

27 June 2022

Final report by the Complaints Commissioner**Complaint number FCA001676***The complaint*

1. On 3 March 2022 you asked me to investigate a complaint about the FCA.

What the complaint is about

2. The FCA described the part of the complaint you subsequently referred to me as follows:

You allege the FCA allowed Bank X to trade using an incorrect EEA Banking Passport and did not notify Bank X's home regulator.

The remedy you are seeking is that you want to know why the FCA did not notify the German authorities that Bank X were trading in the UK, whilst using the incorrect banking passport.

What the regulator decided

3. The FCA did not uphold your complaint.

Why you are unhappy with the regulator's decision

4. You have asked me to investigate your complaint as you do not agree with the FCA's decision.

My analysis

5. The background to this complaint formed the basis of another investigation I undertook for a joint complaint against the Bank of England (BoE000007), the FCA and the Payment Systems Regulator (which is not subject to this Complaints Scheme) and the published report is here: <https://frccommissioner.org.uk/wp-content/uploads/FCA00915-Issued-20-July-2021.-Published-03-August-20211.pdf>). The complaint stems from an authorised push payment fraud perpetrated on your mother in June 2018. You

say that your 'mother believed she was sending £X to her eldest son as they had agreed, but emails were intercepted and she was tricked into transferring the money to a fraudsters account.' What appears to have happened is that your mother as the sender was transferring funds to a legitimate payee but was deceived into providing the account number and sort code of an account held by a different person, and so transferred the funds via CHAPS to a fraudster to Bank X.

6. You are now concerned about how it was that Bank X was able to operate in the UK and you have said to me that you believe that Bank X should have been operating in the UK on an 'Establishment Passport' rather than on an EEA passport. Your main reasons for this are that:

[Bank X] had a London address, were using a UK sort code and were using CHAPS payment system, which is used for sterling transactions solely in the United Kingdom.

7. I have liaised with the FCA on the points you raise and the conclusion of my review is that the FCA is correct to not uphold your complaint. I have checked the file and I can see that Bank X applied to register to offer deposits to UK customers in 2015 via its home regulator, a permissible activity under EEA passporting rules. The usual practice in such cases is for the inward passporting entity to enter into a bilateral agreement for correspondent banking services with a UK bank which would provide services including for example the opening of accounts and payment services. This is what happened with Bank X in 2015. Whilst Bank X had an office presence in the UK, there is no evidence that it was offering banking services, although it was used for marketing (which is not a breach of regulations).
8. You have said to me that you disagree with the FCA's reasoning above and you have referred to an EBA paper ([BoS 2019 xx \(Opinion on the nature of passport notifications for agents and distributors\).docx \(europa.eu\)](#)). You say that this paper 'highlights when an "Establishment Passport" is required, in relation to firms such as Bank X who use "agents" in the host country.' You believe Bank X 'had "stable and continuous" contractual agreements with UK based banks who

were working as bank X “agents” by providing “payment services and dealing with account opening”.

9. You have said to me that the ‘EBA paper, which clarifies that banks who use “agents” in the host country on a “stable and continuous” basis, should be using an “Establishment Passport” shows bank X should have had an establishment passport in the UK.
10. I have noted the points you raise, however, I do not believe that a challenge to the EEA passporting rules and their interpretation is within the remit of the complaints scheme. It is clear the FCA (and Bank X’s home regulator) and you have different interpretations of whether Bank X should have had an establishment or EEA passport. I am sorry to disappoint you, but it is not within my remit to offer an opinion on such matters. You may wish to seek your own independent legal opinion on this matter.
11. You have raised an additional point about Bank X’s marketing. The FCA said to you that the examples you provided about Bank X’s office in the UK ‘related to roles connected to social media, marketing and FinTech roles which are not regulated activities.’ You have made the point to me that marketing of financial services is in fact a regulated activity. I liaised with the FCA on this point and I include below excerpts from the response:
 - a. ‘The Financial Services and Markets Act 2000 (Regulated Activities) Order 20011 outlines which activities are considered to be regulated activities and this does not include marketing of financial services.
 - b. However, the FCA does have clear expectations for firms in relation to financial promotions. In relation to the points you make, the most relevant recent publication about this is from March 2015 when the FCA issued Finalised Guidance in FG15/42 Social media and customer communications. This set out the FCA’s supervisory approach to financial promotions in social media.
 - c. More generally the FCA does not actively monitor the general advertising produced by regulated firms in social media or in more traditional forms of media such as print. The FCA expect firms to follow the rules relating to Financial Promotions where this is applicable. Where reports of mis-leading

or non-compliant Financial Promotions are made to the FCA these are reviewed in line with our standard processes.

- d. It is not feasible, capacity wise, for us to monitor all of financial firms' advertising activity, but we do undertake activity in this area. Proactive monitoring tools are used to identify non compliant financial promotions from authorised firms'.
12. In your original complaint to the FCA and to me you included some examples of what you believed were marketing promotions by Bank X in the UK, but which the FCA deemed did not constitute marketing material. In response to my preliminary report, you have sent me a screenshot of a twitter tweet from 2016 in which allegedly a UK based Bank X employee tweets 'thrilled to be announcing the launch of our bank X debit card, sign up today'. The FCA has not seen this information.
13. Usually, during the course of an investigation, if new evidence emerges, I would ask both the complainant and the FCA for comments. However, in this case, after careful consideration, I have decided not to investigate matters connected with the tweet referenced above. My reasons for this are as follows:
- a. It is clear that Bank X had an office presence in the UK. There is no evidence that it was offering banking services, although it was used for marketing in a general sense (which is not a breach of regulations).
 - b. You have provided a number of marketing examples from Bank X in your original complaint, but these were not deemed to be financial promotions.
 - c. The FCA has already explained that it did not and does not actively monitor the general advertising produced by regulated firms in social media or in more traditional forms of media such as print, as it is not feasible capacity wise.
 - d. The individual tweet you have now brought to my attention and which I have now made the FCA aware of may or may not have been a breach of the financial promotion rules in 2016, however, given that Bank X is no longer active in the UK as of 2019, and that the FCA was not in any event required to monitor its general marketing activity when it was active, there is little or nothing that can be done with this information now. I do not

consider it proportionate to continue to investigate matters with respect to this single tweet for the reasons given above.

14. During the course of my investigation, I did notice some irregularities on the FCA Register with respect to the dates of Bank X's registration. In particular, when Bank X notified the FCA of a new trading name in 2015, this was entered on the Register as a new EEA passport registration which should not have happened, although this does not have a direct bearing on your complaint.
15. The Register is now amended as a result of my involvement. However, the FCA has commented in response to my preliminary report that its 'investigations have shown that the incorrect information on the Register was based on data entered in 2015. This data was the responsibility of the Prudential Regulation Authority (PRA), not the FCA, and appears to have been caused by a manual input error. We have informed the PRA of the error and agreed with them to update the Register to remove the error but we did not carry out an investigation into the error. As the PRA have not had the opportunity to investigate the issue as a complaint or provide any response to your office, we would kindly ask that this point is removed from your final report and/or you provide the PRA with an opportunity to investigate and respond'.
16. This is an unusual situation as the Register error I noted does not have a direct bearing on your complaint, however, it required amendment. I will raise the matter separately with the PRA although this will not lead to a different outcome for you.
17. You asked for confirmation whether Bank X were included in the Temporary Permissions Regime (TPR) or the supervised run-off (SRO) part of the FSCR. The FCA replied that due to confidentiality restrictions it was unable to provide any comment on this. I could see, however, that the Register reflects that Bank X cancelled its permissions in September 2020 and the Temporary Permissions Regime was incepted on 1 January 2021. The FCA has now formally confirmed to me, the Bank did not have TPR status as it cancelled its permissions before TPR began. I find the FCA relied incorrectly on confidentiality restrictions to answer your question given the information was already in the public domain.

My decision

18. I am sorry to disappoint you, but for the reasons above I do not uphold your complaint.

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Complaints Commissioner

27 June 2022