

31 March 2021

Final report by the Complaints Commissioner**Complaint number FCA00814*****The complaint***

1. You first contacted my office in September 2017, and on 24 August 2020, following the FCA's delayed complaint response, my office formally accepted your complaint about the Financial Conduct Authority (FCA) and its predecessor the Financial Services Authority (FSA). I have carefully reviewed the documents supplied by you and the FCA. The issues involved are complex and go back many years. The FCA's files were extensive, in poor order, and not all were initially supplied to my office. This was particularly disappointing, especially since the FCA had already conducted its own complaints investigation, as a result of which I would have expected its files to have been presented to me complete and in an orderly and timely manner. The FCA accepts and apologises for this.
2. This is one of the reasons that it took me longer than usual to issue my preliminary report, which was issued on 20 January 2021. I am aware that you had already had a very long wait for the FCA's complaint response and that this caused you further delay. I thank you for your patience in this matter. Both you and the FCA have had an opportunity to provide your comments and I have now finalised my report.

What the complaint is about

3. Your complaint is about the FSA and FCA's oversight, supervision and regulation of Keydata Investment Services Ltd (Keydata) and related matters.
4. You first complained to the FSA on 7 August 2009. On 12 August 2009 you were informed that the FSA Complaints Team had decided to defer its investigation of your complaint under the Complaints Scheme due to continuing regulatory action

involving Keydata and several connected individuals. You raised further concerns in 2012.

5. Your complaint remained deferred until after [the Upper Tribunal reached a decision dated 6 November 2018](#). In January 2019, your complaint was reopened by the, now, FCA Complaints Team and you were asked if you wished to proceed with your complaint. You agreed, and the FCA's complaint response was issued on 19 August 2020.

What the regulator decided

6. I say more about the FCA's Decision Letter of 19 August 2020 in the *My Analysis* section below. Briefly, the FCA divided your complaint into seven parts, none of which were upheld, apart from a complaint about delay in its own complaints handling, for which you were offered an *ex gratia* payment of £400.
7. The Decision Letter also explained that the FCA had received a number of other complaints about Keydata and that overall the Complaints Team had concluded that the FSA's supervisory approach and activity regarding Keydata, including the approach to its financial promotions, '*could have been improved.*'
8. The FCA also sent you a separate letter dated 19 August 2020 answering other points that you had raised (the Additional Questions Letter).

Why you are unhappy with the regulator's decision

9. You have sent me a detailed response to the FCA's two letters dated 19 August 2020, which I also consider below. In essence, you consider that the regulator was slow to respond to unfolding issues at Keydata, slow to admit its own failings, and that its primary motivation is to protect itself rather than the public.

Preliminary points

Historical Note

10. The FSA existed from 28 October 1997 until 1 April 2013. It took over the role of the UK Listing Authority on 1 May 2000. Its responsibilities were extended by the Financial Services and Markets Act 2000 (FSMA), which was implemented on 1 December 2001. On 1 April 2013 The Financial Services Act 2012 (the Act) came into force and the FSA was replaced by the FCA.

Section 348 and Confidentiality

11. The FCA's complaint response explained that there are limits on some information provided '*due to confidentiality and policy restrictions*'. The Decision Letter provided you with a link to further information about this on the FCA's website. Briefly, section 348 (s.348) of FSMA classes some information the FCA holds about firms as confidential and restricts how that information is dealt with. In addition to this, any information that is not restricted by s.348 FSMA may be restricted due to the FCA's policy on sharing information about regulated firms and individuals, who also have legal protections. Under this policy, the FCA will not normally disclose the fact of continuing action without the agreement of the firm concerned.
12. 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. This is so that I, as an independent person, can see whether I am satisfied that the FCA has behaved reasonably. 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) behaved reasonably – but I am unable to give further details.
13. My office has previously criticised the FCA's reliance on s.348 in some situations. My understanding is that it applies only to confidential information received by the FCA in the course of its statutory duties. S.348 cannot in my view be used to protect information generated by the FCA itself, nor information which is already in the public domain. I recognise that the FCA has a difficult task in deciding what information should properly be disclosed, particularly when balancing its various legal responsibilities or when there is a danger of prejudicing proceedings. Nevertheless, in my view there is scope for greater openness in this case, and in this report, I have referred to some of the further material I have reviewed. In doing so, I have taken into account that, in the case of Keydata, complainants have had a very long wait for answers and that there is no continuing action: there has been a published Upper Tribunal decision and the relevant individuals have been penalised – see the *Brief Chronology and Background* below.

Reports from Dame Elizabeth Gloster and Mr Raj Parker published 17 December 2020

14. During the period of my investigation into your complaint, the Treasury published and the FCA responded to a report by [Dame Elizabeth Gloster](#) (into the FCA's regulation of London Capital & Finance plc (LCF) between 1 April 2014 and 30 January 2019) and the FCA published and responded to a report by [Mr Raj Parker](#) (into the FSA and FCA's handling of the Connaught income fund series 1 and connected companies). Although these reports were not available to the FCA's Complaints Team when conducting their complaints investigation, they contain many common themes relevant to my investigation into your complaint about Keydata. I have therefore referred to both reports below and I have had regard to them in my proposed recommendations. I note that the FCA has accepted and agreed to implement all of the recommendations made by [Dame Elizabeth](#) and [Mr Parker](#), which I have set out in an annex to this report.

My analysis

Brief Chronology and Background

15. Keydata was regulated by the FSA from December 2001. The FCA's files show that between March 2002 and April 2005, the FSA received intelligence and dealt with a number of concerns about Keydata's promotional literature and misleading, unrealistic marketing involving a range of different products. As a result of this, some regulatory steps were taken.
16. In November 2005, KPMG and HSBC reported to the FSA their concerns about misleading marketing from Keydata. Around the same time, separate intelligence was received that suggested wider issues with the firm. This was initially dealt with by the FSA's Financial Promotions team but eventually Keydata was referred to the Supervision team who visited the firm in September 2007. Following this visit, Keydata was referred to Enforcement on 16 November 2007.
17. Enforcement action continued and, in June 2009, when it became clear that the firm could not meet its tax liability for products wrongly marketed as ISAs, the FSA applied to put Keydata into insolvency administration. £475m had been invested by 37,000 investors between 26 July 2005 and 8 June 2009 and the

Financial Services Compensation Scheme (FSCS) has since paid out £330m in compensation.

18. On 2 July 2014 Keydata was dissolved at Companies House following a motion from PWC, the insolvency administrators. As a result of this, FSA Enforcement action was discontinued against the firm. Enforcement proceedings continued against Keydata individuals. These were lengthy, protracted and in some cases contested, culminating in an Upper Tribunal decision dated 6 November 2018. The Tribunal upheld penalties imposed by the FCA. Keydata's CEO and Sales Director were both fined and prohibited from conducting regulated activity.
19. The [Upper Tribunal decision](#) sets out in detail the complex nature of Keydata's structure, products and connections, and the extent to which its senior staff acted without integrity, had conflicting interests, and misled and made false statements to the regulator. Under the Complaints Scheme, both I and the regulator must regard findings of fact and decisions of the Upper Tribunal as conclusive.

Your substantive complaint

20. As already noted, your complaint was deferred between August 2009 and January 2019. I deal with the deferral decision and the delays in the FCA's complaints investigation in the next section.
21. Your original complaint, in August 2009, arose because you held the FSA partly responsible for the situation that had led to the loss of ISA status on your Keydata investment. You wanted the FSA to communicate with you about this.
22. On 11 May 2012, you wrote to the FSA to give feedback about your experience as a Keydata investor in claiming compensation from the FSCS. This was treated as a new complaint (reference 3042) and responded to on 19 June 2012. To the extent that your complaint was also about the FSA's supervision of Keydata, the FSA Complaints Team said: '*Your original complaint regarding Keydata has already been deferred until the conclusion of ongoing enforcement action. We will write to you regarding this matter once this action has been completed. At such time, we will also consider the information contained in your letter dated 11 May 2012 which may be relevant... Your letter will be considered*

again upon completion of the ongoing enforcement action. This will be dealt with under complaint reference 1694, which remains deferred....'

23. You responded to this letter with further points, including asking whether the FSA intended to publish a report about how it had handled Keydata, and asking for specific confirmation that your letter of 11 May 2012 would be attached to complaint reference 1694. The FSA responded on 20 August, saying that there were no immediate plans for a formal review but this did not rule out one in the future, nor did it mean that improvements had not already been taken on board. This letter confirmed that: *'All of the correspondence you have submitted will be considered and, where appropriate, responded to after the conclusion of the Keydata investigation under complaint reference 1694.'*

24. You had some further contact with the now FCA Complaints Team in 2016, 2017 and 2018 but your complaint remained deferred until January 2019 when the FCA asked if you wished to pursue it now that the Enforcement proceedings had concluded. On 9 February 2019 and 25 April 2019 you wrote setting out your concerns in full. Your letter of 9 February 2019 summarised your complaint as:

'The Authority failed in its statutory objectives by failing to protect consumers from an errant regulated firm and harmed the reputation of the UK financial system through its incompetent and slow handling of the situation, and caused expense to member firms of FSCS who were levied in order that compensation be paid to KIS investors.'

25. You referred to other *'matters of fact'* that you would like clarified, acknowledging that these fell outside what the FCA considered to be within the scope of the Complaints Scheme, but stating your belief that your points had wider relevance, which you hoped the FCA would review. You amplified these *'discussion points'* in your letter of 25 April 2019, sent after reading the Upper Tribunal Decision.

26. Seven months later, on 14 November 2019, the FCA wrote to you describing your complaint as follows:

*'You consider that the FSA failed in its statutory objectives to protect consumers from Keydata Investment Services (Keydata). In your letters, you have highlighted specific allegations which I have listed below, **forming part of your complaint.**'* (My emphasis)

27. The FCA's letter then set out details of seven allegations, which I deal with below. You were asked to provide any comments on this scoping of your complaint by 6 December 2019. You replied in detail on 1 December 2019, but this letter was not supplied to me with the FCA's files and is not referred to in the Decision Letter.
28. You kindly supplied me with a copy of your letter of 1 December 2019 and I followed this up with the FCA. Their enquiries revealed that the letter was received by the FCA's Supervision Hub on 3 December 2019 but not passed onto the Complaints Team. The FCA have told me that because staff are currently working from home due to the pandemic, an internal post log cannot be checked. However, the electronic information supplied to me shows that on 9 December 2019 the Supervision Hub closed the file it had opened for your letter with a closure reason of '*no response required*'. This is very difficult to understand as your letter is clearly addressed to the CEO, Chairman and Complaints Team manager, has the correct complaint reference number, and states that it is a response to the Complaints Team's letter of 14 November.
29. In this letter, you acknowledged the FCA's summary of your complaint but said that you wanted your letters of February and April 2019 answered in full and that many questions you had asked and opinions you had offered had been ignored. You set out detailed concerns about how the FSA's relationship with Keydata had been established and developed and said that in your view the regulator needed to consider a number of systemic issues about:
- a. how it authorises individuals and firms;
 - b. staff competency and lines of communication;
 - c. whether there is an internal culture of allowing firms to continue to trade despite risks;
 - d. the adequacy of its rules; and
 - e. whether there is a culture of '*cover-up*' and '*hiding behind confidentiality requirements long after it is strictly necessary*' when the regulator's oversight is found wanting.

30. You also asked for information about the: *'subjects, scope and progress of the 'Regulatory Failure Investigations' being conducted by Dame Elizabeth Gloster'*.
31. However, it is now clear that the Complaints Team did not receive or have sight of this letter and therefore has not had regard to it when responding to your complaint. In response to this, the FCA has told me that it has *'largely responded elsewhere to some of the points'* you made, particularly in its Additional Questions Letter, which I deal with further below. It also says that its letter of 14 November 2019 *'provided an appropriate summary of the concerns [you] raised, bearing in mind we conducted our investigation into Keydata as a group complaint with common allegations as flagged in our decision letter'*. However, and unusually, the FCA's Decision Letter of 19 August 2020 does not refer to the FCA's previous letter of 14 November 2019 and the paragraph in it quoted above (paragraph 26) has been omitted. Additionally, as the FCA accepts, not all the points you made have been responded to.
32. I am also not satisfied that the FCA Complaints Team had regard to your letter of 11 May 2012 when investigating your complaint in 2019 to 2020. This letter was also not initially supplied to me with the FCA's files, although the subsequent correspondence between 19 June and 20 August 2012 was. Although the FCA has now provided me with a copy of this letter, it is not mentioned in the FCA's Decision Letter of 19 August 2020, other than a vague, incorrect, statement that: *'your complaint was made in 2012'*. I am therefore unable to be certain that your letter of 11 May 2012 was attached to your 2009 complaint as promised to you.
33. In my view, taken together, these omissions significantly narrowed your complaint. As a result, the FCA's Decision Letter focused on only the seven allegations identified by the Complaints Team, instead of the broad-ranging concerns about the FSA's supervision of Keydata and related matters that you had raised. The Decision Letter also wrongly states that you first complained in 2012, not 2009, and gives the dates of your letters of 9 February 2019 and 25 April 2019 as 25 February 2019 and 11 April 2019. These were careless mistakes, which I return to under *My Decision* below.

34. Overall, I am not satisfied that the FCA has demonstrated that it has given your complaint the careful and detailed consideration that you were entitled to expect after such a long wait.
35. Having said this, the FCA's Decision Letter did set out some broader conclusions about the FSA's supervision of Keydata, provided to all complainants, as follows:

'While investigating your specific allegations... I have formed a conclusion on the wider approach taken by the FSA to supervising Keydata. On review, I believe the supervisory approach at the time and the activity it undertook (including its approach to financial promotions) could have been improved. The FSA received various pieces of intelligence on aspects of Keydata's approach and had regular contact with Keydata about its misleading financial promotions over a two-year period between 2005 and 2007. The FSA could potentially have changed its approach in response to Keydata's misleading marketing materials sooner. This work led to the FSA undertaking a firm visit in September 2007, which, due to the extent of the concerns identified, resulted in the referral of the firm to Enforcement in November 2007. At this point, I believe Supervision could have considered using alternative tools in addition to the Enforcement referral, such as actions to require the firm to amend its financial promotions or potentially change its approach to issuing similar products to investors while the investigation was ongoing. It was not until December 2008 that other wider tools were considered in relation to Keydata, such as ceasing the sale of products. The FSA ceased Keydata's regulatory activity in June 2009.

In reaching my conclusion, I have acknowledged and considered the approach to small firm supervision in place at the time. I also recognised that Keydata had concealed significant amounts of relevant information from the supervisory team, with these further significant issues only being uncovered through the Enforcement investigation.

It is important to note the FCA's approach to Supervision today has been revised to improve the process for identifying issues in small firms who do not have dedicated, named supervisors responsible for overseeing them. In addition, different departments within the FCA take a more joined up approach

when dealing with firms. For example, all supervisory (including financial promotions-related) interaction is now recorded on the same system and there are enhanced approaches in place in relation to the interaction between Supervision and Enforcement.

For further details on the FCA's approach to Supervision now please refer to the "FCA Mission: Approach to Supervision" which was published in April 2019. Supervision now aims to be more forward-looking and pre-emptive in the way it supervises firms - <https://www.fca.org.uk/publications/corporate-documents/our-approach-supervision>'

36. I welcome this reflection on the FSA's approach to supervision of small firms, which my office has commented on in previous cases, most notably in 2016 when recommending an independent review of FSA oversight of the Connaught Income Fund Series 1. As noted above, the FCA has now published and responded to the Connaught review, along with its response to Dame Elizabeth Gloster's Final Report on her Independent Investigation into the FCA's Regulation of LCF.
37. However, in my view the FCA's complaint response to you lacks the detailed, open reflection about the regulator's performance that complainants could reasonably have expected after such a long wait, especially given that Keydata is now dissolved and all Enforcement proceedings are concluded.
38. I consider that the complaint response underplays the nature and impact of the inadequacy of the FSA's supervision of Keydata and delayed regulatory action. There is an overemphasis on the period after November 2005, some of which was already in the public domain and therefore more likely to form the basis for complaints. The FCA says that this is because the Complaints Team concluded that, prior to that, decision-making and responses to intelligence and alerts were in line with expectations at the time. However, the complaint investigation revealed that concerns raised about Keydata's financial promotions dated back to March 2002 and that there are insufficient records of the approach taken to supervision of the firm from October 2003 until supervision by the Small Firms Division from 2006. The Complaints Team's conclusion that concerns raised in

November 2005 were thoroughly investigated is also not supported by the evidence.

39. The FCA's files also show that in July 2009 the FSA conducted an internal review of its supervision of Keydata. This report concluded that, although Keydata was dealt with in line with the FSA's risk-based approach:
- a. There was a history of non-compliance going back to 2002 regarding Keydata's failure to ensure that marketing material for its products was fair, clear and not misleading;
 - b. The approach taken to supervision of the firm in 2003 was unclear and the paper file relating to the firm could not be located;
 - c. Some of the intelligence received in November 2005 not only highlighted financial promotions concerns but suggested wider issues within the firm. However, there was no record of further contact being made with the source of this intelligence to fully understand the nature of these allegations;
 - d. The concerns that were followed up were taken forward by the Financial Promotions Department (Fin Proms) and not Supervision, *'the department more appropriate to deal with the nature of the allegations made'*;
 - e. Had these concerns been taken forward by Supervision at the outset, it was felt that *'the timescale within which events unfolded may have been reduced, even though the same conclusion would have been reached (i.e. a referral to Enforcement).'* Although a referral was made to Enforcement very quickly after the Supervision visit in September 2007, *'a significant period of time had already passed from the date on which Keydata was first contacted by Fin Proms (December 2005)'*;
 - f. *'The partnership between Fin Proms and Supervision was fundamental to identifying and addressing the serious issues within the systems and controls of Keydata. However not all correspondence between Fin Proms and the firm were stored in the same location ... to ensure a clear audit trail of the contact with the firm'*;
 - g. *'The rationale behind some key decisions made within [the FSA's Small Firms Division] regarding Keydata was not documented clearly'*, including

'the key decision by [the Triage team] to forward information to Fin Proms despite some of the concerns being outside the scope of that department, and the basis on which Supervision did not undertake a visit until several months [September 2007] after their meeting with the firm in March 2007'.

40. It is therefore clear that by July 2009, the FSA thought that the Supervision Department should have been involved sooner after further financial promotions concerns were reported in November 2005, that the information received suggested wider issues within the firm, and that had these concerns been taken forward by Supervision at the outset, it might have led to an earlier Enforcement referral. Although the Enforcement proceedings would undoubtedly still have been protracted and contested, it seems clear that the starting point could and should have been reached earlier, with potentially better outcomes for investors.
41. The FCA did not mention this July 2009 review in your Decision Letter, an example of the narrowing of your complaint, although it was mentioned to other complainants, who were told that reviews such as this have been used to strengthen its regulatory approach to supervision. I return to this under *My Decision* below.
42. There is also a discrepancy between the conclusions of the 2009 internal review and the FSA's letter to you of 6 September 2011, which said that: *'Problems with a financial promotion do not necessarily mean that there are problems with the product **or firm** itself'* (my emphasis). Even if the FSA generally considered this to be the case, it had already reached a different conclusion in the case of Keydata. Similar wording was also used in FAQs published on the FSA's website in 2010. The FCA has been unable satisfactorily to explain to me why the FSA's letter to you included this statement, which contradicted internal findings, since the FSA Complaints Team had not investigated your complaint at this point and the files show that the Team was aware of the 2009 internal review.
43. Furthermore, despite these internal findings, the FCA has not offered you or the other Keydata complainants any remedy for the FSA's accepted inadequacies, not even an apology. The only expression of regret in the FCA's Decision Letter is that: *'you have suffered a loss due to the actions of Keydata'*. Although I acknowledge the extent of deception practised by Keydata and its CEO Stewart

Ford, and that the FCA considers that it has now improved its supervisory approach, there is nothing in the complaint response that suggests the FCA holds any awareness of the need to apologise for the FSA's inadequacies or to account for a situation where bad actors were apparently able to mislead the regulator and cause consumers significant loss. I return to these matters and the question of remedy under *My Decision* below.

44. I now turn to the FCA's response to the seven allegations it identified for you:

a. *Part One - You allege that the FSA did not conduct a thorough review of Keydata in response to the FSA receiving intelligence from KPMG.*

The FCA did not uphold this allegation on the basis that the FSA's Financial Promotions team took timely action between November 2005 and January 2006 and was satisfied with explanations given by Keydata at the time. The complaint response says that this decision was made without considering in hindsight: '*what we now know from the material gathered through the Enforcement investigation and revealed in the Upper Tribunal judgment - that Keydata misled the FSA and in fact did not take any steps to resolve the issues*'. In my view, this response is not supported by the evidence I have seen. It is also an example of how the FCA has narrowed the focus of your complaint and does not take into account the following:

- i. The broader picture of regulatory knowledge that the FSA *did* have, namely concerns about Keydata's marketing going back to March 2002;
- ii. The conclusions already reached by the internal review in July 2009, including that other intelligence received in November 2005 suggested wider issues within the firm but this was not followed up;
- iii. That concerns remained in the Financial Promotions team for too long and Supervision should have been involved sooner;
- iv. The fact that another person's complaint, that '*the FSA should have acted sooner when intelligence surfaced about Keydata's misleading promotional literature, and the risks with its business model*', has been upheld due to poor record-keeping and the lack of a holistic approach.

In my view, given the broader context of your complaint, *Part One* of your complaint should have been upheld by the FCA to reflect what the evidence shows about the overall inadequacy of the FSA's supervision of Keydata. The FCA has now offered to extend this aspect of your complaint to '*a more generic complaint about the adequacy of supervision post November 2005*' and to provide you with a revised response upholding that allegation.

- b. *Part Two - You allege the FSA knew Keydata's products were not ISA compliant from 14 November 2006 but took no action until 8 June 2009 when Keydata was placed into administration. In addition, you allege the FSA did not share intelligence with HMRC or the affected investors in relation to the ISA status of Keydata's products.*

The FCA did not uphold this allegation on the basis that there is '*no evidence that the FSA was aware that Keydata's products were not ISA compliant from November 2006. The Upper Tribunal judgment notes the FSA first became aware that Keydata's products were not eligible to be classified as ISAs on 18 November 2008 in a compelled interview with Keydata's Compliance Officer*' (paragraph 542 of the Upper Tribunal judgment). The Decision Letter goes on to say that the FSA was in regular contact with Keydata once it became aware of the ISA status issue at the end of 2008, and subsequently due to the nature of Keydata's response to the FSA's requests in relation to this area, essentially its lack of co-operation, contacted HMRC via a relevant legal gateway.

This issue formed the basis for correspondence you had with the FSA in 2009 and 2011 when you raised questions about when the FSA became aware that Keydata's products were ISA non-compliant. Your view now is that there is strong circumstantial evidence that the FSA knew about this issue before 14 November 2006 and you have referred me to paragraph 4.94 of the [FSA's Decision Notice in respect of Stewart Ford](#) dated 14 November 2014 and issued in May 2015. However, I am satisfied that this refers to the level of Mr Ford's awareness rather than the FCA's. I must have regard to the findings of the Upper Tribunal on this matter and it is also clear from the FCA's files that discussions took place between the FSA and HMRC with due regard for their respective jurisdictions. I note that in her

report, Dame Elizabeth Gloster has recommended that: '*HM Treasury should consider addressing the lacuna in the allocation of ISA-related responsibilities between the FCA and HMRC*'. I have concluded that the FCA was correct not to uphold this aspect of your complaint. I note the further comments you have made about this matter in response to my preliminary report but it is not possible for me to go further under the Scheme on this point, especially given the involvement of the Upper Tribunal in this matter. However, as already noted there is a broader question about the FSA's overall supervision of Keydata. I return to this in the *My Decision* section below.

- c. *Part Three - You allege Keydata incorrectly recognised its products as Bonds rather than an Unregulated Collective Investment Scheme (UCIS). You allege the FSA therefore failed to identify Keydata being in breach of the Rule to prohibit the sale of UCIS to retail investors.*

The FCA did not uphold this allegation on the basis that '*the potential for the products to be a UCIS as opposed to a Bond was considered by the FSA*' and a view was taken that they were not. I have seen correspondence in the FCA's files that supports this and I am satisfied that the FCA was correct not to uphold this aspect of your complaint. You have provided me with your view of why you consider this to be incorrect from a regulatory perspective, essentially that the nature of the risk looks more like a collective investment scheme than a bond, and that the key question is around whether such an investment scheme is regulated or unregulated. I appreciate that you continue to disagree on this point but ultimately, these are questions of regulatory discretion and legal interpretation that cannot be determined under this Complaints Scheme.

- d. *Part Four - You allege the FSA allowed Keydata to continue marketing and selling Lifemark bonds even after Lifemark's permissions were suspended by the Luxembourg Regulator.*

The FCA did not uphold this allegation on the basis that, although Keydata continued to sell this product between 9 February 2009 and 3 April 2009, during the ban by the Commission de Surveillance du Secteur Financier

(CSSF), the Complaints Team found no evidence that the FSA was aware of the CSSF's suspension of sales. You consider that this contradicts paragraph 4.84 of the Decision Notice in respect of Stewart Ford. However, I am again satisfied that this relates to Mr Ford's knowledge and not the FSA's. The FCA's files show that Lifemark directors, who included Stewart Ford, deliberately concealed information regarding the CSSF's concerns of Lifemark and the suspension of sales from the FSA and key individuals at Keydata. The Complaints Team checked with the 'passporting' team, who confirmed that they were not aware of any specific requirements in 2009 for the FSA to be notified of suspensions by other regulators. I acknowledge your view that the FCA should have been more proactive. However, based on the evidence I have seen, my view is that the FCA was correct not to uphold this aspect of your complaint. Nevertheless, as already noted there is a broader question about the FSA's overall supervision of Keydata, delayed regulatory action, and the fact that individuals were able to avoid earlier scrutiny. I return to this in the *My Decision* section below.

- e. *Part Five - You allege the FSA was slow to act on knowledge that Stewart Ford failed to manage his conflicts of interest.*

The FCA did not uphold this allegation on the basis that the FCA acted as soon as it became aware of Mr Ford's conflicts of interest in June 2008. The Decision Letter again makes reference to the findings of the Upper Tribunal on these matters and the extent to which Mr Ford misled both the FSA and other individuals at Keydata about the extent of his interests. I accept that the nature and complexity of these interests did not come to light until the FSA began Enforcement action. However, in my view this is another example of the FCA narrowing your complaint. As already noted, there is a broader question about the FSA's overall supervision of Keydata, its delayed regulatory action, and the fact that individuals were able to avoid earlier scrutiny. Although I agree that the FSA acted once it had awareness, the point is that it could have, and should have, reached that awareness sooner. In my view, the FCA should have partly upheld this aspect of your complaint. The FCA proposes to address this by now responding to, and upholding, your broader complaint about supervision of Keydata.

- f. *Part Six - You allege the FSA was late to warn the public about the risks of Life Settlement products.*

The FCA did not uphold this allegation on the basis that the regulator '*has to consider the balance of public interest when making a decision to warn the public about a market... for example size of market, evidence that detriment exists and understanding the consequences for investors already involved in the market*'. It said that initial desk research on Life Settlements in July 2004 found only seven firms conducting business in the UK and that subsequent warnings from February 2010 were appropriate, as the FCA considers that it was '*the enforcement investigation into Keydata [that] provided the FSA with evidence that detriment existed in this market which gave sufficient weight to enable the FSA to consult on making rules in this area, and then to exercise its rule making powers. It started to make clear interventions into this market in the period post the enforcement investigation into Keydata commenced*'. Your concern is that the warnings from February 2010 were more about the FSA hiding its own shortcomings than preventing consumer loss. It is understandable that this lack of public trust has arisen and, in my view, the FCA could do more to show that it appreciates this and that there is a need for it to demonstrate greater openness and transparency. The FCA's files show that the referral to Enforcement on 16 November 2007 noted that potential consumer detriment would not crystallise until 2010 and I must accept that the full nature of the detriment did not come to light until after the Enforcement action began. However, as already noted there is a broader question about the FSA's overall supervision of Keydata, its delayed regulatory action, and the fact that individuals were able to avoid earlier scrutiny. Although I agree that the FSA acted once it had awareness, the point is that it could have, and should have, reached that awareness sooner. In my view, the FCA should have partly upheld this aspect of your complaint. The FCA proposes to address this also by now responding to, and upholding, your broader complaint about supervision of Keydata.

- g. *Part Seven - You are unhappy about the delay in the Complaints Team investigating your complaint about the FSA/FCA.*

The FCA upheld this allegation because of the delay in the Complaints Team between January 2019 and August 2020 and offered you an *ex gratia* payment of £400 for this. I consider this further below.

The Additional Questions Letter

45. With its Decision Letter, the FCA sent you its Additional Questions Letter, also dated 19 August 2020, responding to what it considered to be matters beyond the scope of your complaint. This was its response to the broader '*discussion points*' and '*matters of fact*' you had set out in your letters of 9 February 2019 and 25 April 2019. The FCA turned these points into 19 questions, which it claimed to answer, although you do not agree that it has answered them all. As the Complaints Team did not have sight of your letter of 1 December 2019, some points you made in that letter were also not covered as noted above.
46. I agree with you that not all the questions you posed have been answered in the Additional Questions Letter and I also agree that some of the answers given do not address the specific points you made. To the extent that these matters are genuinely outside the scope of the Complaints Scheme, they do not fall to be considered by me. Some of them were dealt with by the Upper Tribunal.
47. However, in my view, some matters should have been included in the FCA's response to your complaint, for example your concerns about the FSA's supervision of Keydata's financial promotions and its referral of fraud to the SFO. You also had concerns about how Keydata and its individuals had become authorised and whether they had been properly scrutinised. Such matters were responded to for other complainants. Excluding these matters contributed to the narrowing of the scope of your complaint, as I have already discussed above.
48. I also note the answer provided to Question 5: '***Did the FSA fail in letting the fraud at Keydata happen? We have considered the actions/inaction of the supervision of Keydata which we have detailed for your reference in our decision letter. This will include considerations of fraud***'. However, the FCA's Decision Letter does not include '*considerations of fraud*'. There is only one reference to '*fraudulent activities*' at Keydata, which is not developed further other than to say it was this, rather than the FSA's lack of supervision, that caused your loss.

49. The FCA also answers here, a question you had asked eighteen months previously, in your letter of 9 February 2019, informing you that *'there is no current intention to publish a report into the FSA's performance in relation to Keydata'*. You had already raised this issue in 2012 and you asked repeatedly between November 2019 and July 2020 whether Keydata has been the subject of a regulatory failure review. The FCA did not tell you until its Decision Letter that it has not. There is no reason why you could not have been told this sooner, since all the relevant reviews had been announced by 25 July 2019¹.
50. The Additional Questions Letter concludes by saying: *'It is not normally the role of the Complaints Team to respond to questions about historic events, or processes. However, as you have been waiting for some time for a response we've liaised with the relevant business areas in order to answer the most pertinent questions'*. Given the reasons why these events and processes were *'historic'*, and that the *'some time'* you had waited was over a decade, I consider this wording to be particularly insensitive. The FCA also used this phrasing in its scoping letter of 14 November 2019, although that letter said that you would receive an answer to *'your questions'*, not just *'the most pertinent questions'*. It is not clear to me on what basis the FCA decided that these were the *'pertinent questions'* to be answered and the general tone of this letter is that this has been done as a favour to you.
51. The files I have seen show that there was considerable internal indecision about how and when to respond to you about the matters you had raised. I have already discussed the fact that your complaint was too narrowly scoped and that some points you made have not been answered. Overall, I am not satisfied that the Additional Questions Letter was an appropriate response to the questions you had asked and the feedback you had offered, and in any event the FCA took far too long to provide it. I return to this further below.

¹ The FCA announced independent reviews of Interest Rate Hedging Products and the Connaught Income Fund Series One on 20 June 2019 and a Treasury-directed review of London Capital and Finance on 25 July 2019.

Delay in complaints handling - deferral and the period before January 2019

52. As previously noted, your original complaint made in August 2009 and aspects of the further concerns you raised in May 2012 were deferred. The Complaints Scheme says:

‘3.7 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.’

53. This wording is not particularly clear but the intention behind it is to ensure that a complaints investigation does not adversely affect or prejudice continuing regulatory action. I am satisfied that it was appropriate for the FSA to defer consideration of your complaint on this basis when you first complained in 2009.

54. The original deferral letter asked you to come back when the Enforcement proceedings were concluded. This is something my office has criticised because complainants will not be in a position to know when proceedings have ended. As a result, the FCA has developed its policy approach and is now more proactive in contacting complainants. Deferral decisions are also reviewed every six months to consider whether there continues to be a genuine risk of prejudice.

55. Although this policy was not in place when you complained in August 2009, I am satisfied that the FSA Complaints Team did in fact keep matters under review and decided early on to contact complainants proactively once the Enforcement proceedings were over. You had further correspondence with the FSA Complaints Team in 2009, 2011 and 2012, which answered some additional questions you posed. I note that in these exchanges, the FSA Complaints Team was careful to send you printed material due to your lack of internet access. As

already noted, the letter you sent on 11 May 2012 was treated as a separate complaint with another reference number, apart from elements that related to Keydata, which remained deferred.

56. The Complaints Team also sent you a letter dated 4 April 2013 when regulatory functions transferred from the FSA to the FCA. You have told me that you did not receive an update sent by email to other complainants on 3 July 2015 and I have not seen any evidence in the FCA's files that you were considered for this mailing and written to by post. As a result, when you chased progress in June 2016, you had not heard in writing from the regulator for over three years. This was unacceptable and suggests poor record-keeping by the FCA.
57. A response was eventually sent to your June 2016 enquiry on 31 August 2016 after the FCA Complaints Team had managed to access the relevant files. This letter provided you with an update on the Enforcement action and confirmed that your complaint remained deferred. Confusingly, the letter referred to: '*your complaint made against the FSA in 2012 under reference 1694*'. As already noted, the complaint you made in 2012 was given reference 3042 and I have not been able to satisfy myself from the FCA's files that your letter of 11 May 2012 was ever attached to your 2009 complaint (reference 1694) as promised to you.
58. You have told me that you would also have liked the Complaints Team to have notified you of the upcoming Upper Tribunal hearing in 2017 and that the failure to do so: '*may have resulted from...genuine ignorance of the forthcoming hearing due to poor inter-departmental communications within the FCA*'. In response to my preliminary report, the FCA has supplied me with a chronology and copies of its correspondence with you, some of which was not previously supplied. It says that it also had several telephone discussions with you and that it did notify you of the tribunal hearing on several occasions. Clearly this material should have been provided to me sooner but I have noted that there was contact with you throughout 2018. In January 2019 you were formally contacted again, to see if you wanted your complaint to be reactivated.
59. Overall, I am satisfied that it was reasonable for the FCA to continue to defer consideration of the Keydata complaints until after the Upper Tribunal decision was reached in November 2018, when it was able to publish Final Decision

notices in respect of Stewart Ford and Mark Owen. After this, it was proactive in contacting complainants again. Nevertheless, the upshot of this deferral decision was to postpone further consideration of what went wrong at Keydata for many years, despite the internal review carried out in July 2009. It is of concern that no steps were taken by the FCA to address the issues identified in that review in a holistic manner. The long delay also inevitably made the complaints investigation more difficult as noted by the FCA in its Decision Letter. In your case, poor record-keeping and inadequate file management compounded these difficulties and there is no reasonable excuse for this given that your complaint made in August 2009 was deferred, not closed.

60. I acknowledge that deferral of the investigation of complaints is often necessary if it could divert resources away from the regulatory investigation, and/or if it could prejudice the regulatory action. However, prolonged deferrals may also carry an opportunity lost in undertaking internal reviews and implementing lessons learned at the most appropriate time. This is a problem I have seen with Keydata, in that during the lengthy deferral period, in your case between 2009 and 2019, and despite an internal review, there has been continued inadequate supervision of firms, including regulatory failure in the case of LCF, and continued FCA omissions to act robustly and at speed.
61. Furthermore, given the gravity of the complaints and the losses investors had experienced, it would have been better customer service for the Complaints Team to have taken steps to ensure that it kept itself informed about progress of the Enforcement proceedings and to have provided occasional updates to complainants between July 2015 and December 2018 without being prompted. This might also have ensured better file management for complaints that were open and deferred, not closed. In your case the July 2015 update was also missed. You approached the regulator and my office in 2017 and 2018 to express understandable concerns about the continuing delay.
62. As noted above, the FCA has now changed its policy and reviews deferral decisions every six months. This is to be welcomed, although I have recently noted some slippage in the timeliness of these reviews and updates to complainants and I will be keeping this under review. I return to this under *My Decision* below.

Delay in complaints handling from January 2019 to 19 August 2020

63. The FCA reactivated complaints about Keydata on 17 January 2019, following the publication on 16 January 2019 of the FCA's Final Notices in respect of Stewart Ford and Mark Owen. Complainants were contacted and asked if they now wished to pursue their complaints. You wrote to the FCA on 9 February 2019 setting out your current concerns.
64. The FCA's files have been supplied to me in such a way that it has been very difficult to follow clearly the subsequent progress of your complaint. However, the chronology appears to be:
- a. Between January and April 2019, the FCA decided to treat Keydata as a group complaint and delayed the start of its complaint investigation until all the complainants were identified;
 - b. This was not communicated to you before you chased progress on 28 March 2019 and again on 12 April 2019, by which time you were understandably frustrated;
 - c. You spoke to the complaints investigator assigned to your case (and to the Complaints Team manager) and received a written update dated 10 April 2019 in which you were promised four-weekly updates;
 - d. You were also sent a paper copy of the Upper Tribunal decision. This led you to call the Complaints Team on 18 April 2019 when you asked the FCA to add to your complaint your concerns about authorisation of individuals and fraud. The complaint investigator informed you that you could write in to amend your complaint and you did so on 25 April 2019. However, as discussed above, the FCA decided not to add these matters to your complaint but responded to some of them in its Additional Questions Letter;
 - e. On 23 April 2019 the complaint investigator began contacting internal teams to commence the investigation;
 - f. Despite the promise of four-weekly updates, it appears that you did not receive an update in May 2019 and you telephoned the Complaints Team on 7 June 2019. Updates were sent to you on 14 June, 11 July and 12 September 2019;

- g. The investigator sent an update to Keydata complainants on 9 October 2019 but this was not sent to you because the Complaints Team was considering a draft letter to you setting out the FCA's understanding of your complaint. The intention was also to answer your '*additional questions*' with this letter but this was not pursued. Shortly after this, the complaints investigator was changed but you were not informed;
- h. The complaint was being actively worked on by the new complaints investigator from mid-October but I am not clear whether you were eventually sent an update in October 2019. If you were this has not been supplied to me;
- i. The Complaints Team sent you a letter setting out its understanding of your complaint on 14 November 2019, signed by the Complaints Team manager. This letter made no reference to previous correspondence and did not inform you of a change of investigator. Once again four-weekly updates were promised. As noted, you were asked to comment by 6 December 2019 and you did so on 1 December, but the Complaints Team did not see this letter;
- j. It appears that you did not receive a written update in December 2019 or January 2020. On 30 January 2020 you spoke to the Complaints Team manager, who said they were '*pushing for a 13 February response*'. An email update was sent to complainants on 7 February 2020 and you received a posted update letter dated 10 February 2020;
- k. At this point, the Complaints Team decided that it needed more time to complete its investigation and said that it now expected to respond by 31 March 2020. However, again this target was not met and, because you were not on email, you were once again overlooked for an update. It seems a letter was posted to you on 7 April 2020 after you phoned in on 1 April 2020;
- l. It seems no written update was sent to you in May 2020. In June, you phoned and said you were receiving no meaningful updates and asked to speak to a more senior manager. You were told this was not possible;
- m. However, on 1 July 2020, you did speak to someone more senior. You explained about the lack of updates, the lack of an answer about regulatory

failure, and that you had not been told when the first complaints investigator left. You wanted to know what had happened since January 2019;

- n. Following this phone call, there was further internal discussion but, although other complainants were updated on 10 July 2020, it seems that you were not written to again until the Decision Letter was issued on 19 August 2020.

65. Both you and the FCA have accepted that this is an accurate record of the essence of your interactions with the Complaints Team between January 2019 and August 2020, although the FCA has now provided some further correspondence and detail of phone calls.

66. The Complaints Scheme states that:

'6.4 The relevant regulator(s) will seek to resolve the complaint as quickly as possible. The relevant regulator(s) will either finish investigating a complaint within four weeks, or they will write to the complainant within this time setting out a reasonable timescale within which they plan to deal with the complaint'.

67. Clearly, there was never any expectation that the FCA would complete its complaint investigation into Keydata within four weeks. However, I have seen no evidence that the FCA ever set out to you a reasonable timescale and all the anticipated timescales you were given were breached. Although I consider it was reasonable for the FCA to decide to group the complaints, this meant that the investigation did not start until April 2019 and you were not kept informed. You did not receive a letter scoping your complaint until November 2019 after the first investigator had left (a further seven months). You received no written updates between November 2019 and February 2020, including being overlooked for updates sent to others. Despite subsequent phone calls to the Complaints Team, you received no written updates after April 2020. The complaint response was not sent out until 19 August 2020 (a total of nineteen months).

68. Although you were able to speak to the Complaints Team manager on several occasions, and in July 2020 to a more senior manager, the evidence I have seen shows a pattern of failing to keep you informed, failing to update you when promised, poor customer service and general disorganisation. There was indecision and delay about providing a response to your '*additional questions*'.

69. After nine months the FCA decided to change the complaints investigator without notifying you. I am not clear from the FCA's files why this change occurred but it was poor customer service not to inform you. I am aware that it is your belief that the first investigator left after uncovering information about the regulator's failings. This is speculation on your part, and I have seen no evidence that this was the case. However, I appreciate that by this point your trust was eroded and you felt you were in a '*war of attrition*' (your words) with the FCA about your complaint.
70. The FCA's files show that the complaint investigation was being actively pursued from November 2019, although anticipated deadlines for completion continued not to be met. This was mostly due to a lengthy process of internal sign-off for the Decision Letters, which reflects the seriousness of the allegations made. However, I am concerned about the complaints handling experience and supervision of some of those involved in the investigation of your complaint. This was a large group complaint going back many years, involving multiple and very serious allegations about the regulator's competence regarding a firm that had caused widespread consumer detriment. Despite the internal checks and senior management level sign-off, there has clearly been a lack of quality control over both the handling of your complaint investigation and the FCA's customer service. The complaint response eventually sent to you contained inaccuracies and did not provide a full response to your complaint.
71. The FCA has been open with my office about the problems in its complaints handling function and these are set out in my predecessor's final [Annual Report](#). In brief, the Complaints Scheme has not been working satisfactorily. The FCA Complaints Team is working hard but it has been overwhelmed and has not met targets for timely, good quality complaint responses until recently, when some improvements have been achieved. This has had a significant impact on both individual complainants and affected trust in the regulatory system as a whole.. Obviously, the period between March and August 2020 was affected by the coronavirus pandemic, which could not have been foreseen. However, your complaint should have been concluded long before this. The continued delays, poor customer service, and inadequate complaint response you received from the FCA after more than a ten-year wait were completely unacceptable.

72. You quite understandably became extremely frustrated with the delay in the FCA's complaint investigation and at times asked my office to intervene and take over the investigation. We contacted the FCA on these occasions but it was our view that it was better for the FCA to complete its investigation first and that remains my position. The Complaints Scheme is designed to have a first stage consideration by the regulator and the FCA must ensure that its complaints function is properly resourced. The FCA has recently added resource and I will be monitoring this over the coming months to see if there are indeed improvements.
73. The FCA has offered you an *ex gratia* payment of £400 for distress and inconvenience arising from its complaints handling delay between January 2019 and August 2020. Although this is at the higher end of payments recently offered by the FCA for delay, I consider it to be wholly inadequate for the poor service provided to you. I comment further on this under *My decision*.

My decision

74. I have upheld some elements of your complaint and concluded that:
- a. The original deferral of your complaint pending the outcome of Enforcement action was reasonable in all the circumstances and the FSA's Complaints Team was responsive to your questions between 2009 and 2012;
 - b. However, the deferral decision left the underlying concerns you had raised unaddressed for many years, which has contributed to a delay in implementing systemic improvements despite the FCA's assurances to you;
 - c. The FSA's letter to you of 6 September 2011, although I accept that it was intended to be helpful to you, included a statement that was premature, ignored the FSA's own internal findings about its supervision of Keydata, and as a result did not give you the full picture;
 - d. The FCA Complaints Team failed to update you in July 2015, when other Keydata complainants were updated. This appears to have been because you were not on email, which the FCA knew, and is therefore no excuse as you should have been updated by post instead. As a result, when you chased the FCA for progress in June 2016, you had not been contacted by the regulator for over three years;

- e. The Complaints Team could have been more proactive in contacting Keydata complainants between July 2015 and December 2018, insufficient care was taken over oversight and file management of the deferred complaints, and there was unreasonable delay in FCA complaint handling in 2019 and 2020;
- f. The FCA's Decision Letter to you dated 19 August 2020 was inadequate because:
 - i. it did not refer to the aspects of your 11 May 2012 complaint relating to the FSA's supervision of Keydata and I am unable to be clear that this letter was linked to your complaint or specifically considered by the Complaints Team in 2019/2020 as you had been promised and were entitled to expect;
 - ii. it omitted part of the FCA's letter to you dated 14 November 2019, thereby unreasonably narrowing the scope of your complaint and not fully responding to your overarching complaint;
 - iii. the Complaints Team had not seen your letter of 1 December 2019 responding to its letter of 14 November 2019;
 - iv. it left out relevant information about the extent of the inadequacy of FSA's supervision of Keydata, left you with unanswered questions, and failed to offer any remedy for the inadequate supervision that it did identify;
 - v. it contained careless mistakes in dates of your correspondence with the Complaints Team, including saying you first complained in 2012, not 2009;
- g. *Part One* of your complaint should have been upheld by the FCA and *Parts Five* and *Six* should have been partly upheld. The FCA disagrees with this but has agreed to amend *Part One* to a more general allegation about the adequacy of Supervision, and then to uphold that element of your complaint;
- h. Although it was reasonable for the FCA not to uphold *Parts Two* and *Four* of your complaint, there is a broader question about the FSA's overall supervision of Keydata and delayed regulatory action that meant Keydata's

products and individuals were able to avoid earlier scrutiny, leaving investors exposed;

- i. It was reasonable for the FCA not to uphold *Part Three* of your complaint.
- j. It was reasonable for the FCA to uphold *Part Seven* of your complaint. However, its offer of an *ex gratia* payment of £400 for distress and inconvenience arising from complaints handling delay between January 2019 and August 2020 is wholly inadequate in the circumstances;
- k. There was internal indecision about how and when to respond to your broader points about the regulator and specific questions about Keydata. Some of these were eventually addressed in a separate letter. It is not clear to me on what basis these points were selected; some should have been included in your complaint. Overall, I am not satisfied that this letter was an appropriate response and the FCA took far too long to provide it.

75. I asked the FCA to provide, in response to my preliminary report further responses to the broad-ranging nature of your complaint, and points that remain unanswered from your letters of 11 May 2012, 9 February, 25 April and 1 December 2019 and the FCA's Additional Questions Letter as identified above. I said that this response should include but is not limited to your complaints about the FSA's authorisation and supervision of Keydata, and the other points that I have identified in paragraphs 29, 47 and 48. Some of these matters have already been investigated by the Complaints Team as part of the group complaint. As noted above, in response to this the FCA has agreed to provide you with a revised response upholding an allegation of inadequate supervision post November 2005. It has also provided me with a schedule setting out the remaining points on which it proposes to respond to you and asked me to assess if this is sufficient in order to achieve finality. I agree with the need to reach finality for you, although ultimately it is not for me to say what points the FCA should respond to and that is a matter for its own judgment. With regard to the points set out in paragraphs 29, 47 and 48, I have already stated that, in addition to a response on its supervision of Keydata, the FCA should provide you with a complaint response (that is, not just an 'Additional Questions' response) on: its authorisation of the firm; its authorisation and scrutiny of key individuals; and

'considerations of fraud', which were stated to be included in the FCA's Decision Letter but were not. The FCA does not need to respond to those aspects of your complaint letter dated 11 May 2012 that it excluded in its response to that complaint dated 19 June 2012, but as I have already said, it should respond to such of the information contained in your letter dated 11 May 2012 that is relevant to your original complaint about Keydata, as it promised to do. I consider that it will do this by responding to the points identified above and the other matters from across your correspondence that it has identified in its response to my preliminary report. You will have the opportunity to come back to me if you remain dissatisfied when you receive that response. Although this is not ideal, and I would have preferred that all matters were concluded via my final report, it is important that all material is properly considered by the FCA and that you have the opportunity to respond should you wish to do so.

Remedy

76. As noted above, the FCA has not offered you any remedy for its wider, admitted failings. Under the Complaints Scheme, the available remedies for a well-founded complaint include offering the complainant an apology, taking steps to rectify an error or, if appropriate, the offer of a compensatory payment on an ex gratia basis, both for distress and inconvenience and for financial loss (6.6).

Apology

77. I have concluded that it would be appropriate for the FCA to offer you an apology at the highest level for the inadequacies identified in the FSA's supervision of Keydata and for the failings I have identified in its complaints handling function.

Rectification

78. I have noted what the FCA has said to you about improvements in its Supervision function. However, it is clear that there is considerable further work needed to implement and embed systemic change, particularly in light of the Parker and Gloster reports. I appreciate that these reports were not available to the FCA when investigating your complaint and that the FSA's inadequate supervision of Keydata predates the events reviewed in both reports. However, the conclusions reached and recommendations made in these reports, which the FCA has accepted and agreed to implement, are clearly relevant to the issues

under consideration in your complaint. Despite the assurances given to you in the FCA's Decision Letter, it is clear that the recommendations made following the FSA's internal review in July 2009 were not implemented in a timely or holistic manner.

79. Among the issues highlighted in both the Gloster and Parker reports, which are also common to the FSA's supervision of Keydata, are:

- a. The lack of a holistic approach to regulation. For example, the Gloster report says: *'the FCA was aware that LCF repeatedly breached the financial promotions rules. However, the Financial Promotions Team (which formed part of the Supervision Division) handled each case separately rather than considering whether the pattern of conduct was indicative of poor culture or systems and controls, or even misconduct, at LCF... The consequence of the inadequate policies outlined above was that the FCA failed to take appropriate action in response to LCF's repeated breaches of the financial promotion rules. Apart from repeatedly writing to LCF asking it to cure its breaches, the FCA did not take any action against LCF until late 2018'*.

I note the similarity of this scenario, arising from April 2014 to January 2019, to the FSA's inadequate supervision of Keydata, long after the FSA's internal review of July 2009 into Keydata had reached similar conclusions;

- b. An over-emphasis on the regulatory perimeter. The Gloster report says: *'As a result, the FCA did not consider whether LCF's breaches might be symptomatic of a more serious problem. In particular it failed to question, in any meaningful way, whether LCF might have obtained, or used, its FCA-authorized status in order to attract investors to its unregulated bond business.'* Dame Elizabeth also points to a regulatory gap between the FCA and HMRC in relation to claims of ISA status, which were clearly an attraction for investors, as in the case of Keydata;
- c. Poor record-keeping and inadequate technology systems;
- d. Failing to act speedily or at all;
- e. Failing to respond to or pass on information and intelligence;

- f. Poor staff training and a lack of engagement with or understanding of the regulator's remit over fraud and financial crime.
80. These matters are similar to the issues that you set out in your letter of 1 December 2019, which was not passed onto the Complaints Team (see paragraph 29 above). The comments made by LCF Bondholders in relation to their experience are similar to those expressed by you and other Keydata complainants to me and to the FCA (see Gloster report Chapter 1, 9.4). It is clear that investors were entitled to much better protection from the regulator.
81. I welcome the fact that the FCA has accepted and agreed to implement the recommendations made in the Gloster and Parker reports and I have annexed the recommendations made in them to this report for ease of reference. My own recommendations include asking the FCA to ensure that my final report, the FSA's 2009 internal review into Keydata, and the matters highlighted in the FCA's own complaints investigation are included in its implementation programme and that I be kept informed of progress.
82. I have considered making a recommendation about the need for systemic improvement in the FCA's complaints function, but the FCA is well aware of this need and is actively taking steps to address this. I have therefore decided to give the FCA a further period to demonstrate that this is being delivered through operational improvements.

Compensation - Financial Loss

83. The Complaints Scheme provides for *ex gratia* compensatory payments for both financial loss and for distress and inconvenience. There has been a longstanding lack of clarity about the circumstances in which the regulators will offer such payments and last year they consulted on this topic as part of a wider [consultation about the Scheme](#). In relation to financial loss, although it is agreed that such payments are not assessed or calculated in the same way as legal damages for loss, this issue remains unresolved and in my view should be subject to further discussion in the light of both [my predecessor's response to the consultation](#) and the conclusions in the Parker and Gloster reviews. It is important to note that the question of redress was not within the remit of either review, although Dame Elizabeth has made some observations about it.

However, compensatory payments are within my remit and I am currently developing my own policy position on these and other matters.

84. These are complex matters which have been discussed over many years and have not been resolved during the course of my investigation into your complaint. Neither FSMA (2000) nor the Act (2012) provide guidance or clarity on the issue. I am also mindful that the FCA Complaints scheme is not a redress scheme: that is the remit of the FOS and the FSCS. Calculating an ex gratia payment for financial loss from the FCA would involve taking into account a great number of factors, over and above the FCA's regulation of a firm. These factors can be difficult to unravel and may involve assessing complex matters of causation for which the Complaints Scheme is not the appropriate vehicle. I continue discussions with the FCA on these matters and it is my hope that through these discussions, we will reach common ground in offering fair and transparent outcomes for complainants.
85. In my preliminary report, I explained that I had not yet reached a final conclusion regarding any recommendation for a compensatory payment for your financial loss. I asked both parties to make further representations on this, including asking the FCA to reconsider its decision not to offer you such a payment. In your case, the FCA has responded that as it has not had 'direct dealings' with you, it feels it is not appropriate to offer you an ex gratia payment for loss, albeit it accepts that '*there are things the FSA could (with the benefit of hindsight) have done better*'. Having reviewed all representations made to me, I have concluded that on this occasion it would not be appropriate for me to recommend that the FCA offers you an *ex gratia* payment for financial loss. I am very sorry indeed for the loss you have experienced; however, I must have regard to overall fairness. You have told me that you declined an offer of compensation from the FSCS because in your view it would have compromised your rights and that as a result to date you have lost all your capital and any derived interest from 2005 onwards. You consider that the FSA's supervision of Keydata failed both the regulator's consumer protection and integrity objectives such that it amounted to 'bad faith', and that '*the reliance that the public placed in the regulator for protecting it from fraudulent activity within regulated firms was misplaced*'. Unfortunately, it is not possible to state with any certainty under the Complaints

Scheme whether the inadequate way the FSA supervised Keydata contributed to individual investors' losses. I must also have regard to the conclusions of the Upper Tribunal about the nature and extent of the deception practised on the FSA by bad actors within Keydata. My understanding is that eligible investors have now received the maximum amount available from the Financial Services Compensation Scheme (£48,000 at the relevant time). Although this is well below the amount many have lost, and you have rejected the sum you were offered, this Complaints Scheme is not designed to fill a gap in regulatory compensation. I have also taken into account that, in most circumstances, the regulator has legal immunity and that whether there has been 'bad faith' is something that ultimately can only be determined by the courts.

86. Although you have raised with me what you consider to be the FCA's failure to ensure compliance with the Compensation Rules by FSCS, these are not matters that I can consider under the Complaints Scheme.

Compensation – Distress and Inconvenience

87. I have concluded that the FCA should offer you a higher *ex gratia* payment for distress and inconvenience. In doing so, I have had regard to the FCA's proposed compensation policy, set out in its recent consultation document, which it says reflects current practice. This says (my emphases):

'4.8 When considering distress or inconvenience, we would generally only make a compensatory payment when **our actions or inactions have contributed significantly** to the complainant's distress or inconvenience. We propose that compensatory payments would normally fit into the following bands, although **there may be exceptional circumstances** where we conclude that a higher level of compensatory payment for distress or inconvenience would be appropriate.

4.9 While these bands do not appear in the current Scheme, we believe that the outcomes for most complainants, under the revised Scheme, would be broadly consistent with the FCA's current practice:

- Up to £250 where the complainant has experienced a moderate level of distress or inconvenience;
- £250-£500 where the complainant has experienced a high level of distress or inconvenience; and,
- £500-£1000

where the complainant has experienced a very high level of distress or inconvenience’.

88. In my view the FSA’s inactions and inadequate supervision identified above, together with delays and poor customer service in the FCA’s complaints handling, plus, in your case, errors and omissions in the FCA’s complaint response, have clearly contributed significantly to a very high level of distress or inconvenience experienced by you and other Keydata complainants, in your case for more than a decade. Internal documents show that Supervision involvement and subsequent Enforcement action was delayed and that Supervision could have been considering other action even after the referral to Enforcement. The FCA’s customer service to you in 2015, 2016 and again in 2019 to 2020 was also extremely poor. Your letter responding to the scoping of your complaint was not passed to the Complaints Team by the Supervision Hub. There were inexcusable delays in the FCA’s eventual complaint investigation and its response to you lacked detail, contained mistakes and omissions, and did not offer you any remedy for the FSA’s inadequate supervision of Keydata.
89. These are clearly exceptional circumstances making a higher payment for distress and inconvenience both appropriate and proportionate.

My Recommendations

90. I therefore recommend that:

- a. The Chair of the FCA Board offers you an apology for the elements of your complaint that I have upheld: the acknowledged inadequacy in the FSA’s supervision of Keydata and the consequent delay in commencing effective supervisory and Enforcement action, as well as the failings I have identified in the FCA’s complaints handling function.
- b. The FCA should:
 - i. undertake an enquiry into how your letter of 1 December 2019 failed to reach the Complaints Team from the Supervision Hub and take steps to ensure that systems are in place for correspondence to be dealt with correctly between internal teams;

- ii. develop a system to ensure that it: records whether or not it has received a response to a letter setting out its understanding of a complaint; states in its Decision Letter whether or not a response has been received; and, where it has, states what account has been taken of it and any changes made to the complaint as a result.
- c. The FCA should also:
- i. provide my final reports on your complaint and the other Keydata complaints to the FCA Board and to the Chairs of its Audit and Risk Committees, who are overseeing the FCA's implementation of the recommendations made in the Parker and Gloster reports published on 17 December 2020, all of which the FCA has accepted;
 - ii. ensure that there is robust monitoring of and timely implementation of its Transformation programme, which should include and reflect the FSA's internal review of Keydata in 2009, the FCA's complaint investigation report into Keydata (2019 to 2020) and the conclusions I have reached about Keydata in my final reports, alongside those arising from the other independent lessons learned and regulatory failure reviews;
 - iii. review the function, purpose and adequacy of its deferrals policy to ensure that the Complaints Team maintains adequate records of complaints made, keeps itself and complainants properly informed about the progress of any regulatory action and ensures that the Complaints Team is made aware of any immediate or subsequent lessons learned or other reviews and how their conclusions are being implemented during the period that complaints remain deferred.

91. I am pleased to say that, in response to my preliminary report the FCA has fully accepted my general criticisms of its complaints handling and investigation and my suggested process improvements and has also agreed to recommendations a to c above. It has provided me with further detail of the systemic improvements it is proposing, some of which are already being implemented, including monitoring complaints during deferred periods and updating complainants, increased oversight and quality control and adequate resource for the complaints function. You should shortly hear from the Board Chair with his apology and the

FCA has also agreed to issue you with a revised Decision Letter and its further response to your complaint.

92. In my preliminary report, I also recommended that the FCA offers to pay you the sum of £3000 for the distress and inconvenience caused to you by the matters I have highlighted in my report. The FCA accepts that yours is an exceptional case, including the impact of overall delays and it also agrees that an increased amount for distress and inconvenience is appropriate. It proposes to offer you a lower figure of £1250 and it also proposes to offer increased payments for distress and inconvenience to all of the Keydata complainants that had a similar experience, not just to those who have continued their complaints to my office.

93. The FCA considers that this payment offer to you should reflect complaint handling delays and service issues between January 2019 and August 2020 only; it does not propose to offer you an amount for the distress and inconvenience caused to you arising from the FSA's admitted supervisory failings during the period from November 2005 to June 2009. It draws my attention to the factors set out in paragraph 7.14 of the Complaints Scheme, which says:

'In deciding how to respond to a report from the Complaints Commissioner, the relevant regulator(s) will normally take into account:

- a) the gravity of the misconduct which the Complaints Commissioner has identified and its consequences for the complainant;
- b) the nature of the relevant regulator(s)' relationship with the complainant and the extent to which the complainant has been adversely affected in the course of their direct dealings with the relevant regulator(s)
- c) whether what has gone wrong is at the operational or administrative level;
- d) the impact of the cost of compensatory payments on firms, issuers of listed securities and, indirectly, consumers.'

94. The FCA says that, although '*there are certain aspects of its supervision the FSA could (with the benefit of hindsight) have done better*', in circumstances where there were no '*direct dealings*' with you, and in light of paragraph 7.14 of the Complaints Scheme, as well as considerations about the general background of

the Scheme, it does not consider that your case warrants a payment for this. However, my view remains that such a payment is justified in all the circumstances of your complaint and that this is within the scope of the Scheme.

95. I appreciate that the FCA did not have 'direct dealings' with you in relation to your decision to invest with Keydata, but in my view that argument would be more appropriate to determinations about a compensatory payment for direct financial loss, which I am not recommending. Paragraph 3.2 of the Scheme says:

'To be eligible to make a complaint under the Scheme, a person must be seeking a remedy ... in respect of some inconvenience, distress or loss which the person has suffered as a result of being directly affected by the regulators' actions or inaction.'

It is accepted that the regulator's supervision of Keydata was inadequate. It is not possible to say that this was the direct or indirect cause of your financial loss, but the FSA's delay and inaction has clearly directly affected you and contributed to your situation, causing you distress and inconvenience. I am also not persuaded by the 'benefit of hindsight' argument since the FSA had identified many of the factors that contributed to its inadequate supervision of Keydata by July 2009 and it is only the protracted Enforcement proceedings that have meant your complaint was not investigated or responded to for nearly 12 years. Clearly what went wrong was at an operational and not merely administrative level and despite the FCA's complaint investigation you have still not had a full response.

96. In recommending a compensatory payment for your non-pecuniary losses, regard should be given to how you have been affected by the regulator's actions 'in the round', which includes the distress and inconvenience you have experienced as a result of the combined shortcomings of both the FSA's supervisory failings and the FCA's complaint mishandling. You have been severely impacted by both on a personal level, which is why I think a distinction between the two does not take this into account. For this reason, I consider that it is wrong to seek to compartmentalise the distress and inconvenience you have experienced overall and I think a compensatory payment for all of these matters is appropriate, in addition to the apology the FCA will provide to you.

97. The FCA does not have to accept my recommendations, but in my view the sum I recommended for your distress and inconvenience was proportionate and appropriate for the reasons explained above, having regard to all the factors set out in the Scheme, and given your overall experience of your complaint against the regulator, some elements of which I have upheld. It does not set any precedents, as I will continue to consider each case I receive on its merits, but it does reflect the exceptional circumstances of your complaint, including the distress and inconvenience you have experienced arising from the regulator's inadequate supervision, compounded by delays and poor customer service in its complaints handling function.

98. I therefore repeat my recommendation that the FCA offers to pay you the sum of £3000 for the severe and exceptional distress and inconvenience caused to you by the matters I have highlighted in my report and I hope that it will now do so.

Amerdeep Somal
Complaints Commissioner
31 March 2021

ANNEX – RECOMMENDATIONS FROM GLOSTER AND PARKER REPORTS

[A] FROM GLOSTER CHAPTER 2: *Executive summary* (pages 47 to 49)

5.2 The Investigation's recommendations are set out in full in Part D (**Chapter 14** (Recommendations)) of this Report. They are split into two categories: (i) recommendations targeted at the FCA's policies and practices; and (ii) recommendations focused on the regulatory regime.

5.3 In summary, the recommendations targeted at the FCA's policies and practices are as follows:

(a) *Recommendation 1*: the FCA should direct staff responsible for authorising and supervising firms, in appropriate circumstances, to consider a firm's business holistically.

(b) *Recommendation 2*: the FCA should ensure that its Contact Centre policies clearly state that call-handlers: (i) should refer allegations of fraud or serious irregularity to the Supervision Division, even when the allegations concern the non-regulated activities of an authorised firm; (ii) should not reassure consumers about the nonregulated activities of a firm based on its regulated status; and (iii) should not inform consumers (incorrectly) that all investments in FCA-regulated firms benefit from FSCS protection.

(c) *Recommendation 3*: the FCA should provide appropriate training to relevant teams in the Authorisation and Supervision Divisions on: (i) how to analyse a firm's financial information to recognise circumstances suggesting fraud or other serious irregularity; and (ii) when to escalate cases to specialist teams within the FCA.

(d) *Recommendation 4*: the senior management of the FCA should ensure that product and business model risks, which are identified in its policy statements and Reviews as being current or emerging, and of sufficient seriousness to require ongoing monitoring, are communicated to, and appropriately taken into account by, staff involved in the day-to-day supervision and authorisation of firms.

(e) *Recommendation 5*: the FCA should have appropriate policies in place which clearly state what steps should be taken or considered following repeat breaches by firms of the financial promotion rules.

(f) *Recommendation 6*: the FCA should ensure that its training and culture reflect the importance of the FCA's role in combatting fraud by authorised firms.

(g) *Recommendation 7*: the FCA should take steps to ensure that, to the fullest extent possible: (i) all information and data relevant to the supervision of a firm is available in a single electronic system such that any red flags or other key risk indicators can be easily accessed and cross-referenced; and (ii) that system uses automated methods (e.g. artificial intelligence/machine learning) to generate alerts for staff within the Supervision Division when there are red flags or other key risk indicators.

(h) *Recommendation 8*: the FCA should take urgent steps to ensure that all key aspects of the Delivering Effective Supervision (“**DES**”) programme that relate to the supervision of flexible firms are now fully embedded and operating effectively.

(i) *Recommendation 9*: the FCA should consider whether it can improve its use of regulated firms as a source of market intelligence.

5.4 In summary, the recommendations targeted at the regulatory regime are as follows:

(a) *Recommendation 10*: HM Treasury should consider addressing the lacuna in the allocation of ISA-related responsibilities between the FCA and HMRC.

(b) *Recommendation 11*: HM Treasury should consider whether Article 4 of MiFID II or section 85 of FSMA should be extended to non-transferable securities.

(c) *Recommendation 12*: HM Treasury should consider the optimal scope of the FCA’s remit.

(d) *Recommendation 13*: HM Treasury and other relevant Government bodies should work with the FCA to ensure that the legislative framework enables the FCA to intervene promptly and effectively in marketing and sale through technology platforms, and unregulated intermediaries, of speculative illiquid securities and similar retail products.

[B] LESSONS LEARNED FROM PARKER (See Section I pages 83 to 88)

Lesson 1: Issues were caused by a lack of clarity about the role of operators and other market participants and the nature and extent of the regulatory perimeter.

Lesson 2: The Regulator should continue to improve information sharing between departments and its related IT systems and processes.

Lesson 3: The importance of effective coordination and oversight across different teams.

Lesson 4: Continue to invest in and update systems regarding whistleblowers.

Lesson 5: The culture of the Regulator.