

9 September 2020

## Final report by the Complaints Commissioner

### Complaint number FCA00768

#### *The complaint*

1. On 30 June 2020 you asked me to review the FCA's decision to defer investigation of a complaint which you had made on behalf of your client.

#### *What the complaint is about*

2. On 4 November 2019 you complained to the FCA, on your client's behalf, and set out a timeline, the principal features of which were:
  - a. Your client had been the subject of an FCA investigation since investigators were appointed in April 2018;
  - b. Your client had co-operated fully with the investigation;
  - c. In May 2018 the FCA had indicated that it intended to tell your client what, if any, further action it would be taking against your client within three months;
  - d. In August 2018 the FCA had indicated that it would be a further three months before it could give your client a substantive update;
  - e. In November 2018 the FCA had said that it was trying to obtain information from overseas, and that it would give a substantive update in a further three months;
  - f. In December 2018 the FCA said that it was concluding its inquiries, and hoped to be able to make a decision in the new year;
  - g. In March 2019 the FCA said that its investigation had concluded, and that it should be able to tell your client the outcome by June 2019;
  - h. In June 2019 the FCA first informed you that the investigation was continuing, and two days later said that that was an error, that its

investigation was complete and that it hoped to be able to tell your client whether or not he would receive an Annotated Warning Notice by September 2019;

- i. In September 2019 the FCA initially said it hoped to give your client its decision that month, and then said it would do so by October 2019;
  - j. In October 2019 the FCA said that it would be issuing an Annotated Warning Notice by March 2020 (the delay being due to other unrelated casework, and the involvement of other parties in the proceedings being brought against your client).
3. In the light of that timeline, you complained that:
- a. The FCA had repeatedly missed its own timescales, and not kept your client properly informed;
  - b. The FCA's reasons for its delays were inadequately particularised, and the delays were not defensible, particularly since:
    - i. The case against your client was not complex, and
    - ii. The delays were causing serious adverse effects upon your client's personal and professional life, as the FCA was aware.
4. The remedies which you sought were:
- a. An independent review of whether the actions being taken by the FCA against your client were proportionate;
  - b. If the case proceeded, written confirmation that the proceedings would not be delayed by litigation or other regulatory proceedings;
  - c. Confirmation that your client's case would be prioritised;
  - d. A revised time estimate for the Annotated Warning Notice (if the case proceeded);
  - e. The expeditious and efficient progress of any further proceedings;
  - f. Regular (monthly) updates on progress against the timeline, with proper explanations for any delays.

*What the regulator decided*

5. The FCA decided to defer investigation of your client's complaint. It said:

*I am deferring our investigation of [your client's] complaint. This is because the complaint is connected with, or arises from, some form of continuing work by the FCA. In this case, as you are aware, the ongoing action is the Enforcement work being undertaken. Please accept my apologies for the time it has taken to reach this conclusion.*

*We are generally only able to begin investigating a complaint after any ongoing work is finished. Once that action is finished, we will write to you to inform you, and to ask if you still wish us to look at the complaint.*

*The Complaints Scheme (the Scheme) sets out what the FCA will do in circumstances where there is continuing work at the time a complaint is made. Paragraph 3.7 of the Scheme states:*

*'A complaint which is connected with, or which arises from, any form of continuing action by the regulators will not normally be investigated by either the regulators or the Complaints Commissioner until the complainant has exhausted the procedures and remedies under FSMA (or under other legislation which provides for access to the Scheme) which are relevant to that action. The complainant does not have to be the subject of continuing action by the regulators for this provision to be engaged. An investigation may start before those procedures are completed if, in the exceptional circumstances of the case, it would not be reasonable to expect the complainant to await the conclusion of the regulators' action and that action would not be significantly harmed.'*

*It may be helpful for me to explain the objective which underlies paragraph 3.7. The objective is to ensure that a complaint investigation does not cause detriment to, or prejudice, any ongoing work by the FCA. Such interference may inhibit the FCA from achieving its statutory objectives in a timely manner. The key staff assisting the Complaints Team with its investigation are the same staff who are responsible for bringing the action to a timely conclusion. Involving those staff in two processes at the same time would inevitably delay the conclusion of the Enforcement work, which could harm consumers and*

*would also, we suggest, be against the interests of [your client], given the nature of his complaint. Consistent with the underlying policy, and to prevent the Scheme being used to prejudice ongoing action, an investigation of a complaint by the Commissioner does not prevent the FCA from taking or continuing to take any work it considers appropriate (please see paragraph 7.4 of the Scheme). The result of your complaint could not, therefore, be the termination of any ongoing enforcement work.*

*I have considered, in line with paragraph 3.7 of the Scheme, whether there are 'exceptional circumstances' relating to this case. I have concluded that there are not, and that any investigation of this complaint should take place after the conclusion of the enforcement action and any work which may result from the current investigation.*

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

6. In your complaint to me, you made the following additional principal points:
  - a. Since your complaint was made to the FCA, the FCA had further changed its position and delayed the proceedings, saying first in March 2020 that a decision would now be made in May 2020 (which it confirmed three times), and then on 28 May that it would 'move to drafting Annotated Warning Notices for all subjects under investigation', and that it expected to provide written notification regarding the service of a Notice in September 2020, while noting that this was not straightforward. You have subsequently told me that in August the FCA informed you that the matter would not be put before the decision makers until November 2020, further delaying the resolution of these matters;
  - b. The FCA had misdirected itself in its interpretation of paragraph 3.7 of the Scheme Rules (see paragraph 5 above). In your view, your client had exhausted the statutory procedures and remedies available to him under the Financial Services and Markets Act 2000 (FSMA), and there were exceptional circumstances which justified the investigation of his complaint at this point – given the effect of the prolonged regulatory investigation on his professional and private life.

### *Preliminary points*

7. This report is concerned solely with the question of whether or not the FCA was right to defer consideration of your client's complaint. At this stage, I am not considering the complaint's merits.
8. Your client's fundamental objective – which is entirely understandable – is to bring the FCA regulatory proceedings to a conclusion as soon as possible. I cannot intervene in the FCA's regulatory processes to direct how they should be undertaken.

### *My analysis*

9. It is not disputed by the FCA that your client's complaint includes matters which fall within the Scheme: the FCA has deferred investigation, not excluded it. The matter therefore is one of timing.
10. Starting with the interpretation of the Scheme rules, in a final report which I published in July 2020 - <https://frccommissioner.org.uk/wp-content/uploads/FCA00731-final-report-020720-for-publication.pdf> - I said the following:

*The questions to be answered are:*

- a. Has the complainant exhausted the procedures and remedies? (If they have, the 3.7 ground for deferral falls away);*
- b. If the answer to a. is no, then the question is whether there are 'exceptional circumstances' under which it would 'not be reasonable' to expect the complainant to wait and the regulator's continuing action would not be 'significantly harmed'.*

*As I understand it, paragraph 3.7 makes deferral the norm in such circumstances for two reasons:*

- a. Because decisions under the Complaints Scheme might be seen to prejudice the statutory regulatory processes;*
- b. A complaints investigation run in parallel with enforcement proceedings might divert resources from those proceedings, which ought to take precedence.*

11. In my view, your client has not exhausted the 'procedures and remedies' under FSMA, since the investigation is continuing and, if your client's case were to proceed, some of the matters about which he complains might be argued at the Regulatory Decisions Committee (RDC) or beyond. In your response to my preliminary report, you have made the point that the RDC role is to determine whether or not the allegations in a Warning Notice are well founded, not to consider the conduct of the FCA's Enforcement Department. For that reason, you argue that your client has effectively already exhausted the procedures and remedies.
12. I accept the point that the RDC may not entertain some of the points raised in this complaint, but the fact is that there *are* continuing statutory proceedings against your client which have not been exhausted, and your client will have opportunities to make representations in the course of those.
13. In terms of 'exceptional circumstances', I accept that your client's situation is particularly (although probably not exceptionally) difficult, and that there is a clear interest on all sides in the prompt conclusion of the proceedings. Against that, I must take into account the fact that the FCA Enforcement Department is having to deal with competing priorities, and that there are apparently related proceedings which may have an impact upon the way in which the case against your client is handled. It is not this Scheme's role to second-guess those judgements.
14. Additionally, I need to consider what the impact of a complaints investigation might be. To be meaningful, it would require at least some investigation of the underlying management of the enforcement proceedings, since without that it would be hard to reach any conclusion about whether or not Enforcement's handling of the communications and timescales about which you complain was reasonable. That would inevitably entail some diversion of Enforcement's resources. You have suggested that that diversion might not be significant, given how long Enforcement has had to investigate the matter, and you have warned against the argument that Enforcement is 'too busy to be held to account'. I recognise that danger, though it is mitigated by the fact that the FCA has only *deferred* the complaint.

15. Furthermore, even if the complaint were to be investigated now, it seems to me that - at the most - the outcome might hypothetically be some criticism of the past handling the matter, and some recommendation on future handling, since – as I have stated – this Scheme cannot be used to direct the management of live proceedings.
16. In those circumstances, I do not think that the diversion of resources into a complaints investigation *at this stage* would be justified.
17. You have argued that, in the absence of a remedy under this Complaints Scheme, the FCA's Enforcement Department is effectively unaccountable. While I understand your client's wish to use whatever methods are available to expedite progress, the conduct of the proceedings will be open to challenge through the legal process; and your client's concerns could be investigated under this Scheme when the deferral ends. In that respect, I **recommend** that the FCA should review the deferral of this complaint as soon as either an Annotated Warning Notice has been issued, or a decision has been made not to take the proceedings any further.

*My decision*

18. For these reasons, my view that the FCA was right to defer consideration of your client's complaint.
19. Nonetheless, I recognise your client's pressing need to have these proceedings brought to a conclusion. For whatever reason, it is clear that the proceedings have been very protracted, and that the FCA's estimates of timings have had to be repeatedly revised. That is clearly undesirable. I therefore urge the FCA to ensure that reliable timescales and progress reports are supplied to your client promptly and effectively.

Antony Townsend  
Complaints Commissioner  
9 September 2020