

8 April 2019

Final report by the Complaints Commissioner**Complaint number FCA00503***The complaint*

1. You complained to me about the FCA's rejection of a complaint you had made about advice it had given you in connection with an investment.

What the complaint is about

2. Your complaint to the FCA was that you had spoken to a call associate in the FCA's Customer Contact Centre (CCC) on 16 May 2018. The purpose of your call was to confirm that Firm X (UK) was a regulated entity as you wished to invest with it. You stated the associate told you that the firm was part of Firm X (Austria), and confirmed the firm was legitimate based on its registration number, and was eligible to operate in the UK under EU passporting laws.
3. You are unhappy that the CCC associate did not provide you with accurate advice on the firm, and led you to believe the firm you were dealing with was a legitimate firm, as a subsidiary of Firm X (Austria). You invested £13,000 but it turned out that fraudsters had cloned the firm and you lost your money. You believe the FCA is responsible for your losses and should compensate you.

What the regulator decided

4. The FCA did not uphold your complaint. It gave the following reasons:
 - a. It found no evidence to indicate that the call associate informed you that the firm you were enquiring about was a subsidiary of an Austrian parent company.
 - b. The call associate had explained that Firm X was passporting into the UK and had encouraged you to contact its home regulator in Austria before investing, and had sent an email to you repeating this advice, adding that

FCA00503

you should clarify with the Austrian regulator whether the firm was authorised to offer the proposed investment;

- c. The FCA had received notification that fraudsters might be attempting to clone Firm X but 'due to timings it was unlikely that the FCA would have had an opportunity to issue an alert on the Financial Services Register prior to your call to the CCC and prior to you transferring your funds';
 - d. The legitimate firm had ceased trading but it did not appear that the Austrian regulator had notified the FCA (which it was supposed to do under the EEA passporting arrangements);
 - e. It appeared that you had made your investment without waiting for a response from the Austrian regulator to the questions which the FCA had advised you to put.
5. Whilst the FCA did not uphold your complaint, it said
- 'It is unfortunate that the call associate who spoke with you on 16 May 2018 did not observe that the firm you had enquired about only held a passport for insurance related activities, yet you were enquiring about savings products', but this would not have had a bearing on your complaint as the advice from the call associate to contact the Austrian regulator would still have been the best course of action to take'.

Why you are unhappy with the regulator's decision

6. You are unhappy with the FCA's decision for two principal reasons:
- a. You consider that the FCA should have informed you that Firm X was not listed for savings products (element one);
 - b. You learned from a Freedom of Information request that the FCA was receiving alerts about fraudulent activity connected to this company 'across May and June 2018'. You feel the FCA was slow to act, and did not inform you of the problems with this company in a timely manner. Had it shared its information with you (and other investors) sooner, you might not have invested on 17 May and 1 June 2018 (element two).

My analysis

Element One

7. My investigation has revealed the following facts which are highly relevant to your complaint:
 - a. Firm X was licensed in Austria in 2001;
 - b. In 2005, the Bundesministerium Für Wirtschaft Und Arbeit (then the Austrian regulator) notified the Financial Services Authority (FSA – then the UK regulator) of Firm X's intention to passport into the UK;
 - c. In 2005, the FSA registered the passport request, but reversed the name order of the firm;
 - d. In August 2006, the Austrian authorities notified the FSA that Firm X's passport should be revoked;
 - e. In August 2006, instead of de-registering Firm X, the FSA registered the firm under its correct title (thereby creating *two* registered passport firms when there should have been none);
 - f. In June 2018, concerns about cloning begin to emerge;
 - g. In July 2018, an alert was issued by the FCA, and the second firm X was deregistered;
 - h. In February 2019, when the duplicate entry was identified, that too was deregistered.
8. There were therefore two serious errors made by the FSA: firm X was registered under the wrong name in 2005; and in 2006, instead of being deregistered, a second entry (under the correct name) was made.

Element Two

9. I have reviewed the FCA records which show the dates of the alerts connected to Firm X and the action the FCA took with respect to these. Like the FCA, I am required to respect confidentiality. This means that sometimes I cannot report fully on the confidential material to which I have access. However, as part of the Complaints Scheme, I have access to all the FCA's complaints papers, including confidential material. Sometimes this means that all I can say to complainants is

that, having studied the confidential material, I am satisfied that the FCA has (or has not) responded reasonably – but I am unable to give further details. This can be frustrating for complainants, but it is better that I am able to see the confidential material. On occasions, I have persuaded the FCA to release further confidential information to help complainants understand what has happened, but this is not always possible.

10. In your case, I am satisfied on balance that the FCA's complaint response - that due to timings it was unlikely that the FCA would have had an opportunity to issue an alert on the Register before your call to the CCC and before you transferring your funds - was reasonable under the circumstances.
11. As part of my investigation, I have carefully reviewed the advice you were given by the FCA. You called the CCC on 16 May 2018. The FCA said that the associate did not pick up on the fact that you were planning on opening a savings account whereas the firm was authorised as an insurance intermediary. However, this did not have a bearing on your complaint.
12. I have listened carefully to the recording of the phone call. The associate explained to you that the firm was based in Austria and had passported into the UK. The associate explained that the home regulator for this firm would be the Austrian regulator, as a result of which customers might not be eligible for Financial Ombudsman Service (FOS) and Financial Services Compensation Scheme (FSCS) awards.
13. During the conversation you asked – twice - 'what should I do then?', and the associate said both times that you should:
 - a. Contact the Austrian regulator and ask what permissions this firm had and what products it was authorised to offer, and what protections (such as FOS and FSCS) consumers in the UK could rely on; and
 - b. Contact the FSCS separately to ask if it covered this firm.
14. The call associate subsequently sent you an email with the details of the above organisations.
15. You called the Austrian regulator but did not wait for a reply before you invested with the firm the following day on 17 May.

16. I consider the CCC gave you sufficient information and guidance to enable you to understand that the Firm X was not regulated by the FCA, and to explain that you should conduct your own further due diligence first and contact the Austrian regulator and the FSCS before investing. While I agree with the FCA that the fact the FCA associate did not pick up that you were planning on opening a savings account was unfortunate, it does not alter the fact that you were given further and clear advice to undertake further inquiries: even if the CCC had alerted you to the issue of Firm X's permissions, the advice would have been for you to contact the Austrian regulator. Furthermore, the email which followed the phone call clearly advised you to check on the permissions.
17. Whilst this does not affect my assessment of your complaint, I understand the FCA has undertaken steps to provide further training to CCC call associates on handling these issues.

My decision

18. Matters in this case are complicated. Ultimately, you have lost your investment to fraud. However, it appears the failures of the regulator have been a facilitator to the criminal activity, and contributed to your decision to make your investment.
19. The FCA register entry for this firm was seriously inaccurate. If it had been deregistered in 2006, you might not have lost your investment in the way you did.
20. This is not the first time I have dealt with a complaint about the Register showing inaccurate or misleading information. In one such case (<http://frccommissioner.org.uk/wp-content/uploads/FCA00459-FR-18-06-18-publication-version.pdf>) I found that whilst a clone firm was the principal cause of the complainant's loss, it was able to take advantage of the FCA's woefully inaccurate Register. The complainant had checked the Register before investing and assured themselves the company was authorised. The FCA accepted that that complainant might not have made their investment had its register been accurate, and based on my recommendation offered the complainant an ex gratia payment of 50% of the complainant's loss.
21. Your case has similarities to the one above. However, unlike the other complainant, you contacted the CCC. The CCC gave you advice to contact the

Austrian regulator before investing. That was good advice. You did so, but did not wait for a reply before investing. Had you waited, you would have found out the firm was no longer authorised, and you would not have lost your investment in the way you did.

22. Against that, I have to weigh the fact that the FSA made two serious errors; that had the firm not been erroneously shown on the FCA's register it could not have been cloned in the way it was; and that the FCA Complaints Team did not uncover the extent of the regulatory failings.
23. While it is understandable that the FCA should be protected from general liability for consumers' losses, this is not an ordinary case. The FCA (and the FSA before it) for twelve years showed a deauthorised Austrian company as registered despite having information that it should not be. Although the FCA cannot be held responsible for the criminal behaviour of others, the FSA's serious failings contributed to your financial loss. While I do not consider that the FCA should be held responsible for the totality of your loss, in my preliminary report I **recommended** that it should make an ex gratia payment to you of 50% of your loss.
24. The FCA argued against this recommendation. Its view is as follows:

In our view, the direct cause of the complainant's loss was her own actions and it would not therefore be appropriate for the FCA to make a substantial compensatory payment to the complainant....

this complaint raises a more general question as to whether the FCA should consider making substantial compensatory payments for errors on the Register which do directly cause loss to consumers. As the PR [Preliminary Report] notes, the existence of the statutory immunity in FSMA [Financial Services and Markets Act 2000] is not a complete answer, given the power to make such payments exists under the Scheme. We have therefore considered whether, absent the immunity, the general law would impose an obligation on the FCA to compensate consumers for errors on the Register. We conclude that there would be no such obligation. This is on the basis that the social policy reflected in court decisions does not support imposing on a public body, under a statutory duty to make information available to the public,

responsibility towards an undefined class (the public in general) for an indefinite period for an amount which cannot be anticipated. The present complaint seems to us to be a good example of why the policy exists: the errors on the Register were made in 2006 but only came to light in 2018, 12 years later. Were the FCA to accept the recommendation, it would amount to the FCA warranting to the public that all entries on the Register are accurate, which as noted, is a position we are unable to accept.

25. I have considered this point but I do not agree with it. In 23 above I acknowledge the FCA should be protected from general liability for consumer losses. I accept that there should not be a general warranty for the accuracy of the Financial Services Register. However, in this case the FCA's failings with respect of the register are unusually serious and significant - the Register is incorrect as a direct result of two serious errors. I therefore **repeat my recommendation** that the FCA should consider making an ex gratia payment to cover 50% of your losses.
26. Finally, my investigation into this complaint has shown that the registration of passported firms appears to be defective. In addition to the points described above, the registration entries appear to contain references to defunct regulators and have erroneous dates. Given the danger that the registration of defunct firms can pose to consumers through cloning (as illustrated by this and the other case mentioned above) I **recommend** that the FCA undertakes a review of its processes to reduce the risks. The FCA has accepted this recommendation, and has undertaken a review of its register as a result of which a number of Austrian and Czech records have been removed from the Register, and further improvements to the intelligibility and accuracy of the records are planned. I welcome these steps.

Antony Townsend
Complaints Commissioner
8 April 201

