

31 March 2021

Final report by the Complaints Commissioner**Complaint number FCA00816*****The complaint***

1. You first contacted my office on 24 October 2019, and on 25 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. You first complained to the FSA on 15 February 2011 about what you described as *'the FSA's failure to carry out its statutory duty to protect the interests of consumers as the result of poor supervision, incompetence and lack of prudent regulation'*.

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4. On 3 March 2011 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. 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

5. The FCA divided your complaint into two parts as follows:

- a. *Part One - You claim that the FSA failed to adequately supervise Keydata, to ensure that it was acting in accordance with FSA rules and regulations*

This complaint was upheld because the complaints investigator concluded that *'the adequacy of supervision could have been improved'*. However, you were not offered any remedy for this and the FCA said that a compensation payment would not be appropriate because *'we are not satisfied that the FSA's actions or inactions were the sole or primary cause of your loss'*.

- b. *Part Two - You allege the FSA's enforcement process failed to safeguard underlying assets of Lifemark*

This complaint was not upheld on the basis that *'multiple problems with SLS and Lifemark's assets had been were [sic] concealed from the FSA at the time, only becoming apparent through the enforcement investigation... the FSA acted appropriately in performance of its regulatory functions at the time... did not regulate SLS or Lifemark and did not have a role in safeguarding the assets of those firms, which were incorporated in Luxembourg'*.

6. You were offered an *ex gratia* payment of £400 for lengthy delays in the FCA's complaints handling between January 2019 and August 2020.

Why you are unhappy with the regulator's decision

7. You have told me that you find the FCA's decision *'wholly unsatisfactory'*, that in your view *'primary culpability does indeed lie with the FSA'*, particularly given

that you invested in July 2006, and that the FCA's complaint response '*defies logic*' and is '*neither fair nor robust*'.

8. You say that: '*It was precisely inaction on the part of the FSA that triggered the chain of events that led to my losing a very considerable portion of my pension. It was only the systemic failure to implement financial rules and regulations which made the financial product available for investment in the first place. Such failures inevitably incentivise fraudsters*'.
9. You are seeking an *ex gratia* payment to cover the gap between the statutory compensation you received (£48,000) and the amount that you lost, c. £93,000.

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 March 2011 and January 2019. I deal with the deferral decision and the delays in the FCA's complaints investigation in the next section.
21. Your complaint was reactivated on 17 January 2019 after the FCA had published Final Notices in respect of its Enforcement decisions about Keydata individuals. On 22 May 2019, the Complaints Team wrote to you setting out your complaint as described in paragraph 5 above and asking you to reply by 5 June if this understanding of your complaint was incorrect. You have confirmed to me that you did not respond to this as your original complaint was as stated.

Part One

22. Part One of your complaint - *You claim that the FSA failed to adequately supervise Keydata, to ensure that it was acting in accordance with FSA rules and regulations* - was upheld by the FCA on the basis that *'the adequacy of supervision could have been improved'*. In doing so, the FCA provided you with information about the way Keydata had been categorised and supervised by the FSA. Some of this information was already in the public domain. The FCA said that other information about interactions between the FSA and firms and individuals was protected by s.348 of FSMA and could not be provided to you.
23. The FCA's Decision Letter also 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.'

24. The Decision Letter also said that: *'An internal review of the supervision of Keydata was conducted in July 2009 and a number of lessons identified which illustrates a number of weaknesses in the processes or operations of the FSA that contributed to the inadequate supervision of Keydata'*. The FCA's files show that these weaknesses included poor record-keeping, despite the FSA's statutory obligations, and a lack of co-ordinated systems and approach between different regulatory teams. The FCA told you that reviews such as this have been used to strengthen its regulatory approach to supervision and that:

'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... 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'](https://www.fca.org.uk/publications/corporate-documents/our-approach-supervision)

25. 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.
26. 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.
27. 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.
28. The FCA's files show that the FSA's July 2009 internal review 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'*.
29. 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.

30. There is also a discrepancy between the conclusions of the 2009 internal review and the FSA's deferral letter to you of 3 March 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 deferral letter 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.
31. Furthermore, despite upholding Part One of your complaint, 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.

Part Two

32. *Part Two* of your complaint - *You allege the FSA's enforcement process failed to safeguard underlying assets of Lifemark* – was not upheld on the basis that the FSA lacked a regulatory role in safeguarding these assets and the Keydata CEO concealed the multiple problems affecting them.
33. The FCA's Decision Letter makes reference to sections of the Upper Tribunal's decision, to which I must also have regard. It is clear that Lifemark directors, who included Keydata CEO Stewart Ford, deliberately concealed information regarding the Luxembourg regulator's concerns about Lifemark from both the

FSA and other key individuals at Keydata. The Complaints Team checked with the FCA's '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. Based on the evidence I have seen, I consider that the FCA was correct not to uphold this aspect of your complaint. 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, the point is that the FSA could have, and should have, reached that point sooner. 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.

34. You have told me that your IFA (sadly now deceased) advised you in February 2011 that the FSA was responsible for the failure of PWC (as insolvency administrators of Keydata) to safeguard the underlying assets of the Lifemark Bonds and thereby protect investors. I am not clear whether you put this specific point to the regulator as part of your complaint and it is not referred to in the FCA's Decision Letter. Although the FSA applied to put Keydata into insolvency administration in June 2009, it was the court that actually made this decision, and appointed PWC as administrators. I have no jurisdiction over these kinds of regulatory decision, and there are separate arrangements for complaints about PWC as insolvency administrators, which fall outside this Complaints Scheme.

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

35. As previously noted, your original complaint made in February 2011 was 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.'

36. 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 2011.
37. The FSA's 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.
38. Although this policy was not in place when you complained in February 2011, 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. I believe you had a letter from the Complaints Team dated 4 April 2013 when regulatory functions transferred from the FSA to the FCA. You were among those sent an email update on 3 July 2015 and you were contacted in January 2019 to see if you wanted your complaint to be reactivated.
39. 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.

40. 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 2011 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.
41. 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.
42. 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

43. Your complaint was reactivated on 17 January 2019 when the FCA asked if you wished to pursue it now that the Enforcement proceedings had concluded. You replied on the same day confirming that you did. On 5 March 2019, you received an update from the Complaints Team saying that the team was experiencing heavy workloads and consequent delay. Between January and April 2019, the FCA also decided to treat Keydata as a group complaint. This delayed the start of its complaint investigation while all the complainants were identified.
44. From the FCA's files, it seems that the subsequent chronology was as follows:

- a. On 8 April 2019, you received an update from the complaint investigator, who apologised for the delay in initiating the investigation and promised to send you four-weekly progress updates;
- b. On 23 April 2019 the complaint investigator began contacting internal teams to commence the investigation;
- c. You received updates on 22 May, 2 July and 30 August 2019;
- d. On 6 September 2019 you complained about the continuing delay to a senior investigator in the Complaints Team. You received a response on 11 September 2019 from the complaint investigator, who apologised for the delay but was unable to provide any anticipated timescale for completion;
- e. On 9 October 2019 the complaint investigator sent you another apologetic email, saying that delay would be addressed in the eventual complaint response;
- f. Around this time, a new investigator took over the complaint but you were not informed. The complaint was actively worked on by the new investigator from mid-October 2019;
- g. On 24 October 2019, you contacted my office to complain about the FCA's delay and gave permission for us to forward this to the FCA;
- h. The Complaints Team sent you further updates on 22 November 2019 and 23 December 2019, signed by the Complaints Team manager, giving a date of 13 February 2020 for a final complaint response;
- i. On 4 February 2020 you contacted the Complaints Team to say that you had not received a promised update. On 7 February 2020 you received a response informing you that the FCA now expected to respond by 31 March 2020. At this point you contacted my office again;
- j. On 13 March 2020, you asked the FCA for '*all available material*' about your complaint under the Freedom of Information Act 2000;
- k. On 30 March 2020, the Complaints Team informed you that its response would not be ready by 31 March. You replied and said that you understood about the coronavirus pandemic but were still waiting for a response to your 13 March request;

- l. On 28 April 2020, the Complaints Team manager wrote to say that the FCA's complaint response was in the final stages but that you could not be sent the material you had requested on 13 March 2020 due to s.348 FSMA and FCA policy considerations;
 - m. No written update was sent to you in May or June 2020. On 22 July 2020, you chased the Complaints Team manager again, pointing out that you had heard nothing for three months. You did not receive a response to this;
 - n. The FCA's Decision Letter was issued on 19 August 2020.
- 45. 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.
- 46. 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.'
- 47. 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 did not receive a letter scoping your complaint until May 2019 (four months). Despite promised completion dates of 13 February 2020 and 31 March 2020, the complaint response was not sent until 19 August 2020 (a total of nineteen months). The promise of four-weekly updates was not kept: for example, no update was sent to you in June 2019 and updates sent in July and August 2019 were more than eight weeks apart. Updates were also missed in January, May, June and July 2020, even though you had chased progress in July 2020 after hearing nothing for three months.
- 48. There were also other customer services failings. Your complaint about the continuing delay in September 2019 was addressed to a senior investigator but passed back to the complaint investigator for reply. In my view it would have

been better practice if the senior investigator or the Complaints Team manager had replied to you, particularly given the lengthy delay. In its response to my preliminary report, the FCA has accepted this. You were also not informed in October 2019 when the complaint investigator changed. Overall, 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.

49. Although the FCA's files show that the complaint investigation was being actively pursued from November 2019, 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 the handling of the complaint investigation, the FCA's customer service, and the delay in the eventual complaint response sent to you.
50. 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 and poor customer service you received from the FCA after nearly a ten-year wait were completely unacceptable.
51. You quite understandably became extremely concerned about the delay in the FCA's complaint investigation and at times asked my office to intervene. 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.

52. The FCA offered you an *ex gratia* payment of £400 for distress and inconvenience arising from its complaints handling delay between January 2019 and August 2020, which you accepted. 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 below.

My decision

53. 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;
- 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 deferral letter of 3 March 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 Complaints Team could have been more proactive in contacting Keydata complainants between July 2015 and December 2018, insufficient care was taken in oversight and file management of the deferred complaints and there was unreasonable delay in FCA complaint handling in 2019 and 2020;
- e. Although *Part One* of your complaint was upheld by the FCA, the FCA's Decision Letter dated 19 August 2020 was inadequate because it left out relevant information about the extent of the inadequacy of the FSA's supervision of Keydata, left you with unanswered questions, and failed to offer any remedy for the inadequate supervision it did identify;

- f. Although it was reasonable for the FCA not to uphold *Part Two* 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;
- g. The FCA's 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.

Remedy

54. 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

55. 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

56. 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 the 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.

57. 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 overemphasis 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.

58. The comments made by LCF Bondholders in relation to their experience are also 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.

59. 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 recommendations include asking the FCA to ensure that this report, the FSA's 2009 internal review into Keydata, and the matters highlighted in its own complaints investigation are included in its implementation programme and that I be kept informed of progress.
60. 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

61. 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.
62. 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.

63. 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. Although you have argued eloquently that the FSA holds primary culpability for its inaction, and that the FSA's remit was to protect the interests of **all** investors, not just those who invested less than £50,000, it is not possible to state with any certainty under the Complaints Scheme whether or to what extent the way the FSA supervised Keydata contributed to individual investors' losses. I must also have due regard to the conclusions of the Upper Tribunal about the nature and extent of the deception practised on the FSA by bad actors within the firm. Your original complaint requested the difference between the amount you lost and the statutory compensation you received, which was the maximum amount available from the Financial Services Compensation Scheme (£48,000 at the relevant time). Although this is well below the amount you have lost, 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.

Compensation – Distress and Inconvenience

64. 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.'

65. In my view the FSA's inactions and inadequate supervision identified above, together with the delays and poor customer service in the FCA's complaint handling, have clearly contributed significantly to a very high level of distress or inconvenience experienced by you and other Keydata complainants, in your case for nearly ten years. 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 2019 to 2020 was also extremely poor. There were inexcusable delays in the FCA's complaint investigation and its eventual response to you lacked detail and did not offer you any remedy for the FSA's inadequate supervision of Keydata.

66. These are clearly exceptional circumstances making a higher payment for distress and inconvenience both appropriate and proportionate.

My Recommendations

67. 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 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.

68. 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.
69. In my preliminary report, I also recommended that the FCA offers to pay you the sum of £2500 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 £750 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.
70. 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.'

71. 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.

72. 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 10 years. Clearly what went wrong was at an operational and not merely administrative level.

73. 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.

74. 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.

75. I therefore repeat my recommendation that the FCA offers to pay you the sum of £2500 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.