

29 November 2018

Final report by the Complaints Commissioner**Complaint number FCA00420***The complaint*

1. On 22 October 2018 you complained to me about the FCA's decision not to uphold your complaint about its correspondence with you. (You had originally sent your complaint on 9 October but, despite its having been correctly addressed, it appears not to have reached this office.)

What the complaint is about

2. In considering the matter, the FCA described your complaint as follows:

Part One

You are unhappy because the FCA has failed to adequately justify its own guidance on Legal Entity Identifiers (LEI). In particular, you object to the inadequacy of the justification offered [to you] for its guidance and its unprofessional failure to address arguments [from you] pointing to a different interpretation.

To resolve this complaint, using the wording in your complaints form to the FCA, you would like *'Re-engagement by the FCA in the dialogue I sought as to whether trusts are, in law, eligible for LEIs, including provision of any rebuttal thought by the FCA to be required of my analysis of LEI eligibility (and in particular my analysis of the definition of eligibility contained in ISO 17442:2012). Alternatively, if it accepts the accuracy of my analysis, recognition by the FCA that its own analysis of the legislation relating to trust eligibility for LEIs and resulting guidance requires re-evaluation and amendment'*.

Part Two

You are unhappy that the FCA *'had manufactured a complaint from my correspondence and used this artifice in order to be shot of the matter'*. The FCA failed to address this Part of your complaint in its previous response.

Part Three

You are unhappy with the length of time it has taken to complete the investigation into your complaint.

What the regulator decided

3. The FCA rejected part one of your complaint. It said that it had “responded appropriately and articulately to your queries about LEIs”, and was “satisfied that the FCA did adequately and reasonably engage with you....Ultimately the question of whether your interpretation or the FCA’s is correct is a matter for the courts to decide and is not a matter for the Complaints Scheme.”
4. On part two of the complaint, the FCA said that “it was clear you were expressing dissatisfaction with the responses....and it follows that....the matter should proceed to a complaint.” For that reason, the FCA did not uphold part two.
5. The FCA upheld part three of the complaint. It apologised that the investigation of your complaint had taken longer than the FCA had hoped, and offered you £100 as a gesture of goodwill, an offer which you accepted on the basis that it should be paid to a charity.

Why you are unhappy with the regulator’s decision

6. In asking me to investigate the matter, you said
I reject the premise implicit in the investigator's approach that the level of detail in the FCA's responses to my queries can suffice in itself to demonstrate that such responses were adequate. Without any examination of the form those responses took an assessment on such a basis relies upon an assumption that the FCA's responses were both relevant and accurate.
7. You drew my attention to examples of what you consider to be inaccuracies and irrelevance in the FCA’s responses, and you concluded by saying:

Even if the investigator is right in saying that the FCA is not obliged to cover every point a consumer may raise, this is a case in which its failure to respond to two propositions repeatedly raised, and as such of obvious importance to the person who raised them, is a clear infringement of its own Transparency principle of operation. By failing to address these propositions, the FCA has not acted transparently, has not provided appropriate information about the basis of its guidance on LEIs, and has not demonstrated itself to be an organisation that is open and accessible to an enquirer from the general public such as I.

Preliminary point

8. It is not the role of the Complaints Scheme, nor am I qualified, to rule on the interpretation of legislation. The FCA is right to say that that is a matter for the courts. However, I need to go into some detail about the arguments which both you and the FCA advanced in the correspondence, since that is necessary to establish whether or not the FCA's responses to your points were adequate and reasonable.

My analysis

9. The background to your complaint arises from your role as lead trustee for a trust established under a will. The Trust has employed a financial services institution to provide investment services. That institution, following advice from the FCA on the requirements of MiFID ii (the Markets in Financial Instruments Directive which came into force earlier this year), required the Trust to obtain a Legal Entity Identifier (LEI) as a condition of the institution continuing to provide investment services.
10. Your interpretation of the law surrounding this issue is that trusts of the kind of which you a trustee are not eligible for an LEI. The FCA disagrees. There was considerable correspondence on this matter between you and the FCA in the autumn of 2017. This culminated in the FCA deciding that your dissatisfaction with the responses you had received amounted to a complaint under the Complaints Scheme. In December 2017 you received a decision from the FCA's Complaints Team rejecting your complaint but, following your approach to me and my intervention, the FCA accepted that it had not adequately investigated

the matter, and took the complaint back. The outcome of that investigation, which took from January to September 2018, is summarised in paragraphs 3-5 above.

Part one – adequacy of the FCA’s response

11. There is no dispute that the FCA did engage with your concerns in the period 21 September to 17 November 2017 (when the matter became a complaint). The relevant department of the FCA emailed you on several occasions in an attempt to address your concerns, and held a telephone discussion with you.
12. In my view, the two most significant interactions were: a long email, dated 6 November 2017, in which the FCA set out in considerable detail its approach to the interpretation and implementation of the European directive; and your commentary on that analysis, which you sent to the FCA on 12 November. It was your response of 12 November which led the FCA to conclude that it had taken the matter as far as it could, and that it should therefore be converted into a complaint.
13. It appears to be common ground that the Directive’s requirements are ambiguous in relation to trusts, and it is therefore unsurprising that there is scope for debate. In essence, the FCA’s analysis of 6 November was its attempt to establish that a purposive interpretation of the legislation led to the conclusion that trusts were eligible for LEIs. Your commentary set out why, in your view, the FCA’s arguments did not support that conclusion, and drew attention to some areas in which you considered that the FCA had misquoted or misinterpreted the relevant provisions.
14. In its decision letter of 27 September 2018, the FCA said:

I agree that the FCA should provide appropriate information on its regulatory decisions, but this is not an absolute obligation. In my investigation, I identified no material, in FSMA [the Financial Services and Markets Act 2000] or elsewhere, which required or obliged the FCA to continue correspondence relating to its guidance which covered every point raised by a consumer.....The FCA will take into account factors such as the need to use its resources in the most efficient and economic way.

15. As a general statement of approach, this seems to me to be sensible. There may come a time when the FCA properly concludes that it has taken correspondence as far as it reasonably can, and that it is under no obligation to go further. The question for me is whether the FCA exercised its discretion in an appropriate way in your particular case.
16. In answering that question, I should say that the judgement is not a straightforward one. However, I have concluded that the FCA should have made a greater attempt to answer your points, for a number of reasons.
17. The first is that the issue was not a trivial one. If it were found that your interpretation was right, it would follow that the FCA's guidance was imposing unnecessary costs upon a potentially large number of people. It was, therefore, important from the FCA's point of view – not just yours – to test whether or not you had a valid point. This placed an onus upon the FCA to satisfy itself that its guidance was soundly based – and to demonstrate that to you.
18. The second reason goes to the point you made to me in your email of 22 October (quoted in paragraph 6 above). The undoubted level of detail in the FCA's initial responses to you indicates that the FCA went to some trouble to address your points, but that does not prove that the responses were adequate.
19. The third reason is related. Given that the FCA mishandled the initial investigation into the complaint and had to take it back, and then took a further eight months to reinvestigate it (during which it missed a number of deadlines), I think that it was incumbent upon it to address the question of whether the responses were adequate, not simply to rely upon the length of the explanations and the absence of an absolute duty to explain. I note that in February 2018 (i.e. early on in the second investigation), a member of staff argued that it was important to engage with the substance of your arguments. Unfortunately, that view appears not to have prevailed.
20. To illustrate why I think that the FCA's responses were inadequate, I have identified what seem to me to be some key unanswered issues (I have not attempted to analyse every point).
21. The first issue relates to the interpretation of ISO17442:2012, which the FCA appears to have at least partly relied on for its view that trusts are eligible for

LEIs. The FCA has argued that the sentence ‘Legal entities include, but are not limited to, unique parties that are legally responsible for the performance of financial transactions or have the legal right in their jurisdiction to enter independently into legal contracts, regardless of whether they are incorporated or constituted in some other way (eg trust, partnership, contractual)’ confirms that trusts are eligible for LEIs. You have argued that the inclusion of the word ‘trust’ is simply meant to illustrate the fact that ‘the form in which the candidate was constituted is irrelevant to LEI-eligibility’. It does not seem to me that the FCA has properly engaged with this argument, which is central to your case. Does the FCA accept that ISO17442 does *not* unambiguously define trusts as being legal entities for the purposes of an LEI?

22. The second issue relates to the definition of legal persons. Under Markets in Financial Instruments Regulation (MiFIR), investment firms must use an LEI to identify clients who are legal persons. You have drawn attention to the fact that in English law trusts are not legal persons. The FCA has cited EFTA case law, though that does not appear to be directly applicable to these circumstances. The FCA’s responses do not seem to me to state clearly why it thinks that the references to legal persons ought to include trusts.
23. This leads to the third issue. The FCA has argued that it is necessary to take a purposive approach to the interpretation of the MiFIR legislative framework, and I understand the reasons for that approach. However, you have argued that it is not necessary to make trusts eligible for LEIs, since the purpose of the Directive can be met by identifying the trustees. Additionally, you have pointed out that, since there is no requirement to renew the LEI, relying upon it is pointless since the trustees and beneficiaries may change, thus undermining the purpose of the requirement. Again, it is not clear to me what the FCA’s position is in relation to this argument. (This third issue is one which you have only raised more recently, but it appears to be highly relevant to the overall position.)

Part two – the FCA had ‘manufactured a complaint’ and ‘used this artifice in order to be shot of the matter’

24. It is important that, when someone is dissatisfied with what the FCA is doing, there is a mechanism to record the dissatisfaction and attempt to resolve the

matter. As I have explained above, I do not think that the FCA's responses to your inquiries were entirely satisfactory, but I have seen nothing to persuade me that the FCA's decision to treat your correspondence as a complaint was done for any reason other than to try to resolve the matter. Nor do I consider that the FCA set out to be other than transparent in its explanations.

25. I do not uphold this element of your complaint.

Part three – delay

26. Your complaint was initially mishandled, and then badly delayed. Although some of that delay was related to a Freedom of Information Act request, the delays were unacceptable. The FCA has already acknowledged this, and offered you a payment of £100 which you have asked should go to a charity. There is no need for me to consider the matter further.

Decision

27. The FCA engaged with you on your query about the eligibility of trusts for LEIs, and went to some lengths initially to give you information about the matter. However, when you subjected the FCA to detailed challenge of its arguments, it decided to treat the matter as a complaint. The complaint was first mishandled, and then badly delayed; and when a decision was finally issued it did not engage with the substance of the matters which you had raised.

28. I do not consider that the FCA set out to be difficult or unhelpful, but I do think that a further, and more focused, response to your arguments initially, or during the complaints investigation, might have averted the months of effort which have been expended on this matter.

29. I uphold part one of your complaint, and **recommend** that the FCA writes to you explicitly addressing the main arguments which were set out in your 12 November 2017 response to the FCA's email of 6 November 2017, and the third issue described in paragraph 23 above. I am pleased to say that the FCA has, in response to my preliminary report, undertaken to do so.

Antony Townsend

Complaints Commissioner

29 November 2018