

18 December 2020

Final report by the Complaints Commissioner**Complaint number FCA00827***The complaint*

1. On 16 September 2020 you complained to me about the FCA's handling of the ongoing enforcement investigation against your client. My preliminary report was issued on 12 November 2020 and both you and the FCA have had the opportunity to comment.

What the complaint is about

2. Your client has been the subject of an FCA enforcement investigation for over 2 years now.

The FCA summarised your client's complaint as follows: Your client, Mr X, is the subject of an ongoing Enforcement investigation. Your client is unhappy with the delays in conducting the investigation and the Enforcement team's failure to keep him adequately informed on their progress. Mr X has asked to be provided with full details of the scope of the investigation and the expected timetable for next steps

What the regulator decided

3. The FCA decided that it was necessary the investigation into your client's complaint be deferred and as such, referred to paragraph 3.7 of the Complaints Scheme as to the underlining reasons for this decision:

[Investigations that may be deferred](#)

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

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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.

The FCA went on to explain that paragraph 3.7 of the Complaints Scheme, ensured that a complaints investigation did not have an adverse impact on any ongoing regulatory work by the FCA. The FCA explained the ways in which this may occur:

- a. Resources could be diverted away from the regulatory work, which may inhibit the FCA from achieving its statutory objectives. This is because the FCA staff that would be needed to assist the Complaints Team with its investigation will include the same staff who are responsible for bringing the regulatory action to a conclusion. Involving those staff in two processes at the same time would inevitably delay the conclusion of the work, which could be detrimental to both consumers and the individual concerned
- b. The complaints investigation may prejudice the regulatory action. This might happen if, for example, the complaints investigation findings cut across the likely findings of the regulatory action

Subsequently, the FCA decided that your client's case did not fall into the category of 'exceptional circumstances', in order for the FCA to proceed with a complaints investigation, notwithstanding ongoing action.

Why you are unhappy with the regulator's decision

4. In your letter sent to me on your client's behalf, you informed me of the FCA's failure to pursue your client's investigation with reasonable expedition, resulting in unreasonable delay and failure to keep your client updated. You also told me that the FCA did not give any explanation in relation to the complaint your client raised, concluding that your client's circumstances did not constitute 'exceptional circumstances'. In particular you informed me of the following:

- (a) Your client disagrees with the FCA's conclusions that an investigation into the complaint would adversely impact the investigation, as the facts are straight forward and all relevant

correspondence between the FCA and your client was enclosed in the complaint.

- (b) The Complaints Team will only need to seek minimal factual evidence relating to matters set out in the complaint in order to assess whether the speed of progress has been reasonable and appropriate in light of your client's status as an individual under investigation. Also, given your client's personal circumstances and inability to obtain alternative employment in the financial services sector and accordingly should not require any significant input or assistance from the relevant FCA case team in investigating the complaint.
- (c) The complaint relates to matters that are entirely procedural in nature and have no overlap with the substantive issues which are the subject of the investigations. There is no risk that any finding from the investigation of the complaint would cut across the findings of the investigation
- (d) A request that I open an investigation into the complaint immediately

Preliminary points

- 5. This report is concerned solely with the question of whether or not the FCA was right to defer consideration of your client's complaint. I have carefully reviewed the helpful material which you have sent to me and the FCA's complaint file in making my decision.

My analysis

- 6. I empathise with your client's concerns regarding the time scales into the ongoing FCA investigation against them and the importance of being kept regularly updated.

Starting with the interpretation of the Scheme rules specifically 3.7, *The questions to be answered are:*

- a. Has the complainant exhausted the procedures and remedies? (If they have, the 3.7 ground for deferral falls away);*

b. If the answer to a. is no, then the question is whether there are 'exceptional circumstances' under which it would 'not be reasonable' to expect the complainant to wait and the regulator's continuing action would not be 'significantly harmed'.

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

a. Because decisions under the Complaints Scheme might be seen to prejudice the statutory regulatory processes;

b. A complaints investigation run in parallel with enforcement proceedings might divert resources from those proceedings, which ought to take precedence.

7. As it stands your client has not yet exhausted the 'procedures and remedies' under FSMA. The enforcement investigation is ongoing and I need to consider the underlying reasons for the FCA's decision to defer the complaint in this case.
8. You mentioned to me that the facts of the case were straight forward and disagreed that a complaints investigation would have an adverse effect on the enforcement investigation. A determination of whether the facts of the case are straightforward would not be a basis for the complaint to commence and thereby satisfy 3.7 of the Complaints Scheme. I need to be satisfied that there are exceptional circumstances that mean the commencement of the complaint investigation is necessary even though an enforcement investigation is still live and that it would be unreasonable for your client to await the conclusion of the FCA's enforcement investigations. I would also need to determine that the FCA's regulatory conclusions would not be prejudiced in anyway should the complaints investigation be allowed to go ahead in parallel to the enforcement investigation.
9. I empathise with your client's position and the effect this is having on them, two years of investigation is more than likely to have had a detrimental impact on your client's life and employment. However, such is the nature of regulatory investigations, unfortunately this is the likely impact whilst an investigation is ongoing. From what I have seen, I do not consider your client's circumstances to be exceptional. As such, I do not think it is appropriate that the FCA begin the complaints investigation before the procedures into the enforcement are completed. I realise this will be frustrating for your client given the length of time

of the enforcement investigations. However, I recognise and have addressed unreasonable delays pertaining to the deferral of the complaints case, further on in this report.

10. I am mindful of the resources that would be required to adequately investigate your client's complaint. You mentioned to me that the complaints team, "*should not require any significant input or assistance from the relevant FCA case team in investigating the complaint.*" However, it would not be as straightforward as this. The principal investigators involved in the enforcement investigation, would be required to outsource their expertise and knowledge of your client's case, to the Complaints Team at the FCA. This is to be expected, which will ensure a thorough investigation into your client's complaint. I am aware that kickstarting the complaints investigation would inevitably take the principal investigators away from continuing the enforcement investigation –which should be the priority. Given these circumstances I do not think the diversion of resources into a complaints investigation at this stage would be justified.
11. You told me that, "*There is no risk that any finding from the investigation of the complaint would cut across the findings of the investigation*". Having looked at the FCA case file, I am satisfied that any decisions under the complaints scheme may be seen to prejudice the regulatory action of the FCA. Like the FCA I am required to respect confidentiality which means 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 complaint papers, including confidential material. Sometimes this means that all I can say to complainants and their representatives is that, having studied the confidential material, I am satisfied that the regulatory action of the FCA may be prejudiced if a decision under the Complaints Scheme were allowed to go ahead. It is therefore more appropriate for the enforcement investigations and the conclusions of that investigation to take precedence.
12. Whilst I am satisfied that the FCA have not yet exhausted the procedures and remedies under FSMA, I also take into account that you submitted the complaint on behalf of your client in December 2019. The decision letter you received from the FCA was sent in September 2020 and informed your client that in six months time from the date of the letter, the FCA would reconsider whether the deferral

remains appropriate. This is a concern and not the first time a Complaints Commissioner has commented on the issue of delay. I suggest that the FCA should offer you an ex gratia payment of £150 for the delay caused.

My decision

13. For these reasons, my view is that the FCA was right to defer consideration of your client's complaint.
14. Nonetheless, I recognise your client's pressing need to have these proceedings brought to an end as soon as possible. I therefore urge the FCA to ensure that timescales and progress reports are supplied to your client promptly and effectively.
15. In response to my preliminary report the FCA has acknowledged the time taken to respond to your client's complaint and that this was unsatisfactory. The FCA has told me that in your client's case they have agreed to my recommendation of £150 for the delay caused.

Amerdeep Somal
Complaints Commissioner
18 December 2020