 'false comfort' to investors. You feel the complaints process has been 'adversarial and at times hostile' and the FCA has not used the Scheme to offer redress where it is justified or to learn from its mistakes. You have also told me the FCA promised to issue its decision letter to you on 10 September 2021 but that it posted the letter on 13 September 2021. (Element Six)
20. I note the points you raise. I have already commented on the length of time the FCA took to investigate your original complaint, and the fact that it did not give your complaint the careful consideration it deserved in FCA00814. I have also commented on the issue of compensation and confidentiality in that report. I can appreciate how the totality of these issues, coupled with the FCA's yet further delay in posting its decision letter to you has left you disillusioned with the complaints process.
21. I do consider, however, that the FCA is making efforts to 'learn from its mistakes', and I am continuing to monitor a number of initiatives in place at the FCA which are aimed at preventing a recurrence of the issues which arose during its supervision of Keydata.

22. You have made three comments in respect of the FCA's letter to you of 22 December 2021 (element seven). These are that:
- a. The question as to whether the Regulator failed to stop Keydata marketing bonds which were illegal (i.e. banned) due to their non-compliance with the E.U. Prospectus Directive, remains unanswered.
 - b. Did the Regulator's delay in bringing enforcement action against a director of Keydata allow him the time to distribute the proceeds of the commissions/fees he received personally from Keydata in relation to the bonds into areas beyond the consideration of the Scottish bankruptcy courts?
 - c. The transcript of a call referred to in that letter is clearly incorrectly dated as it took place in 2017 (almost certainly 29/8/17) and not 31/8/16 as stated.
23. On the issue of the prospectus, the FCA has answered a number of your questions and concluded its answer as follows:

I acknowledge you have a continuing concern about Keydata's compliance with the Prospectus Directive, which came into force in UK law from July 2005, and believe that the product in which you invested in December 2005 was an "illegal" product (to use your terminology). As I have outlined in our discussions, further investigation in relation to the prospectuses will not result in any different outcome in respect of this complaint and, regrettably, there are likely to remain questions you have that cannot, or will not, be able to be answered. In relation to this particular question, there is not any further information I am able provide to you based on our investigation of the complaints.

24. The FCA's answer to other questions you posed about the Keydata director has now led you to ask a follow up question about whether any potential delay in FCA enforcement action led to alleged distribution of proceeds which may not otherwise have happened (22b above). This is a matter which you now raise and which the FCA has not investigated or reviewed before. It is usually the case that when complainants raise complaints which the FCA has not investigated before, unless there are exceptional circumstances, I refer these

complaints back to the FCA for an initial investigation first as that is usually the swiftest way of resolving matters.

25. I have now twice referred matters back to the FCA for an initial investigation, as I wanted to ensure the FCA gave appropriate consideration to your complaint. Your ensuing correspondence with the FCA, as well as my preliminary report, has led to many further questions from you and disagreement with various aspects of either the FCA's responses or my response to you and you have raised new points of view about how the FCA could have handled its regulation of Keydata better in certain aspects. Your new comments and allegations have not been specifically addressed before but are connected with your original complaint about the FCA's oversight of Keydata.
26. In this case, it is clear that there was inadequacy in the FSA's supervision of Keydata and the consequent delay in commencing effective supervisory and Enforcement action, a finding I made in report FCA00814. I was also concerned that that some of the letters you had written to the FCA had not been responded to by the FCA, and it accepted this. The FCA agreed to write to you separately on the points you had raised, and it did so.
27. The FCA subsequently entered into correspondence with you and provided answers about what amounts to specific aspects of its supervision of Keydata. You have disagreed with various points in its correspondence with you, and raised new issues about matters where the FCA could have, in your opinion, taken different actions which may have produced better outcomes for investors.
28. I am conscious that you have waited for a very long time to have your complaint answered, and that the FCA seemed not to have addressed one of your letters in its original decision. It is for this reason I asked the FCA to answer the questions in that letter in my report FCA00814.
29. The FCA did so, and the protracted correspondence between the FCA and you following that has led to a further complaint from you: this one, as well as further requests for information or differences of opinion between you and the FCA about what it could have done better in regulating Keydata.
30. I have considered all the above (including your representations and the representations of the FCA) and my views is as follows:

31. I have already determined there was inadequacy in the FSA's supervision of Keydata and the consequent delay in commencing effective supervisory and Enforcement action of that firm in report FCA0084. I recommended an ex gratia payment for you which the FCA did not accept.
32. You are now alleging there were even further inadequacies in the FCA's supervision of Keydata. There are questions the FCA has answered, and questions it says it has no answers for, and other questions you have asked of me but not the FCA. I have reviewed your allegations.
33. I can appreciate you remain concerned about the FCA's regulation of Keydata. It is a concern I share, and which the FCA has acknowledged. If your concerns are about 'lessons learned' by the regulator, I can assure you that my investigation of the case shows me that from a supervisory point of view, the FCA has implemented procedures to ensure the likelihood of similar issues arising in future is minimised. Therefore, given the age of this case and the fact events have moved on since then, I do not have any further recommendations for improvements the FCA can undertake more than I did in my report FCA00814. Unfortunately, the FCA has not accepted my recommendation that it should offer you a further ex gratia payment. The FCA is not obliged to accept a recommendation I make and there is nothing more I can do for you on that.
34. I now need to focus on what more I can do for you under the Scheme for the continuation of your complaint. I understand you remain dissatisfied and I have sympathy for your situation, but unless you can provide concrete evidence which I will consider, my decision is that the FCA's response to your current complaint is not unreasonable, and I do not think there are any evidential matters you have brought which need to be referred back to the FCA for further review presently. I appreciate you question that a call you had with the FCA happened three days later than the date it happened based on the FCA's transcript versus your recollection than when it had. I consider this to be related to your general queries about when calls with the FCA took place, how they were recorded, and how they can be related to you. I have already given my thoughts on this in paragraph 16 above.

My decision

35. I understand you do not agree with my findings and that you feel I am biased in favour of the FCA. I am sorry you feel this way, but I can assure you I have reviewed your points carefully, both in this report and in my previous report, and my findings remain for the reasons above. I recognise that you would like me to go further than I have done and address additional points of detail. However, I have had to strike a balance between a proper consideration of your complaint and not undertaking another thorough investigation into the FCA's regulation of Keydata of the kind I did in report FCA00814.

Amerdeep Somal

Complaints Commissioner

12 January 2022