

15 June 2020

**Final report by the Complaints Commissioner****Complaint number FCA00522***The complaint*

1. On 11 March 2020 you asked me to investigate a complaint about the FCA. I have carefully reviewed the papers sent to me by you and the FCA. My preliminary report was issued on 4 May and both you and the FCA have commented.

*What the complaint is about*

2. Your complaint is about an investment you made in 2015 with a firm (Firm B) and what you consider to be the FCA's failure to supervise Firm B or to enforce EU and FCA rules designed to protect you as a non-domiciled investor.
3. Your complaint has been dealt with in three separate decision letters of the FCA's Complaints Team dated 31 January 2019, 24 May 2019 and 15 January 2020. You first contacted my office in November 2018 and you have had a very long wait for a final complaint response from the FCA. The decision letter of 24 May 2019 invited you to engage in further correspondence with the FCA and you have also kept in regular contact with my team.
4. All the complaints considered by the FCA arise from your concerns about its supervision of Firm B. I have therefore decided to consider all three decision letters even though the 2019 letters are now outside the usual three-month limit for referrals to my office.

*What the regulator decided*

5. The FCA's decision letter of 31 January 2019 told you that it had divided your complaint into three parts as follows:

- a. **Part One** - *You believe that the firm was not transparent about the costs and fees of the investment services that were provided to you. You believe this has led to you paying more than you could have paid a different firm.*

The Complaints Team decided that it could not investigate this part of your complaint because individual complaints about a firm are handled by the Financial Ombudsman Service (FOS) and not the FCA.

- b. **Part Two** - *You have provided information about the above situation to the FCA's Customer Contact Centre (CCC). You are unhappy that the FCA is unable to give you feedback related to this.*

The Complaints Team excluded this part of your complaint for two reasons:

- i. because Section 348 (s.348) of the Financial Services & Markets Act (FSMA) classes some information the FCA holds about firms as confidential and places restrictions on how that information is dealt with.
- ii. because Paragraph 3.5 of the Scheme states that complaints which amount to a dissatisfaction with the FCA's general policies or with the exercise of, or failure to exercise, discretion where no unreasonable, unprofessional or other misconduct is alleged cannot be investigated.

The investigator told you that paragraph 3.5 applied to this aspect of your complaint because any information that is not restricted by s.348 of FSMA may be restricted due to the FCA's policy on sharing information about regulated firms and individuals. In view of this, the FCA does not generally provide feedback on action taken in response to information received.

- c. **Part Three** - *You are unhappy with the FCA's supervision of the firm. You believe the FCA has not monitored the firm to ensure it adheres to the rules that govern it. Specifically, you have alleged that the firm has not adhered to Competition and European legislation and made reference to Article 19 of Directive 2004/39/EC (MiFID I).*

This part of your complaint was investigated by the FCA's Complaints Team.

6. The FCA's decision letter of 24 May 2019 upheld Part Three of your complaint on the basis that the information you provided to the CCC (now the Supervision

Hub) was not handled correctly, and they should have requested further information from you.

- a. In response to this decision letter, you were asked to supply that information for the relevant FCA supervisory team to decide whether further action was necessary, although it was explained to you again that the FCA does not generally provide feedback on action taken in response to such information.
  - b. The investigator also noted that on one occasion you were told wrongly that the FCA had no rules applicable to your situation in 2015. Later, a different CCC Associate correctly informed you COBS 6.1.9R would have applied.
  - c. A recommendation was made that *all CCC Associates are reminded that they should be more inquisitive when information about firms is provided to them. If more information is needed to decide how to classify information this should be requested.*
  - d. You were also offered a payment of £75 for delay in handling your complaint.
7. Following the decision letter of 24 May 2019, you continued in correspondence with the Complaints Team to provide the further information requested and you also had further correspondence with the Supervision Hub. In September 2019, a new complaint was opened by the Complaints Team.
8. The FCA's decision letter of 15 January 2020 divided this complaint into two parts as follows:
- a. **Part One** - *You are unhappy that the FCA did not give you any guidance and that the FCA has been unhelpful. You have said that you haven't received an answer to your questions about the rules which applied in 2015 regarding discretionary portfolio management and what information you should have been given by [Firm B] in relation to the fees you'd be charged.*

The Complaints Team did not uphold this part of your complaint because it said that your concerns had already been investigated and dealt with in the decision letter of 24 May 2019, and would not be looked at again. Further information was provided to you about EU and FCA rules applicable in 2015, when you invested, and from January 2018 when MiFID II was introduced.

- b. **Part Two** - *You are unhappy because you say that you feel the FCA is discriminating against you because you are French.*

In relation to this part of your complaint, the new Complaints Team investigator provided an explanation of an apparent misunderstanding that had arisen during the first investigator's consideration of your complaint. The decision letter went on to say that: *I would like to explain that being French (or more broadly, a person's nationality) is not a protected characteristic under the Equality Act 2010 and it follows that you cannot be discriminated against on this basis. Instead, I have considered whether you were treated fairly by the FCA on the basis that you are French. To do this, I reviewed all the contact you have had with the FCA within our internal systems, looking through all the correspondence on individual queries and complaints you have had with us. I have found that, the guidance given within your queries and complaints with the FCA was reasonable and there was no evidence you were treated unfairly by the FCA.*

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

9. You have told me that you are dissatisfied with the complaint outcome because you do not consider the FCA has provided an answer or followed its consumer protection objective. You do not know if this is because you are French but you have personally lost a lot of money in costs and fees that were not highlighted to you by Firm B from the start. You also consider that many European citizens have been affected by this and other investment recommendations and their rights have not been protected by the FCA.

*Preliminary points*

10. You approached the FCA's Supervision Hub (then CCC) in the autumn of 2018 after having been in correspondence with the Financial Services Directorate of the European Commission, which suggested you contact *the competent national supervisory authority in order to assess whether in your particular case the legal requirements applicable under MiFID I were breached*. You were advised that for the UK the competent national supervisory authority is the FCA. By the time you contacted my office in November 2018, that is before you were referred to the FCA's Complaints Team, you were aware that you should also approach the

FOS about your individual complaint about Firm B, and you had submitted a complaint there.

11. A complicating factor in your case is that Firm B operates in both the UK and the separate jurisdiction of Jersey. My understanding from what you have told me is that the FOS referred your complaint to the Jersey Ombudsman who agreed to look at it but that Firm B then said the FOS had already considered the matter. As a result you have not been able to pursue your complaint about Firm B. Unfortunately, this is not something I can help you with as I do not have any jurisdiction over the FOS or the Jersey Ombudsman. I can only suggest that you approach them again, explain your situation and ask that your complaint is reconsidered. You may show them this letter if you think that would be helpful.
12. Finally, I should explain that I cannot direct the FCA in its supervision of firms. I recognise that you would like me to oversee the FCA's supervision of the firm in question, but this is not something which I can do.

#### *My analysis*

##### *Your first complaint – decision letters 31 January and 24 May 2019*

13. Your complaint about the FCA made via my office in November 2018 was about the FCA's alleged inaction in implementing and enforcing EU directives MiFID I and II. It followed your unsatisfactory conversations with the Supervision Hub, during which you had been given some inaccurate information.
14. The complaint should have been a very simple one for the FCA to handle, but it took six months for the FCA to send you a decision.
15. The FCA's Complaints Team was correct to tell you that it could not look at your individual complaint about Firm B, although it was clear from your complaint that you had already approached the FOS. Your complaint was clearly about the FCA's supervision of Firm B and what you considered *the FCA's* failure to enforce its own rules and guidance.
16. The FCA was also correct to say that complaints about the FCA's general policies are excluded: however, this was not really the substance of your complaint.

17. Part Three of your complaint was investigated and upheld. My consideration of the FCA's files shows that the investigator considered the supervisory issues carefully and asked FCA teams appropriate questions. The recommendations she made for improvement were appropriate. You were correctly offered an *ex gratia* payment for delay, which was partly caused by confusion about who internally was responsible for supervision of this aspect of Firm B's work. Of itself that concerns me because it means there were no clear lines for the Supervision Hub to pass your information to, even if they had decided to do so, as they ought to have done.
18. Once the appropriate FCA supervisory team was identified, they informed the Complaints Team that they would need further information from you to assist their supervision of Firm B and to consider whether any regulatory action was required. The FCA requested this from you in its decision letter of 24 May 2019. However, the files show that the Complaints Team investigator was aware of this request several weeks before this letter was issued. It is not clear to me why you were not asked to send in this information sooner. It also appears that at least some of the information you were asked to send had already been supplied by you. It is therefore understandable that your response to the decision letter was that you found it 'unbelievable' that you had waited six months to be asked to send in your information again.
19. Although the decision letter repeated the FCA's policy that feedback will generally not be provided, in my opinion it would have been more helpful if you had been asked to supply the information ahead of the decision letter, which could then have thanked you for it. In my view this has created confusion in your mind about what was going to happen to that information, and raised an expectation that you would receive a further response from the Complaints Team. The correspondence you had with the Complaints Team between May and September 2019 supports this view, although the FCA's intention was good. This in part led to your second complaint.
- Your second complaint – decision letter 15 January 2020*
20. You continued to correspond with the Complaints Team between May and September 2019 and during this time you were also asked to re-engage with the

Supervision Hub. You said that your complaint concerns remained unresolved and you asked if your treatment was because you are French. A new complaint was created, and on 3 September you were told that a summary would be sent to you within four weeks. However, this did not happen, although an update was provided to you on 2 October when you were told that a further complaint you had submitted on 15 September would also be included. On 2 December a Senior Investigator asked the complaints investigator if the summary had been sent. The decision letter of 15 January 2020 did not provide you with any explanation why the Complaints Team did not summarise as promised.

21. As noted above (paragraph 8) the Complaints Team divided your second complaint into two parts as set out in its decision letter of 15 January 2020.

***Part One***

22. Regarding Part One, the FCA said that you had already had a response to your concerns and Part Three of your first complaint had been upheld. Further information was provided about the applicable rules and guidance. From the correspondence, it appears that you wanted the FCA to confirm whether Firm B has breached its rules and guidance to assist you in making your complaint about the firm. However, that is not the role of the FCA and would be a matter for the Ombudsman (see also paragraphs 10 to 12).
23. In my preliminary report, I asked the FCA to provide me with an update on its supervision of Firm B in relation to the matters you have raised. I explained that I may not be able to share this information with you to the extent that it is confidential.
24. The FCA has told me that:
  - a. It does not believe that you have sent it some of the information it requested relating to the discretionary service you signed up to, including the requested annual statement information (pre and post MiFID II), and documentation that showed the details of the contract for service that you signed (post-sale information). It cannot fully assess Firm B's compliance with MiFID I as it cannot be certain which rules applied at the time as they are service specific.

- b. Without the requested post-sale information, the FCA is unable to make a judgement on the compliance with the disclosure requirements of MiFID I.
  - c. To help the FCA to understand which service you agreed to, the FCA would need to receive from you the post-sale information, so that Supervision can review whether Firm B complied with the MiFID I rules in your case.
25. The FCA should have collected this information from you long ago. You now have the opportunity to send them this further information if you wish. In your response to my preliminary report you have also sent me a great deal of information, at least some of which has been supplied to the FCA before. I am happy to send this on to the FCA as requested by you but I am unable to oversee the FCA's assessment of this information, although I realise that this is what you would like me to do. However, the FCA should let me know the outcome of its assessment, so that I can provide some reassurance that it has been properly considered. As previously explained, neither I nor the FCA will be able to share with you its findings or details of any action (if taken).
26. The FCA has also told me that:
- a. It has sought clarification about the applicable rules from its Retail Distribution Policy team and the following information has been provided:  
  
In 2015:
    - COBS 6.1.9R would always have been a relevant rule in relation to costs disclosure. It applied to firms that carried on 'designated investment business' for clients. It required firms carrying out discretionary portfolio management (DPM) services for a client to disclose the costs and charges associated with that service and it would have applied if the firm was carrying out advisory services.  
In addition, if advisory services had also been provided in 2015:
    - COBS 6.1A.17R to COBS 6.1A.19G would have also been relevant – to require the firm to give information about its charging structure in relation to its advisory business.  
So:



- if the firm in question was providing DPM services, it was right to say that COBS 6.1.9R was relevant - and that the rule required costs disclosure.
- if the firm was carrying on advisory services, it was right to say that COBS 6.1.9R was relevant to require costs disclosure. It was also right to say that COBS 6.1A.17R to COBS 6.1A.19G was also relevant - to require disclosure of the charging structure.

b. The concerns you raised were when MiFID I rules applied; they should no longer arise because the MiFID II rules are clearer and more prescriptive.

27. You have also drawn my attention to the FCA's Thematic Review of *Wealth management firms and private banks Suitability of investment portfolios* published in 2015 <https://www.fca.org.uk/publication/thematic-reviews/tr15-12.pdf>. I asked the FCA to tell me how this was considered in relation to its supervision of Firm B at the time and subsequently, including following the further information you supplied at its request in 2019.

28. The FCA has now provided me with further information about this; however, until it has analysed the additional material it has requested from you and provided me with an update on its supervision of Firm B, I am unable to say whether I am satisfied with this.

### ***Part Two***

29. Regarding Part Two of your second complaint, that you had been treated differently because you are French, the decision letter of 15 January 2020 set out the Complaints Team's view of an apparent misunderstanding that had arisen during the first investigator's consideration of your complaint. However, from my reading of the file, this was not what your complaint was about and you had already resolved this issue directly with the first investigator.

30. Of much greater concern to me is that the decision letter went on to say that *nationality is not a protected characteristic under the Equality Act 2010 and it follows that you cannot be discriminated against on this basis*. Under the Complaints Scheme, it is not for me to interpret the law or to make a finding of discrimination; however, what you were told here is clearly wrong. Section 9 of the Equality Act 2010 includes nationality within the protected characteristic of

race - <http://www.legislation.gov.uk/ukpga/2010/15/section/9> - and guidance from the Equality and Human Rights Commission states: *race...refers to a group of people defined by their race, colour, and nationality (including citizenship) ethnic or national origins... In the Equality Act, race can mean your colour, or your nationality (including your citizenship). It can also mean your ethnic or national origins, which may not be the same as your current nationality.*

<https://www.equalityhumanrights.com/en/equality-act/protected-characteristics>

Discrimination on the basis of nationality has been unlawful in the United Kingdom for more than forty years.

31. The decision letter went on to say that *Instead, I have considered whether you were treated fairly by the FCA on the basis that you are French.* In my view this was in fact the correct test for the Complaints Team to apply as, like me, it cannot make findings of law under the Scheme. I have seen no evidence that you were treated unfairly because of your nationality, although it is possible that some misunderstandings arose because of language difficulties. I note that some of the later correspondence with you was conducted in both English and French.
32. As a result, I do not consider that the FCA's error in saying nationality is not a protected characteristic under the Equality Act 2010 has had an effect on the outcome of your complaint, Nevertheless, it was a significant and worrying mistake and the Complaints Team has now confirmed that it will take steps to ensure that its staff are correctly trained on the Equality Act 2010 and its application to their work.
33. In my view you were also making a wider point, beyond the personal, that the FCA does not care about non-domiciled investors, and in particular European Union investors wherever they live, in relation to its consumer protection objective. The Complaints Team did not address this issue or provide you with any information about what, if any, specific steps it has taken to protect these investors. I therefore asked the FCA to tell me what, if any, specific steps it has taken to protect non-domiciled and European Union investors wherever they live, in relation to its consumer protection objective. It says:

- a. *We do not generally differentiate between the treatment of non-domiciled, EU or other customers. The MiFID frameworks and rules are intended to apply consistently to all EU MiFID investors in all EU Member States.*
- b. *Everything we do (all rules, rule changes, consultations, feedbacks etc.) must be assessed for equality and diversity considerations. This would ensure that non-domiciled and European Union investors are treated the same as UK investors.*
- c. *We would expect UK firms to treat all customers fairly.... This would include such elements as costs, charges and disclosures.*
- d. *However, where firms in the UK are providing certain types of services to customers, such as financial advice or discretionary services, we would expect firms to establish and take account of the needs and circumstances of each customer in providing suitable advice and recommendations, and relevant ongoing services.*
- e. *For customers who are non-domiciled residents in the UK for tax purposes, this factor should be considered in advice being provided, products being recommended, and information provided to the customers. In addition, not all non-domiciled residents have the same tax requirements.*
- f. *For customers who are EU nationals and not permanently resident in the UK, this may also be relevant in the provision of some services and products (for example, longer term investments or pensions).*
- g. *Where the delivery of our consumer protection objective, generally or in particular cases, requires cooperation between UK and non-UK regulatory authorities, the necessary frameworks, agreements and contacts are in place.*

34. From the evidence I have seen, I am satisfied that the delays and errors you experienced in the handling of your complaint by the FCA were not due to your nationality.

*My decision*

35. My overall view is that the FCA's approach has unnecessarily complicated your complaint, which was essentially straightforward. From your first contact with the

Supervision Hub, your interactions with the FCA have been unsatisfactory. This has caused long delay and confusion.

36. I have concluded that it was unhelpful for the FCA to wait until its decision letter of 24 May 2019 to request further information from you. This helped to create your expectation that you would receive a response from the Complaints Team regarding that information, even though this was not the FCA's intention. I am pleased to note that in response to my preliminary report, the FCA has accepted that it would have been better to request information from you sooner.
37. I have also concluded that the FCA's second consideration of your complaint was inadequate in the following ways:
- a. No summary of your complaint was provided despite this having been promised in the Complaints Team's acknowledgement letter. This is not the first time I have seen this in recent cases. A complaint summary is provided so that complainants can check that the FCA has correctly identified their complaint and can comment on this. It is unfair to complainants to omit this step as it means that they do not know what the FCA is investigating until they receive their final decision letter.
  - b. The decision letter of 15 January 2020 contained a significant error in relation to the protected characteristics set out in the Equality Act 2010.
  - c. Some aspects of your complaint were not commented on or addressed.
38. I have therefore **partly upheld** your complaint on the basis that, although the core decisions made by the FCA were correct, the FCA's handling of your complaint – both by the Supervision Hub and by the Complaints Team – was poor and badly delayed.
39. I **recommend** that:
- a. The FCA ensures that:
    - i. its Supervision Hub has clear reporting lines to pass on supervisory issues and information in all cases and
    - ii. takes steps to ensure complaints cases are not delayed because Complaints Team staff are unable to obtain clarity about who is the responsible internal team (Paragraph 17).

- b. The FCA takes steps to ensure that it provides its summary of the complaint to complainants before issuing its decision letter (Paragraph 20).
- c. The FCA ensures that its Complaints Team staff are correctly trained on the Equality Act 2010 and its application to their work (Paragraph 32).
- d. The FCA increases its offer of an *ex gratia* payment from £75 to £150 to reflect the multiple failings in its various responses.

40. In response to my preliminary report the FCA has told me that it is confident that there are clear reporting lines in place for its Supervision Hub to pass on information. It has accepted all my other recommendations. This is welcome. You should hear shortly from the FCA with its offer to pay you £150.

### **Conclusion**

41. I have partly upheld your complaint and made recommendations which the FCA has accepted. I realise that this report does not provide you fully with answers to concerns that you raised with the FCA as long ago as November 2018. However, I will now send to the FCA the information that you have sent to me and you also have the opportunity to send the FCA the additional information that it says it needs (paragraph 24). I am unable to oversee the FCA's assessment of this information, although I realise that you would like me to. However, I have asked the FCA to let me know the outcome of its assessment.

Antony Townsend

Complaints Commissioner

15 June 2020